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CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11 – The suit was filed by the plaintiff principally as a suit for injunction and it was valued at Rs.1,00,000/- – Despite being a commercial dispute could not lies before the Commercial Court constituted under the Commercial Act 2015, on account of less valuation – The learned District Court while considering the petition under Order 7 Rule 11 filed by defendant gave its own interpretation and consider the figure mentioned in the plaint i.e the turn over for the year 2019-20 to be the specified value and transfer the suit to commercial Court, when no estimation of market value of trade mark right was provided in the plaint itself – Whether such order is sustainable under law? – Held, No – It is well settled principle of law in a matter involving rejection of plaint only the averments made in the plaint are material and nothing else can be taken into consideration – Since the suit has been valued at Rs, 1,00,000/- and consideration of the same as specified value is clearly illegal and impermissible.

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Durga Sharma @ Durga Debi Sharma (Since Dead) Through Her LRs. -V- Chirangila Sharma (Since Dead) Through His LRs.

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CONSTITUTION OF INDIA, 1950 – Article 227 – Exercise of supervisory power – An Arbitration Misc. Case was filed claiming the enhancement of the compensation for acquiring the land – An award enhancing the compensation and payment of interest was passed – Original petitioner died – The legal heirs filed three several petitions under Order XXII Rule 9 of the Code of Civil Procedure and an application under section 5 of the Limitation Act,1963 – All application were dismissed – However in the mean time Union of India deposited the amount for payment of the compensation by the State – Held, it is a fit case where exercising the power under Art. 227 of the Constitution, direction may be given to the executing court to execute the arbitral award in favour of the petitioners.

Radharani Patra & Anr. -V- Union of India & Ors.
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CRIMINAL PROCEDURE CODE, 1973 – Sections 167(2),173,173(8) – At the time of taking cognizance of offence no chemical examination reports was submitted along with charge sheets – Preliminary charge sheets have been filed before expired of 180 days keeping the investigation open as per section 173(8) of Cr.P.C. –

Whether the petitioners are entitled to default bail in terms of section 167(2) of Cr.P.C. despite the preliminary charge sheets have been filed – Held, No. – The accused cannot plea for default bail, the court shall have to consider the bail of the accused as per section 309(2) of Cr.P.C.

Sk. Eimat @ Bidhia -V- State of Odisha.
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CRIMINAL PROCEDURE CODE, 1973 – Section 227 – Discharge – "There is not sufficient ground" implication of – Held, Section 227 in the new Code confers special power on the Judge to discharge an accused at the threshold if upon consideration of the records and documents, he find that "there is not sufficient ground" for proceeding against the accused – The provision was introduced in the Code to avoid wastage of public time when a prima facie case was not made and to save the accused from avoidable harassment and expenditure.

Asok @ Ashok Mohanty -V- Republic of India.
2022 (III) ILR-Cut…… 841

CRIMINAL PROCEDURE CODE, 1973 – Sections 227, 239 – Whether an accused is justified in law in filing a petition for discharge under section 239 Cr.P.C. before the learned trial Court even though earlier he did not challenge the F.I.R. or the order of cognizance – Held, Yes. – Justified choice of challenging the proceeding at a particular stage lies with the accused and if it is legally permissible, then the Court has to entertain the same and consider the same in accordance with law and cannot reject the petitioner merely on the ground of not challenging the same earlier.

Asok @ Ashok Mohanty -V- Republic of India.
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CRIMINAL PROCEDURE CODE, 1973 – Section 239 – Discharge Scope, ambit and duty of magistrate discussed with reference to case laws.

Asok @ Ashok Mohanty -V- Republic of India.
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CRIMINAL PROCEDURE CODE, 1973 – Section 311 – When can be exercised? – Enumerated with case laws.

Jayanta Behera & Ors.-V- State of Orissa.
2022 (III) ILR-Cut…… 972

CRIMINAL PROCEDURE CODE, 1973 – Section 407 – Petitioner/ husband prayed for transfer of D.V. Misc. Case No. 130 of 2020 filed by Opp. Party wife before the SDJM, Balasore to the Court of Learned SDJM, Bhubaneswar – The petitioner filed C.P. No.495/2020 for divorce in the court of the Learned Judge Family Court, Bhubaneswar, C.P. no. 301/2020 was filed by wife for restitution of conjugal rights in the Court of the learned Judge, Family Court, Balasore – Both the C.P. have been transferred to Learned Judge, Family Court, Bhadrak pursuant to order of High

Court – Whether prayer to transfer the D.V. Case to Bhubaneswar should be allowed? – Held, since two civil proceedings involving the parties have already been transferred to Bhadrak, it would be expedient in the interest of Justice to transferred the D.V. Misc. Case to the court of Learned SDJM, Bhadrak with certain direction.

Pradeep Kumar Das -V- Deeptimayee Das @ Puthal.
2022 (III) ILR-Cut…… 903

CRIMINAL PROCEDURE CODE, 1973 – Section 439 – Application for Bail – Commission of offences punishable under Sections 406/468/467/471/120-B of IPC – Whether the accused has indefeasible right to be released on bail under Section 437(6) of Cr.P.C. in case trial is not completed within the period of sixty days as stated therein – Held, the right conferred on the accused under section 437(6) Cr.PC., is not an absolute one and the same is subject to the condition stated in the said provision – Bail application allowed with terms and condition.

Biswajeet Barik -V- State of Odisha.
2022 (III) ILR-Cut…… 939

CRIMINAL PROCEDURE CODE, 1973 – Section 457 r/w Rule 6 of the Odisha Motor Vehicle (Accidental Claim Tribunal) Rule, 2018 – When there was no insurance Coverage and the vehicle met with an accident, whether the petitioner was entitled to its release and on what condition? – Held, Yes. – The court is of the view that petitioner should have been directed to furnish security as per Rule 6 of the Rule in view of the decision of *Nabaratna @ Nabaratan Agrawal*.

Ganapati Sahu -V- State of Odisha.
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CRIMINAL PROCEDURE CODE, 1973 – Section 482 – Inherent Power – When warranted – Held, High Court can exercise its inherent power under section 482 of Cr.P.C. either to prevent abuse of process or otherwise to secure the ends of justice – It can also exercise where uncontroverted allegations made in the F.I.R. or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out case against the accused.

Gupteswar Meher -V- State of Odisha & Anr.
2022 (III) ILR-Cut…… 871

CRIMINAL PROCEDURE CODE, 1973 – Section 482 – Petitioner challenges the order passed by Learned SDJM taking cognizance of offences U/s. 500(II) of the IPC – The complainant/Opp.Party 2 could not make out a case against the petitioner for commission of offence U/s. 500 of IPC – Effect of – Held, in the above premises, exposing the petitioner to the rigmarole and ordeal of a criminal trial would be an onslaught to her right to seek Justice – Hence on the circumstance, the impugned order is unsustainable and proceeding there on would be an abuse of process of the Court – The CRLMC is allowed.

Sabita Parida @ Samal -V- State of Orissa & Anr.

2022 (III) ILR-Cut…… 965

CRIMINAL TRIAL – The Appellant was charged under Section 302 of the IPC – The Appellant admitted the death of the deceased in his house, but he has given no explanation as to injuries of his wife – The case of appellant is total denial – There is no eye witness – No evidence to involve the appellant with the offence for which he has been convicted – The submission on behalf of appellant that the trial court passed the judgment on surmise and mere suspicion – No circumstantial evidence has been proved to link the Appellant with the crime – Held, the prosecution has miserably failed to prove the charge against the Appellant or to lay the foundational evidence, to say least of episodes of circumstances – No material was brought on record that the appellant had been with the deceased at occurrence night in home and the same was not accessible to others – We are persuaded to interfere with the judgment and order of conviction, consequently those are set aside.

Chalaka Munda -V- State of Orissa.
2022 (III) ILR-Cut…… 714

CRIMINAL TRIAL – Conviction under Section 302 of the I.P.C. – Learned Trial Court convicted the appellant basing upon the evidence of sole eye witness (P.W.3) to the occurrence – The (P.W.3) is the daughter of deceased – The plea of accused /Appellant was that the alleged culpable act was not premeditated and had occurred after sudden quarrel and fight and without any intention of killing – Held, we are of the view that from the evidence as laid by the prosecution, the charge of murder under Section 302 could not be proved beyond reasonable doubt in as much as the appellant had committed assault out of sudden quarrel resulting the death – He is entitled to be acquitted from the charge under Section 302 of the IPC and accordingly the conviction and sentence under Section 302 of the IPC are set aside – The appellant convicted under Section 304 part II of the IPC.

Padma Charan Sahu -V- State of Odisha.
2022 (III) ILR-Cut…… 722

CRIMINAL TRIAL – Offence under Sections 148, 302, 307 read with Section 149 of IPC and Sections 25 and 27 of the Arms Act – There were 32 accused persons – One of the accused Kulamani Nayak, was convicted under Section 302 of IPC apart from the above offences – This is a case based on the direct evidence of injured eye witnesses – P.W.17 is the only independent eye witnesses but he was not been examined by the police – The accused other than Kulamani Naik were charged with the offences under Section 148 and separately on 149 of IPC – Plea of accused /appellants that there was failure on the parts of the P.W.s to specifically state which of the accused caused injury to which P.Ws. – Further, there are some obvious inconsistencies and discrepancies in the depositions of the PWs – Effect of – Held, in the context of the principle of constructive liability embodied in Section 148, 149 of IPC the charge against the accused, other than Kulamani Naik, with the aid of Section 148 and 149 IPC have not been convincingly proved – So also the charge against all of them for commission of the offence punishable under Section 307 of IPC or Section 25/27 of the Arms Act has not been convincingly proved.

Kartika Chandra Swain @ Kartika Swain & Ors. -V- State of Odisha.
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CRIMINAL TRIAL – Offences under sections 376, 302 of Indian Penal Code – Conviction based upon dying declaration and last seen theory – Plea of appellant that when there was no certification by the doctor that the victim was conscious and in a fit state of mind to make the declaration, the trial court ought not have accepted the dying declaration – Held, merely because the P.W.8 (doctor) did not endorse on the bed head ticket that the victim was in a conscious state of mind would not mean that no such statement was ever made by her – The legal position in regard to the dying declaration is explained with reference to case laws.

Milu @ Rashmi Ranjan Jena -V- State of Odisha
2022 (III) ILR-Cut…… 660

DECLARATION OF THE CASTE STATUS – Value of school register as documentary evidence – Held, pursuant to the judgment of Apex court render in Kumari Madhuri Patil V. Additional Commissioner, Tribal Development, *AIR 1995 SC 94,* the entries in the school register preceding the Constitution do furnish great probative value to the declaration of the status of a caste.

Michael Nayak -V- State of Odisha & Ors.
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ELECTRICITY ACT, 2003 – Sections 135,149 – Mandatory requirement of Section 149 – Although the FIR states that it is the company that has committed the offence under Section 135 of the Electricity Act – The case was not registered against the company rather against two of its employees i.e. against the present Petitioners – Whether the proceeding maintainable? – Held, No – As the mandatory requirements of section 149 of Act are not satisfied the proceeding against the petitioners are quashed.

Prasanna Kumar Panda & Anr. -V- State of Odisha & Ors.
2022 (III) ILR-Cut…… 695

EMPLOYEES COMPENSATION ACT, 1923 – Compensation – Petitioner/ Insurance Company contended that the deceased has been murdered and therefore the case does not fall under the purview of accidental death – Held, law is well settled that if the employee is murdered in connection with employment while discharging his duties, the same is covered within the purview of Employees Compensation Act to get the compensation.

Manager, Magma HDI General Insurance Company Ltd.-V- Puspalata Sahoo & Ors.
2022 (III) ILR-Cut…… 877

GIFT DEED – Whether it can be challenged in the second Appeal? – Held, No.

Gangadhar Pradhan -V- Brundaban Pradhan (Since Dead) By his Lrs & Ors.
2022 (III) ILR-Cut…… 790

HINDU LAW – Whether gift of undivided ancestral property belonging to Mitakshara joint family by the Karta or father of family is void? – Held, No – Karta

of a joint family may alienate joint family property in three situations, namely, (i) legal necessity (ii) benefit of the estate (iii) with the consent of all the coparceners of the family – Case law and relevant paras of Mulla Hindu Law in the regard discussed.

Gangadhar Pradhan -V- Brundaban Pradhan (Since Dead) By his Lrs & Ors.
2022 (III) ILR-Cut…… 790

INDIAN EVIDENCE ACT, 1872 – Section 106 – Burden of proof – The law is well settled that, unless it is successfully proved by the prosecution that the accused is seized of the knowledge how an event or occurrence had taken place, the accused cannot be asked to explain or the accused cannot be put under any obligation to explain the same in order to exculpate him in terms of the provision of Section 106 of the Indian Evidence Act.

Chalaka Munda -V- State of Orissa.
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INDIAN PENAL CODE, 1860 – Sections 120-B, 405,415,420,468 and 471 – The basic ingredients/ requirements of the offences indicated with case laws.

Asok @ Ashok Mohanty -V- Republic of India.
2022 (III) ILR-Cut…… 841

INDIAN PENAL CODE, 1860 – Section 304 Part-II – The Appellant/Petitioner was convicted U/s 304-II – The age of appellant was 16 years at the time of occurrence and in the meanwhile 33 years have passed and his conduct does not indicate any innate Criminal Proclivity – Effect of – Held, law is no longer *res integra* that while sentencing an accused his conduct during and after the occurrence has to be taken into account since this Country does not follow the retributive jurisprudence – This court directs the sentence of the Appellant for the offence under section 304-II of IPC to be reduced to the period of incarceration already undergone.

Debraj Putel -V- State of Odisha.
2022 (III) ILR-Cut…… 948

INTERPRETATION OF STATUTE – Enforceability of a notification – Respective department published/circulated notification on 15.10.2020 but inadvertently due to lack of inter departmental correspondence the said Rules were published in the gazette only on 27.07.2021 – Effective date for implication – Held, the delay cannot be cured by creating a legal fiction to lend enforceability of the Rule with retrospective effect from 15.10.2020 instead from the actual date of notification on 27.07.2021 in the Official Gazette.

Jitendra Kumar Dash & Ors. -V- State of Odisha & Ors.
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LEGAL MAXIM – *"Expressio unius est exclusion alterius*" – Means – If a statue provides for a thing to be done in a particular manner, then it has to be done in that manner and any other manner are barred.

Shaswata Pratika Pradhan -V- State of Odisha & Ors.
2022 (III) ILR-Cut…… 742

NATURAL JUSTICE – Whether the principle of natural justice is mandatory in case of administrative proceeding – Held, Yes.

Dr. Ramesh Chandra Samal -V- State of Odisha & Ors.
2022 (III) ILR-Cut…… 881

NON-SPEAKING ORDER – Effect of – Held, it is trite law that reasons are heart and soul of an order and a non-speaking order is a manifestation of gross non-application of mind.

Panu Charan Rath-V-The Collector & District Magistrate-Cum-Management Incharge of Nayagarh Bistrict Central Co-operative Bank Ltd. & Anr.
2022 (III) ILR-Cut…… 944

ODISHA EDUCATION ACT, 1969 – Section 6-B (1)(a), 6 B(5) – Withdrawal of recognition was recommended on the ground that the institution had not fulfilled the conditions stipulated under Section 6-B(1)(a) of the Odisha Education Act – Petitioner challenges the same in Writ application – Whether Writ is maintainable? – Held, No – As the order is appealable as provided under Section 6-B (5) of the Act, Writ application is not maintainable.

Principal-In-Charge of Jateswar Dev College of Education and Vocational, Sagada & Anr. -V- State of Odisha & Ors.
2022 (III) ILR-Cut…… 920

ODISHA MEDICAL AND HEALTH SERVICES (Method of Recruitment and Conditions of Service) Rules, 2017 and Clause-3 of the Advertisement No. 18 of 2018 – The Petitioners have secured more than the cut-off marks, but were not selected as they had applied in SEBC category for which no vacancy was exist – Hence, their candidature was rejected and written scores were not taken into account – Whether mere mentioning of the category as SEBC deprive the petitioners from being considered on their own merit under the UR category? – Held, every person is first a general category candidate, notwithstanding the fact that the petitioners belong to the SEBC category, their candidature cannot be ignored if they are found eligible on their own merit.

Dr. Prajyoti Swain & Ors. -V- State of Odisha & Anr.
2022 (III) ILR-Cut…… 928

ODISHA POLICE SERVICE (METHOD OF RECRUITMENT AND CRITERIA OF SERVICE OF ASSISTANT SUB INSPECTOR) Order, 2020 – Rule 5 r/w Rule 660 of Orissa Police Manual Rules – Promotion to the post of ASI – Order 2020 was published by Government in home department by Notification dt. 15.10.2020 – The selection process was carried out and completed up to the date of the declaration of the result of the written examination and drawing of the select list for detainment of the candidate for training of ASI as per 2020 order – Whether the amended Rules were effectuated by notification in absence of publication in Orissa

Gazette – Held, Not effectuated – Publication in Orissa Gazette was the inbuilt necessary requirement for the enforcement of the Police Order 2020 – The respondent authorities are directed to redraw the select list as per Rule 660 of Police manual.

Jitendra Kumar Dash & Ors. -V- State of Odisha & Ors.
2022 (III) ILR-Cut…… 701

ORISSA CONSOLIDATION OF HOLDING AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Section 36 – Whether the revisional authority has power to make out a third case and can direct for recording the land in the name of the Government? – Held, No – The proceeding under Section 36 of the Act is an intra-party dispute – It is up to the Revisional Authority based on its own conclusion either to allow the revision or dismiss the same but in no circumstance, the Commissioner can execute its power available under Section 37 of the Act while conducting/deciding a case under section 36 of the Act.

Debendra Prasad Nayak & Ors. -V- Commissioner, Consolidation, BBSR & Ors.
2022 (III) ILR-Cut…… 802

PAYMENT OF GRATUITY ACT, 1972 – Section 7(3-A), 8 r/w Rule 19 of Payment of Gratuity Rule, 1972 – The employee filed an appeal challenging the Order of Controlling Authority wherein claim of interest for delay payment of gratuity had been rejected – The Appellate Authority relied upon the Apex Court judgment allow the appeal with a direction to Petitioner/Corporation to deposit balance interest amount – Whether the employee is entitled to balance interest amount? – Held, Yes. – In view of such clear and unambiguous provision enshrined under Section 7 & Section 8 of the Act, this Court is of the view that there is no infirmity or illegality in the order passed by the appellate authority.

Managing Director, Odisha Forest Development Corporation ltd., Bhubaneswar-V- Hadubandhu Nayak & Ors.
2022 (III) ILR-Cut…… 956

PREVENTION OF CORRUPTION ACT, 1988 – Section 7 – Essential ingredients in order to attract the culpability – Held, (i) the person accepting the gratification should be a public servant (ii) he should accept the gratification for himself and the gratification should be as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official function, favour or disfavour to any person.

State of Odisha (G.A. Vigilance) -V- Rabinarayan Patra.
2022 (III) ILR-Cut…… 822

PREVENTION OF CORRUPTION ACT, 1988 – Offences punishable under section 7 and section 13(2) read with section 13 (1)(d) of the Act – Basic requirements for statutory presumption under section 20 of the Act – Held, In a case of this nature, there is no dispute that the prosecution has to successfully prove the foundational facts i.e. the demand, acceptance of bribe money and recovery of the same from the accused, then only the statutory presumption under section 20 of the Act against the guilt of the accused would arise.

State of Odisha (G.A. Vigilance) -V- Rabinarayan Patra.
2022 (III) ILR-Cut…… 822

PREVENTION OF CORRUPTION ACT, 1988– Section 13(1)(d) – Basic duty of the prosecution – To attract offences under this section the prosecution must establish that (i) the respondent as a public servant used corrupt or illegal means or otherwise abused his position as such public servant and (ii) he has obtained a valuable thing or pecuniary advantage for himself or for any other persons.

State of Odisha (G.A. Vigilance) -V- Rabinarayan Patra.
2022 (III) ILR-Cut…… 822

PRINCIPLE OF ESTOPPEL – The petitioner participate in the process of financial bid, without any objection with regard to the amendment made in clause 5.2 of the bid, subsequently he cannot be turn around and say that the amendment to clauses is arbitrary, unreasonable and contrary to the provision of law – Thereby he is stopped to challenge the same by filling present Writ Petition.

M/s. Kamala Agencies -V- State of Odisha & Ors.
2022 (III) ILR-Cut…… 754

REASON ORDER – The learned trial Court rejected the discharge petition in a slipshod manner on some fallacious ground without even limited evaluation of materials and documents – Effect of – Held, failure to record reasons can amount to denial of Justice.

Asok @ Ashok Mohanty -V- Republic of India.
2022 (III) ILR-Cut…… 841

RECOVERY OF COMPENSATION – When the owner of the vehicle had knowledge about the possession of fake D.L. by the deceased/driver and the owner deliberately allowed the deceased to drive the vehicle without testing his competency, whether the insurer has a right to recover the compensation amount? – Held, Yes. – The Insurer has the right to recovery of the compensation from the owner.

Manager, Magma HDI General Insurance Company Ltd. -V- Puspalata Sahoo & Ors.
2022 (III) ILR-Cut…… 877

SECURITIZATION OF RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 – Section 13(4) r/w Rule 9(7) of Security Interest Enforcement Rule, 2003 – Whether the sale of the Security Asset on public auction as per Section 13(4) of SARFAESI Act, which ended in issuance of a sale certificate as per rule 9(7) of 2003 Rule as a complete and absolute sale for the purpose of 2002 Act or whether the sale would became final only on the registration of the sale certificate ? – Held, execution and registration of sale deed is no more required after issuance of sale certificate.

Sebati Tudu -V- Authorized Officer, Indian Overseas Bank, Bhubaneswar & Ors.
2022 (III) ILR-Cut…… 867

SERVICE LAW – Criminal proceeding vis-a-vis disciplinary proceeding – Whether acquittal in Criminal Proceeding would automatically bring to an end of the disciplinary proceeding – Held, No.

Kalakar Chakra -V- Orissa Gramya Bank & Ors.
2022 (III) ILR-Cut…… 670

SERVICE LAW – Disciplinary proceeding – Inordinate delay in concluding the proceeding – Effect of – Held, liable to be quashed.

Partha Sarathi Das -V- State of Odisha & Ors.
2022 (III) ILR-Cut…… 953

SERVICE LAW – Validity of a waiting list – Duration of its Operation – Held, a waiting list prepared by the competent authority is a list of eligible and qualified candidates who in order of merit are placed below to the last selected candidate – Usually it is linked with the selection or examination for which it is prepared – The authority should take a desired step that if one of the selected candidate in particular stream declines to join then the next candidate in such stream is to be selected – This Court here observes, once a selected panel is drawn up the same should be maintained till expiry of the valid period – Writ application allowed with certain direction.

Dr. Ambuja Satpathy -V- State of Odisha & Anr.
2022 (III) ILR-Cut…… 805

TENDER – Interference of the Court in exercise of power under Article 226 of the Constitution of India – Held, does not warrant – Tender in question was invited for supply of essential commodities, since amendment to clause 5.2 was made keeping larger public interest in mind and the same was meant for benefit of all the bidders, including the petitioner, such decision of tender committee, amending the clause was not objected by the petitioner either when it was published in the website or when it participated during the process of evaluation of financial bid – This court is of the considered view that the writ petition as the behest of the petitioner does not warrant interference of this Court in exercising the Jurisdiction under Article 226 of the Constitution of India.

M/s. Kamala Agencies -V- State of Odisha & Ors.
2022 (III) ILR-Cut…… 754

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2022 (III) ILR - CUT- 657

Dr. S. MURALIDHAR, C.J & CHITTARANJAN DASH,J.

W.A. NO. 334 OF 2017

MICHAEL NAYAK ……...Appellant

.V.

STATE OF ODISHA & ORS. ………Respondents

DECLARATION OF THE CASTE STATUS – Value of school register as documentary evidence – Held, pursuant to the judgment of Apex court render in Kumari Madhuri Patil V. Additional Commissioner, Tribal Development, *AIR 1995 SC 94,* the entries in the school register preceding the Constitution do furnish great probative value to the declaration of the status of a caste. (Para-7)

Case Law Relied on and Referred to :-

1. AIR 1995 SC 94 :Kumari Madhuri Patil Vs. Additional Commissioner,Tribal Development.

For Appellant : Mr. P.K. Mohanty, Sr. Adv.

For Respondents : Mr. D.K. Mohanty,AGA

ORDER Date of Order:17.10.2022

Dr. S. MURALIDHAR, C.J.

1. The present appeal is directed against the judgment dated 4th September, 2017 of the learned Single Judge dismissing the W.P.(C) No.15421 of 2014 filed by the Petitioner questioning the order dated 28th June 2014 passed by the State Level Scrutiny Committee (SLSC) in FCC No.32 of 2012 holding that the Appellant belonged to the 'Pana Cristian' community and therefore the caste certificate issued in his favour declaring him as belonging as Scheduled Caste (SC) was illegal and obtained fraudulently.

2. This is an second round of litigation on the issue of the caste certificate issued in favour of the present Appellant. Earlier the Appellant had filed W.P.(C) No.17655 of 2009 which was disposed of by this Court on 2nd August, 2011 remanding the matter to the SLSC for the proceeding to be started de-novo by giving an opportunity to the Appellant "only after supplying copies of those disputed documents be confronted with on the basis of which the report has been submitted by the Vigilance Officer and the same be placed on record of course provide the Appellant to produce his rebuttal evidence."

3. While issuing notice in the present appeal on 10th October, 2017 this Court passed an interim order that no coercive action shall be taken against the Appellant pursuant to report of the SLSC and the impugned order of the learned Single Judge. That interim order has continued since.

4. The background facts are that the Appellant is working as SikhyaSahayak and is a resident of village Lengumaha P.S. Raikia, District Kandhamal. Pursuant to the decision of the Supreme Court in ***Kumari Madhuri Patil v. Additional Commissioner, Tribal Development AIR 1995 SC 94***, an enquiry was commenced against the Appellant. The Investigating Officer (IO) submitted a report through the District Vigilance Cell, Kandhamal along with a letter dated 24th November, 2008. A copy of the said report was sent to the Appellant asking him to show cause why his caste certificate should not be cancelled. The Appellant submitted his reply on 28th January, 2009 and on 7th February, 2009 appeared before the SLSC. On that basis the SLSC passed an order declaring that the Appellant did not belong to the Pana Hindu community.

5. This regard the first round of litigation which has been referred to herein before with this Court remanding the matter to the SLSC. Thereafter copies of the documents gathered by the SLSC were supplied to the Appellant. It must be noted that the Tahasildar, Raikia had published a notice in the locality on 27th October, 2013 inviting objections. Since no objection was received within the stipulated period, the SLSC proceeded further in the matter. It appears that four persons had deposed before the IO that the Appellant belonged to the Pana Christian community. In response to the show cause notice, the Appellant submitted that the said witnesses had deposed as above against him only because he had filed a case against them for destroying his house in a riot that took place in Kandhamal district. When the four witnesses appeared before the SLSC on 21st March, 2012 they asserted that both the Appellant and his father belonged to the Pana Hindu community. In other words, the said witnesses turned hostile and did not support the case of the State that the Appellant belonged to the Pana Christian community. However, it appears from the impugned order dated 28th June, 2014 of the SLSC that its members did not accept the statements made by the four witnesses to the SLSC that the Appellant and his father belonged to the Pana Hindu community. The SLSC concluded that the Appellant had managed to win overthe said witnesses and they accordingly changed their versions to support him.

6. The SLSC then fell back on the report of the IO to the effect that the Appellant and his father had married into the Pana Christian community. However, in the same breath the IO noted in his report that the Appellant's

mother and wife still followed Hindu rituals. The SLSC then proceeded to surmise that since the Appellant was named 'Michael' he must be a Christian. In doing so the SLSC overlooked the entry in the school register which clearly showed that the Appellant was a Pana Hindu. The RORs of certain lands stood recorded in the name of grandfather of the Appellant and the relevant column therein mentioned their caste as 'Pana'. Nevertheless, the SLSC chose to reject all the above evidence. Again, proceeding on a conjecture that the parents of the Appellant "might have changed the caste as 'Pana' with an ulterior motive in order to grab the benefits meant for SC", the SLSC held that the Appellant was a Pana Christian. Thus the SLSC rejected the oral evidence of the four persons who by turning hostile actually supported the case of the Appellant.

7. As far as the documentary evidence is concerned, the school register showed the Appellant to be a 'Pana Hindu'. In this context, it may be noted that in ***Kumari Madhuri Patil v. Additional Commissioner (supra)***, the Supreme Court observed as under:

> "The entries in the school register preceding the Constitution do furnish great probative value to the declaration of the status of a caste. Hierarchical caste stratification of Hindu social order has its reflection in all entries in the public records. What would, therefore, depict the caste status of the people inclusive of the school or college records, as they then census rules insisted upon."

8. There appears to be no credible evidence either oral ordocumentary to show that the Appellant was not in fact a 'Pana Hindu' but a 'Pana Christian'. However, the impugned order of the SLSC throughout proceeds on conjectures and surmises to come to such a conclusion.

9. For the aforesaid reasons, the Court finds the impugned order dated 28th June, 2014 of the SLSC in FCC No.32 of 2012 to be unsustainable in law and is hereby set aside. The corresponding impugned order of the learned Single Judge is also set aside. Consequential order under Annexure-3 is also set aside.

10. Learned AGA then submitted that the matter should once again remanded to the SLSC for a third round of enquiry. Considering the fact that this exercise has gone for more than a decade now, it will be harassment of the Appellant if a third time enquiry iscommenced against him regarding the genuineness of his caste certificate. Consequently, the Court declines this prayer.

11. Consequently, the writ appeal is allowed with no order as to costs

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2022 (III) ILR - CUT- 660

Dr. S. MURALIDHAR, C.J & CHITTARANJAN DASH,J.

CRLA NO. 23 OF 2014

MILU @ RASHMI RANJAN JENA ……..Appellant

.V.

STATE OF ODISHA ……...Respondent

CRIMINAL TRIAL – Offences under sections 376, 302 of Indian Penal Code – Conviction based upon dying declaration and last seen theory – Plea of appellant that when there was no certification by the doctor that the victim was conscious and in a fit state of mind to make the declaration, the trial court ought not have accepted the dying declaration – Held, merely because the P.W.8 (doctor) did not endorse on the bed head ticket that the victim was in a conscious state of mind would not mean that no such statement was ever made by her – The legal position in regard to the dying declaration is explained with reference to case laws. (Paras-16-20)

Case Laws Relied on and Referred to :-

1. 2011 SAR (Criminal) 972 : Surinder Kumar Vs. State of Haryana.
2. 2007SAR (Criminal) 941 : NallapatiSivaiah Vs. Sub-Divisional Officer, Guntur A.P.
3. 2009 SAR (Criminal) 677 : State of Rajasthan Vs. Yusuf.
4. (2010) 45 OCR (SC)-494 : Arun Bhanudas Pawar Vs. State of Maharashtra.
5. (2011) 49 OCR (SC)-609 : WaikhomYaima Singh Vs. State of Manipur.
6. (2010) 46 OCR (SC)-739 : Gopal Singh Vs. State of M.P.
7. (2009) 44 OCR-800 : State of Orissa Vs. Tulu Dalabehera.
8. (2002) 6 SCC710 : Laxman Vs. State of Maharashtra.
9. (2006) 13 SCC 165 : Sham Shankar Kankaria Vs. State of Maharashtra.
10. (2010) 6 SCC 566 : Puran Chand Vs. State of Haryana.
11. (2008) 17 SCC 190 : Panneerselvam Vs. State of Tamil Nadu.

For Appellant : Mr. Bikram Chandra Ghadei
For Respondent : Mrs. Saswata Patnaik Addl. Govt. Adv.

JUDGMENT Date of Judgment: 31.10.2022

Dr. S. MURALIDHAR, C.J.

1. This appeal is directed against the order dated 17th December 2013, passed by the learned 1st Additional Sessions Judge, Puri in S.T. Case No.37/365 of 2013/2012, convicting the Appellant for the offence punishable under Section 376 of Indian Penal Code (IPC) and sentencing him to undergo rigorous imprisonment (RI) for seven years with a fine of Rs.5000/- and in default to undergo RI for a period of six months and further convicting the Appellant for

the offence punishable under Section 302 of IPC and sentencing him to undergo RI for life with a fine of Rs.5000/- and in default to undergo RI for six months. Both the sentences weredirected to run concurrently.

2. By the impugned judgment, the trial Court found the Appellant guilty of raping and murdering by setting on fire an adolescent minor girl of 15 years.

3. The case of the prosecution as spoken to by Ranjana Swain (PW-1), the mother of the deceased, was that the deceased was in friendly terms with the Appellant which was disapproved by the family members of the deceased. They asked the deceased to discontinue her relationship with the Appellant despite which, the deceased was stated to be still seeing him.

4. Further the case of the prosecution as spoken to by PW-1 was that in the night of 10th May, 2012 at around 2 am, when the deceased was sleeping with her grandmother in a room which was adjacent to the room in which PW-1 was sleeping with her husband, Nimai Swain (PW-4), the Appellant entered the house and called the deceased away. He is stated to have sexually assaulted her inside the mill. On her insisting that if the Appellant refused to marry her she would disclose the fact before the family members, the Appellant is stated to have poured kerosene kept in a jerry can in the mill and set the deceased on fire.

5. Hearing the shouts of the deceased, Pabitra Kumar Swain (PW-5) and Rinku Swain (PW-6) rushed to the mill as they were out to attend nature's call at that time. According to them, the rice mill (huller) was about 35 cubits from where they were. By the time they reached there, they noticed the Appellant who gave PW-5 apush blow and escaped from the spot. PWs-5 and 6 immediatelytried to save the life of the deceased by pouring water on her body. Thereafter, they shouted for help. Hearing their hullah, other family members living nearby came to the spot. They took the deceased first to the house when she was still in a conscious state and she disclosed before PWs 5, 6 and PW-1 that she had been called by the Appellant at the dead hour of the night to the rice huller, where he committed rape on her and when she insisted that he should marry her, the Appellant sprinkled kerosene on her body and set her on fire.

6. PWs 5 and 6 arranged to take the deceased first to the hospital at Rebena Nuagaon and thereafter to the District Headquarters Hospital (DHH), Puri where she was attended to by Dr. Chintamani Tripathy (PW-8) in the burns ward. PW-8 is stated to have recorded the dying declaration of the deceased at around 9 pm on 11th May, 2012. The deceased finally succumbed to theburn injuries and died on 13th May, 2012 around noon. Thereafter, her post-mortem

was conducted by Dr. Susanta Kumar Panda (PW-9) who opined that the cause of death was due to septicaemia from anti-mortem burns which was more than 95%. It was at this stage that the vaginal swab was collected and sent for pathological examination.

7. Srikanta Kumar Tripathy (PW-10) was the Sub-Inspector of Police (SI) attached to the Puri Sadar Police Station (PS), before whom a written report was presented on 11th May, 2012. After registering the FIR under Sections 376/326/307 of IPC, he took upinvestigation and in course thereof, on 15th May, 2012 effected the arrest of the Appellant from village Sahanikera. After the receipt of the information of death of the deceased on 13th May 2012, the offence was converted to Section 302 IPC apart from Section 376 IPC. Certain exhibits were collected from the spot and sent to the S.F.S.L., Rasulgarh for chemical examination. He also visited the Sahanikera School and received an extract of the Admission Register which showed the age of the victim/deceased to be 15 years old on the date of the incident.

8. On completion of investigation, a charge sheet was laid against the Appellant to which he pleaded not guilty and claimed trial. As many as ten witnesses were examined on behalf of prosecution and for the defence; Dr. Badri Narayan Mishra (DW-1), who was on duty as Medical Officer in the OPD/Casualty of DHH, Puri was examined.

9. On an analysis of the evidence, the trial Court came to the conclusion that the prosecution had proved the charges against the Appellant on both counts of offences i.e., under Sections 302 and 376 of IPC, beyond all reasonable doubt and proceeded to convict and sentence him as noted hereinbefore.

10. The findings of the trial Court were as under:

(i) The evidence of PWs 5 and 6 proved that the Appellant was last seen with the deceased; while he was running away from the spot, he gave a push to PW-5;

(ii) From the version of PWs 2, 5 and 6, it was plain that the Appellant and the deceased were not the strangers to the mill because they had visited it often in the past;

(iii) PW 2 stated that he had kept the jerrycan of kerosene near the electric motor along with a match box and this was not unknown to the Appellant, since he had visited the mill on many occasions;

(iv) Although PW 7, the nurse on duty was declared hostile, in her examination-in-chief she admitted that on 11th May 2012, the deceased had been admitted in the burns ward and that on that date, PW-8 had recorded her dying declaration at 9 pm. Although she denied her presence at the time of recording it, the fact of recording of the dying declaration by PW-8 was admitted by her;

(v) PW-8 in his cross-examination did admit that the deceased had suffered 95% burns and was in a critical condition but he added that he had recorded the statement of the deceased when she was conscious, although he did not make an endorsement on the body of the dying declaration that she was in a fit state of mind. Further, it was also not recorded in the question-answer form. The mother of the victim, i.e., PW-1, who was present throughout, was not made a witness to the dying declaration. Since the victim survived for more than 48 hours thereafter, it could be presumed safely that she was in a fit state of mind at the time of making thedying declaration;

(vi) The evidence of Dr. Badri Narayan Mishra (DW-1) did not weaken the case of the prosecution. He admitted the fact that he had not mentioned in the bed head ticket about the state of consciousness of the deceased and he also maintained studied silence with regard to the nature of the burn injuries;

(vii) The mere failure while PW-1 to disclose at the time of admission of the deceased about her being raped and burnt would not throw doubts of the truth of her version "as such she might have thought it prudent being scared and scarred not to disclose the same before the doctor in the earliest opportunity";

(viii) The vaginal swab was sent nearly four days after the occurrence, when the entire body of the victim was completely burnt and, therefore, the pathological report with regard to the presence of spermatozoa in the vaginal swab "cannot be safely accepted";

(ix) PW-9, the doctor who conducted the post-mortem, admitted that he had not reflected in his report that there was a smell of kerosene in the body but, the fact that the deceased was burnt alive by the Appellant was evident from the statement of PW-1;

(x) Although PWs-1 to 6 were related witnesses, it was unnatural to expect in an offence of this nature, witnesses other than close family members to be available to narrate what happened. Theirevidence was fully corroborated by the medical evidence;

11. This Court has heard the submissions of Mr. Bikram Chandra Ghadei, learned counsel appearing for the Appellant and Ms. SaswataPatnaik, learned Additional Government Advocate (AGA) for the State.

12. Mr. Ghadei submitted that where there was no certification by the doctor on the body of the dying declaration that the victim was conscious and in a fit state of mind to make the declaration, the trial Court ought not to have accepted the dying declaration. Reliance is placed on the decision in ***Surinder Kumar v. State of Haryana 2011 SAR (Criminal) 972***. The mother did not endorse the dying declaration as a witness despite her presence throughout. Further, with the deceased having suffered 95% burns, it was very unlikely that she was in a fit state of mind to make any statement whatsoever. The dying declaration, therefore, ought to be discarded. Reliance is placed on the decision in ***Nallapati Sivaiah v. Sub-Divisional Officer, Guntur A.P. 2007 SAR (Criminal) 941***.

13. Mr. Ghadei submitted that there was no evidence whatsoever of the Appellant having committed rape on the deceased. In Ext-15, it had been stated that there was no sign of any recent physical intercourse or presence of any spermatozoa on the vaginal swab. At the spot of occurrence, there were no burn marks. Mr. Gadhei submitted that from the evidence of DW-1, it appeared that the information given by the attendants of the deceased was that the burn had been caused by self-immolation by pouring kerosene athome. It was submitted that the trial Court ought to have held thatshe committed suicide being depressed about the decision held in the meeting in the evening hours that the deceased should not have any further relationship with the Appellant.

14. Mr. Gadhei submitted that since all the PWs were related witnesses and inimical to the Appellant, their testimonies ought not to be accepted. Their evidence was also not fully corroborated by the medical evidence. Therefore, it was unsafe to base the conviction of the Appellant on such evidence. Reliance is placed on the decisions in ***State of Rajasthan v. Yusuf 2009 SAR (Criminal) 677, ArunBhanudasPawar v. State of Maharashtra (2010) 45 OCR (SC)-494, WaikhomYaima Singh v. State of Manipur (2011) 49 OCR (SC)-609, Gopal Singh v. State of M.P. (2010) 46 OCR (SC)-739 and State of Orissa v. Tulu Dalabehera (2009) 44 OCR-800.***

15. Mrs. Saswata Patnaik, learned Additional Government Advocate appearing for the State on the other hand, submitted that the dying declaration was correctly recorded by PW-8, who being a government servant was the attending doctor at the DHH, Puri. There was no need for PW-8 to fabricate any

evidence as he was nowhere concerned with either the deceased or the Appellant. Reference was made to the Constitution Bench decision of the Supreme Court in ***Laxman v. State of Maharashtra (2002) 6 SCC710***, which clarified that even in the absence of certification by the doctor as to the mental status of the deceased, the dying declaration could be relied upon. It was submitted that the otherdecisions cited by learned counsel for the Appellant weredistinguishable on facts. In the present case, not only is the last seen evidence fully proved by PWs-5 and 6 but, PW-8 has proved the dying declaration of the deceased and has also withstood the cross-examination of the defence in that regard. The medical evidence also has corroborated the dying declaration.

16. The above submissions have been considered. The crucial piece of evidence in the present case is the dying declaration, made by the deceased, naming the Appellant as the person who raped her and then set her on fire when she insisted that he should marry her. The legal position in regard to the dying declaration has been explained in ***Sham Shankar Kankaria v. State of Maharashtra*** (2006) 13 SCC 165 as under:

> "10. This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason the requirements of oath and cross- examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence.
>
> 11. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross- examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that thedeceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, *it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in Paniben v. State of Gujarat (1992) 2 SCC474 (SCC pp.480-8 1, para18).* *(Emphasis supplied)*
>
> (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (*See Munnu Raja v. State of M.P.*, (1976)3 SCC 104)

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (*See State of U. P. v. Ram SagarYadav* (1985) 1 SCC 552 and *Ramawati Devi v. State of Bihar* (1983) 1 SCC 211).

(iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (*See K. Ramachandra Reddy v. Public Prosecutor* (1976) 3 SCC 618).

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See Rasheed Beg v. State of M.P. (1974) 4 SCC 264).

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (*See Kake Singh v. State of M.P. 1981 Supp*. SCC 25).

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See *Ram Manorath v. State of U.P.* (1981) 2 SCC 654).

(vii) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected. (*See State of Maharashtra v. KrishnamurtiLaxmipati Naidu*, 1980 Supp SCC 455).

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (*See SurajdeoOjha v. State of Bihar* 1980 Supp SCC 769).

(ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (*See Nanhau Ram v. State of M.P.,* 1988 Supp SCC 152).

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See State of U.P. v. Madan Mohan, (1989) 3 SCC 390).

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. (*See Mohanlal Gangaram Gehani v. State of Maharashtra,* (1982) 1 SCC 700)"

17. The above legal position was reiterated in ***Puran Chand v. State of Haryana (2010) 6 SCC 566 and Panneerselvam v. Stateof Tamil Nadu (2008) 17 SCC 190.***

18. In the present case, the dying declaration unequivocally and unambiguously points to the guilt of the Appellant on both counts i.e., for the offence under Section 376 of IPC and of murder under Section 302 of IPC. This is not a case where inconsistent dying declarations have been made by the deceased. The fact remains that although she was burnt alive at around 2 am on 10th May, 2012, she remained alive till the noon of 13th May, 2012, i.e., forwell

over three days. Further, she remained alive for almost 48 hours after the making of the dying declaration at 9 pm on 11th May, 2012. Her state of mind to make the dying declaration has to be assessed in the above background notwithstanding that she suffered 95% burns.

19. PW-8 is obviously an experienced doctor and was fully aware of the gravity of the situation as far as the making of the dying declaration was concerned. He clearly mentions "at the time of recording the statement, though she was able to talk but was suffering from severe pain". In his cross-examination, he mentioned inter alia as under:

> "4.....when I visited the patient at about 12.05 P.M. she was in critical condition having 95% burn injuries and was beyond my control. As such she was referred to Cuttack medical. Throughout the treatment the mother of the patient was present by her side and expressed her inability to shift the patient to Cuttack hospital and preferred to treat her at the Headquarters hospital, Puri. There was 3 degrees of consciousness namely, conscious, subconscious and non-conscious and usually unconscious and sub-conscious state it can be safely presumed that a person cannot speak rationally. However, in a conscious state though a person is capable of revealing her mind rationally in the event of any serious injury, but it cannot be discarded in some caseseven in conscious state of mind also in extreme case of injury, one can speak in-coherently in state of delirium.xxx"

20. The above statement in cross-examination indicates that PW-8 was aware of what he was doing. There was no need for him to write up a dying declaration which was never made. Merely because he did not endorse on the bed head ticket that the victim was in a conscious state would not mean that no such statement was ever made by her. The same also holds good for the criticism that the declaration was not in a question-answer form. These are not inviolable mandatory requirements for the acceptance of a dying declaration. On the other hand, a Constitution Bench of the Supreme Court in ***Laxman v. State of Maharashtra*** (supra) explained as under:

> "3…The court, however has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by

signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessarynor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

21. The Court is not persuaded that in the present case the dying declaration was not voluntarily made by the deceased or not in a conscious state of mind and that it should be discarded. In ***Surinder Kumar v. State of Haryana*** (supra) at the relevant time not only was the deceased brought to the hospital with 100% burns, but at the time when the Magistrate recorded her statement, the treating doctor was not present. In the present case, the doctor was very much present when the statement was made and in fact it is the doctor who recorded it. Each case, therefore, turns on its own facts and it cannot be laid down as inviolable general rule that without certification of the state of consciousness of the deceased, a dying declaration recorded without such endorsementshould be rejected.

22. Again in ***Nallapati Sivaiah v.Sub-Divisional Officer, Guntur A.P.*** (supra) there was no evidence of the details of any treatment administered to the victim. The doctor, who was said to have been present at the time of recoding of the dying declaration, was not examined. Moreover, there were two dying declarations which were inconsistent. In the present case, however, there is only one dying declaration and it is not shown to be suffering from any internal inconsistency. The second factor here is that the dying declaration is consistent with what was spoken by the deceased first, soon after the incident, in front of the family members which in turn has been consistently spoken to by PWs 1, 5 and 6. Therefore, the decision in ***Nallapati Sivaiah v. Sub-Divisional Officer, Guntur A.P.*** (supra), is also of no assistance to the Appellant in the present case.

23. Turning now to the decision in ***State of Rajasthan v. Yusuf*** (supra), it is found that there was an inherent attempt to falsely implicate a large number of family members of the accused. That was what perhaps persuaded the Court to discard the dying declaration. However, in the present case, there is no attempt to implicate anyone other than the Appellant himself. The dying declaration made in the present case lends assurance to its truth and credibility. The other decisions, cited by learned counsel for the Appellant also appeared to have turned on its own facts and do not persuade the Court to discard the dying declaration made bythe deceased.

24. As regards as the presence of the accused at the scene of crime, both PWs 5 and 6 have consistently spoken about the Appellant running away from the spot when they reached there. PW 5 stated that the accused gave him a 'push blow'. This was corroborated by PW 6. Therefore there could be no mistake as regards his identity. Both PWs 5 and 6 were subject to detailed cross-examination, which they withstood. Further, when the IO (PW 10) conducted a raid at the house of the accused the nextmorning, he was absconding. He could be traced only on 15th May 2012. Consequently, the presence of the accused at the scene of crime soon after its commission by him, stands conclusively proved by the prosecution. The alternative plea that the victim immolated herself stands belied by the fact that the accused ran away from the spot and made no attempt to save her.

25. The medical evidence does show that the death was due to ante-mortem burns which were extensive. The forensic evidence has also supported the case of the prosecution regarding the deceased being killed by burning.

26. The dying declaration implicates the accused of both offences viz., of rape and murder. Although the vaginal swab did not indicate the presence of spermatozoa, it has to be recalled that the swab was itself taken three days after the deceased was admitted to the hospital and in a condition of 95% burns. Therefore, the mere absence of forensic corroboration of the dying declaration on this aspect will not falsify the dying declaration, which hasotherwise been held to be voluntary and truthful. Consequently,this Court concurs with the trial Court as far finding the Appellant guilty of the offence under Section 376 IPC is concerned.

27. The net result is that there is no merit in this appeal and it is dismissed as such.

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2022 (III) ILR - CUT- 670

Dr. S. MURALIDHAR, C.J & CHITTARANJAN DASH, J.

W.A. NO. 468 OF 2016

KALAKAR CHAKRA ……..Appellant

.V.

ORISSA GRAMYA BANK & ORS. ……..Respondents

(A) CONSTITUTION OF INDIA, 1950 – Art. 226 – Scope of interference by the High Court under this Article in disciplinary enquiries – Held, to review the factual findings of an Appellate Authority is definitely beyond the scope of interference by the Writ Court – Its jurisdiction is confined to examine whether there was any procedural irregularities in the conduct of enquiry. (Para-21)

(B) SERVICE LAW – Criminal proceeding vis-a-vis disciplinary proceeding – Whether acquittal in Criminal Proceeding would automatically bring to an end of the disciplinary proceeding – Held, No. (Para-18)

Case Laws Relied on and Referred to :-

1. AIR 2006 SC 2730 : Division Controller N.E.K.R.T.C Vs. H. Amaresh.
2. AIR 2005 SC 2769 : Bharat Heavy Electricals Ltd. Vs. M. Chandrasekhar Reddy.
3. AIR 2006 SC 1214 : Government of A.P. Vs. Mohd.Nasrullah Khan.

For Appellant : Mr. M.K. Khuntia
For Respondents : Mr. S.C. Samantaray

JUDGMENT Date of Judgment : 31.10.2022

Dr. S. MURALIDHAR, C.J.

1. This appeal is directed against the Judgment dated 18th May 2016, passed by the learned Single Judge dismissing the O.J.C. No.6048 of 1994, filed by the present Appellant. In the said writ petition, the Appellant had challenged the enquiry report dated 31st July 1992, submitted by the Enquiry Officer (EO) and the consequential order of dismissal passed on 29th September, 1992 by the Disciplinary Authority (DA) as well as the order dated 18th July, 1994 of the Appellate Authority (AA), confirming the dismissal of the Appellant for acts of misconduct committed by him while he was working in the Soso Branch of the Baitarani Gramya Bank ('Bank').

2. The background facts are that the Appellant was appointed in 1980 as Sweeper-cum-Water Boy-cum-Messenger at the Soso Branch of the Bank in

Keonjhar on a temporary basis. On 4th August, 1981 he was transferred from Soso Branch to the Batto Branch, Keonjhar. Pursuant to the instructions issued by the Chairman of the Bank, the Appellant applied on 14th November, 1988 for being considered for regularization. He appeared in the interview and viva-voce.

3. On 15th January, 1989 the Central Bureau of Investigation (CBI) registered a First Information Report (FIR) for alleged financial irregularities in the Bank. On 30th September 1989, the CBI filed a charge sheet against three persons: (i) BansidharSahoo, Junior Cashier-cum-Clerk of the Bank, (ii) Sibnarayan Dash, Manager of the Bank in Keonjhar and (iii) Gajendra Kumar Mishra, Junior Cashier-cum-Clerk of the Bank at the Saintala Branch, Keonjhar. They were charge-sheeted for the offences punishable under Sections 120-B/420/467/471 IPC read with Section 468 of IPC.

4. Meanwhile, on 15th November 1990, the services of the Appellant was regularized with effect from 31st December, 1987.

5. On 18th June 1991, the Appellant was placed under suspension on the charge of having prepared five credit advices totaling Rs.79,900/- purportedly drawn in the Keonjhar Branch of the Bank favouring one Sri Subash Chandra Samal, stated to be a fictitious account holder of the branch. The said amount was stated to have been withdrawn subsequently from the said Bank account thereby causing direct pecuniary loss to the Bank.

6. On 14th August 1991, in the disciplinary proceedings, the Appellant was issued a charge sheet by the Bank seeking his explanation on the following two charges:

> "Charge-I: Sri Kalakar Chakra got prepared a roundstamp for the branch without any approval/sanction.This round seal was found to be affixed on forged credit advices purported to be drawn by Soso Branch of Keonjhar Branch.
>
> Charge-II: Sri Kalakar Chakra is alleged to have prepared 5 credit advices totaling Rs.79,900/- purported to be drawn by Soso branch on Keonjhar Branch favouring one Sri Subash Chandra Samal, a fictitious account of the branch, which was withdrawn subsequently from the said fictitious account, thereby causing heavy loss to the Bank."

7. On 27th August 1991, the Appellant submitted his explanation to the charge sheet basically denying having anything to do with the above five credit advices. He denied to getting any round seal for the branch prepared without approval/sanction. On 27th August 1991, the Appellant furnished a detailed explanation to the charge sheet before the DA.

8. On 31st July 1992, the EO submitted an enquiry report holding the Appellant guilty of both the charges and placing the report before the DA for appropriate action.

9. On 12th August 1992, the DA issued a Show Cause Notice (SCN) to the Appellant based on the above enquiry report. On 21st September 1992, the Appellant submitted his explanation to the above SCN. On 29th September 1992, the Chairman of the Bank issued an order dismissing the Appellant from services.

10. The Appellant then challenged the dismissal order in O.J.C. No.7065 of 1993, which was disposed of on 7th April, 1994 permitting the Appellant to file an appeal before the appropriate authority. Pursuant thereto, the Appellant on 27th April, 1994 filed an appeal against the dismissal order dated 29th September, 1992. However, on 18th July, 1994 a reply was sent by the Board of Directors of the Bank informing the Appellant that his appeal had already been disposed of. In fact, it was pointed out that the appeal had been disposed of on 6th January, 1993 and the said fact had been communicated to him on 13th January, 1993. It is the contention of the Bank that these facts were not disclosed by the Appellant when O.J.C. No.7065 of 1993 was disposed of by this Court by its order dated 7th April, 1994.

11. The Appellant contended before the learned Single Judge that the CBI had filed a charge sheet against three of the Bank's employees and not the Appellant, although the Appellant was questioned by the CBI. In the criminal case, which was registered against the three employees of the Bank, a judgment was passed on 27th April, 1996 by the Additional Chief Judicial Magistrate (ACJM), Bhubaneswar, acquitting them. Thereafter, all the three were reinstated in the service of the Bank.

12. The case of the Appellant is that after the aforementioned judgment of the ACJM negatived the case of the Bank and the CBI that the sum of Rs.79,900/- had been withdrawn from the fictitious account of one Subash Chandra Samal, the charge against the Appellant that he got prepared two round seals of the Bank and used that to prepare the aforementioned credit advices must fail. It is submitted that since the criminal case ended in the acquittal of the three co-accused persons and with the Appellant being only a witness and not an accused in that case, the enquiry report as well as the consequential order of dismissal were bad in law.

13. Mr. M.K. Khuntia, learned counsel appearing for the Appellant, specifically drew attention to the order of the ACJM acquitting the three accused

persons, where it was categorically held that the said Sri Subash Chardra Samal was not a fictitious person and that "question of forging the signature by the accused B.D. Sahu an authenticated with the signature by accused S.N. Das respectively is not believable".

14. It is contended by Mr. Khuntia, learned counsel for the Appellant, that if indeed the finding was that S.C. Samal was not a fictitious person and his S.B. Account No.1021 was not a fictitious account, the logical conclusion was that the Appellant ought to be exonerated of the charges in the disciplinary enquiry and he also ought to have been reinstated in service.

15. Mr. S.C. Samantaray, learned counsel appearing for the Respondent-Bank submitted that the settled legal position is that mere acquittal in a criminal case would not automatically bring to an end the disciplinary proceedings as they proceed on different standards of proof.

16. The learned Single Judge also took note of the decisions in ***Division Controller N.E.K.R.T.C v. H. Amaresh AIR 2006 SC 2730, Bharat Heavy Electricals Ltd. v. M. Chandrasekhar Reddy AIR 2005 SC 2769.*** It is pointed out that the Appellant's specific misconduct was not subject matter of the criminal trial and, therefore, not much reliance can be placed on it by the present Appellant to escape the consequences of facing disciplinary proceedings.

17. The above submissions have been considered. The scope of interference by the High Court under Article 226 of the Constitution of India in disciplinary enquiries is fairly well settled. In ***Government of A.P. v. Mohd.Nasrullah Khan AIR 2006 SC 1214***, it was observed as under:

> "11. By now it is a well-established principle of law that the High Court exercising power of judicial review under Article 226 of the Constitution does not act as an Appellate Authority. Its jurisdiction is circumscribed and confined to correct errors of law or proceduralerror, if any, resulting in manifest miscarriage ofjustice or violation of principles of natural justice. Judicial review is not akin to adjudication on merit by re-appreciating the evidence as an Appellate Authority."

18. Further, the High Court is not expected to act as an appellate Court sitting in appeal over factual findings in a disciplinary enquiry. All that the High Court had to examine was whether there were any errors of law or procedural law resulting in manifest miscarriage of justice or violation of principles of natural justice. In the present case, it is a fact that the Appellant never himself faced any criminal charges. In other words, he was not sent up for trial at all. Therefore, as far as the Appellant was concerned, the mere fact

that arising out of the same case, the criminal case was instituted against three other persons, stated to be involved in the misconduct, were acquitted by the trial Court would not ipso facto mean that the Appellant also should be exonerated in the disciplinary proceedings.

19. Even if it was the Appellant himself who was acquitted in the criminal case, the position would be no different as was explained by this Court recently in its judgment dated 9th March, 2022 in W.P. (C) 10444 of 2009 (***Sk. Akbar Ali v. State of Odisha***) where, after referring to the judicial precedents of the Supreme Court, it was held as under:

> "In State of Rajasthan v. Heem Singh 2020 SCC On Line SC 886, the Supreme Court while considering the effect of an acquittal observed that precedentsindicate that any such acquittal under special circumstances narrated therein does not conclude a disciplinary enquiry while referring to one of its earlier judgment in Southern Railway Officers' Association v. Union of India (2009) 9 SCC 24, wherein, it was observed that acquittal in a criminal case by itself cannot be a ground for interfering with an order ofpunishment imposed by the disciplinary authority asthe position of law is well settled that an order of dismissal can still be passed even if the delinquent had been acquitted of the criminal charge. Another decision in Inspector General of Police v. S. Samuthiram (2013)1 SCC 598 was also referred to by the Supreme Court in Heem Singh case to hold that unless the accused has an honourable acquittal in the criminal case as opposed to an ordinary one shall not affect the decision in the disciplinary proceeding leading to an automatic reinstatement. The meaning of the expression 'honourable acquittal' was under consideration before the Supreme Court in RBI v. Bhopal Singh Panchal (1994) 1 SCC 541 and in that case, it was held that mere acquittal does not entitle an employee to reinstatement in service and the acquittal has to be honourable, which means, the accused is said to be fully acquitted of blame or exonerated and the aforesaid decision was also quoted with approval in Heem Singh case. In fact, the celebrated and judgment legal classicus on the subject is of the Supreme Court in R.P. Kapur v. Union of India AIR 1964 SC 787 in which it was held that even in the case of acquittal, departmental proceeding may follow where the acquittal is other than honourable. In Union of India v. Dalbir Singh 2020 SCC On Line SC 768, the Supreme Court affirmed the view that a disciplinary action cannot be stifled unless the foundation is based on a false case or no evidence. Again, in State of Assam v. Raghava Rajgopalchari 1972 SLR 44 (SC), the Supreme Court borrowed the view expressed in Robert Stuart Wauchope v. Emperor ILR (1934) 61 Cal. 168, wherein, the expression 'honourably acquitted' was elaborated upon and defined."

20. Again, in ***Division Controller N.E.K.R.T.C v. H. Amaresh*** (supra) the Supreme Court observed: "Once a domestic Tribunal based on evidence comes to a particular conclusion normally it is not open to the tribunal and courts to substitute their subjective opinion in place of the one arrived at by the domestic tribunal."

21. Turning to the case on hand, two of the five credit slips, viz., ME-5 and ME-6 were found to contain not only the affixation of the round seal recovered from the drawer of the table frequently used by the Appellant, but it also bore the

handwriting of the Appellant. Although it was argued that the findings of the EO in this regard are perverse since no handwriting expert was examined, this Court is unable to accept that the entire enquiry report will stand vitiated only for that reason. The EO has recorded how three of the witnesses in fact identified the signature and handwriting of the Appellant. On factual basis, therefore, the Appellant cannot possibly argue that the learned Single Judge exercising jurisdiction under Article 226 of the Constitution should have reviewed the factual findings as an Appellate Authority. That was definitely beyond the scope of interference by the writ Court. As already pointed out, the scope of the proceedings was to examine whether there were any procedural irregularities in the conduct of the enquiry. The learned Single Judge as well as this Court have been unable to find any such irregularity. The mere non-examination of a handwriting expert cannot be viewed as a procedural irregularity since there was sufficient evidence to otherwise prove the signature and handwriting of the Appellant on the relevant documents. Therefore, there is no scope in the present case, for the Court to interfere either with the report of the EO or the order of the DA on the merits i.e. finding the Appellant guilty of the two charges.

22. As regards the quantum of punishment, the legal position as regards the scope of interference was explained in ***Division Controller N.E.K.R.T.C v. H. Amaresh*** (supra) as under:

> "18…This Court has considered the punishment that may be awarded to the delinquent employees who misappropriated funds of the Corporation and the factors to be considered. This Court in a catena of judgments held that the loss of confidence as the primary factor and not the amount of money mis-appropriated and that the sympathy or generosity cannot be a factor which is impermissible in law. When an employee is found guilty of pilferage or of mis-appropriating a Corporation's funds, there is nothing wrong in the Corporation losing confidence or faith in such an employee and awarding punishment of dismissal. In such cases, there is no place for generosity or misplaced sympathy on the part of the judicial forums and interfering therefore with the quantum of punishment."

23. In the present case too, one of the issues is the Bank losing confidence in the Appellant given the nature of his duties. As observed in ***Bharat Heavy Electricals Ltd. v. M. Chandrasekhar Reddy*** (supra):

> "25….The Labour Court has itself come to the conclusion the management has lost confidence in the respondent. If that be the case the question of it exercising its jurisdiction under Section 11-A to alter or reduce the punishment does not arise.
>
> 26. That apart the reasons given by the Labour Court to reduce the penalty are reasons which are not sufficient for the purpose of reducing the sentence by using its discretionary power. The fact that the misconduct now a lleged is the first misconduct again is no ground to

condone the misconduct. On the facts of this case as recorded by the Labour Court the loss of confidence is imminent, no finding has been given by the courts below including Labour Court that either the fact of loss of confidence or the quantum of punishment is so harsh as to be vindictive or shockingly disproportionate. Without such finding based on records interference with the award of punishment in a domestic inquiry is impermissible."

24. To summarize the legal position, an acquittal in a criminal case involving certain other persons, in relation to the sameincident, will not result in an automatic exoneration in disciplinary proceedings of another employee who never faced the criminal trial. Moreover, the standards of proof in a criminal trial and in disciplinary proceedings are different. In the former standard of proof is beyond reasonable doubt, whereas in the latter, the charges are required to be established on a preponderance of probabilities.

25. Consequently, the Court is not satisfied that the Appellant has made out any ground for interference with the impugned order of the learned Single Judge. The writ appeal is accordingly dismissed but in the circumstances with no order as to costs.

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2022 (III) ILR - CUT- 676

Dr. S. MURALIDHAR, C.J & CHITTARANJAN DASH,J.

CRA NOS. 227, 232 AND 233 OF 1996

KARTIKA CHANDRA SWAIN @
KARTIKA SWAIN & ORS. ………Appellants
(IN CRA NO.232 OF 1996)
SANKAR LENKA & ORS.

(IN CRA NO.233 OF 1996)
GANDHI ROUT & ORS.

STATE OF ODISHA ………..Respondent

CRIMINAL TRIAL – Offence under Sections 148, 302, 307 read with Section 149 of IPC and Sections 25 and 27 of the Arms Act – There were 32 accused persons – One of the accused Kulamani Nayak, was convicted under Section 302 of IPC apart from the above offences – This is a case based on the direct evidence of injured eye witnesses – P.W.17 is the only independent eye witnesses but he was not been examined by the police – The accused other than Kulamani Naik were charged with the offences under Section 148 and separately on 149 of

IPC – Plea of accused /appellants that there was failure on the parts of the P.W.s to specifically state which of the accused caused injury to which P.Ws. – Further, there are some obvious inconsistencies and discrepancies in the depositions of the PWs – Effect of – Held, in the context of the principle of constructive liability embodied in Section 148, 149 of IPC the charge against the accused, other than Kulamani Naik, with the aid of Section 148 and 149 IPC have not been convincingly proved – So also the charge against all of them for commission of the offence punishable under Section 307 of IPC or Section 25/27 of the Arms Act has not been convincingly proved.

(Para-51,52)

Case Laws Relied on and Referred to :-

1. (1981) 3 SCC 675 : Hari Obula Reddy Vs. The State of Andhra Pradesh.
2. (2005) 10 SCC498 : Ramashish Rai Vs. Jagdish Singh.
3. (1968) 3 SCR 525 : Mohar Rai Vs. State of Bihar.
4. (1976) 4 SCC 394 : Lakshmi Singh Vs. State of Bihar.
5. 2000 SCC (Cri) 285 : Padam Singh Vs. State of Uttar Pradesh.
6. AIR 1973SC 501 : Thulia Kali Vs. State of Tamil Nadu.
7. AIR 1993 SC 2644 : State of A.P. Vs. Punati Ramulu.
8. (2010) 6 SCC 519 : Eknath Ganpat Aher Vs. State of Maharashtra.
9. (2013) 4 SCC607 : Subal Ghorai Vs. State of West Bengal.

For Appellants : Mr. Dharanidhar Nayak, Sr. Adv.

For Respondent :Mr. Janmejaya Katikia, Addl. Govt. Adv.

JUDGMENT Date of Judgment : 31.10.2022

Dr. S. MURALIDHAR, C.J.

1. The present three sets of appeals (CRA Nos.227, 232 and 233 of 1996) are directed against a common judgment dated 13th August, 1996 passed by the learned Additional Sessions Judge, Khurda in S.T. No.22/111 of 1995 convicting the Appellants under Sections 148, 302, 307 read with Section 149 IPC and Sections 25 and 27 of the Arms Act.

2. It requires to be noticed at the outset that before the trial Court, there were 32 accused persons. One of the accused Kulamani Nayak, Accused No.26 (A26) was convicted under Section 302 IPC apart from the above offences. He had filed a separate Criminal Appeal No.268 of 1996. After he had served more than10 years in custody, he was enlarged on bail by this Court by an order dated 1st February, 2007. However, during the pendency of the present appeal,he expired on 7th June, 2019. The appeal filed by Kulamani Nayak, (A26) i.e.

Criminal Appeal No.268 of 1996 was disposed of by this Court as having abated by an order dated 30th August, 2022.

3. As far as the remaining accused are concerned, during the pendency of the Appeals, Udayanath Pradhan-A18 (who was also Appellant No.1 in Criminal Appeal No.227 of 1996) and Makadam Sahu-A25 (Appellant No.1 in Criminal Appeal No.233 of 1996) expired. Consequently, the appeals as far as the said two accused-Appellants were concerned, were disposed of as having abated by the order dated 30th August, 2022 of this Court.

4. It requires to be further noticed that by an order dated 23rd August 1996, the Appellants in Criminal Appeal No.227 of 1996 were enlarged on bail by this Court. By the identical orders dated 29th August 1996, the Appellants in the remaining two appeals i.e. Criminal Appeal Nos.232 and 233 of 1996 were enlarged on bail by this Court.

5. This Court has heard the submissions of Mr. Dharanidhar Nayak, learned Senior Counsel appearing for the Appellants and Mr. Janmejaya Katikia, learned Additional Government Advocate for the State.

Case of the prosecution

6. The case of the prosecution is that on account of alleged attempt at removal of earth from the gochar land in village Raghunathpur by the villagers of village Ghumusarpadar,there was a misgiving and misunderstanding between the two sets of villagers. It is the case of the prosecution that at around 9 am on 23rd June 1994, some of the villagers of Ghumusarpadar assembled in their Jubak Sangh Office with a view to evolve a compromise formula using the good offices of one LingarajPradhan (P.W.17), who was a Sarpanch of a different village i.e. Singheswar Grama Panchayat.

7. While the villagers of Ghumusarpadar were thus engrossed, the accused party i.e. the Appellants herein belonging to village Raghunathpur, armed with deadly weapons, such as country made guns, lathi, kanta, bhali, etc., formed an unlawful assembly and marched towards the village Ghumusarpadar. Some of them were wearing helmets. Seeing them, P.W.17 went forward to persuade them not to cause any breach of peace. However, in front of thehouse of Raja Kishore Tarai (P.W.7), P.W.17 was given a lathiblow on his head by Madhu Lenka-A5 (Appellant No.3 in Criminal Appeal No.232 of 1996).

8. Seeing P.W.17 fall on the ground, some of the villagers of Ghumusarpadar i.e. Shyama Sundar Raut (deceased), Madhusudan Tarai (P.W.8), Mahendra

Tarai (P.W.10), DasarathiRaut (P.W.16), Bhikari Raut (not examined) and certain others, who were sitting on the verandah of the JubakSangh Office, rushed to rescue P.W.17. The accused persons belonging to village Raghunathpur were stated to have abused them in filthy language and threatened them. KulamaniNayak (A26) (the deceased Appellant in Criminal Appeal No.268 of 1996), Hazari Rout (A28) (Appellant No.9 in Criminal Appeal No.232 of 1996), Jitendra Nayak @ Tukuna (A29) (Appellant No.10 in Criminal Appeal No.232 of 1996) and Hazari Pradhan (A27) (Appellant No.11 in Criminal Appeal No.233 of 1996) being armed with country made guns opened fire. Further, the case of the prosecution is that Kulamani Nayak (A26) opened fire as a result of which Shyama Sundar Raut was seriously injured.

9. The case of the prosecution is as a result of A27, A28 and A29 opening fire with their respective country made guns,MahendraTarai (P.W.10), Madhusudan Tarai (P.W.8), Doma Barik (P.W.13), Dasarathi Raut (P.W.16), Bhikari and others were seriously injured. Shyama Sundar Raut succumbed to his gunshot injuries after he was taken to Balugaon Government Hospital. Apart from the above, Trinath Raut, Pabitra and Bhagaban Pradhan (who were not examined) and Bijaya Dalei (P.W.9) as well as Harihar Tarai (P.W.11) were stated to be seriously injured. It is stated that Indramani Swain (A31) (Appellant No.12 in Criminal Appeal No.233 of 1996) dealt a blow on the head of Kedar Lenka (P.W.12) by means of a kati, as a result of which P.W.12 became seriously injured. The other accused persons were stated to have also indiscriminately used brickbats as a result of which some more persons of village Ghumusarpadar were injured.

Investigation

10. Debendra Tarai (P.W.3) lodged an oral report at the Balugaon Police Station (PS) on 23rd June,1994 at 9.45 am before Chandra Sekhar Das (P.W.25), the Investigating Officer (IO), who was the Officer-in-Charge (OIC) at Balugaon PS, who then registered the FIR as PS Case No.24/1994 and took up investigation. P.W.25 is stated to have visited the spot at 10 am, prepared a spot map and issued injury requisitions in respect of Bijaya Dalei (P.W.9), Ramesh Raut (P.W.5), Rohita Tarai (P.W.2), Rama Dalai (not examined), Dasarathi Raut (P.W.16), Kedar Lenka (P.W.12), Doma Barik (P.W.13),PrasantRaut (P.W.6) and Madhusudan Tarai (P.W.8) for their medical examination. At 12 noon, he isstated to have held an inquest over the dead body of Shyama Sundar Raut inside the Balugaon PHC premises and prepared an inquest report. Later, he despatched the dead body of Shyama Sundar Raut for Post-Mortem (PM) Examination.

11. At 2 pm on 23rd June 1994, P.W.25 is stated to have searched kothaghar of village Raghunathpur, seized 12 company made card board cartoons of Aerostar mini helmets and prepared a seizure list. At 2.30 pm on the same day, he is stated to have seized four wooden lathis from the house of A26 (Kulamani Nayak), one farsa having wooden handle, one small tangia with wooden handle and one mini white fibre helmet. From the house of A31 (Indramani Swain), P.W.25 is stated to have seized a katuri having a bamboo handle. He is stated to have searched the house of Gandhi Raut (A24) and seized a Bhali having a bamboo handle, one Khanati having bamboo handle and a bamboo lathi.From the house of A25 (Makadam Sahu), P.W.25 is stated to have seized one Todi Ankus and 2 bamboo lathis. Other seizures wereeffected on 25th June 1994, by P.W.25. On 18th July 1994, heseized a tenta having 11 spikes, which was dangling from the body of Bijaya Dalei (P.W.9) and 2 pellets extracted from the body of Doma Barik (P.W.13).On completion of investigation, P.W.25 filed a charge-sheet against the aforementioned accused persons, who pleaded not guilty and claimed trial.

12. The case of the four accused i.e. A26 to 29, who were allegedly armed with country made revolvers, was that they were not present at the material time and subsequently got information that 10 to 15 persons belonging to Raghunathpur village were assaulted and injured by villagers of Ghumusarpadar and that a false case had been foisted on them due to previous enmity among village factions.

13. A6 (Matia Nayak) pleaded alibi stating that he was performing duty as a lineman in a sub-station inside the Chilka Naval base from 6 am to 2 pm on 23rd June, 1994. Some of the accusedpleaded that they attended the meeting at the Jubak Sangh Office of Ghumusarpadar at 8 am on 23rd June, 1994; while the meeting was going on, there was a hot exchange of words, as a result of which the villagers of Ghumusarpadar attacked them with deadly weapons, which were kept ready in the Jubak Sangh Office and caused various injuries to them. The accused fled away from the spot fearing for their lives despite which the false case had been foisted on them because of the previous enmity.

14. Certain other accused pleaded that they were neither present at the spot nor had assaulted anyone. Kartika Swain (A7) pleaded that he was returning after selling milk and was assaulted by villagers of Ghumusarpadar and that a false case had been foisted on him.

15. 25 witnesses were examined for the prosecution. Of these, P.Ws.1 to 3, 5 to 13 and 16 were projected as occurrence witnesses and P.W.17 as an

injured witness. Of the occurrence witnesses, P.Ws.2, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 16 and of course P.W.17 were all injured witnesses in respect of whom injury certificates were sought to be produced by the prosecution. Two police officers-Bhabani Prasad Rath, the Assistant Sub-Inspector (ASI) of Police, Balugaon PS (P.W.15) and the IO (P.W.25) were examined. As many as 7 doctors (P.Ws.18 to 24) were examined. Bansidhar Baral (P.W.4) and Sk. Jamir (P.W.14)were the two seizure witnesses.

16. One Durga Prasad Padhi (D.W.1), Junior Engineer, GRIDCO, Balugaon was examined to prove the alibi plea of A6 (MatiaNayak). Likewise, the injury certificates of Gandhi Raut (A24), Rankanath Pradhan (A22), Narasingh Raut (A19), Makadam Sahu (A25),Udayanath Pradhan (A18),Kartika Swain (A7),Trinath Raut (A21),Panchanan Rout and Jogendra Swain (A11) were marked as Exhibits A to K, which had been issued by the Medical Officer of Balugaon PHC. The attendance sheet and duty chart of A6 (Matia Nayak) (Exhibits L and M) were also produced.

Trial Court judgment

17. On an analysis of the evidence, the trial Court came to the following conclusions:

(i) The evidence of P.W.17 that 20 to 25 persons of Raghunathpur marched towards the Jubak Sangh Office of Ghumusarpadar in a violent manner and that he went forward to stop them to prevent breach of peace was not assailed by the defence. From his evidence, it appeared that the accused persons had formed an unlawful assembly in village Ghumusarpadar on 23rd June, 1994 at 9 am;

(ii) The evidence of the P.Ws. also showed that the accused persons had made a thorough preparation by arming themselves with deadly weapons and wearing helmets, thus,forming an unlawful assembly sharing a common object of committing rioting with the villagers of Ghumusarpadar to cause bloodshed. Section 149 of the IPC was available to be raised in the caseinasmuch as even if one of the members of the accused was guilty of committing the offence, other members would be equally liable for that offence having shared a common object with the one who purported it;

(iii) The death of Shyama Sundar Raut was a homicidal one;

(iv) All the occurrence witnesses had unequivocally stated that Kulamani Nayak (A26) opened fire from a country made gun and due to such firing, Shyama Sundar Raut was seriously injured and subsequently succumbed to the pellet injuries after he was taken to the Balugaon PHC;

(v) The evidence of Dr. Ashok Kumar Samantaray (P.W.20), who conducted the PM on the deceased Shyama Sundar Raut, confirmed that he died due to gunshot injuries to the vital organs like heart and lungs as evidenced by the PM report (Ext.26);

(vi) Of the 8 injured occurrence witnesses, Dr.M.V.S. Rao (P.W.21) attached to the MKCG Medical College and Hospital, Berhampur found entrance wounds caused by fire arms on Madhusudan Tarai (P.W.8) and Harihar Tarai (P.W.11). The injury reports of P.Ws.2, 5, 7 and 16 showed that they had suffered simple injuries. Likewise, P.W.21 also noticed simple injuries on P.Ws.6, 9,10,12 and 13 and in some cases,found penetrating wounds;

(vii) Dr. Banambar Senapati (P.W.19) had marginalized the injuries found on P.Ws.8,12 and 16 and this was clearly an attempt by P.W.19 to fabricate the evidence thereby trying to derail the prosecution.The trial Court recommended that he be prosecuted for this. The injury reports furnished by P.W.21 as regards P.Ws.8 and 11 were far more acceptable and reliable as those were corroborated by the radiological findings of Dr. Balakrushna Bastia (P.W.22) and Dr. Nervadyswari Deep (P.W.23);

(viii) In the final analysis, it appeared that Shyama Sundar Raut was fatally injured as a result of the gunshot fired by at least Kulamani Nayak. Due to the opening of gun fire from the country made guns by Jitendra Nayak @ Tukuna (A29), Hajari Raut (A28) and Hajari Pradhan (A27), P.Ws.8 and 11 suffered entrance wounds. Further, it appeared that Digambar Swain (A30), Matia Nayak (A6) and Madhu Lenka (A5) and certain others assaulted Bijaya Dalei (P.W.9), Lingaraj Pradhan (P.W.17) and some others in the course of rioting;

(ix) Thus, the prosecution had proved its case under Section 302 IPC against Kulamani Nayak (A26) and Section 302 read with Section 149 of the IPC against other accused persons. Further, the prosecution also proved the case under Section 307 read with 149IPC against all accused persons;

(x) The prosecution had proved its case under Sections 25 and 27 of the Arms Act against A26 to A29 and against other co-accusedpersons under Section 25/27 of the Arms Act read with Section149 IPC;

(xi) Although there were several lapses in the investigation by P.W.25 (as listed out in para 31 of the judgment of the trial Court), these could not be glossed over or soft pedalled. The Inspector General of Police was called upon to launch a full scale enquiry into the "highly questionable conduct of P.W.25 vis-a-vis this case and to take exemplary action against him so that it serves as a lesson to others fence sitters or wrong doers of his ilk."

18. The trial Court then proceeded to sentence all of the Appellants to undergo imprisonment for life without separate sentences for other offences. However, it was observed that in case, the sentence under Section 302 and Section 302 read with149 IPC was set aside or varied, in such case, the convicts would be deemed to have been sentenced to RI for one year, four years, one year and three years each respectively for the offences under Sections 148,307 IPC and Sections 25 and 27 of the Arms Act respectively and in such event, all sentences would run concurrently.

Submissions on behalf of the Appellants

19. Mr. Dharanidhar Nayak, learned Senior Counsel appearing for the Appellants, submitted as under:

(a) The consistent finding of the trial Court in the impugned judgment was only that Shyama Sundar Raut had died as a resultof the gunshot injuries fired by Kulamani Nayak (A26), who was now dead. As far as the other accused are concerned, they could not be said to have shared the common object of committing the murder of Shyama Sundar Raut as it took place in a free fight at the spur of the moment. There was no intention as such to kill specifically Shyama Sundar Raut;

(b) The failure of the prosecution to explain the injuries on the accused for which there were injury certificates had considerably weakened the prosecution case particularly since it was the case of the defence that the aggressor party was the prosecution party i.e. the villagers of village Ghumusarpadar and not the villagers of village Raghunathpur;

(c) There were considerable discrepancies in the depositions of the eye-witnesses and in particular, there was no clarity on which of the accused had caused what injuries and to whom. As a result of previous enmity between the factions of the two villagers and in the absence of any independence witness, the evidence of the P.Ws., projected as injured witnesses, had to be approached with great caution. They were prone to make exaggerations and embellishments. They could not have been implicitly believed by the trial Court;

(d) It could not be said that the versions of the so-called eye- witnesses were fully corroborated by the medical evidence as there was serious discrepancy in the evidence of the doctors themselves, particularly P.Ws.19 and 21. There were seriouslapses in the investigation which went to the root of the matter and could not have been glossed over by the trial Court.

Submissions on behalf of the State

20. In reply, Mr. Janmejaya Katikia, learned Additional Government Advocate submitted that the evidence of the injured eye-witnesses deserved acceptance by the trial Court and their evidence was rightly believed by it. According to him, there was no merit in the contention that the injured eye-witnesses were unreliable on account of the previous enmity between the two village factions when it was clear from the evidence of P.W.17, who was an independent witness, unrelated to either faction that it was the villagers of village Raghunathpur, who had formed an unlawful assembly and had come in a violent mood with deadly weapons with an intention of causing rioting and bloodshed in village Ghumusarpadar.

21. Mr. Katkia submitted that the medical evidence of P.W.21 was fully corroborated by the report of the Radiologists (P.Ws.22 and 23). The trial Court itself had found discrepancies in the medical evidence of P.W.19 and asked for disciplinary action to be taken against him.

22. The mere lapses in investigation on the part of P.W.25 would not enure to the benefit of the accused. Particularly those lapses were found, as the trial Court has in the instant case, to be caused only to help the accused. These lapses by themselves therefore would not help the accused escape guilt. The offence under Sections 149 of IPC was clearly attracted since the evidence of the prosecution clearly proved the formation of an unlawful assembly by the accused, who shared the common object of committing the offence of killing one of the villagers and attempting to kill the other villagers of village Ghumusarpadar.

Analysis and reasons

23. The above submissions have been considered. At the outset, the Court must note that this is a case based on the direct evidence of injured eyewitnesses. One of the injured eyewitnesses is P.W.17 and he does not belong to either of the two villages, which were having misunderstandings over the alleged attempt of excavation of earth from village Raghunathpur by the villagers of village Ghumusarpadar. In other words, P.W.17, who was the Sarpanch of a different village viz., Singheswar Grama Panchayat, could be said to be an independent witness, who was himself injured having been dealt with a lathi blow by accused Madhu Lenka (A5).

24. The deposition of P.W.17 has been carefully examined by this Court. He stated that on the date of occurrence, he had in fact gone to village Raghunathpur

and had met some of the villagers there including the deceased Shyama Sundar Raut, Matia Nayak (A6) and they had requested him to settle the matter on that date itself. They had told him that they were about to come to him, but the villagers of Ghumusarpadar were not allowing them to pass through the public road which was running through their village. P.W.17 then expressed his difficulty saying that it was notpossible to settle the dispute on that day itself. He told them that he would call a Panchayat meeting to decide the disputes between the two villagers. He asked five of them to come with him to the Panchayat Office. In the meanwhile, a hut of an old lady was gutted. So, it took time to put out the fire and this delayed all of them coming to the Panchayat Office.

25. According to P.W.17, at this stage, Matia Nayak (A6) met him in the front of house of one Ananta Ch. Naik and challenged him saying that he was incapable of dispensing justice. P.W.17 asked A6 to have patience, extricated himself and returned to village Ghumusarpadar where fifteen persons were sitting in the Jubak Sangh premises. When they asked P.W.17 about his efforts in settling the dispute, he told them that "the villagers of Raghunathpur have agreed for an amicable settlement" and that "five of them might come to the Panchayat Office."

26. According to P.W. 17, he then heard the hue and cry near the tank of village Ghumusarpadar which is 200 cubits from the Jubak Sangh Office. That group belonged to village Raghunathpurand comprised "about 20 to 25 persons". They were raising "hullah violently". On hearing the hullah, P.W.17 went forward to meet them to prevent breach of peace since he sensed that there could be rioting if the two groups came face to face. When he went close to the group of persons, he could "see accused MadhuLenka only" and no sooner did he reach there that Madhu Lenka (A5) dealt a blow by a lathi to his head as result of which P.W.17slumped to the ground. Thereafter, he lost his senses.

27. It is important to note that P.W.17 was not examined by the police. Interestingly, the defence did not choose to cross-examine P.W.17 at all. It is plain that the evidence of P.W.17 could be used only to prove the following:

(I) There was a brewing discontentment among the two sets of villagers;

(II) Even the villagers of village Raghunathpur were ready for a settlement, but were getting impatient;

(III) That about 20 to 25 persons of village Raghunathpur had approached near the tank of village Ghumusarpadar and were raising hullah while the meeting was in progress;

(IV) Importantly, P.W.17 does not mention that they were armed much less armed with deadly weapons;

(V) P.W.17 could only recognize A5 and none of the other accused. P.W.17 only states that A5 dealt a lathi blow on his head after which he lost his senses;

(VI) Since P.W. 17 was not examined by the police, there was also no injury report to prove the injury stated to have been suffered by him.

28. Therefore, the evidence of P.W.17 cannot be relied upon, as was done by the trial court, to hold that the prosecution had proved that the villagers of Raghunathpur had come armed with deadly weapons with a view to causing riot and bloodshed. Since P.W.17 is the only independent witness in the case, with all otherwitnesses for the prosecution belonging to village Ghumusarpadar, the evidence of the other injured eyewitnesses has to be approached with a great deal of caution. The case law in this regard needs to be discussed at this stage. 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."

29. 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 well- settled 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."

30. The principle to be kept in view is that the evidence of an inimical eye-witness must inspire confidence and must not sufferfrom embellishments or exaggerations.The evidence of an interested witness must receive independent corroboration.

31. At this stage, the Court would like to take note of the lapses committed by P.W.25 during his investigation, which have been listed out by the trial Court. These include:

(A) Failure to send some of the material objects to the State FSL, Rasulgarh for chemical examination;

(B) Failure to issue injury requisitions in respect of those P.Ws who were referred to the MKCG Medical College and Hospital in time. He also failed to record their evidence within a reasonable time;

(C) Although he was supposed to have visited the spot on 23rd June, 1994 at 10 am, P.W.25 waited till 25th June, 1994 to seize brickbats and lathis;

(D) P.W.25 failed to record the statements of P.Ws.2, 5, 6, 7 and13 and one AchutaTarai (not examined) though he lodged that he recorded their statements;

(E) Although P.W.17 was assaulted by a lathi, P.W.25 did not consider it necessary to examine him and to issue a policerequisition for his medical examination;

32. The clear finding of the trial court in regard to P.W.25 is as under:

> "xxx xx x xxx
>
> (viii) This witness appears to have distorted and mutilated the statements of witnesses recorded u/s 161 Cr.P.C. The injuries found on some of the injured persons in this case, were such that they could not have stated in the manner in which p.w.25 recorded their statements u/s161 Cr.P.C. This is why, the statements recorded by him were not given much importance in view of the judgments discussed earlier."

33. Thus, the trial Court has chosen to completely overlook the improvements made during their depositions in Court by several of the injured P.Ws.

34. There is merit in the contention of Mr. Nayak about the failure of the P.Ws. to specifically state which of the accused caused injuries to which PW. Further, there are some obvious inconsistencies and discrepancies in the depositions of the PWs. P.Ws.1 and 3 stated that P.Ws.6 suffered gunshot injuries whereas P.W.6 himself did not assert that he had received any gunshot injury. P.Ws.8 and 11 say that they received firearm injuries and this

is supported by the medical evidence. However, P.W.8 says that the firing by Hajari Raut (A28) hit him on the left side chest, right side belly and on the right leg above the knee joint and below the knee joint. He also speaks about P.Ws.10, 11 and 13 being hit by the gunfire opened by A28 and A29 although he says he lost consciousness soon after he was fired upon. That part of the evidence is, therefore, only hearsay. Likewise, on examinationof the deposition of P.W.11, he too attributes his injuries to thegunshot from A28. However, these witnesses were examined by the police more than a month after the incident. An important fact to be noted here is that none of the firearms purportedly used in the commission of the offence was seized.

35. Turning to the evidence of Kedar Lanka (P.W.12), he states that his injury was as a result of the tenta blow given by A32 Indramani Raut and lathi blows by Indramani Swain (A31). He too talks of Kulamani Nayak (A26) firing upon the deceased and three others i.e., A27 to A29 opening fire in quick succession. However, as pointed out by the trial Court itself, these depositions were recorded much later by the police. In his cross-examination, he states that he was examined by the police one and half months after the incident and he had not disclosed anything to anyone earlier. P.W.11 states in his cross-examination "I have not seen any assault on anybody other than Shyam Rout and Sarpanch. I was examined by the police after one month or one to one and half month after I was discharged from the Medical College Hospital, Berhampur."

36. Witness after witness talks of the delay during examination by the police. It will be recalled that among the lapses in investigation pointed out by the trial Court is the failure by the IO to record the statements of P.Ws.2, 5, 6, 7, 13 and even P.W.9, who suffered the tenta blow on the right side chest from A6-Matia Nayak, states that he was examined by the police one and half months after the date of the occurrence. In other words, there wassufficient time for the witnesses to be tutored to parrot the samenarrative. This kind of evidence does not inspire any confidence whatsoever. What is uniformly stated by all these injured witnesses therefore has to be viewed with some suspicion. In the absence of corroboration by some independent witness, or unambiguously by the medical evidence, the said evidence of the PWs, although injured, does not inspire confidence. As will be noticed later, the medical evidence is also not very clear and does not fully corroborate the narrative of the injured eye witnesses.

37. The trial Court found fault with P.W.19 for handling the injuries of all accused persons as well as the ten of the prosecution party in a matter of one and half hours only. However, what is significant is P.W.19 is still retained as prosecution witness and he has not been declared hostile by the prosecution. Importantly, it has not been put to him by the prosecution that the injury reports at Exts. A to K are false. On the other hand, this has been proved by the defence in his cross-examination. The trial Court could not have therefore over looked the above aspect of the evidence of P.W.19 and to have discarded it in toto on the basis of the fact that he examined as many as 20 persons within a span of one and half hours. No suggestion was given to him by the prosecution that he could not have done so. The Court is therefore not satisfied at all with the manner in which the trial Court has simply rejected the evidence of P.W.19 and recommended action against him only because there was a variance in the reports submitted by him and that submitted by P.W.21.

38. The following further findings of the trial Court on the variance of the injury reports submitted by P.W.19 on the one hand and those by P.W.21 on the other, are important:

> "xxx. More importantly, there is great deal of variance in the injury reports submitted by P.W.19 vide Exts.21, 22 and 25 when those reports are compared with Exts.27, 29 and 31 furnished by P.W.21."

Non-explanation of injuries on the accused

39. Turning next to the injuries on the accused persons, it is plain that P.W.19 did issue those injury certificates and yet the prosecution did not attempt to explain how it occurred. In ***Mohar Rai v. State of Bihar (1968) 3 SCR 525***, commenting on the effect of the prosecution's failure to properly explain the injuries on the accused, the Supreme Court held: "….the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true."

40. In ***Lakshmi Singh v. State of Bihar (1976) 4 SCC 394***, theSupreme Court explained the legal position thus:

> "It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

> (1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
>
> (2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on amost material point and therefore their evidence is unreliable;
>
> (3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.
>
> The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one."

41. During their statements under Section 313 Cr.P.C. each of the 10 accused persons maintained that they were assaulted in the Jubak Sangh Office of Ghumusarpadar all of a sudden by the members of the prosecution party. Although the trial Court placed the burden of proving this on the accused themselves, the fact remains that the injury reports probabilise their being assaulted by the prosecution party. Merely because the place of assault is proved to be false by the unchallenged evidence of P.W.17, it would not falsify the injury reports Exts.A to K.

42. Thus on a perusal of the entire evidence, this Court is not satisfied that it safe to base the conviction of the Appellants on the testimonies of the injured PWs. The entire truth has not emerged from their narratives. The evidence throws up more than a reasonable doubt that the events transpired as depicted by the prosecution through the voices of the aforementioned PWs. In this context, the following observations of the Supreme Court in ***Padam Singh v. State of Uttar Pradesh 2000 SCC (Cri) 285***, incontext of the duty of the appellate Court while examining a trialCourt judgment on conviction are relevant:

> "2…It is the duty of an appellate Court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution can be said to have been proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by the appellate Court in drawing inference from proved and admitted facts. It must be remembered that the appellate Court like the trial Court has to be satisfied affirmatively that the prosecution case is substantially true and the guilt of the accused has been proved beyond all reasonable doubts as the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final court of appeal and that presumption is neither strengthened by an acquittal nor weakened by a conviction in the trial court The judicial approach in dealing with the case where an accused is charged of murder under Section 302 has to be cautious, circumspect and careful and the High Court, therefore, has to consider the matter carefully and examine all relevant and material circumstances, before upholding the conviction."

Delay in lodging the FIR

43. Among the lapses pointed out is that although the FIR was lodged at 9.45 am on 23rd June 1994, the Informant (P.W.3) stated that he had come to the PS after having sent P.Ws.8, 9, 10, 12 and 16 to the MKCG Medical College and Hospital, Berhampur. From the injury reports of the said P.Ws., it was plain that they were still at the Balugaon PHC till 11.10 am. If the above statement of P.W.3, the informant, were to be accepted, then the FIR could nothave been registered at 9.45 am. The trial Court notices this discrepancy but tries to overcome it by accepting the explanation of P.W.3 that he assumed that some of the injured had been sent to the MKCG Medical College and Hospital, Berhampur on the advice of local doctors even though actually they were not sent by them and their examination had not taken place by the local doctors. This explanation is not convincing at all. There actually appears to be a discrepancy as to the exact time of lodging the FIR. When this is seen with the lapses committed by the IO, then it raises even more serious doubts. The fact that the FIR was received in the Court of JMFC, Banpur through the Balugaon PS, which is only 10 KMs from the Court only on 24th June, 1994 further raises serious doubts.

44. The delay in lodging the FIR has not been convincingly explained at all. If indeed the IO had rushed to the spot and was busy being preoccupied, then it is not possible for him to have registered the FIR at 9.45 am. In fact, this was noted as one of the serious lapses by the trial Court. It notes that "(i) as pointed out above by Mr. Kanungo, P.W.25 is forced to admit that while he was present at the spot at 10 A.M. on 23.6.94, in this case, he has mentioned in the case diary of the counter case that he was present at the Police station on the same day and same time, as aforesaid."

45. The failure to properly examine the delay in lodging the FIR can actually be fatal to the prosecution as explained in the following cases. In ***Thulia Kali v. State of Tamil Nadu AIR 1973SC 501***, it was held:

> "12…First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained."

46. Again, in ***State of A.P. v. PunatiRamulu AIR 1993 SC 2644***, it was held:

> "5. Once we find that the investigating officer has deliberately failed to record the first information report on receipt of the information of a cognizable offence of the nature, as in this case, and had prepared the first information report after reaching the spot after due deliberations, consultations and discussion, the conclusion becomes inescapable that the investigation is tainted and it would, therefore, be unsafe to rely upon such a tainted investigation, as one would not know where the police officer would have stooped to fabricate evidence and create false clues."

47. In the instant case, the serious lapses in the investigation by the I.O. (P.W.25) have already been noted. These cannot bebrushed aside as lapses deliberately made to help the accused particularly when there is very little credible material to counter-balance the large gaps in the prosecution evidence. It is too simplistic to attribute the lapses to the defence and to convict them on that basis even while recommending disciplinary action against the IO. This way the true picture would never emerge.

48. It appears that the trial Court was in a dilemma faced with the serious lapses of the above investigation and the closeness of the time period from the date of occurrence when the judgment was being delivered i.e., within slightly above two years from the date of occurrence. There had been a clash between two sets of villagers where one had died and several had been injured on both sides. It must have been very difficult for the trial Court to accept the fact that the investigation had been botched up by P.W.25 and further that there were serious discrepancies in injury reports submitted by two Government doctors i.e., P.Ws.19 and 21. The trial Court chose the path of ignoring the lapses in investigation and ignoring the conflicting injury reports and instead recommending disciplinary action against the IO and P.W.19. What was perhaps overlooked was that the above lapses had seriously weakened the case of the prosecution throwing very grave doubts on the manner in which the evidence was led in the Court.

49. As far as the present appeals are concerned, the Court is of the view that on a complete analysis of the evidence that while the eye witness testimonies and the medical evidence unmistakably prove that accused Kulamani Nayak by opening gunfire did kill Shyama Sundar Raut and, therefore, was rightly convicted for the offence under Section 302 IPC, it is difficult to infer from the evidence led by the prosecution that the other co-accused shared the common objective of causing that death. The trial Court also appears to have harboured a doubt in this regard as in the last paragraph of the impugned judgment the trial Court anticipated this result and, therefore, ordered alternative sentences.

50. The accused other than Kulamani Naik were charged with the offences with the aid of Sections 148 and separately under 149 IPC. The evidence of the prosecution seeks to project the case of attack on the prosecution party by the accused party whereas it is more of a free fight with there being injured persons on both sides. In such cases, the Court has to be extra careful that'innocent bystanders' are not roped in. In ***Eknath Ganpat Aher v. State of Maharashtra (2010) 6 SCC 519*** the facts were that it was a free fight in which the injuries on the accused were not properly explained. The Supreme Court observed as under:

> "22….Despite the fact that a number of accused persons had received injuries and also despite the fact that no reason was forthcoming from the prosecution in regard to the injuries suffered by the accused persons, the Courts below discarded the said injuries holding that the said injuries were extremely minor and that injured accused persons could not prove that they had been assaulted by the complainant party. The Courts below were of the opinion that stand taken by the accused persons was not enough to discard the credible evidence of the injured eye-witnesses.
>
> 23. In our considered opinion the aforesaid approach of the Courts below was incorrect. Nine persons including four witnesses belonging to the complainant party received injuries whereas as many as 14 accused persons received injuries including some who even suffered grievous injuries. Admittedly, there was a mob of about75-100 persons who descended from the hill side to the place of occurrence by pelting stones and a melee followed. Not even a single witness including the injured witnesses could specifically state as to who had caused what injury either to the deceased or to the injured witnesses or to the accused. A very generalstatement has been made that the accused persons were armed with deadly weapons and caused injuries to the complainant party. In a situation where a mob of 75-100 persons entered into a clash with the complainant party it could not have been possible for any of the witnesses, who would naturally be concerned with their own safetyand to save themselves from the assault, to see as to who had inflicted what type of injury either on the deceased or on the injured witnesses.
>
> 24. In view of such omnibus and vague statements given by the witnesses, the Court below acquitted as many as21 accused persons on the ground that there is noevidence on record to implicate them in the offences alleged. There being no other evidence to specifically ascribe any definite role to any of the 14 appellants herein, it is difficult to hold that any of the present appellant had inflicted any particular injury on any of the deceased or the injured witnesses. Unless there is cogent and specific evidence attributing a specific role in the incident to the accused persons, who have themselves been injured and there being no explanation forthcoming as to such injuries, it would be unsafe to pass an order recording conviction and sentence against the appellants, moreso when the prosecution has produced, in support of its case, witnesses who are inimical to the accused persons. It is crystal from the records that land of Gat No. 170 is the bone of contention between the complainant party and theaccused. As noted above, civil cases with regard to the question of title and ownership to the said land have been instituted by both the accused and the complainant party which are pending final adjudication."

51. Again, in ***Subal Ghorai v. State of West Bengal (2013) 4 SCC607***, in the context of the principle of constructive liability embodied in Section 149 IPC, it was observed by the Supreme Court as under:

> "53. But this concept of constructive liability must not be so stretched as to lead to false implication of innocent bystanders. Quite often, people gather at the scene of offence out of curiosity. They do not share common object of the unlawful assembly. If a general allegation is made against large number of people, the Court has to be cautious. It must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. Unless reasonable direct or indirect circumstances lend assurance to the prosecution case that they shared common object of the unlawful assembly, they cannot be convicted with the aid of Section 149 of the IPC. It must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all stages. The court must have before it some materials to form an opinion that the accused shared common object. What the common object of the unlawful assembly is at a particular stage has to be determined keeping in view the course of conduct of the members of the unlawful assembly before and at the time of attack, their behaviour at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations. The criminal court has to conduct this difficult and meticulous exercise of assessing evidence to avoid roping innocent people in the crime. These principles laid down by this Court donot dilute the concept of constructive liability. They embody a rule of caution."

52. In the considered view of this Court the charges against the accused, other than Kulamani Naik, with the aid of Sections 148 and 149 IPC have not been convincingly proved by the prosecution. So also, the charge against all of them for commission of the offence punishable under Section 307 IPC or Sections 25/27 of the Arms Act has not been convincingly proved.

Conclusion

53. Consequently, the Court is not satisfied that the case against the co-accused, other than Kulamani Nayak, has been convincingly proved by the prosecutionbeyond all reasonable doubt. With the appeal as far as Kulamani Nayak has filed being Criminal Appeal No.268 of 1996 having been already abated, the Court is not therefore called upon to deal with that anymore.

54. As far as the remaining appeals are concerned, the Court is not satisfied that the prosecution has been able to prove the case against the accused beyond all reasonable doubt and, therefore, they be given the benefit of doubt and acquitted of the charges. The impugned judgment of the trial Court as far as they are concerned is set aside.

55. The appeals are accordingly allowed. The trial Court will ensure compliance by each of the Appellants with the provisions of Section 437 A Cr PC, till such time the bail bonds furnished by the Appellants in the present appeal shall remain in force.

2022 (III) ILR - CUT- 695

Dr. S. MURALIDHAR, C.J.

CRLMC NO.112 OF 2016

PRASANNA KUMAR PANDA & ANR. ……..Petitioners

.V.

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

ELECTRICITY ACT, 2003 – Sections 135,149 – Mandatory requirement of Section 149 – Although the FIR states that it is the company that has committed the offence under Section 135 of the Electricity Act – The case was not registered against the company rather against two of its employees i.e.against the present Petitioners – Whether the proceeding maintainable? – Held, No. – As the mandatory requirements of section 149 of Act are not satisfied the proceeding against the petitioners are quashed. (Para- 6-8)

Case Laws Relied on and Referred to :-

1. (2012) 5 SCC 661 : Aneeta Hada Vs. Godfather Travels and Tours Pvt. Ltd.
2. (2015) 12 SCC 781 : Sharat Kumar Sanghi Vs. Sangita Rane.

For Petitioners : Mr. Asok Mohanty, Sr. Adv.

For Opp. Parties : Mr. J. Katikia, Addl. Govt. Adv.
Mr. Prasanta Kumar Tripathy

ORDER Date of Order : 14.10.2022

Dr. S. MURALIDHAR, C.J.

1. The present petition has been filed by two employees of the Essel Mining and Industries Ltd.; one being the Unit head and the other Manager, C.S.R. seeking to quash G.R. Case No.220 of 2015 pending in the Court of learned S.D.J.M., Keonjhar.

2. At the time the notice was issued in the present petition on 21st June, 2018; the further proceedings in the aforementioned criminal case was stayed by this Court.

3. A copy of the F.I.R. lodged by the complainant, North Eastern Electricity Supply Company of Odisha Limited (NESCO) has been enclosed as Annexure-1. The complaint has been lodged by the Sub-Divisional Officer, Barbil Electrical Sub-Division of NESCO. In the very first line, it is stated that confidential information had been received that *“M/s. Essel*

Mining and Industries Ltd., Barbil dishonestly availing electricity by hooking process from nearest LT mains at 15 nos different borewell points under Barbil Electrical Sub-Division".

4. Although the FIR states that it is the company that has committed the offence under Section 135 of the Electricity Act ('Act'), the case was not registered against the company but only against two of its employees i.e. the present Petitioners.

5. Section 149 of the Act reads as under:

> "***149. Offences by companies***.-
>
> 1. Where an offence under this Act has been committed by a company, every person who at the time of offence was committed was in charge of and was responsible to the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of having committed 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 had 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 by a company and it is proved that the offence has been committed with the consent or connivance of or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of having committed such offence and shall be liable to be proceeded against and punished accordingly.
>
> Explanation: For the purposes of this section,--
>
> a. "company" means a body corporate and includes a firm or other association of individuals; and
>
> b. "director", in relation to a firm, means a partner in the firm."

6. It is plain from the above provision that where an offence is alleged to be committed by a company, then the company as well as the persons who are in charge of and responsible to the company for the conduct of its business have to be arraigned as accused. Without the company being arrayed as an accused, it is not permissible in law for the case to proceed only against its employees. Secondly, in the complaint there is no specific averment

that the present two petitioners, who are described as Unit head and Manager, C.S.R. respectively were in-charge of and responsible to the company for conduct of its business. The mandatory requirement of Section 149 of the Electricity Act, 2003 is, therefore, not satisfied in the present case.

7. The legal position in this regard is well settled. Reference may be made to the decisions in ***Aneeta Hada v. Godfather Travels and Tours Pvt. Ltd. (2012) 5 SCC 661*** and the subsequent judgment in ***Sharat Kumar Sanghi v. Sangita Rane (2015) 12 SCC 781*** where it was held as under:

> "11. In the case at hand as the complainant's initial statement would reflect, the allegations are against the company, but the company has not been made arrayed as a party. Therefore, the allegations have to be restricted to the Managing Director. As we have noted earlier, allegations are vague and in fact, principally the allegations are against the company. There is no specific allegation against the Managing Director. When a company has not been arrayed as a party, no proceeding can be initiated against it even where vicarious liability isfastened on certain statutes. It has been so held by a three-Judge Bench in ***Aneeta Hada v. Godfather Travels and Tours Private Limited*** in the context of Negotiable Instruments Act, 1881."

8. For the aforementioned reasons, the Court quashes the proceedings in G.R. Case No.220 of 2015 pending in the Court of S.D.J.M., Keonjhar and all the orders and proceedings consequent thereto are hereby quashed.

9. The petition is allowed in the above terms. But, in the circumstances, with no order as to costs. An urgent certified copy of this order be issued as per rules.

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2022 (III) ILR - CUT- 697

JASWANT SINGH, J & M.S. RAMAN, J.

W.P(C). NO. 41856 OF 2021

M/s. SUNTONY SINGNAGE PVT. LTD. ………Petitioner

.V.

THE PRINCIPAL COMMISSIONER OF CENTRAL GOODS AND SERVICE TAX & ORS. ………Opp. Parties

CENTRAL GOODS AND SERVICES TAX ACT, 2017 – Section 107(1) – Appeal preferred by the petitioner/company has been rejected on the ground of delay – Effect of – Held, in view of order of the Hon'ble Apex Court passed in the case of re: - Cognizance for extension of limitation in miscellaneous Application No. 665 of 2021, the appeal should have been treated as filed within the period of limitation as per category III specified in the Judgment. (Para-6)

For Petitioner : Mr. Chitta Ranjan Das.
For Opp. Parties : Mr. Radhe Shayam Chimanka, Sr. Adv. for CGST

ORDER Date of Order: 12.07.2022

BY THE BENCH

1. This matter is taken up by virtual/physical mode.

2. The writ petition is directed against the order dated 7th October, 2021 assed by the Additional Commissioner, GST (Appeals), Bhubaneswar, whereby the appeal preferred by the Petitioner-Company has been rejected on the ground that the appeal was presented beyond the statutory period prescribed under Section107(1) of the Central Goods and Services Tax Act, 2017 (in short, "CGST Act"). The grievance of the Petitioner-Company in a nutshell is that it has preferred appeal against the order of cancellation of registration which was not entertained by the Appellate Authority-Additional Commissioner,GST(Appeal) under the CGST Act on the ground of limitation without taking cognizance of Order dated 23rd September, 2021 of Hon'ble Supreme Court passed in connection with surge of COVID-19 virus during pandemic during the relevant period.

3. Mr. Chitta Ranjan Das, counsel for the Petitioner has submitted a list of dates and events to demonstrate that the Appellate Authority ignored the relevant rulings of Hon'ble Supreme Court and whimsically rejected the appeal.

For better appreciation the date and particulars as furnished by the petitioner in the writ petition is extracted hereunder:-

Date	Particulars	Legal Backing
21.11.2019	Communication of order of cancellation of registration	
20.02.2020	Last date of normal period of limitation for filing of the appeal	Under Section 107(1) of the Act
20.03.2020	Last date of condonable period of limitation under Section107(4)of the Act.	Under Section 107(4) of the Act.
20.03.2020	Hon'ble Supreme Court extended the period of limitation **from 15.03.2020 till further orders**.	No.(S).3/2020
08.03.2021	Hon'ble Supreme Court has opined that the order dated 23.03.2020 has served its purpose; the extension of limitation should come to an end Accordingly **from 15.03. 2020 to 14.03.2021 shall be excluded** for the period of limitioon	Suo Motu Writ Petition(civil) No.(S).3/2020
27.04.2021	The Hon'ble Surpeme Court restore the order continuation of the order dated08.03.2021 directed **the period of limitation shall stand extended till further orders.**	M.A.No.665 of 2021 in S.M.W.(C) No.3/2020/
26.07.2021	Appeal petition filed by in the APL01 Petitioner	The **last date** for filing the appeal petition was **20.03.2020** including condonable period of one month. The period from **15.03.2020 to 02.10.2021 stands excluded** for the purpose of **limitation** as per the order dated 23.09.2021 by the Hon'ble Supreme Court. The appeal filed after three months and twenty five days from its receipti.e.with in the condonable period of limitation.
23.09.2021	Hon'ble Supreme Court directed for computing the period of limitation, the Period from **15.03.2020 till 02.10.2021 shall be excluded.**	M.A.No.665/2021in S.M.W. (C) No. 3/2020."

4. Mr. C.R. Das, counsel for the Petitioner placed on record copy of Order dated 23rd September,2021 of the Hon'ble Supreme Court passed in Miscellaneous application No. 665 of 2021 in SMW(C) No. 3 of 2020 (IN RE: COGNIZANCE FOR EXTENSION OF LIMITATION). Para 8 of the said order is extracted hereunder:-

"Therefore, we dispose of the M.A. No.665 of 2021 with the following directions:-

I. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till02.10.2021 shall stand excluded. Consequently, the balanceperiod of limitation remaining as on 15.03.2021,if any, shall become available with effect from 03.10.2021.

II. In cases where the limitation would have expired during period between 15.03.2020 till 02.10.2021, notwithstanding the actual balance period of limitation

remaining, all persons shall have a limitation period of 90 days from 03.10.2021. In the event the actual balance period of limitation remaining, with effect from 03.10.2021, is greater than 90 days, that longer period shall apply.

III. The period from 15.03.2020 till 02.10.2021 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29A of the Arbitration and Conciliation Act, 2015 and provisos (b) and (c) of Section138 of the Negotiable Instruments Act, 1881 ***and any other laws****, which prescribe period(s) of limitation for instituting proceedings, outer limits (****within which the Court or Tribunal can condone delay****) and termination of proceedings.*

IV. The Government of India shall amend the guidelines for containment zones, to State.

"Regulated movement will be allowed for medical emergencies, provision of essential goods and services, and other necessary functions, such as, time bound applications,including for legal purposes, and educational and job- related requirements." [Emphasis supplied]

The counsel for the Petitioner, therefore, submitted that, since the last date for filing of appeal fell on 20th March, 2020 aforesaid order of the Hon'ble Supreme Court of India which specifically indicated that for computation of limitation for institution of proceedings the period from 15th March, 2020 to 2nd October, 2021 would stand excluded, the order of the Appellate Authority rejecting the appeal cannot be held to be sustained.

5. Mr. Radhe Shyam Chimanka, Senior Standing Counsel for CT & GST Organization has conceded to the aforesaid position as put forth by the Petitioner-Company and has raised no serious objection.

6. This Court, having the opportunity to peruse the Order dated 23rd September, 2021 of the Hon'ble Supreme Court, finds that the said Court in no ambiguous terms specified that the period from 15th March, 2020 till 2nd October, 2021 stands excluded for the purpose of computing the periods prescribed under any law which "prescribes period(s) of limitation for instituting proceedings, outer limits (within which the Court or Tribunal can condone delay)". It is undisputed fact on record that as the petitioner has received the Assessment Order on 21.11.2019, the last date for filing of appeal was 20th March, 2020 which fell within the condonable period of limitation specified under Section 107(4) of the CGST Act andappeal being filed on 26th July, 2021, the appeal should have beentreated as filed within the period of limitation in view of Category- III specified in the Order dated 23.09.2021 of the Hon'ble Apex Court. The Additional Commissioner, GST (Appeal) conspicuously

ignored to keep in view the purport of said Order. Therefore, there is warrant for intervention in the appellate order under challenge in the writ petition.

7. Accordingly, the impugned Appellate Order dated 7th October, 2021 is hereby set aside and the appeal is restored to file. The Appellate Authority may proceed with the appeal for hearing after giving opportunity hearing to the Petitioner-Company in accordance with law and decided the case on merits, unless the appeal is free from other defects and subject to compliance of statutory requirements.

8. The writ petition stands disposed of in the light of above observation and direction.

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2022 (III) ILR - CUT- 701

JASWANT SINGH, J & M.S. RAMAN, J.

W.A. NO. 778, 814 & 815 OF 2021

JITENDRA KUMAR DASH & ORS. ……….Appellants

.V.

STATE OF ODISHA & ORS. ……....Respondents

W.A. NO.814 OF 2021
BRUNDABATI BHOI & ORS. ………Appellants

.V.

STATE OF ODISHA & ORS. ………Respondents

W.A. NO.815 OF 2021
AJIT KUMAR SAHU & ORS. ………Appellants

.V.

STATE OF ODISHA & ORS. ………Respondents

(A) ODISHA POLICE SERVICE (METHOD OF RECRUITMENT AND CRITERIA OF SERVICE OF ASSISTANT SUB INSPECTOR) Order, 2020 – Rule 5 r/w Rule 660 of Orissa Police Manual Rules – Promotion to the post of ASI – Order 2020 was published by Government in home department by Notification dt. 15.10.2020 – The selection process was carried out and completed up to the date of the declaration of the result of the written examination and drawing of the select list for detainment

of the candidate for training of ASI as per 2020 order – Whether the amended Rules were effectuated by notification in absence of publication in Orissa Gazette – Held, Not effectuated – Publication in Orissa Gazette was the inbuilt necessary requirement for the enforcement of the Police Order 2020 – The respondent authorities are directed to redraw the select list as per Rule 660 of Police manual.

(Para 17,18)

(B) INTERPRETATION OF STATUTE – Enforceability of a notification – Respective department published/circulated notification on 15.10.2020 but inadvertently due to lack of inter departmental correspondence the said Rules were published in the gazette only on 27.07.2021 – Effective date for implication – Held, the delay cannot be cured by creating a legal fiction to lend enforceability of the Rule with retrospective effect from 15.10.2020 instead from the actual date of notification on 27.07.2021 in the Official Gazette.

Case Laws Relied on and Referred to :-

1. 2022 SCC OnLine SC 680 : State of Himachal Pradesh & Ors. Vs. Raj Kumar & Ors.
2. (2011) 6 SCC 725 : Deepak Agarwal Vs. State of U.P.
3. (2019) 4 SCC 319 : Union of India Vs. Krishna Kumar.

For Appellants : Mr. Sameer Kumar Das (W.A. No.778 of 2021)
Mr. Manoranjan Mohanty (Sr. Adv.)
Ms. Subhashree Mohanty (W.A. No.814 & 815 of 2021)

For Respondents : Mr. L. Samantaray, AGA (in all the Writ Appeals)

Mr. Budhadeb Routray, Sr. Adv.
Mr. J. Biswal, (in W.A. No.778/2021)

For Interveners : Mr. Goutam Mishra, Sr. Adv.
Mr. Dinesh Kumar Patra, (in W.A.No.778/2021)

JUDGMENT Date of Hearing & Judgment: 13.07.2022

JASWANT SINGH, J.

1. The present three (03) intra court Appeals are filed by the Appellants, who were writ petitioners in three separate writ petitions i.e. WP (C) No. 5079 of 2021 with I.A. No.13515 of 2021, W.P.(C) No.199 of 2021 with I.A. No.13644 of 2021 and W.P.(C) No.3140 of 2021 with I.A. No.13645 of 2021 involving identical facts and issues and are aggrieved by a common judgment and order dated 09.09.2021 passed in WP (C) No.5079 of 2021 and by the declination of IA No. 13515 of 2021 seeking the modification of the Order dated 09.09.2021.

2. The Appellants (Writ Petitioners in the Writ Petition) are the matriculate Constables who are seeking directions to consider their eligibility to undergo the training for promotion as ASI of Police based on the Orissa Police Manual Rules, which prescribes the requirement of 30% marks in the written examination to qualify for inclusion in the Select List for ASI training and the validity of such select List to be one year or till the vacancies exist for which the selection process is conducted, whichever is later: as against the amended provision of Police Order 2020 wherein 40% marks in such written examination and the validity of such list to be 31 December of concerned year is prescribed.

Private respondents in W.A. No.778 of 2021 are constables who had secured 40% marks in the written test for being deputed to the ASI training course and whose names find mention in the select list dated 14th December, 2020/22nd December, 2020. An application to join the proceeding as intervener in W.A. No.778 of 2021 has been filed by the similar situated constables as the private respondents. The private respondents and the applicants had filed writ petitions seeking the validity of the select list till the exhausting of list of one year, whichever was later as per the un-amended rule i.e. PMR 660 instead of as prescribed under Police Order 2020. The writ petitions were also disposed of vide common order dated 09.09.2021.

3. For the sake of brevity, the facts and prayers, which are common to all the three writ petitions, are being noticed from the pleadings in WP (C) No.5079 of 2021, out of which the present Letters Patent Appeal arises are reproduced below:

> *"i) Admit the writ application*
>
> *ii) Call for the record*
>
> *iii) Issue a writ in the nature of mandamus or any other writ / writs direction / directions directing the opposite parties to allow the petitioners to undergo the ASI training on the basis of their seniority keeping in view the prevalent Rule relating to promotion to the post of ASI and the petitioners may be allowed to undergo the ASI training as has been done in the case of the other candidates who have been qualified in the written test under Rule 660 of PMR*
>
> *iv) In the alternative issue appropriate order / direction directing the opposite parties to undergo the ASIO course training taking into consideration the petitioners long service as constables from the date of their initial appointment.*
>
> *v) And pass any other order / orders for the ends of justice directing the opposite parties to extend the same benefit as has been extended to large number of Constables who were qualified in the previous written examination.*

> *vi) And / or pass any other order/orders, direction/directions as this Hon'ble Court deems fit and proper for the ends of justice."*

4. By the Order dated 09.09.2021, the Single Bench in WP (C) 5079 of 2021, has passed the following directions:

> *"2. It is agreed by learned counsel for the parties that the **issue involved in this case is analogous to one involved in W.P.(C) No. 863 of 2021** and **W.P.(C) No. 1994 of 2021**, which have been allowed on 09.09.2021 by this Court.*
>
> *3. Therefore, in view of the reasons stated in the detailed judgment dated 09.09.2021 passed in W.P.(C) No. 863 of 2021 and W.P.(C) No. 1994 of 2021, **this writ petition is allowed**.*
>
> *4. It is directed that **validity of the list, which was published on 14.12.2020, as modified on 22.12.2020, cannot be lapsed by 31.12.2020 and the same shall be implemented in terms of PMR-660,** which is applicable to the petitioners."*

In WP (C) 863 of 2021 decided on 09.09.2021, based on which the relief in toto in writ petition of the Appellants was mistakenly not allowed, the issue in controversy was of matriculate constables having secured 40% marks seeking the merit list of candidates prepared on 14.12.2020 to remain valid in terms of Rule 660 of Odisha Police Manual Rules for the reason to operate the list till it was exhausted and thus to allow the petitioners to undergo Assistant Sub-Inspector (ASI) of Police Training based on having qualified in the written test and seniority under Rule 660 of Odisha Police Manual Rules by not applying the Odisha Police Service (Method of Recruitment and Conditions of Service of Assistant Sub-Inspector) Order, 2020 (for short, "Police Order,2020"). The WP (C) 863 of 2021 was allowed by the Order dated 09.09.2021 in the following terms:

> *"20. In view of the facts and law, as discussed above, this Court is of the considered view that the validity of the select list published on 14.12.2020, as modified on 22.12.2020, shall continue for a period of one year or till the same is exhausted, whichever is later, and the petitioners are to be allowed to go for ASI training for promotion in terms of PMR 660 not by Order, 2020, which has come into force only w.e.f. 27.07.2021 and, as such, the same has got prospective effect. Accordingly, it is directed that validity of the list, which was published on 14.12.2020, as modified on 22.12.2020, cannot be lapsed by 31.12.2020 and the same shall be implemented in terms of PMR-660, which is applicable to the petitioners.*
>
> *21. In the result, the writ petitions are allowed. However, there shall be no order as to costs."*

An IA No. 13515 of 2021 was filed before the Single Bench seeking modification of the order dated 09.09.2021 passed in WP (C) 5079 of 2021 by the Appellants / Writ Petitioners with a specific prayer to include the Writ Petitioners in the select list having secured 30% as per Rule 660 of the Orissa Police Manual Rules (hereinafter referred to as **"PMR"**) but by the order dated 29.09.2021, the application for modification was declined on the basis that since the matter was heard along with batch of other Writ Petitions and at the time of hearing of the case, the counsel for the petitioner has not pointed out this fact before the Court and the modification is now sought after the judgement.

5. Though the Writ Petition filed by the Appellants has been allowed but the present Letters Patent Appeal is filed by the Writ Petitioners being aggrieved against the Order dated 09.09.2021 passed by the Single Bench on the ground that the said decision is self-contradictory wherein on one hand it is held that the ongoing selection process, which is subject matter of Writ Petition relating to promotion to the post of ASI shall be governed under Rule 660 of PMR but on the other hand, inadvertently, the Select List issued on 14.12.2020 as modified on 22.12.2020 (containing candidates with 40% marks) by applying qualifying conditions under the Orissa Police Service (Method of Recruitment and Criteria of Service of Assistant Sub Inspectors) Order 2020 (hereinafter referred to as **"Police Order 2020"**) has been validated.

Brief background

6. The factual matrix and the submissions in the Writ Petition are that, the Appellants-Petitioners were initially appointed as 'Constables' in the year 2002, 2008 and 2011. In the hierarchy of ranks, the promotional avenue from the post of 'Constable' is to the rank of 'Assistant Sub Inspector of Police' and in this regard Rule 660 of PMR prescribes the procedure for appointment by promotion to the post of Assistant Sub Inspector of Police. The Appellants-Petitioners claim that large number of vacancies in the rank of Assistant Sub Inspector of Police were available in last many years in different districts but no attempt was made to allow the Petitioners to be considered for promotion after completing the residency period, while other similarly situated persons were made to undergo ASI course of training.

The Appellants-Petitioners were, for years, awaiting to be considered to undergo the examination to qualify for training as per Rule 660 of PMR but the said legal obligation has not been discharged by the Respondents from the last 18 years after the last exam was conducted in the year 2002. It is contended that, no doubt Police Order, 2020 was passed on 15.10.2020 under Article 309 of the

Constitution of India but was awaiting its enforcement from the date of its notification/publication in the official gazette as provided in the said Police Order, 2020 itself.

7. In the meantime, by the order dated 23.10.2020, willingness of the eligible Constables was sought for the conduct of written examination for promotion to the rank of Assistant Sub Inspector of Police. The Petitioners exercised their option and appeared in the written examination conducted on 06.12.2020 for undergoing ASI course.

The Petitioners secured more than 30% marks and less than 40% marks by which they were qualified under the Orissa Police Manual Rule 660, even though in the yet to be notified/published in the official Gazette, Rule 5 of the Police Order 2020, the candidate appearing in the examination have to secure 40% marks in each subject and 40% in aggregate to qualify in the written examination.

8. Thus, the subject matter of the Writ Petition was whether 30% marks as required under Rule 660 PMR would be applicable to qualify the said examination and the impugned action of excluding the Appellants – Petitioners from the List of qualified candidates by applying the Police Order 2020 is illegal and unlawful.

It was claimed by the Appellants – Writ Petitioners that since the vacancies are available prior to 15.10.2020, at the time when Police Order 2020 was passed, therefore, the vacancies will be governed in accordance with the provisions made under Rule 660 of the PMR and the Petitioners having secured over 30% marks are eligible for undergoing ASI course of training. It is the case of the Petitioners-Appellants that their names were required to be included in the list of candidates published on 14.12.2020/22.12.2020 but their names were ignored and the said list remained valid till 31st December, 2020 i.e. only for 5 days in reference to Rule 5 (3) of the Police Order 2020.

It is in the said background that the aforesaid Writ Petitions were filed wherein directions were sought to allow the Petitioners to undergo ASI training on the basis of their seniority and having passed with more than 30% marks in the qualifying written test, keeping in view the Rule prevalent at the time of arising of vacancies as has been done in the past in case of other candidates who have qualified in written examination under Rule 660 of Orissa Police Manual Rules.

9. That the official Respondent Nos.1 to 3 herein filed their counter affidavit dated 21.12.2021 in writ petitions through Additional Superintendent of Police, Office of Director General and Inspector General of Police Odisha. In the counter affidavit, it was mentioned that the Orissa Police Service (Method of Recruitment and Criteria of Service of Assistant Sub Inspector) Order 2020 was published/circulated by the Government in Home Department by Notification dated 15.10.2020 **with the stipulation that the Rules will come into force from the date of its publication in the Orissa Gazette** but inadvertently due to lack of inter departmental correspondence the said Rules were **published in the Gazette only on 27.07.2021**. It is mentioned that the written examination and the selection process was carried out in consonance with Police Order 2020.

10. In the pleadings, relevant to the issue in controversy, the following provisions are relevant and important :

Rule 660 PMR

Under the aforementioned Rule, matriculate constables as also non-matriculate constables, who had passed a constable course of training and possess at least seven years of service after the initial training becomes eligible to take the written test of qualifying nature provided in Clause (c) of PMR, 660 for being deputed to the ASI course of training against the seats/vacancies allotted to each district/unit/range, and such persons who were deputed of course are required to possess satisfactory record and are otherwise declared suitable.

11. The written test to be conducted as per Clause (c) of PMR, 660 provided that the written test ordinarily consists of law and rules and ability to write an essay in English. The mark for each subject and the time to be allowed for each was to be prescribed by the I.G. It is a conceded case that prior to laying down of the exhaustive rule for conducting the written test as per Police Order, 2020, the D.G.P. with the prior approval had since many decades followed the bench mark of obtaining 30% marks for a constable to be declared as pass in the written test so conducted. This position was also acknowledged and laid down in a Division Bench judgment of this Court rendered on 19th June, 2003 in W.P.(C) No.1858 of 2002 reported as ***2003 (II) OLR-206*** and other connected cases. It is also conceded that prior to the amended Police Order, 2020, the select list so prepared based on 30% pass marks was to remain valid till it was exhausted for being deputed to the training course for promotion to the ASI. By virtue of the Police Order, 2020, the list now to be prepared based with 40% minimum marks is prescribed to be valid till the end of a calendar year in which the written exam is held. For better clarity, the relevant provisions of the amended rule are hereby noticed.

Rule 5 of the Police Order 2020

Under Rule 5 the relevant amendment from Rule 660 PMR was carried out and under the aforementioned amended provision Rule 5, the candidate has to secure **40% of marks** to qualify the written examination and the list of qualified candidates remains **valid for that calendar year only**.

In this regard towards the enforceability of Police Order 2020 and aforementioned amended provision by way of Rule 5, a bare perusal of the Notification dated 15.10.2020 in its Clause 1 provides as under:

> *"1. Short title and commencement – The Order may be called the Odisha Police Service (Method of Recruitment and conditions of service of Assistant Sub Inspectors) Order 2020.*
>
> *(ii) **This shall come into force from the date of its publication in the Odisha Gazette**."*

There is no dispute regarding the fact that the Police Order 2020 came to be **published in the Odisha Gazette on 27.07.2021** and by the said provision the Police Order, 2020 would come into force on 27.07.2021.

12. The common issues as in the Writ Petition of the Appellants was also under challenge to an extent in WP (C) No. 863 of 2021 and WP (C) No.1994 of 2021 which came to be decided by a common order on 09.09.2021 and was allowed. The Writ Petition No. 5079 of 2021 of Appellants was allowed in same terms as that of WP (C) No.863 of 2021 and WP (C) No.1994 of 2021.

In WP(C) No.863 of 2021 and WP (C) No.1994 of 2021, the Writ Petitioners therein also included the candidates who though have qualified the written examination with over 40% marks were aggrieved against the application of Police Order 2020 on the process of selection and by applying Rule 5 (3) of said Police Order, the Select List was to elapse at the end of calendar year (31.12.2020) to their detriment and exclusion from being detailed/deputed for ASI training.

13. The Appellants – Writ Petitioners are aggrieved against the order dated 09.09.2021 passed in their WP (C) No. 5079 of 2021 to the extent that on one hand the Single Bench has allowed the Writ Petition filed by the Appellants – Writ Petition (wherein the Appellants – Writ Petitioners questioned for being excluded from the list of qualified candidates based on eligibility of 40% marks as prescribed in Police Order 2020) and on the other

hand held the list dated 14.12.2020 which was prepared with the Constable securing marks more than 40% as per Police Order 2020 to be valid.

The Appellants have submitted that in the Writ Petition, it was their specific case that the Selection List dated 14.12.2020 has been prepared based on Rule 5 (3) of the Police Order 2020 and thus the Order dated 09.09.2021 passed in WP (C) 863 of 2021 and WP (C) 5079 of 2021 is self-contradictory as on one hand, the Single Bench has allowed the writ petition only on the premise that Police Order 2020 has no application to the selection and PMR-660 is to operate and selection is to be made based on PMR-660, however, on the other hand, the Single Bench upheld the Select List dated 14.12.2020 which is prepared on the basis of Police Order 2020.

Furthermore, the Appellants have submitted that it is an undisputed fact that the name of the Appellants does not find mention in the Select List dated 14.12.2020 as modified on 22.12.2020 on the premise that the Appellants have not scored more than 40% marks in the written examination as per the eligibility requirement under Rule 5 (3) of Police Order 2020.

14. We have heard the rival contentions of the parties and gone through the record of the case. The order dated 09.09.2021 under challenge in the present Letters Patent Appeal is passed in Writ Petition No. 5079 of 2021 based on the Order dated 09.09.2021 passed by the Single Bench in WP (C) No. 863 of 2021 and WP (C) No. 1994 of 2021. Therefore, the findings and observations of the Single Bench in Order dated 09.09.2021 in WP (C) 863 of 2021 and WP (C) 1994 of 2021 assumes importance and relevant for consideration of the grounds and challenge raised by the Appellants in the present Appeal.

15. In the Order dated 09.09.2021 in WP (C) No. 863 of 2021 and WP (C) No. 1994 of 2021, the Single Bench has made the following observations :

> *"9. On perusal of aforementioned rules, it is made clear that in order to fill up the posts in the rank of ASI of Police, the District Superintendent/Heads of Police establishments were under obligation to report the vacancy and anticipated vacancy positions in respect of ASI by 15th of April and by 15th of October of every year to the Director General of Police. Despite such statutory provision, no steps were taken in respect of vacancies and anticipated vacancies in the rank of ASI………..*
>
> *10. On receipt of the vacancy position, the Director General of Police under the PMR-660 is obliged to conduct the departmental written examination among the constables, who have got seven years of experience after constable training by fixing minimum marks to qualify in the said written examination with approval of*

Government. On passing of the departmental written examination, such constables become qualified under PMR-660 for nomination by their respective police district/establishment to be considered for being deputed to ASI training. After the select list was drawn for deputing them for ASI training, the same shall be placed for approval of the Director General of Police and finally the selected constables are to go for ASI training. After completion of such training, the trained constables are to appear in a test/examination at the training centre and their performance in the said test/examination conducted at the end of the training and final appointments in the rank of ASI are to be made on that seniority basis which is to be followed by the authority for consideration for promotion from constable having seven years of experience to the post of ASI.

11. This PMR 660 has not been followed for years together, consequentially the qualified constables were deprived of getting for promotion to the post of ASI…………

12. PMR 660, when is in operation, a notification was issued on 15.10.2020 in exercise of powers conferred under Section 2 of the Police Act, 1861, by the State Government in order to regulate the method of recruitment and conditions of service of Assistant Sub-Inspector of Police called "Odisha Police Service (Method of Recruitment and Conditions of Service of Assistant Sub-Inspectors) Order, 2020, wherein it has been specifically mentioned under Sub- rule (ii) of Rule-1 that "the same shall come into force from the date of its publication in the Odisha Gazette". Though such notification was issued on 15.10.2020, as has been admitted on behalf of the State by way of reply to the rejoinder affidavit filed in W.P.(C) No.863 of 2021, the same was published in official gazette on 27.07.2021. ***Thereby, Order, 2020 has come into force w.e.f. 27.07.2021 and any action taken prior to such Order, 2020, cannot sustain in the eye of law. Rather, it would be under the provision of PMR 660 by allowing qualified constables to appear at the written test to enable them to go for ASI training for promotion.***

X XXX

14. As regards the contention raised by Mr.ManoranjanMohanty, learned Senior Counsel appearing in W.P.(C) No.863 of 2021, that right has been accrued in favour of the petitioners in view of PMR 660 and the same cannot be divested by framing Order, 2020, this Court is of the considered view that since the authorities, instead of going for consideration of the case of the petitioners those who were working as constables for more than 7 years for promotion to the post of ASI, resorted to notification dated 15.10.2020, which was admittedly published in the official gazette on 27.07.2021, the Order, 2020 can only be effective after 27.07.2021 and it may be prospective one. Therefore, any action taken pursuant to notification dated 15.10.2020 cannot sustain in the eye of law.

X XXX

19. In view of the law laid down by the apex Court, as discussed above, ***it is made clear that since the notification dated 15.10.2020 has come into force from the date of its publication in official gazette on 27.07.2021*** *and* ***the process of***

selection was done prior to commencement of said Order, 2020 *and that is in conformity with the PMR 660, the same should be given effect to in terms of PMR 660 instead of resorting to Order, 2020 fixing cut off date of validity of select list dated 14.12.2020, as modified on 22.12.2020, to 31.12.2020……".*

X XXX

The Single Bench has observed that the due process of filling of the vacancies of Assistant Sub-Inspector of Police as per the statutory provisions has not been followed by the respondent authorities over the years to the detriment of the Writ Petitioners. It has been observed that Police Order, 2020 has come into force w.e.f. 27.07.2021 and the process of selection in question has taken prior thereto and completed by conduct of written examination, still further by drawing of the Select List on 14.12.2020. It is only towards the final conclusions, the Single Bench has inadvertently observed that the process of selection in the present case is in conformity with PMR 660 though the observations and conclusion regarding the non-applicability of the Police Order 2020 and the findings and conclusion regarding the applicability of PMR 660, to the present selection process, remains unaffected and unaltered.

16. The present case is not a plain case involving the legal proposition regarding the applicability of the rules / legal prevalent on the date of availability of vacancy or relatable to the vacancy position. The said legal position is no longer res integra now after the passing of the latest judgment by the Supreme Court of India in Civil Appeal No.9746 of 2011, titled as ***State of Himachal Pradesh and Others Versus Raj Kumar and Others***[1] decided on 20.05.2022. The findings of the Hon'ble Supreme Court in the aforementioned decision dated 20.05.2022 which are very relevant to the present controversy are :

"71. The above-referred observations made in the fifteen decisions that have distinguished Rangaiah's case demonstrate that the wide principle enunciated therein is substantially watered-down. Almost all the decisions that distinguished Rangaiah hold that there is no rule of universal application to the effect that vacancies must necessarily be filled on the basis of law that existed on the date when they arose. This only implies that decision in Rangaiah is confined to the facts of that case.

72. The decision in Deepak Agarwal (supra) is a complete departure from the principle in Rangaiah, in as much as the Court has held <u>that a candidate has a right to be considered in the light of the existing rule</u>. That is the <u>rule in force on the date the consideration takes place.</u> This enunciation is followed in many subsequent decisions including that of Union of India v. Krishna Kumar (supra). In fact, in Krishna Kumar Court held that there is only a <u>"right to be considered</u>

1. 2022 SCC OnLine SC 680

for promotion in accordance with rules which prevail on the date on which consideration for promotion take place."

73. The consistent findings in these fifteen decisions that Rangaiah's case must be seen in the context of its own facts, coupled with the declarations therein that there is no rule of universal application to the effect that vacancies must necessarily be filled on the basis of rules which existed on the date which they arose, compels us to conclude that the decision in Rangaiah is impliedly overruled. However, as there is no declaration of law to this effect, it continues to be cited as a precedent and this Court has been distinguishing it on some ground or the other, as we have indicated hereinabove. For clarity and certainty, it is, therefore, necessary for us to hold;

(a) The statement in Y.V. Rangaiah v. J. SreenivasaRao that, "the vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules", does not reflect the correct proposition of law governing services under the Union and the States under part XIV of the Constitution. It is hereby overruled.

(b) The rights and obligations of persons serving the Union and the States are to be sourced from the rules governing the services."

X XX

From the aforementioned observations and findings, it is enunciated as held in case of ***Deepak Agarwalv. State of U.P.[2], and in Union of India v. Krishna Kumar[3]***, that the candidate has a right to be considered as per the Rules existing on the date of consideration. In the present case, the application of the aforementioned principle, clearly shows that on the date of letter declaring the conduct of written examination, the date of declaration of result, drawing of select list which is the final step of consideration towards the qualification of candidates for being qualified for ASI training, the Orissa Police Manual Rules were applicable and the Police Order 2020 had not been enforced. Thus Rule 660 of PMR was applicable and the existing Rule on the date of such consideration.

As informed at the time of hearing, the respondent-State has now filed Writ Appeals along with applications for condonation of delay to challenge the findings qua the non-applicability of the Police Order, 2020 inthe decision dated 9th September, 2021 passed in the aforesaid writ petitions. Learned counsel for the State submits that the entire process of selection was initiated as per the provisions provided in the Police Order, 2020 in as much as format of the question papers was as per the Rules, although concededly, the Police Order, 2020 was published in the official Gazette on 27.07.2021. He further submits that in the present selection, it was nowhere provided that 30% would be the pass

2. (2011) 6 SCC 725 **3.** (2019) 4 SCC 319

marks even as per the un-amended provision i.e. PMR, 660. We afraid that we are unable to accept the contentions and hence reject it. It is an admitted case that till the enforcement of the Police Order, 2020, the pass marks adopted by the Authorities in the said written examination has throughout been 30%. The said position was initially approved by the Government and also acknowledged by a Division Bench of this Court, to follow anything contrary at this stage is not only unfair but also preposterous.

Therefore, based on the long standing past practice, it is hereby held that the pass marks for the selection in question has to be 30% even if there is no specific administrative order passed by the I.G.P.

The other contention in respect of validity of the select list so prepared to be restricted to the time frame provided under the Police Order, 2020 must also fail for the same reasoning and accordingly based on the similar premise, the select list shall be valid till it is exhausted as per the past long standing practice.

17. In the present case, the peculiar feature is that on the date the selection process was initiated, carried out and completed upto the date of the declaration of the result of the written examination and drawing of the select list for detailment of the candidates for training of ASI, the amended Rules were not effectuated by notification in the Orissa Gazette which was the inbuilt necessary requirement for the enforcement of the Police Order 2020. The admitted factual position will not get altered if there is delay due to any inadvertence on the part of the State authorities by issuing the Orissa notification after much delay. The delay cannot be cured by creating a legal fiction to lend enforceability to the Police Order 2022 with retrospective effect from 15.10.2020 instead from the actual date of notification on 27.07.2021 in the official Gazette.

18. Thus, in the peculiar facts and circumstances, the present Writ Appeals call for interference only to the extent of returning the finding that the applicability of provisions of Police Order, 2020, which has concededly come into force w.e.f. 27.07.2021 after the completion of process of selection in question, to the validity of select list dated 14.12.2020/22.12.2020 cannot be sustained and is in fact illegal and unlawful.

Accordingly, the select List dated 14.12.2020 as modified on 22.12.2020 is required to be redrawn on the basis of the process and eligibility of selection prescribed under Rule 660 PMR with its past long standing practice.

The order dated 09.09.2021 passed in WP (C) No.5079 of 2021 is modified to the aforementioned extent and the respondent authorities are directed to redraw the select list on the basis of Rule 660 PMR within the period of two weeks from the date of receipt of certified copy of the order and detail further batches of the ASI training as per the redrawn Select List prepared as per PMR 660 with 30% pass marks and the select list shall remain valid till exhausted as per past practice.

19. The present Writ Appeals stand disposed of in the aforementioned terms.

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2022 (III) ILR - CUT- 714

S. TALAPATRA,J & M.S. SAHOO,J.

JAIL CRIMINAL APPEAL NO. 80 OF 2015

CHALAKA MUNDA ………Appellant

.V.

STATE OF ORISSA ……….Respondent

(A) CRIMINAL TRIAL – The Appellant was charged under Section 302 of the IPC – The Appellant admitted the death of the deceased in his house, but he has given no explanation as to injuries of his wife – The case of appellant is total denial – There is no eye witness – No evidence to involve the appellant with the offence for which he has been convicted – The submission on behalf of appellant that the trial court passed the judgment on surmise and mere suspicion – No circumstantial evidence has been proved to link the Appellant with the crime – Held, the prosecution has miserably failed to prove the charge against the Appellant or to lay the foundational evidence, to say least of episodes of circumstances – No material was brought on record that the appellant had been with the deceased at occurrence night in home and the same was not accessible to others – We are persuaded to interfere with the judgment and order of conviction, consequently those are set aside.

(Para-17)

(B) INDIAN EVIDENCE ACT,1872 – Section 106 – Burden of proof – The law is well settled that, unless it is successfully proved by the prosecution that the accused is seized of the knowledge how an event

or occurrence had taken place, the accused cannot be asked to explain or the accused can not be put under any obligation to explain the same in order to exculpate him in terms of the provision of Section 106 of the Indian Evidence Act. (Para-15)

Case Law Relied on and Referred to :-

1. 1956 SC 404 : Shambu Nath Mehra Vs. The State of Ajmer.

For Appellant : Mr. C. R. Sahu
For Respondent : Mr. S.S. Mohapatra, Addl. Standing Counsel.

JUDGMENT Date of Hearing: 20.07.2022 : Date of Judgment: 07.09.2022

S. TALAPATRA,J.

The Appellant was charged under Section 302 of the I.P.C. for committing cruelty and murder of his wife, namely, Gagei Munda on 09.03.2012 by the Sessions Judge, Keonjhar on 12.05.2015 and on conclusion of the trial, he has been convicted under Section 302 of the I.P.C.

2. It has been observed by the Sessions Judge, Keonjhar as follows:

"16. Culling the materials available on record on the basis of the aforesaid cardinal principles, it is well established that the deceased has met her unnatural and homicidal death in the house of the accused and that she has faced her death due to number of injuries sustained on her body as apparent from P.M. report under Ext.5 and after her death, she had number of charring injuries on different parts of her body and her saree is found to have contained human blood as apparent from the chemical examination report under Ext.8 Moreover, the accused being the husband was the caretaker of the deceased but he was found absent from home. He has also remained absconded for which charge-sheet is submitted showing him as absconder. No evidence is coming forward from the defence regarding any othercircumstances showing the cause of death of the deceased. The plea of fall in the stone quary as raised by the defence has not been substantiated. The cumulative effects of all such circumstances lead to an irresistible conclusion that there is no missing link to exonerate the accused from such charge of committing murder of the deceased, his wife. The nature of injuries sustained by the deceased as apparent from the P.M. report proves the criminal intention of the accused to commit nothing but murder of the deceased which comes under the 1st clause of Sec.300, I.P.C."

[Emphasis added]

3. On a keen reading of the said judgment, it further appears that the Appellant admitted the death of the deceased in his house, but he has given no explanation how the injuries were suffered by his wife. No attempt is made to explain or clarify the incriminating circumstances by the accused, his case is a case of total denial. Thus, the accused not only lost the opportunity to exculpate him, but also stood self-condemned.

4. Pursuant to the said judgment of conviction, the Appellant has been sentenced to suffer imprisonment for life and to pay fine of Rs.10,000/- (Rupees ten thousand), in default whereof, to undergo further rigorous imprisonment for one year, for committing the offence of murder of his wife.

5. In order to substantiate the charge, the prosecution adduced 8 witnesses, including the informant (Raisingh Munda). A series of documents Ext.1 to Ext.9 including the P.M. report (Ext.3) have been admitted in the evidence by the prosecution.

6. Mr. C.R. Sahu, learned counsel appearing for the Appellant has contended that, there is no legal evidence to involve the Appellant with the offence for which he has been convicted. The judgment has been passed on surmise and mere suspicion. No circumstantial evidence has been proved to link the Appellant with the crime. According to Mr. Sahu, learned counsel, admittedly there is no eye witness of the occurrence. Even, the informant (P.W.1) did not claim that he had seen any part of the occurrence. The Appellant, according to the information lodged by P.W.1, had married the deceased. The said marriage was culmination of their love affairs. It had been routine affairs that the Appellant used to, under influence of liquor, demand money from the deceased for consuming liquor. Many a times, the deceased was assaulted by the Appellant. Being afraid, the deceased took shelter in her paternal house. It may be noted here that, P.W.1 is the father of the deceased. It has been revealed in the First Information Report that on 09.03.2012, the Appellant asked the deceased for money to consume liquor, but as the deceased did not comply for want of money, the Appellant got furious and assaulted on the backside of her head by a Silapua (curry stone-bar), inflicted burn injuries and committed her murder.

7. On receipt of such information, he went to the house of the accused and found the deceased lying dead with injuries on different parts of her body including backside of the head. The informant was convinced that the Appellant had committed the murder of his daughter and accordingly, he reported the occurrence to the Police, thus Ramachandrapur P.S. Case No.62 of 2012 was registered and taken up for investigation. The police report under Section 173(2)

of the Cr.P.C. was filed on completion of the investigation by charge-sheeting the Appellant. On commitment the charge aforementioned, was framed.

8. After the prosecution evidence was over, the statement of the Appellant was recorded under Section 313(1)(b) of the Cr.P.C. The Appellant denied the incriminating statements as surfaced in the trial.

9. As the defence did not adduce any evidence, onappreciation of the prosecution evidence, the finding of conviction was returned.

10. To appreciate whether there is evidence to convict the Appellant, a meaningful survey of the evidence is essentially required. As stated earlier, the informant (P.W.1) is not the eye witnesses. Hence, the prosecution has to rely on the circumstantial evidence. P.W.1 introduced the incriminating circumstances by stating that on 09.03.2012, the deceased was assaulted by the Appellant, as she failed to give money to the Appellant for consuming liquor. The Appellant used Silapua (curry stone-bar) to hit the backside of the head of the deceased. P.W.2 namely, Kabi Munda is a post occurrence witness. He accompanied P.W.1, when he had taken the journey to reach his daughter's house on having the information that she had been subjected to physical atrocity. He stood witnesses to the inquest and signed the inquest report (Ext.2). He has stated that P.W.1 was not in visiting terms to the house of the Appellant, but on getting the information from the villagers about the said murderous assault, he went to the house of the Appellant. P.W.3 Smt. Kali Munda turned hostile and denied her previous statement, made to the police. P.W.4, Ladar Munda has testified in the trial that the Appellant and the deceased were living peacefully. But, he was not declared hostile. P.W.5, Dr. Pramod Kumar Behera has carried out the post-mortem examination over the dead body of the deceased. Based on the post-mortem examination, P.W.5 testified that the deceased had the following injuries:

(i) There is bleeding from mouth.

(ii) Faecal material present in anus.

(iii) contusion of size 5 x 3 cm present in front of the neck

(iv) Contusion of size 7 x 2 cm present on the right side of the forehead.

(v) Contusion of size 5 x 4 cm present on left side of face below left eyelid.

(vi) Laceration of size 5 x 4 x 1 cm on occipital region.

(vii) Abrasion of size 1 x 1 cm present on left breast.

(viii) Multiple charings of injuries of varied sizes 1 x 7 cm present in both buttocks, both chests, right elbow, both shoulders, left thigh, left knee and left side of scapula.

2. On dissection, he found as follows:

(i) Trachea and larings are ruptured.

(ii) Hyoid bone was fractured.

11. According to P.W.5 the contusion, abrasion, rupture and fracture, as found on the person of the deceased were ante mortem in nature. The cause of death of the deceased was due to asphyxia, from rapture of trachea and fracture of hyoid bone. P.W.6, Maina Munda did state nothing which is material for proving or disproving the charge. P.W.7, namely, Amulya Kumar Routray had investigated the case. P.W.7 carried out the inquest, did visit the place of occurrence and prepared the site map (Ext.5). P.W.7 has also stated in the trial how he had seized the material objects, including the wearing apparels of the deceased under the seizure list (Ext.7). P.W.7 had also examined witnesses, but he did not complete the entire investigation. In the crossexamination, P.W.7 has admitted that, Raisingh Munda (P.W.1) has not stated to him that about two years back the Appellant visited his home under influence of liquor or that the Appellant committed murder of his daughter. P.W.8, Surya Narayan Das is another Investigating Officer who had completed the investigation and filed the charge-sheet against the Appellant. He has not testified for anything which may be termed as material for purpose of convicting the Appellant.

12. According to Mr. Sahu, learned counsel for the Appellant, the foundation of the conviction is that, the Appellant has failed to explain the episode how the death occurred to his wife and how his wife suffered so many fatal injuries over her body. The trial Judge has committed serious error in understanding the statutory requirement of discharging burden of proof.

13. Mr. S.S. Mohapatra, learned Additional Standing Counsel has in order to repel stated that the prosecution has proved the case by putting the episodes of circumstances in a complete chain pointing exclusively to the guilt of the Appellant. He has further stated that, the prosecution has proved that the Appellant was in a habit to extracting money from his wife (the deceased) for consuming liquor and every day the deceased could not provide money and she used to be tortured by the Appellant. On the fateful day, for refusal of making the money, the Appellant by the curry stone-bar brutally hit the deceased. On the following day, P.W.1 filed the information. In the inquest report, the presence of the injuries had been recorded. The post-mortem report has confirmed the observation recorded in the inquest report as regards the ante mortem injuries. P.W.5 has confirmed the injuries as found during the inquest procedure. According to Mr. Mohapatra, learned Additional Standing Counsel,all those episodes formed a chain by demolishing the hypothesis of innocence in favour of

the Appellant. Therefore, the judgment of conviction is not warranted to be interfered with.

14. Having appreciated the evidence and the submission of the learned counsel for the parties, we would like to make an initial observation that the death of GageiMunda succumbing to the injuries, as noted above has been well established. Now the solitary question that surfaces is that, whether there is legal proof that the Appellant has caused the death of his wife on 09.03.2012 in his house at Patilo, NakhaSahi. True it is that, the dead body was found by P.W.1 and P.W.2 in the yard of the Appellant's house. But P.W.1 has categorically stated that he did not see the occurrence. But he saw one Silapua and Funkanala (iron blow-pipe) lying near the dead body. Neither P.W.1 nor any other witnesses have stated that they had found the Appellant in drunken condition. P.W.1 has only stated that *some local sahi members of the accused gave him information regarding the death of his daughter*. He has merely stated that he cannot give the name of any one of them, from whom he came to know about the episode. But at that time he did not find the Appellant. But he found his grand-father, but he did not enquire anything from any person including the grand-father whether the Appellant was at their house on the previous night when the said occurrence took place. He has further stated that, he noticed marks of burn injuries on the portion of her daughter. P.W.2 did not tell anything about the occurrence, as he nearly accompanied P.W.1. P.W.3, a villager turned hostile and did not reveal anything to involve the Appellant with the commission of offence. Similarly, P.W.4 as noted before did not reveal anything in the trial to support the prosecution case. True it is that P.W.5 has given the catalogue of injuries he found on the dead body of the deceased. He has opined that the cause of death was asphyxia due to rapture of trachea and fracture of hyoid bone. P.W.6 did not reveal anything. P.Ws.7 and 8 are the investigating officers. One of them (P.W.8) filed the charge-sheet on the basis of the purported circumstantial evidence.

15. The prosecution has miserably failed to prove the charge against the Appellant or to lay the foundational evidence, to say least of episodes of circumstances. No material was brought on record that the Appellant had been with the deceased at the night of occurrence in that home and the place of occurrence was not accessible to others. Even the narrative of drinking habit and assaulting the deceased on refusal of giving money to the Appellant for consuming liquor has not been supported by any evidence. Even P.W.1 has resiled from his statement. He has testified that he did not state to the police that the Appellant visited his place in the drunken condition. There is no other evidence on drunkenness, assault or presence of the Appellant on the night of

occurrence. Therefore, we are constrained to observe that, even the circumstances do not form a basis where the onus shifted to the Appellant to explain how the said occurrence took place. The law is well settled that, unless it is successfully proved by the prosecution that the accused is seized of the knowledge how an event or occurrence had taken place, the accused cannot be asked to explain or the accused cannot be put under any obligation to explain the same in order to exculpate him in terms of the provision of Section 106 of the Indian Evidence Act. On cumulative assessment of the evidence, we are of the view that the evidence laid by the prosecution has gone heyware. Even there may be strong suspicion, but however strong the suspicion may be, that cannot substitute the requirement of the legal evidence. As such, it cannot be held that the Appellant was under obligation to explain how the death of his wife had taken place. Hence, the finding of the trial judge in this respect is unsustainable. As consequence, the Appellant is entitled to benefit of doubt.

16. In ***Shambu Nath Mehra vs. The State of Ajmer reported in 1956 SC 404***, it has been enunciated inter alia as under:

> *“"When any fact is especially within the knowledge of any person, the burden of proving that fact is on him". The stress, in our opinion, is on the word "especially". Section 106 is an exception to section 101. Section 101 lays down the general rule about the burden of proof. "Whoever desires any Court to givejudgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist". Illustration (a) says-*
>
> *"A desires a Court to give judgment that B shall bepunished for a crime which A says B has committed.*
>
> *A must prove that B has committed the crime". This lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are preeminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know betterthan he whether he did or did not. It is evident that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside*

India, to mean that the burden lies on an accused person to show that be did not commit the crime for which he is tried. These cases are Attygalle v. Emperor(1) and Seneviratne v. R. (2).

Illustration (b) to section 106 has obvious reference to a very special type of case, namely to offences under sections 112 and 113 of the Indian Railways Act for travelling or attempting to travel without a pass or ticket or with an insufficient pass, etc. Now if a passenger is seen in a railway carriage, or at the ticket barrier, and is unable to produce a ticket or explain his presence, it would obviously be impossible in most cases for therailway to prove, or even with due diligence to find out, where he came from and where he is going and whether or not be purchased a ticket. On the other band, it would be comparatively simple for the passenger either toproduce his pass or ticket or, in the case of loss or of some other valid explanation, to set it out; and so far as proof is concerned, it would be easier for him to prove the substance of his explanation than for the State to establish its falsity.

We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused, the facts cannot be said to be "especially" within the knowledge of the accused. This is a section which must be considered in a commonsenseway; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts.” *[Emphasis added]*

17. Having observed thus, we are persuaded to interfere with the judgment and order of conviction of sentence and consequently, those are set aside.

18. In the result, the appeal stands allowed. The Appellant be set at liberty forthwith, if not warranted in any other case.

19. Sent down the LCRs.

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2022 (III) ILR - CUT- 722

S. TALAPATRA,J & M.S. SAHOO,J.

CRIMINAL APPEAL NO. 479 OF 2022

PADMA CHARAN SAHU ………Appellant

.V.

STATE OF ODISHA ………Respondent

CRIMINAL TRIAL – Conviction under Section 302 of the I.P.C. – Learned Trial Court convicted the appellant basing upon the evidence of sole eye witness (P.W.3) to the occurrence – The (P.W.3) is the daughter of deceased – The plea of accused/Appellant was that the alleged culpable act was not premeditated and had occurred after sudden quarrel and fight and without any intention of killing – Held, we are of the view that from the evidence as laid by the prosecution, the charge of murder under Section 302 could not be proved beyond reasonable doubt in as much as the appellant had committed assault out of sudden quarrel resulting the death – He is entitled to be acquitted from the charge under Section 302 of the IPC and accordingly the conviction and sentence under Section 302 of the IPC are set aside – The appellant convicted under Section 304 part II of the IPC. (Para-12)

Case Laws Relied on and Referred to :-

1. (2011) 2 SCC 490 : Rabindra Kr. Pal @ Dara Singh Vs. Republic of India.
2. (2012) 53 OCR (SC) 59 : Shyamal Ghose Vs. State of West Bengal.
3. AIR 1981 SC 1578 : Mohar Singh & Ors. Vs. State of Punjab.

For Appellant : Mr. N.N. Mohapatra.
For Respondent : Mr. S.S. Kanungo, Addl. Govt. Adv.

JUDGMENT Date of Hearing: 11.08.2022 : Date of Judgment: 26.09.2022

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 27.07.2016 delivered in Sessions Trial No.70 of 2013 by the Additional Sessions Judge, Chatrapur (Ganjam). By the said judgment, the Appellant has been convicted under Section 302 of the I.P.C. for committing murder of one Musa Das on 12.06.1999 at about 1 P.M. at village Gandala. Consequent upon the said conviction, the Appellant has been sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.30,000/- with default imprisonment of 6 (six) months.

However, it has been noted clearly that the period of detention as undergone by the Appellant, shall stand set off from the substantive term of imprisonment.

2. Briefly stated the prosecution case is that on 12.06.1999 at about 1 P.M. at village Gandala, the Appellant had brutally assaulted Musa Das (the deceased) with deadly weapon. In the said assault, the deceased received several bleeding injuries. One Manoranjan Das (P.W.1), brother of the deceased informed the police orally of the occurrence. It has been disclosed in the oral report, as filed by Manoranjan Das that, on the day of occurrence at about 1 P.M., his niece, namely, Jalausha Das, the daughter of the deceased informed him that *while she and her father were returning from village Sadasivpur after performing puja at Gramadevati, the Appellant forcibly dragged her father to the street from Panigrahi mango grove*. Having been reported of the said occurrence by the daughter of the deceased, she and informant rushed to the spot and saw the deceased lying dead having bleeding injuries in front of the house of one Sadananda Sahu. Sadananda Sahu has not been examined in the trial. The informant's another brother, Lingaraj Das, came to the spot and he has stated the police that the Appellant hacked the deceased on several part of his body by a 'Tangia' for which, the deceased fell down on the ground. Even, thereafter, the Appellant dealt several blows on the face of the deceased by the said weapon and left the place. The deceased succumbed to his injuries at the spot. Initially, the village Choukidar was reported of the occurrence. The village Chowkidar escorted the informant to the police station. On the basis of his oral report, the information was reduced in writing and a specific case was registered being Hinjili P.S. Case No.36 of 1999 under Section 302 of the I.P.C. (corresponding to G.R. Case No.143/1999). The investigation was taken up and the final report under Section 173(2) of the Cr.P.C. was filed before the J.M.F.C., Hinjilicut and the case was committed for trial to the Court of the Sessions Judge, Chatrapur. Following the due process of cognizance, the charge was framed against the Appellant under Section 302 of the I.P.C. to which the Appellant pleaded not guilty and claimed to be tried.

3. In order to substantiate the charges framed under Section 302 of the I.P.C., the prosecution has adduced, as many as 7 (seven) witnesses, including the informant (P.W.1) and his brother (P.W.2) and also the daughter of the deceased (P.W.3). Apart that, 9 (nine) documentary evidence (Ext.1 to Ext.9) have been introduced by the prosecution. Four material objects (M.O.1 to M.O. IV) are also brought in the evidence. It may be noted that, at this juncture, no evidence was led by the defence after the prosecution evidence was recorded. The Appellant was examined under Section 313(1)(d) of the Cr.P.C. when he reiterated his plea of innocence and claimed that the evidence as laid by the

prosecution are all concocted. Having appreciated the said evidence, the trial judge has returned the finding as follows:

> *"In this case as discussed earlier the P.W.3 is thesole eye witness to the occurrence. Her evidence isfound cogent, convincing and credible which is supported by the medical evidence. No doubt she is the daughter of the deceased. In the facts and circumstances of the case, she cannot be termed as an interested witness, rather she is a natural witness to the occurrence which is found wholly reliable. Her evidence, which was found cogent, convincing and credible, can be relied safely to hold the accused guilty in this case without any corroboration from independent source keeping in view of the ration of the Hon'ble Apex Court as stated earlier. In this case the prosecution has also succeeded in bringing some evidence into record as discussed earlier which corroborates the entire testimony of P.W.3. Her testimony establishes conclusively that on the day of occurrence the accused has dealt murderous assault to the deceased with a deadly weapon axe near his house resulting of his instantaneous death at the spot."*

It has been brought to the notice of the trial judge that, immediately after the occurrence, the Appellant was found absconding. Mere absconding may not be a sufficient ground to hold some one guilty but, if there are other materials showing his involvement in commission of the offence, abscondence immediately after the occurrence can be taken as an incriminating evidence in support of the prosecution case and against the claim of innocence of the accused. In this regard, the trial judge has relied on a decision of the Apex Court in ***Rabindra Kr. Pal @ Dara Singh vs. Republic of India*** *reported in (2011) 2 SCC 490.* Another report on the same principle has been relied on. In ***Shyamal Ghose v. State of West Bengal*** *reported in (2012) 53 OCR (SC) 59* it has been observed by the Apex Court that the absconding by itself may not be a positive circumstance consisting only with the hypothesis of the guilt of the accused, in as much as, an innocent person may even run away for fear of the falsely implicated in a criminal case. But in certain contexts, absconding of the accused not only goes consistent with the hypothesis of the guilt, but posits a definite pointer towards his guilt. Thus, the trial judge returned the finding of conviction, which is under challenge in this appeal.

4. Mr. N.N. Mohapatra, learned counsel appearing for the Appellant has quite empathetically submitted that P.W.3 who has been considered as the solitary eye witness cannot be trusted by this Court, in as much as, the testimonies of P.Ws.1 and 2 have substantially damaged the element of truthfulness of the testimony of P.W.3. Mr. Mohapatra, learned counsel has argued that in the prosecution case, P.W.3 has been projected, as the solitary eye witness. P.W.3 has stated that she ran away from the place of occurrence when the Appellant started dragging her father toward his village over an issue of

outstanding amount realizable from the Appellant relating to liquor business and without wasting a moment, she rushed to the home and informed P.Ws.1 and 2 and after her return to the spot again, she saw the Appellant cutting the neck of his father by an ‘axe’. Her both uncles (P.Ws.1 and 2) came there, but the accused fled away from the spot before they had reached. Mr. Mohapatra, learned counsel has laid serious emphasis on the statement of P.W.3 where she had stated that the Appellant started dragging her father at 1 P.M. The occurrence took place at Majhi Sahi in village Gandala. Mr. Mohapatra, learned counsel then referred to the testimonies of P.Ws.1 and 2 (her uncles). P.W.1 has stated that, having the information from P.W.3, the daughter of the deceased, they rushed to the spot and found the deceased laying dead with bleeding injury on his forehead and face. The accused had already fled away from the spot. In the cross-examination carried out by the defence, as pointed out by Mr. Mohapatra, learned counsel, P.W. 1 has testified that, at that time at about 2 P.M, he was taking lunch in his house during that time *“the daughter of the deceased disclosed the occurrence to me and P.W.2 at a time. She disclosed this fact at 12 noon and according to him, he reached the place of occurrence at about 1 P.M.”* There had been no cross-examination or re-examination by the prosecution with the leave of the Court.

5. P.W.2 has testified in the trial that having the information from P.W.3, he rushed to the place of occurrence and found the deceased lying dead with cut and bleeding injuries on his person. The accused had already fled away from the spot. In the corss-examination, he has testified as follows:

> *“4. The daughter of the deceased came and narrated the incident to me at about 12 noon. Myself, P.W.1 and some villagers had gone to the spot. We shall have to go to Badasahi from our house to reach the spot. The occurrence took place at Brahmana sahi inside Majhi Sahi. There are neighbouring houses at the spot. Many villagers were present there by the time we arrived.”*

Mr. Mohapatra, learned counsel has succinctly submitted that, no other villagers and the residents of the place in proximity to the place of occurrence were examined by the prosecution as witnesses. P.W.2 has denied the suggestion that, he did not have any knowledge about the occurrence. Mr. Mohapatra, learned counsel appearing for the Appellant has underlined that, P.Ws.1 and 2 have corroborated statement of P.W.3 to the extent that she informed P.Ws.1 and 2. P.Ws.1 and 2 without wavering, have testified in the trial that they rushed immediately after having received the information from P.W.3. P.W.3 has claimed to have seen the occurrence. But both P.Ws.1 and 2 have clearly stated that when they arrived at the spot they did not see the Appellant there. But they saw some villagers at the place of occurrence.

6. Mr. Mohapatra, learned counsel has demonstrated from the record of the evidence that the weapon of offence has been described as 'Tangia' somewhere, an 'axe' and somewhere as *'Kati'*. The evidence of the forensic expert, namely, Dr. Padma Charan Sahu (P.W.7) in this regards has some relevance as he has given the details of external injuries that he found on the person of the deceased. Thereafter, during the cross-examination, as carried out by the defence, P.W.7 has testified that injuries found over the body of the deceased may be possible by a single weapon having sharp edge and also pointed end like the weapon 'Kati'. He found Injuries No.i, ii to v, vi, vii, ix, x and xi were caused by sharp cutting moderately heavy weapon and external injuries No.iii, iv and viii were caused by the pointed weapon.

7. According to Mr. Mohapatra, learned counsel, it is apparent from his opinion, which has not been challenged by the prosecution that there was uses of two types of weapons. However, later on, the forensic expert P.W.7 has opined that, all injuries are possible by *'Kati'*, but none of the witnesses, including P.W.3 have indicated to such weapon. Moreover, weapon of offence was not recovered during the investigation. According to Mr. Mohapatra, learned counsel P.W.3 is a tutored witness or she might have been planted. It is absolutely clear that, she had not seen any part of the occurrence and she had come to the place of occurrence afterwards, but somehow she gathered the information about the occurrence and informed P.Ws.1 and 2. The incongruity between the testimonies of P.Ws.1 and 2 and P.W.3 cannot be lightly brushed aside, as those are mutually destructive. According to Mr. Mohapatra, learned counsel, if the statements of P.Ws are considered it will be apparent that, the place of occurrence was having many houses its vicinity, but no independent witness has come forward from that Sahi, row of houses to testify, to support the case of the prosecution. Mr. Mohapatra, learned counsel has also submitted that, if the prosecution case is properly studied, it would be apparent that the alleged culpable act was not premeditated and had occurred after sudden quarrel and sudden fight and without any intention of killing. Mr. Mohapatra, learned counsel, has referred to the statement of Witness No.2 (who is P.W.3 in the trial), which was recorded by the S.D.J.M., Chatrapur invoking the provision of Section 299 of the Cr.P.C. The said witness has stated that her mother, uncles and she reached at the spot of occurrence together. It is contended that how that was possible that P.Ws.3 and 5 in the trial had reached the spot of occurrence together and had seen the occurrence, when P.Ws.1 and 2 have clearly testified that they have not seen the occurrence. Mr. Mohapatra, learned counsel, has again shown from the testimony of P.W.3, as recorded by the S.D.J.M., Chatrapur that she stated that, the Appellant used 'Khandasa' i.e. sword for cutting the neck of the deceased. But the same witness (P.W.3) had deposed in the trial that weapon used by the

accused was an 'axe' for cutting the neck of the deceased (see line 29 in Paragraph-3). Mr. Mohapatra, learned counsel has pointed out that, the S.D.J.M., Chatrapur recorded the statement of P.W.5, the wife of the deceased, who had stated that the deceased's neck was chopped by a 'Tangia'. It is contended that there are incongruities in the testimonies of the so called eyewitness and also her testimony stands in contradiction with the forensic expert's testimony so far as the weapon of offence is concerned. Moreover, the improvisation by P.W.3 is apparent, as P.W.2 in the pretrial recording of the evidence under Section 299 of the Cr.P.C. testified that, she came along with her mother to the spot. But in the trial, her mother P.W.5 has stated that at the relevant point of time, she was at Berhampur and after getting the information of the said occurrence, she came to the spot. The same P.W.5 while testifying in the pre-trial recording of evidence under Section 299 of the Cr.P.C. had stated as follows:

> *"Since 7/8 (eight) years back at about 12 noon, while I was in my house after my work, my daughter reported me that Padma CharanSahu pulled him and at this myself, my diara and my Dedhasura along with my daughter went to the Sahi of Padma CharanSahu and found the accused cutting my husband's neck by 'Tangia' and we also found my husband dead. On seeing us, the accused entered inside his house and concealed him. My diara reported the matter at P.S. and police searched him."*

Mr. Mohapatra, learned counsel has stated that there is no reason to believe any of the prosecution witnesses. Even though, the law permits to rely on them in appropriate cases. But here, exaggeration improvisation and weaving and alteration of new stories in every phase had been introduced. Hence, no reliance can be placed on testimonies of P.Ws.1, 2, 3 and 5. Mr. Mohapatra, learned counsel, therefore, urged this Court that Appellant is entitled to the benefit of doubt. Mr. Mohapatra, learned counsel has relied on a decision of the Apex Court in ***Mohar Singh and others v. State of Punjab reported in AIR 1981 SC 1578***, where the Apex Court had observed inter alia as under:

> *"5. We have, however, been taken through Ext. P-19, the statement of the deceased Kartar Singh and we find that he has given a very detailed and graphic narration of the entire history of the case, starting from the motive, the enmity and minutest features of theassault excluding the individual acts committed by the appellants. He has also mentioned that the appellants assaulted him with Kassi. The ocular evidence however is that the deceased was attacked not by Kassi but by spade. In view of the detailed and extremely coherent nature of the dying declaration, we find it impossible to believe that the deceased even if conscious would have made such a detailed statement. We are, therefore, inclined to think that this statement smacks of concoction of fabrication in order to make the present case foolproof. At any rate, we find it wholly unsafe to rely on the dying declaration, particularly, when P.W. 12 did not take the necessary precaution of getting the dying declaration attested by*

the wife who was stated to be present there or the doctor who was alleged to be present in the hospital. Thus, the dying declaration has to be excluded from consideration. That being the position the only evidence which we are left with consists of the statements of P.Ws. 3 and 4. The evidence of these witnesses also cannot be relied upon. They are in direct conflict with the medical evidence. While both the witnesses categorically state that the appellants assaulted the deceased with spades with which the earth was being dug out either from the sharp or the blunt side, the doctor (P.W. 1) who held theautopsy of the deceased has clearly stated that theinjuries could be caused only by a Kassi. No question was put by the prosecution to the doctor whether any or all of the injuries on the deceased could be caused in the manner alleged by the witnesses i.e. by a spade.

6. In view of this glaring inconsistency between the ocular and medical evidence, it will be extremely unsafe and hazardous to maintain the conviction of the appellants on such evidence. For the reasons, therefore, we are clearly of the opinion that the prosecution case has not been proved beyond reasonable doubt."

8. In order to repel the contention of Mr. Mohapatra, learned counsel appearing for the Appellant, Mr. S.S. Kanungo, learned Additional Government Advocate appearing for the State has submitted that considering the long time that has been taken for commencement of trial from the date of occurrence, some inconsistencies in the statements of the witnesses are bound to occur. According to Mr. Kanungo, learned Additional Government Advocate, those inconsistencies are not fatal, as the core of the evidence is sufficient and substantive enough to prove the charge. He has also stated that the delay in the commencement is attributable to abscondence of the Appellant. He was arrested in the year 2012 and put to trial whereas the occurrence had taken place in the year 1999. As such, no adverse inference in this regard may be drawn against the prosecution. According to Mr. Kanungo, learned Additional Government Advocate, there is no incongruity in respect of the facts, as proved by P.W.3 that she was travelling back to their village with her father, who was physically challenged and in the road, they were intervened by the Appellant and there took place a hot altercation over the issue of the outstanding payment in respect of the liquor business. The said outstanding was recoverable from the Appellant and suddenly, the Appellant started dragging her father towards the sahi where the house of the Appellant situates. Out of fear and in order to protect her father, she rushed to the house, informed her two uncles and when she returned, she claimed that she had seen the Appellant chopping her father with an 'axe'. Mr. Kanungo, learned Additional Government Advocate has submitted that, even if only the part of transaction as seen by P.W.3 before she had left the place of occurrence is believed, the burden shifts to the Appellant to explain what happened thereafter. It is a well established principle in the Criminal Jurisprudence that the duty of the Court is to separate the grain from the chaff. The entire evidence of P.W.3

cannot be questioned, doubted and branded as unreliable. Her evidence cannot be doubted. That apart, Mr. Kanungo, learned Additional Government Advocate has submitted that, P.Ws. 1 and 2 have in unison stated that they were informed by P.W.3 that the Appellant had attacked the deceased and dragged him towards his village. Therefore, this part of the evidence cannot be disbelieved. If this part of the evidence is believed, as the same is untainted and reliable. The finding as under challenge in this appeal may not warrant interference, even after cumulative reading of the evidence recorded in the trial. As submitted, if this part is believed, the burden shifts to prove as to what happened thereafter, lies with the Appellant to exculpate him from the charge, but he has not discharged the said burden in tune with the provision of Section 106 of the Evidence Act. Mr. Kanungo, learned Additional Government Advocate has further submitted that, the Appellant's abscondence in the present case is to be treated as the incriminating evidence against the Appellant, as immediately after the occurrence, he fled away from the village. He was arrested after more than 12 years from the date of occurrence till arrested by the police and commencement of the case. Therefore, his involvement cannot be doubted and therefore, the judgment of conviction may not be interfered with.

9. For purpose of appreciating the rival contentions as advanced by the counsel for the parties, it would be apposite for us to have a meaningful survey of the evidence, as laid by the prosecution in the trial. True it is that, the trial Court has believed P.W.3 entirely. There is no challenge in the appeal as regards the cause of death or the death being homicidal in nature. The dead body of the deceased was found lying in the close proximity of the house of the Appellant. What P.Ws.1 and 2 have testified in the trial has been narrated in detail above, while recording the submission of Mr. Mohapatra, learned counsel for the Appellant. Even the statement of P.W.3 has been referred quite in detail. Be that as it may, we would like to re-visit the testimony of P.W.3, namely, Jalausha Das. P.W.3 has stated in the trial that the deceased had liquor business and there was an outstanding amount against the Appellant. The deceased had asked the Appellant to pay the dues when the Appellant was accompanying them in their journey for a short while. But near the pond of their village (P.W.3's village), the Appellant dragged his father towards his village, thereafter, she has testified as follows:

> *I immediately came house and intimated the matter to my paternal uncle Manoranjan Das and my elder father Linga @ Lingaraj Das. I thereafter rushed to the spot and found the accused cutting the neck of the deceased by means of an axe. Immediately thereafter my uncles and elder father arrived there. Then the accused fled away from the spot. The occurrence took place on the village road in front of the house of accused at Majhi Sahi in village Gandala.*

In the cross-examination, she had testified that she was returning from the village Sadasivpur during the time from 12 noon to 1 P.M. At that time no person was seen near the village tank and the Appellant dragged the deceased towards his house. She had stated that our house is at a small distance from the village tank. But she had expressed her inability to indicate the exact distance between the placeof occurrence and their house. She had further testified in the crossexamination as under:

> *"7. I intimated the occurrence to my elder father and uncle at a time and thereafter rushed to the spot. I found the accused forcibly cutting the neck of my father by means of an axe. The accused was assaulting the deceased when my uncle and elder father arrived there. By the time, I reached the spot, no other villager was present there."*

She denied her knowledge of whether the police had seized any records relating to the liquor business.

10. Let us now see what the other witnesses have stated about in the trial. P.W.5, Rama Dash (wife of the deceased) has testified that at about 2 P.M. one Hina Das intimated her that the Appellant committed murder of the deceased by cutting his neck. Immediately, she returned from a faraway place and came to learn about the said occurrence. She is a post-occurrence witness. P.W.6, Sitaram Satpathy was the officer-incharge Hinjili Police Station at the relevant point of time and he received the complaint from Manoranjan Das (P.W.1) reporting murder of his brother. He registered the case being Hinjili P.S. No.36 of 1999 under Section 302 of the IPC read with Section 3(ii) (v) of S.C. and S.T. (P.A.) Act and he took up the investigation. He identified the complaint and the F.I.R. (Ext.1). He has given a brief narration of how he had conducted the investigation. He had done the inquest and prepared the inquest report (Ext.3). Thereafter, he made arrangement for the postmortem examination of the dead-body. He had seized the wearing apparels of the deceased by preparing the seizure list (Ext.7), in presence of witnesses. He had searched for the accused, but did not find him. As he was transferred from that police station, the investigation from that point was taken over by Mr. Bijaya Kumar Mohapatra, S.I. of police. In the crossexamination, he has stated that, the place of occurrence is situated on a concrete road in the village. Houses of Sadananda Sahu, Simanchal Sahu, Bijaya Das, Simadri Sahu, Ganapati Mahakud and the Appellant are situated nearby the spot. He had examined some of them, namely, Simadri Sahu, Sadananda Sahu, Simanchal Sahu and Chintamani Sahu. He also seized the blood stained earth and sample earth from the spot on 12.06.1999. He asserted that the distance of the house of the Musa Das (deceased) was about 500 yards away from the place of occurrence. He denied that his investigation was

perfunctory. He had also introduced the chemical examination report of the sample collected from the place of occurrence, as Ext.8. P.W.7, Dr. Padma CharanSahu carried out the autopsy of the dead body of the deceased and he found the following external injuries and internal injuries:

i) One chopped wound of 17 cm X 5 cm X trachea deep present on the right side of neck 1 cmbelow the right side neck placed obliquely parallel and lower to the lower boarder of right side mandible starting 1cm below and going forward end 4 cm left to middle line in front of the neck. The margins are clean cut and the angles are acute. The right side of thetrachea, pharynx and the right side neck muscles, right carotid vessels and internal jugular vessels were sharply cut. The right angle of mandible was fractured at multiple places.

ii) Incised wound 6 cm X 1 cm X bone deep present at the lower boarder of the centre of symphysis mentis 1cm above the injury no.i.

iii) Depressed fracture with ante mortem blood at right maxilla with a puncture wound of size 1cm X 0.5cm Xbone deep with surrounding contusion of size 10cm X5cm present on the right side of fact. Margins punctured wound were irregular and not sharp. This wound was present below the right eye between nose and mandible. Right maxillary bone was fractured into multiple pieces with different size. Right upper canine maxillary tooth also fractured and lost.

iv) Two stroke punctured wound of size 6cm X 5cm X bone deep present on anterior aspect of right shoulder joint. The right humerus was fractured into multiple pieces at its head with ante mortem blood. The punctured wound was irregular and not sharp margin.

v) Incised would of 2.5cm X 1cm X muscle deep with a tale of scratch of 4cm long present medially and placed on a right infra clavicular space of 1.5cm below the injury no.iv.

vi) Cut scratch of size 8 cm long present parallel to and 2 cm below to the injury no.v starting from right armpit and going on the right side of the front of chest.

vii) Incised wound 1cm X 0.5cm horizontally presenton dorsum of left hand starting from ulnar boarder of the hand near left wrist joint going up to middle of middle finger which may be a defence wound.

viii) Punctured stab wound 0.5cm X 0.5cm X bone deep with a scratch of 7cm long present on the left arm 7cm below the left shoulder. The scratch extended medially to a punctured wound with margins sharp and circular in shape.

ix) Contusion with a cut scratch of an are of 10cm X 2cm present horizontally on the left flank being placed 10cm above the left iliac crest.

x) Incised wound 5cm X 0.5cm X skin deep present on the left back horizontally 20cm below the left wing of scapula.

xi) Incised wound of 18cm X 0.5cm X skin deep present horizontally on the back of left shoulder.

xii) Post mortem paling of skin on the right leg, left front of chest and back of chest present.

On dissection he found the following internal injuries:

i) Hyoid bone beneath external injury no.i was intact.

ii) Horizontal fracture of sternum at its junction with 2nd to 3rd ribs and fracture of the 2nd and 3rd ribs in mid clavicular line with ante mortem blood clot on them and intercoastal muscles."

We may also reproduce his opinion, which has been recorded as under:

OPINION

i) All the injuries except external injury no.xii were ante mortem in nature.

ii) External injury nos.i, ii, v, vi, vii, ix, x and xi were caused by sharp cutting moderate to heavy cutting weapon.

iii) External injury no.iii, iv, vii, were caused by pointed weapon.

iv) External injury no.i alone and in combination with all other injuries are fatal and sufficient to cause death in ordinary course of nature.

v) The cause of death was hemorrhage and shock as a result of above injuries.

vi) The time since death was about 18 to 24 hours prior to the time of postmortem examination.

P.W. 7 has observed that, the injuries found by him over the dead body of the deceased may be possible by single weapon, having a sharp edge and also a pointing edge, like a "Kati'. We are persuaded to accept the contention as raised by Mr. Mohapatra, learned counsel that P.W.3 may not have seen the entire transaction or even part of it. Even though, she had stated that she saw the Appellant chopping his father by an 'axe'. Therefore, the discrepancies in respect of the weapon becomes irrelevant as the homicidal death is not challenged by the Appellant at all.

11. We are now to proceed to weigh whether P.W.3 can be believed to infer that of a sudden fight the deceased was attacked by the Appellant by sharp edged and pointed weapon. We have no hesitation to believe the first part of the transaction as witnessed by P.W.3., as the evidence in sequence is available. Therefore, we are inclined to accept the submission of Mr. Kanungo, learned Additional Government Advocate that the Appellant was under obligation to

narrate that what happened after the first part of the transaction. Since no explanation has come forth, we are bound to draw an adverse inference against the Appellant. We are constrained to observe that the innovative submission made by Mr. Mohapatra, learned counsel for the Appellant that this Court should take a judicial notice of the statement of P.Ws.1,2 and 3 as recorded in the pre trial stage under Section 299 of the Cr.P.C. cannot be accepted for the simple reason that, no contradiction was brought out by the defence during the trial based on those statements, as were recorded during the time of abscondence.

12. Having observed thus, we are of the view that from the evidence, as laid by the prosecution, the charge of murder under Section 302 could not be proved beyond reasonable doubt in as much as the Appellant had committed assault out of sudden quarrel, as stated by P.W.3, causing death. He is entitled to be acquitted from the charge under Section 302 of the I.P.C. Consequently, the conviction and sentence under Section 302 of the I.P.C. are set aside. But in our considered opinion from the evidential materials, the charge under Section 304 Part II of the I.P.C. causing homicide not amounting to murder without having any intention of murder has been proved beyond reasonable doubt. The series of injuries as recorded in the post-mortem report are rampant. Those are indicators of outrage. No formal charge is required to be framed, as the charge under Section 304 Part II of the IPC is cognate and minor in nature in relation to the charge under Section 302 of the IPC. No further opportunity, the Appellant is entitled to. Hence, we convict the Appellant under Section 304 Part II of the IPC for committing homicide not being murder as there is no evidence of having intention to kill. As consequence of the conviction under Section 304 Part II of the I.P.C., we sentence the Appellant with rigorous imprisonment to the extent that, he has already served out. The default imprisonment is adjusted against a contemplated sentence of fine against the imprisonment, the Appellant has served out. As such, the Appellant be released and set at liberty forthwith, if not warranted in any other case.

13. In the result, the appeal is partly allowed.

14. Send down the LCRs forthwith.

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2022 (III) ILR - CUT- 734

BISWAJIT MOHANTY, J.

CRP NO. 09 OF 2021

KD GOLD AND DIAMONDS PVT. LTD. ....Petitioner

.V.

M/s. KHIMJI AND SONS ....Opp. Party

CODE OF CIVIL PROCEDURE, 1908 – Order 7 Rule 11 – The suit was filed by the plaintiff principally as a suit for injunction and it was valued at Rs.1,00,000/- – Despite being a commercial dispute could not lies before the Commercial Court constituted under the Commercial Act 2015, on account of less valuation – The learned District Court while considering the petition under Order 7 Rule 11 filed by defendant gave its own interpretation and consider the figure mentioned in the plaint i.e the turn over for the year 2019-20 to be the specified value and transfer the suit to commercial Court, when no estimation of market value of trade mark right was provided in the plaint itself – Whether such order is sustainable under law? – Held, No. – It is well settled principle of law in a matter involving rejection of plaint only the averments made in the plaint are material and nothing else can be taken into consideration – Since the suit has been valued at Rs, 1,00,000/- and consideration of the same as specified value is clearly illegal and impermissible. (Para-6)

Case Laws Relied on and Referred to :-

1. 2022 (12) SCALE 153 : M/s. Patil Automation Private Limited & Ors. Vs. Rakheja Engineers Private Ltd.
2. (1996) 4 SCC 104 : Election Commission of India & Anr. Vs. Dr. Subramaniam Swamy & Anr.
3. AIR 2018 Rajasthan 67 : Neelkanth Healthcare Pvt. Ltd., Jodhpur Vs. M/s. Neelkanth Minechem Partnership Firm, Jodhpur.
4. AIR 2021 Calcutta 169 : Sayan Sarker Vs. Austin Distribution Pvt. Ltd.

For Petitioner : Mr. M. Vashisht, Sr. Adv.
M/s. S.K. Mohanty, J. Mohanty, & R.R. Dash

For Opp. Party : Mr. G. Mukherji, Sr. Adv,
M/s. S.D. Ray, M. Wright, M. Agrawal,
K. Banerjee, A. Mishra, S. Acharya & D.K. Dash.

JUDGMENT Date of Hearing:13.10.2022 : Date of Judgment: 20.10.2022

BISWAJIT MOHANTY,J.

The present Civil Revision has been filed by the petitioner praying for quashing of the order dated 01.10.2021 passed by the learned District Judge,

Khurda at Bhubaneswar in C.S. No.02 of 2021 under Annexure-1. It has also prayed for rejection of the plaint or to pass any order/orders as would be deemed fit and proper.

2. According to the petitioner/defendant, the opposite party/plaintiff herein filed the above noted Civil Suit alleging infringement of trade mark by suppressing many material facts and documents before the learned District Judge, Khurda and obtained an interim order temporarily restraining the present petitioner/defendant from infringing trade mark "Khimji" of the opposite party/plaintiff. On 09.06.2021 vide Annexure-6, the learned District Judge, Khurda transferred the case record to the Court of learned Sr. Civil Judge (Commercial Court),Bhubaneswar for disposal of the same according to lawnotwithstanding the objection of the petitioner/defendant thatsince the specified value of the present suit was valued by the opposite party/plaintiff was Rs.1,00,000/-, the same cannot be transferred as the minimum pecuniary jurisdiction of the Commercial Court as per State Government notification was Rs.5,00,000/-. This has been averred at para 7 of the Civil Revision Petition. On 01.07.2021, the opposite party/plaintiff filed a petition under Order-6, Rule 17 under Annexure-23 before the Commercial Court, Bhubaneswar for change of its name and for introducing the specified value of the subject of dispute to be at Rs.499.899 Crores. The petitioner/defendant filed his reply to the said petition under Annexure-9, which is same as Annexure-24 opposing the prayer for amendment. While such was the position, vide order dated 07.07.2021 under Annexure-10, the learned Commercial Court transferred the case back to the learned District Judge, Khurda considering the lack of jurisdiction holding therein that the plaintiff has choosen his option to value the suit at Rs.1,00,000/- and the said value can be taken into account for determining the specified value and in view of the relevant provisions of the Commercial Courts Act, 2015 for short 'the Act' and in view of the notification dated 11.12.2020 of the Government of Odisha specifying the pecuniary value of the commercial disputes to be not less than Rs.5,00,000/-, the Commercial Court had no pecuniary jurisdiction to entertain the suit. It is not disputed that none has challenged the order dated 07.07.2021. After the matter was transferred back to the learned District Judge, Khurda, the petitioner/defendant filed a petition under Order-7, Rule-11 on 15.07.2021 before the learned District Judge which has been enclosed as Annexure-11. Under Annexure-14, the opposite party/plaintiff filed its objection to such petition. While so, vide order dated 19.07.2021 under Annexure-12, the learned District Judge partly allowed the Order-6, Rule-17 petition filed by the opposite party/plaintiff. While it allowed the proposed amendment at Sl. Nos.1 & 2 of the Order-6, Rule 17 petition however, the learned Court rejected the prayer for proposed amendment at Sl. Nos.3 & 4 as

indicated in the Order-6, Rule 17 petition wherein an attempt was made by the opposite party/plaintiff to incorporate the specified value of the subject matter of the dispute i.e. market value of the trade marks right of mark "Khimji" owned by plaintiff valued at Rs.499.899 Crores in the plaint. It is not disputed by both the parties that none has challenged this order dated 19.07.2021 under Annexure-12. Ultimately, vide impugned order dated 01.10.2021 under Annexure-1, the learned District Judge, who did not allow the application of the opposite party/plaintiff for introduction of specified value i.e. the market value of the trade mark valued at Rs.499.899 Crores, relying upon the averments made at para-22 of the plaint regarding turnover of the opposite party/plaintiff which was Rs.1,37,56,229/- for the year 2019-20 determinedsuch turn over as the specified value of the lis and transferred the case again to the Sr. Civil Judge (Commercial Court), Bhubaneswar. Challenging the order under Annexure-1, the present Civil Revision has been filed.

3. Mr. M. Vashisht, learned Sr. Advocate for the petitioner/defendant submitted that once the learned District Judge, Khurda came to a conclusion that the valuation suit warranted that the matter should be decided by the Commercial Court, he should have rejected the plaint as prayed for by the opposite petitioner/defendant and should not have transferred the same to the Commercial Court. Secondly, he submitted that once the matter came within the purview of 'the Act' and since though the suit was filed on 22.02.2021 without any application filed under Order-39, Rule-3 and since the urgent petition under Order-39, Rule-3 read with Section 151 of C.P.C. was filed and moved later on 01.03.2021 after a gap of more than a week, it showed that there was no urgency in the matter and since the opposite party/plaintiff filed the suit without taking recourse to Pre-institution mediation as provided under Section 12-A of 'the Act', on that ground alone, the learned District Judge should have rejected the plaint. In this connection he relied upon the decision of the Supreme Court in the cases of ***M/s. Patil Automation Private Limited & others Vs. Rakheja Engineers Private Limited****, 2022 (12) SCALE 153.* Thirdly, he submitted that on 13.11.2020 the State had notified for the establishment of Commercial Courts at the level of Sr. Civil Judge in the District of Sambalpur, Berhampur, Cuttack and Khurda in supersession of the earlier notification dated 28.10.2017.Therefore, opposite party/plaintiff should have filed the suit before the said Court since the lis was covered under 'the Act' instead of filing of the same before the learned District Judge. In this connection, he further submitted that even though by the date the suit was filed i.e on 22.02.2021 though the above noted Commercial Courts have not been made functional however, in the background of doctrine of necessity as espoused by the Supreme Court in the case of ***Election Commission of India and another Vs. Dr. Subramaniam Swamy and another****, (1996) 4 SCC*

104, the opposite party/plaintiff should have filed the suit before the Civil Judge, Sr. Division at Khurda. That not having been done, he submitted that the plaint should have been rejected on this account.

4. Mr. G. Mukherji, learned Sr. advocate appearing for the opposite party/plaintiff submitted that a perusal of the plaint would show that it is primarily a suit for injunction and valuation of such suit does not depend upon the valuation of the property involved. He also submitted that the turnover asindicated in the plaint cannot be taken to be the market value of its trade mark rights. He further submitted that in the plaint there exists no estimation by the opposite party/plaintiff withregard to market value of its trade mark rights. He alsosubmitted that the learned court below has gone wrong in determining the specified value on the basis of the turnoverfigures. He reiterated that the suit filed by the opposite party/plaintiff is principally for injunction when an intangible right of his in the form of trade mark was misused and accordingly, it has valued the suit at Rs.1,00,000/-. In such background, he submitted that no wrong has been committed by the learned District Judge in not rejecting its plaint however, by transferring the suit to the learned Commercial Court on the basis of a wrong reading of fact and law and by assessing the specified value at Rs.1,37,56,020/- which was not at all there in the plaint, the learned court below has committed a mistake. In such background, he submitted that the learned court below has gone wrong in transferring the suit to the Commercial Courtas the same has been valued at less than Rs.5,00,000/-.He also submitted that the opposite party/plaintiff has filed C.M.P. No.615 of 2021, in which the present petitioner/defendant has already entered appearance, challenging the same impugned order and praying that the present impugned order be set aside and the suit be transferred back to the learned District Judge, Khurda to proceed further in accordance with law. He also submitted that since its suit has been valued at Rs.1,00,000/-only, the same should be tried only by the learned District Judge as suit with such valuation will not come under the provisions of 'the Act'. In this context, he relied upon the decisions rendered by Rahasthan High Court in the case of ***Neelkanth Healthcare Pvt. Ltd., Jodhpur Vs. M/s. Neelkanth Minechem Partnership Firm, Jodhpur, AIR 2018 Rajasthan 67***. With regard to contention of Mr. Vashisht that the suit was filed on 02.02.2021 without any application filed under Order 39, Rule-3, he submitted the same is not correct as such application was filed on the same date and the reference to the same is there in order dated 22.02.2021 under Annexure-3, wherein it has been clearly mentioned that another petition was filed praying for ex-parte hearing. On the same date, P.O. was on leave and though the same was adjourned to 03.03.2021, however a motion was made on 25.02.2021 for taking up the hearing. On that date, the learned District Judge directed for removal of defects and for putting up

the matter on 01.03.2021 and accordingly temporary restraint order was passed on 01.03.2021. With regard to submission of Mr. Vashisht that once vide notification dated 13.11.2000, the State Government had notified Civil Judge (Senior Division), Bhubaneswar as a Commercial Court, therefore the opposite party/plaintiff should have filed the suit before the said Court, Mr. Mukherji submitted that the said notification made it clear that the establishment of such Commercial Court would be with effect from the date from which such Court would become functional. According to him, such Courts were made functional w.e.f. 07.06.2021 and since the suit in the present case with valuation of Rs.1,00,000/- was filed on 22.02.2021, it was rightly filed before the learned District Judge. In this context, he relied on the decision of the Calcutta High Court rendered in the case of ***Sayan Sarker Vs. Austin Distribution Private Limited, AIR 2021 Calcutta 169***.

5. Heard Mr. M. Vashisht, learned Sr. Advocate for the petitioner and Mr. G. Mukherji, learned Sr. Advocate for opposite party.

6. It is well settled that in a matter involving a prayer for rejection of plaint averments made in the plaint are only material and are to be scanned. A perusal of the plaint under Annexure-2 series shows that the opposite party/plaintiff has filed the suit for infringement of trade mark under Section 134 of the Trade Marks Act, 1999. At para-22, the opposite party/plaintiff has indicated its turnover for the year 2005-2007 at Rs.26,94,386/- and for the year 2019-2020 at Rs.1,37,56,020/- and it has also indicated at para-25 that the prayer for injunction is valued at Rs.1,00,000/- for the purpose of court fee and jurisdiction. The plaint nowhere indicates market value of trade mark rights of the plaintiff as estimated by it. It is not disputed that for the purpose of present case, the only relevant provision is Clause (d) of Sub-Section (1) of Section 12 of 'the Act' as the right involved in this case is an intangible right. As per the said clause, the market value of the intangible right as estimated by the plaintiff (emphasis supplied) shall be taken into account for determining specified value. As indicated earlier, in the plaint no such estimation of market value of the trade mark rights of plaintiff has been indicated by the plaintiff. It is further well settled that in a suit for injunction, court fee is payable on the amount at which relief is valued and for the purpose of suit valuation, valuation of property is not material. A reading of the prayer at para-26 also shows that the suit is primarily a suit for injunction. Though a prayer has been madefor delivery accounts of profits, however, the opposite party/plaintiff has not quantified the same amount as at the stage of filing of suit the plaintiff may not be a position to know the quantum of such profits. It is equally well settled that when such a prayer for accounts is made, the plaintiff can put a tentative valuation. Correct amount can only be

ascertained when accounts are examined and ordinarily the Court is not supposed to examine the correctness of valuation at the inception of the suit as the real value can only come to the picture after a suit is decreed.

Further a reading of Section 2 (1)(i) of 'the Act' makes it clear that specified value relating to a commercial dispute means the value of the subject matter in respect of a suit asdetermined in accordance with Section 12 of 'the Act'. A perusal of Section 12 of 'the Act' as indicated earlier shows that the relevant provision of law vis-à-vis that Section for our purpose is Clause-(d) of Sub-Section-1 of Section 12 which makes it clear that where the relief sought in a suit relates to intangible right, the market value of the said right **as estimated by the plaintiff** shall be taken into account for determining the specified value. Here it is not disputed that there exists no such estimation of the market value of the trade mark rights whose infringement is sought to be protected by the opposite party/plaintiff in the plaint. It may further be noted here that though the opposite party/plaintiff wanted to amend its plaint for incorporating its estimation of the specified value of the subject matter i.e the market value of its trade mark rights at Rs.499.899 Crores, however, the same was not allowed by the learned District Judge himself vide order dated 19.07.2021 under Annexure-12. Further while returning the plaint to the learned District Judge, the Commercial Court, Bhubaneswar vide its order dated 07.07.2021 vide Annexure-10 has clearly observed that since the present plaintiff has choosen its option to value the suit at Rs. 1,00,000/-, the said value can be taken into account to determine the specified value. This order has not been challenged by anybody. In such background, the question arises as to whether by determining the specified value at Rs.1,37,56,020/- by relying upon the turnover given by the plaintiff, the learned District Judge acted with material irregularity? The answer to this question should be a resounding yes. As indicated above specified value in respect of an intangible right in trade mark depends upon the market value of the said right "as estimated" by the plaintiff. Here, admittedly, the opposite party/plaintiff has not indicated its estimation of such value in the plaint and when he wanted to incorporate the same by amendment, that was negatived by the learned District Judge vide order dated 19.07.2021 under Annexure-12. In such background, he ought not to have entered into the exercise of determining the specified value in absence of clear cut estimation of the same given by the plaintiff in the plaint particularly, when he himself has earlier rejected the introduction of the specified value by way of an amendment. This exercise of the learned District Judge also creates difficulty in the background of existence of order dated 07.07.2021 under Annexure-10 passed by the learned Sr. Civil Judge (Commercial Court), Bhubaneswar making an observation that the value of the suit of the plaintiff at Rs.1,00,00/- can be taken into account for determination of

specified value, which has not been challenged by anybody. In this context, a reference can also be made to the grounds of challenge as indicated in Civil Revision petition itself at grounds No. A, B, C, D & E, which are quoted here under.

> "A. For that, the present suit does not fulfils the test and ingredients of 'specified value' as per the Commercial Court Act, 2015 and further the present suit was never filed as a Commercial case as per the provisions of the Act, hence liable to be dismissed on this ground alone.
>
> B. That the suomotu valuation of the present suit by enhancing the valuation to Rs.1.37 Crores and transferring it to Commercial Court is against the provisions Court fee valuation as the opposite party has never valued its suit at such amount.
>
> C. For that the prayer for amendment of the opposite party with respect to specified value being rejected by the Court in the order dated 19.07.2021, there was no occasion for the Court to subsequently give its own interpretation and consider a figure mentioned in the plaint to be the specified value as has been done in the order dated 01.10.2021. Hence the impugned order is liable to be set aside on this ground alone.
>
> D. For that the Court of the District Judge was not acting as a court of appeal so as to send the matter back to the Commercial court when the suit court has already given an observation that the specified value was Rs.1 lakh and had sent the matter back to the court of District Judge on 07.07.2021.
>
> E. For that, the District Judge decided the amendment application under Order-6, Rule-17 vide order dated 19.07.2021 wherein the prayer of the plaintiff seeking amendment of the specified value was rejected. That order having attained finality could not have been recalled or reviewed by any subsequent order by the same court."

A combined reading of all these valid grounds would show that there was no occasion for the learned District Judge to subsequently give its own interpretation and to consider the figure mentioned in the plaint towards turnover to be specified value as has been done in order dated 01.10.2021 when no estimation of market value of trade mark rights was provided by the plaintiff in plaint itself. Therefore, in the background of the well settled principles of law that in a matter involving rejection of plaint only the averments made in the plaint are material and nothing else can be taken into consideration, this Court is of the opinion that the suit filed by the plaintiff being principally a suit for injunction and since it has been valued at Rs.1,00,000/-despite being a commercial dispute cannot go before the Commercial Courts constituted under 'the Act' as the same was not covered under 'the Act' on account of less valuation. 'The Act' does not say that all kinds of commercial disputes should be

tried before the Commercial Courts created by 'the Act'. Only those commercial disputes so far as Odisha is concerned whose specified value is more than Rs.5,00,000/- should be brought before the Commercial Courts or transferred to the Commercial Courts not all commercial disputes. In ***Neelkanth Healthcare Pvt. Ltd., Jodhpur*** (supra) Rajasthan High Court has made it clear that Civil Court's jurisdiction is not barred in Commercial dispute when the specified value does not exceed the prescribed limit. This Court humbly agrees with such opinion of Rajasthan High Court. However, one thing is made clear that if the learned District Judge was not satisfied with the valuation of the suit, he should have required the plaintiff to correct the valuation and to pay appropriate court fees on such valuation/revaluation after giving the plaintiff an opportunity on the issue of valuation. This has also not been done in the present case. In such background, this Court is of the opinion that the learned court below has committed material irregularity in determining the specified value and in passing the consequential order of transfer. Therefore, the submission of the learned counsel for the petitioner that once the Court came to a conclusion that the matter should be tried under 'the Act' on the basis of the recalculation of specified value, it should have rejected the plaint, cannot be accepted as this Court has come to a conclusion that the present matter is not at all covered by 'the Act'. Since the present case is not covered by 'the Act', no question of violation of Section 12-A of the said Act arises and, accordingly, the decision cited by the learned counsel for the petitioner/defendant in the case of ***M/s Patil Automation Private Limited & others*** (supra) is of no help to the petitioner. Similarly, invocation of doctrine of necessity by the learned counsel for the petitioner in the background of State Government notification establishing the Commercial Courts in the district of Khurda on 13.11.2020 and the decision of the Supreme Court in the case of ***Dr. Subramaniam Swamy*** (supra) cannot be accepted in the background of the facts as discussed above particularly when provisions of 'the Act' are not at all attracted to a lis of this nature. It is reiterated that in a case of present nature, determination of specified value by the learned District Judge afresh in the absence of any averment to that effect in the plaint and in the background of his earlier order dated 19.07.2021 under Annexure-12 rejecting the prayer of the opposite party/plaintiff to incorporate the specified value by way of amendment and observation of the Commercial Court in its order under Annexure-10 that since the suit has been valued at Rs.1,00,000/- and the same can be taken as the specified value, is clearly illegal and impermissible when both these two orders remain unchallenged. Accordingly, the impugned order under Annexure-1 is set aside. The learned District Judge is directed to proceed with C.S. No.02 of 2021 in accordance with law.

7. The Civil Revision is accordingly disposed of. No cost.

2022 (III) ILR - CUT- 742

Dr. B.R. SARANGI, J & MISS. SAVITRI RATHO, J.

W.P.(C) NO. 20995 OF 2021

SHASWATA PRATIKA PRADHAN ………Petitioner

.V.

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

(A) CONSTITUTION OF INDIA, 1950 – Article 226 – Writ Jurisdiction – Maintainability – When alternative remedy is not a bar? – Held, when an order of a statutory authority is questioned on the ground that the same suffer from lack of jurisdiction, alternative remedy may not be a bar. (Para -17,18)

(B) LEGAL MAXIM – "Expressio Unius est exclusion alterius" – Means – If a statue provides for a thing to be done in a particular manner, then it has to be done in that manner and any other manner are barred. (Para-11 to14)

Case Laws Relied on and Referred to :-

1. AIR 1987 SC 2186 : Dr. Smt. Kuntesh Gupta Vs. Management of Hindu KanyaMahavidyalaya,Sitapur (U.P.).
2. AIR 1999 SC 22 : Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai.
3. (2009) 14 SCC 338 : Godrej Sara Lee Limited Vs. Assistant Commissioner (AA).
4. (2021) 6 SCC 15 : Uttar Pradesh Power Transmission Corporation Limited Vs. CG Power and Industrial Solutions Limited.
5. AIR 1936 PC 253 : Nazir Ahmed Vs. King Emperor.
6. AIR 1964 SC 358 : State of Uttar Pradesh Vs. Singhara Singh.
7. AIR 2001 SC 1512 : Dhananjay Reddy Vs. State of Karnataka.
8. AIR 1999 SC 3558 : Chandra Kishore Jha Vs. Mahabir Prasad.
9. AIR 2008 SC 1921 : GujratUrja Vikas Nigam Ltd. Vs. Essar Power Ltd.
10. (2009) 6 SCC 735 : Ram Deen Maurya Vs. State of U.P.
11. 2016 (I) OLR 922 : Subash Chandra Nayak Vs. Union of India.
12. 2021 (I) OLR 844 : Rudra Prasad Sarangi Vs. State of Orissa & Ors.
13. 132 (2021) CLT 927: Bamadev Sahoo Vs. State of Orissa.

For Petitioner : M/s. M.K. Mohanty & M.R. Pradhan
For Opp. Parties : Mr. T. Pattnaik, Addl. Standing Counsel.

JUDGMENT Date of Hearing & Judgment: 02.05.2022

Dr. B.R. SARANGI, J.

The petitioner, by means of this writ petition, seeks to quash the letter no.719 dated 09.03.2021 under Annexure-9 issued by the Tahasildar, Bonai-opposite party no.3 cancelling the bid process of Baliatota Sand Bed under

Tahasildar, Bonai in the district of Sundargarh, and to issue direction to opposite party no.3 to forward the documents under Annexure-10, along with the relevant documents and certificates mentioned at serial nos.6, 7 and 8 of the list for environmental clearance, for execution of the lease deed in his favour.

2. The factual matrix of the case, in brief, is that in order to lease out for a period of five years from 2019-20 to 2023-24, Baliatota Sand Bed, in river Brahmani, was put to auction. The petitioner submitted his application in Form-M in triplicate for the said sand quarry in sealed cover offering his bid. He paid the application fee of Rs.1,000/-, earnest money and other dues for making the application. The application of the petitioner was found complete in all respect and was taken into consideration by the competent authority. As the petitioner was found to be the highest bidder, the Tahasildar, Bonai, vide letter no.106 dated 16.01.2020, intimated the petitioner in Form-F that he was selected as successful bidder for grant of sand quarry on lease for five years and accepted Rs.15/- towards royalty per cubic meter of sand. It was further intimated that the mining plan and environment clearance for the said lease had not been obtained.The petitioner was also directed to convey the acceptance of the terms and conditions and to deposit the security amount. In response thereto, the petitioner conveyed the acceptance of terms and conditions of the quarry lease and deposited Rs.2,00,000/- towards security deposit through Banker's cheque and on further calculation the petitioner also deposited another Rs.45,000/- on 06.02.2020.

2.1 As per Rule-28 of the Odisha Minor Mineral Concession Rules, 2016, the mining plan was to be prepared and approved by the competent authority. As the competent authority failed to do so, vide letter no.244 dated 03.02.2020, Tahasildar, Bonai intimated the petitioner for obtaining the mining plan and environment clearance from the authorized officers at his own expenditure at an early date. After receipt of the letter dated 03.02.2020 under Annexure-3 from the Tahasildar, Bonai, with regard to getting approval of mining plan and environment clearance, the petitioner immediately prepared the mining plan from the authorized agency and submitted the same before the Dy. Director of Mines, Koira. In response to the same, the Dy. Director of Mines, Koira visited the sand bed on 21.03.2020 for final survey. But due to COVID-19, all activities in respect of mining and sand quarries were stopped due to lock-down and shut-down. Thereafter, the petitioner intimated the Tahasildar, Bonai, on 07.07.2020, that due to lock-down and shut-down he was unable to obtain the mining plan and environment clearance and to give some more time to submit the same. After lifting of lock-down and shut-down, the petitioner got the mining plan approved on 01.10.2020 from the Dy. Director of Mines, Koira. As per the estimation of

mining plan, the petitioner was to lift 21,179 cubic meter of sand from the said sand quarry. The approved mining plan was submitted by the petitioner before the Tahasildar on 29.10.2020 and the Tahasildar on the very same day, vide order dated 29.10.2020, directed the petitioner for obtaining the environmental clearance from the authorized officer at his own expenditure as an early date.

2.2 As per Rule-29, environment clearance is to be obtained for operation of sand quarry. Rule-29(2) provides that the competent authority may apply forand obtain the environment clearance. But the Tahasildar, vide Annexure-6 dated 29.10.2020, directed the petitioner to obtain environment clearance from the authorized officer at his own expenditure. Rule-29(3) provides that in case environment clearance under subrule (2) is not obtained by the competent authority, the selected bidder shall obtain the same before executing the lease deed. The petitioner had already obtained the mining plan approved on 29.10.2020, and he deposited the documents to obtain environment clearance before the Tahasildar for counter signature immediately after receiving the letter under Annexure-6, on 01.11.2020. But the relevant documents for obtaining the environment clearance were not countersigned by the Tahasildar, Bonai nor did he grant certificate to the effect that there were no other mines located within 500 mtrs. from the periphery of the proposed mines lease area as per the DSR report in the area. The Tahasildar was to issue a certificate indicating the distance of boundary of mining lease from river bridge, railwaybridge, river embankment and electric high transmission line and was also to issue the location map/trace map of all leases (existing/operating) around 1 km. area of the project site. The Tahasildar, being the competent authority, was to issue a forwarding letter for environmental clearance. But he did not counter sign the documents for issuance of certificate, though the petitioner made several requests.

2.3 The countersign having not been done, finding no other way out, the petitioner had approached this Court by filing W.P.(C) No.10449 of 2021 with a prayer to issue direction to the Tahasildar, Bonai to countersign the documents required for environmental clearance for execution of the lease deed. On 18.03.2021, on instruction received from the Tahasildar, Bonai, learned Addl. Government Advocate submitted that the Tahasildar has not received the documents for countersignature for environmental clearance from the petitioner and on the basis of such instructions, this Court, vide order dated 18.03.2021, disposed of the said writ petition directing the petitioner to appear in person before the Tahasildar, Bonai at 11 AM on 22.03.2021 and give another set of documents properly dated and signed for the purpose of countersignature for environmental clearance. This Court further directed that after examining the

documents, the Tahasildar will inform the petitioner and if he is not prepared to countersign, the reasons therefor not later than 30.03.2021. If the petitioner is aggrieved by such decision, it will be open to him to seek appropriate remedies in accordance with law. In compliance of the said direction, the petitioner physically presented himself before the Tahasildar,Bonai at 11 AM on 22.03.2021 and submitted another set of documents for environmental clearance and relevant certificates required for the said clearance. But the Tahasildar, before countersigning the said documents, served a copy of letter no.719 dated 09.03.2021 to the petitioner on the very same day in which the Tahasildar had cancelled the bid and forfeited the security amount of Rs.2,45,000/-, which is subject matter of challenge in this writ petition. As such, the Tahasildar, after serving the letter dated 09.03.2021, countersigned the documents and handed over the said documents for environmental clearance without the certificates mentioned at serial nos.6, 7 and 8, which are mandatory documents to be submitted for environmental clearance and also the forwarding letter for the said clearance. Hence this application.

3. Mr. M.K. Mohanty, learned counsel for the petitioner contended that the action of the Tahasildar cancelling the bid and forfeiting the security amount, vide letter dated 09.03.2021, is in gross violation of the order passed by this Court. It is contended that if the Tahsildar had passed order on 09.03.2021 with regard to cancellation of lease, such fact should have been brought to the notice of the Court when the order was passed on 18.03.2021 in W.P.(C) No.10449 of 2021, on the basis of instructions received by the State Counsel from the Tahsildar. Thereby, the order impugned so passed by the Tahasildar under Annexure-9 antedating to 09.03.2021, cannot sustain in the eye of law. It is further contended that though the Tahasildar denied to have received the documents for environment clearance from the petitioner for countersignature, but the petitioner had submitted the same on 01.11.2020. Therefore, without entering into the controversy, this Court, vide order dated 18.03.2021, while disposing of W.P.(C) No.10449 of 2021, directed the petitioner to appear in person before the Tahasildar at 11 A.M. on 22.03.2021 and give another set of documents for environmental clearance properly dated and signed for the purpose of countersignature. Pursuant to such direction, though the petitioner complied the same on 22.03.2021 by producing relevant documents for countersignature, but the Tahasildar served on him the order dated 09.03.2021 under Annexure-9, by which the lease was cancelled and the security amount wasforfeited, which is in utter disregard to the order dated 18.03.2021 passed by this Court in W.P.(C) No. 10449 of 2021. It is further contended that the bid of the petitioner was not cancelled till 18.03.2021 and also the security amount was not forfeited. But when the order was passed by this Court and after receipt of

the order passed by this Court for countersignature, the Tahasildar became vindictive and passed the order impugned antedating to 09.03.2021 and served the same on the petitioner on 22.03.2021. As such, if the Tahasildar was not prepared to countersign, the reasons thereof should have been informed to the petitioner not later than 30.03.2021. Thereby, the Tahasildar has acted arbitrarily, unreasonably and contrary to the rules by passing the order impugned. Accordingly, he seeks for interference of this Court in exercise of extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India.

To substantiate his contention, he has placed reliance on the judgments of the apex Court in the cases of ***Dr. Smt. Kuntesh Gupta v. Management of Hindu KanyaMahavidyalaya, Sitapur (U.P.)***, AIR 1987 SC 2186; ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai***, AIR 1999 SC 22; ***Godrej Sara Lee Limited v. Assistant Commissioner (AA)***, (2009) 14 SCC 338; and ***Uttar Pradesh Power Transmission Corporation Limited v. CG Power and Industrial Solutions Limited***, (2021) 6 SCC 15.

4. Mr. T. Pattnaik, learned Addl. Standing Counsel for the State-opposite parties contended that as per Rule-28 of OMMC Rules, 2016, only the competent authority is responsible for preparation and approval of the mining plan. As per sub-rule (3) of Rule28, in the event approval under sub-rule (2) is notobtained by the competent authority, the selected bidder shall get a mining plan prepared from a recognized person and approved by the authorized officer. It is contended that since approval under subrule (3) was not obtained, it is the petitioner who is responsible for preparation of the mining plan. It is further contended that due to COVID-19, the government work was not hampered and, as such, the petitioner was given sufficient time to submit the mining plan considering his time petition received on 07.07.2020. But the petitioner failed to submit the mining plan as well as the environmental clearance within the time period, whereas during the same period other bidders submitted their mining plan and got approved from the recognized authorities and also got the environmental clearance in the year 2020. Thereby, the petitioner was guilty of delay and laches in getting the mining plan and the environmental clearance approved within time. It is also contended that thepetitioner had not submitted any document before the Tashasildar for countersignature for obtaining environmental clearance till 09.03.2021, thereby, providing the ancillary certificate, such as, the documents mentioned in sl.nos.6, 7 and 8 does not arise. It is further contended that the order for cancellation of lease though was passed on 09.03.2021, but the same was not brought to the notice of the Court, while the order dated 18.03.2021 was passed. It is further contended that as the Tahasildar is the competent authority under Rule-27(13) of

the OMMC Rules, 2016 for issuance of impugned order dated 09.03.2021, no illegality or irregularity has been committed by issuing the same and accordingly he seeks dismissal of the writ petition. It is furthercontended that since there is availability of alternative remedy under Rule-46 of OMMC Rules, 2016, against cancellation of lease, by preferring appeal before the higher forum, the writ petition otherwise also is not maintainable before this Court.

5. This Court heard Mr. M.K. Mohanty learned counsel for the petitioner and Mr. T. Pattnaik, learned Addl. Standing Counsel for the State-opposite parties by hybrid mode. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties this writ petition is being disposed of finally at the stage of admission.

6. On the basis of factual matrix, as delineated above, and the rival submissions, as recorded above, it is emerged that till 18.03.2021, though the petitioner had submitted the documents for countersignature for grant of environmental clearance, no action was taken at the level of the Tahasildar. That is why, the petitioner approached this Court by filing W.P.(C) No.10449 of2021 seeking direction to the Tahasildar to countersign the documents required for environment clearance. The said writ petition was disposed of on 18.03.2021 with the following orders:-

"1. Heard Mr. M.K.Mohanty, learned counsel for the Petitioner and Mr. Nanda, learned Additional Government Advocate for the State-Opposite Parties.

2. The grievance of the Petitioner is that the counter- signature of the Tahasildar, Bonai on the documents submitted by the Petitioner for environment clearance is not being appended despite the Petitioner having submitted the documents way back in November, 2020.

3. On instruction, Mr. Nanda states that according to the Tahasildar, he has not received those documents yet.

4. To avoid any further controversy on this score, the Court directs that the Petitioner will appear in person before the Tahasildar at 11 a.m. on 22nd March,2021 and give another set of documents properly dated and signed for the purpose of counter signature for environment clearance.

5. After examining the documents, the Tahasildar will inform the Petitioner, if he is notprepared to counter sign, the reasons thereof not later than 30th March, 2021. If the petitioner is aggrieved by such decision, it will be open to him to seek appropriate remedies in accordance with law.

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

7. An urgent certified copy of this order be issued as per rules and also be communicated directly to the Tahasildar, Bonai for compliance."

7. In Compliance of the aforesaid order, when the petitioner appeared before the Tahasildar, Bonai on 22.03.2021 at 11.00 AM and handed over the documents for countersignature, instead of complying the order of this Court passed on 18.03.2021, the petitioner was served with order dated 09.03.2021 with regard to cancellation of the lease and forfeiture of the security amount vide Annexure-9. When instructions were received from the Tahasildar and the matter was placed before this Court on 18.03.2021, the State Counsel could have apprised the Court with regard to the order passed on 09.03.2021. Therefore, this Court, instead of entering into the controversy, disposed of the said writ petition, vide order dated 18.03.2021, directing the petitioner to submit the documents before the Tahasildar on 22.03.2021 at 11.00 AM for countersignature. As such, when the petitioner produced the documents for countersignature on 22.03.2021, though such documents were received andcountersigned, but subsequently the order dated 09.03.2021 was served on the petitioner, which clearly indicates that the Tahasildar has acted malafidely in order to cause harassment to the petitioner, as he had approached this Court against the inaction of the Tahasildar in countersigning the documents producedbefore him for grant of environmental clearance. Though power has been vested on the Tahasildar under Rule-27(13) of the OMMC Rules, 2016 to do so, but fact remains, the order dated 09.03.2021 has been antedated only to frustrate the claim of the petitioner in pursuance of the order passed by this Court on 18.03.2021. Therefore, the conduct of the Tahsildar is tell tale, that he has tried his level best not to carry out the order dated 18.03.2021 passed by this Court. If he was so fair, he could have brought to the notice of this Court when the writ petition was disposed of on 18.03.2021, that he has already passed order of cancellation and forfeited the security amount videorder dated 09.03.2021. This fact having not been brought to the notice of this Court, it is presumed that the Tahasildar has acted with mala fide intention not to allow the petitioner to operate the quarry by hook or by crook. Such action of the Tahasildar-opposite partyno.3, is also in gross violation of the order dated18.03.2021.

8. For just and proper adjudication of the case, relevant provisions of Odisha Minor Minerals Concession Rules, 2016 are extracted hereunder:-

"27. GRANT OF QUARRY LEASES

xxx xxx xxx

(13) The selected bidder shall be required to execute quarry lease in Form-N within three weeks from the date of intimation of his selection, if the approval of the mining

plan and environment clearance has been obtained before auction, and in other cases, three months from the date of intimation, failing which, the intimation shall stand cancelled and the security deposit shall stand forfeited:

xxx xxx xxx

28. Mining plan as a pre-requisite to the grant ofquarry lease:— *No quarry lease shall be granted by the Competent Authority unless there is a mining plan prepared by the recognized person and duly approved by the authorized officer for the development of the mineral deposits in the area concerned.*

Provided that the recognized person shall not charge any amount in excess of the ceiling on fees specified by the Director.

(2) The Competent Authority may cause the mining plan to be prepared and approved.

(3) In case the approval under sub-rule (2) has not been obtained by the Competent Authority, the selected bidder shall cause a mining plan to be prepared from a recognized person and approved by the authorized officer having jurisdiction.

xxx xxx xxx

43. Execution and registration of license or lease:—

xxx xxx xxx

(3) If no deed for prospecting license-cum-mining lease or mining lease or quarry lease is executed within the time specified, due to any default on the part of the selected bidder, the Controlling Authority may revoke the grant order and forfeit the security deposit, if any.

xxx xxx xxx

46. Procedure for filing appeal:— *(1) Any person aggrieved by an order of the Competent Authority, may, within one month from the date of communication of the order, prefer an appeal in Form-X against such order, to the Sub- Collector, if the order is passed by the Tahasildar, to the Collector, if the order is passed by the SubCollector, to the Revenue Divisional Commissioner, if the order is passed by the Collector, to the Conservator of Forests, if the order is passed by the Divisional Forest Officer, to the Joint Director, if the order is passed by the Mining Officer or DeputyDirector, to the Director, if the order is passed by the Joint Director and*

to the State Government in the Department of Steel and Mines, if the order is passed by the Director: Provided that in case of matters related to specified minor minerals, the State Government may review its order on receipt of review petition from any aggrieved person or suomoto within ninety days of communication of such order and correct or modify their order.

(2) No appeal shall be admitted unless the amount, if any, assessed in accordance with the provisions of these rules as per the orders, has been deposited.

(3) The Appellate Authority mentioned under subrule(1) may call for relevant records and other information from the concerned authority and may, if considered necessary, stay the operation of the order of the authority in any particular case till the appeal is finally disposed or until further orders are passed, as the case may be.

(4) Every application for appeal shall be accompanied by a non-refundable fee of rupees one thousand.

(5) In the event of any dispute relating to the area, conditions, the dues payable or any other matters under the prospecting license-cum-mining lease or mining lease or quarry lease executed for the purpose, the suits or appeals shall be filed only in the civil courts in whose jurisdiction such area falls."

9. As it appears, when the petitioner carried out the statutory obligation in terms of Rule-28(3), opposite party no.3 somehow or other did not want to comply with the same, thereby caused harassment to the petitioner. Therefore, the petitioner approached this Court by filing W.P.(C) No.10449 of 2021. As such, for the purpose of grant of environmental clearance, the documents which are mandatory, were placed in the check list at sl.nos.6, 7 and 8, which read as under:-

"6. Certificate from Tahasildar that there is no other mines located within 500m from the periphery of the proposed mine lease area as per DSR report in the area.

7. Certificate from Tahasildar indicating distance of boundary of mining lease from River Bridge, Railway Bridge, river embankment and Electric High Transmission Line (in case of sand mining).

8. Location map / Trace map from Tahasildar of all leases (existing & operating) around 1km area of the project site."

10. Even though the petitioner appeared before opposite party no.3 on 22.03.2021 for countersignature of the documents for grant of environmental clearance, he was served with order dated 09.03.2021, whereby the lease was cancelled and the security amount was forfeited. This action of the opposite party

no.3 is not appreciated and, as such, the Tahasildar had to act in compliance of the direction given by this Court. Instead of doing so, the Tahasildar had tried to overreach the order passed by this Court and taken a stand that the order of cancellation dated 09.03.2021 is appealable one, which cannot sustain in the eye of law, in view of the fact that under Rule-43(3) it is the controlling authority, who can cancel the same in the event no deed for prospecting license-cum-mining lease or mining lease or quarry lease is executed within the time specified due to any default on the part of the selected bidder. The controlling authority has been defined under Rule-2(g), as mentioned in schedule-III, which has been substituted vide O.G.E. No.1211 dated 19.07.2017. On perusal of the schedule-III, it appears that it is the Collector of the district, who is the controlling authority. Thereby, if power has been vested with the Collector of the district, the Tahasildar, being a competent authority, cannot cancel the lease or forfeit the security amount. Thereby, the order of cancellation passed by the Tahasildar on 09.03.2021 is without jurisdiction.

11. It is apt to refer here the legal maxim "***Expressio Uniusest exclusion alterius***" i.e. if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and any other manner are barred.

12. In ***Nazir Ahmed v. King Emperor***, AIR 1936 PC 253, law is well settled "where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden." The said principles have been followed subsequently in ***State of Uttar Pradesh v. Singhara Singh***, AIR 1964 SC 358, ***Dhananjay Reddy v. State of Karnataka***, AIR 2001 SC 1512, ***Chandra Kishore Jha v. Mahabir Prasad***, AIR 1999 SC 3558, ***GujratUrjaVikas Nigam Ltd. v. Essar Power Ltd.***, AIR 2008 SC 1921, ***Ram DeenMaurya v. State of U.P***., (2009) 6 SCC 735.

13. In ***Subash Chandra Nayak v. Union of India***, 2016 (I) OLR 922, similar question had come up for consideration before this Court and this Court in paragraph-8 observed as follows:

> "............the statute prescribed a thing to be done in a particular manner, the same has to adhered to in the same manner or not at all. The origin of the Rule is traceable to the decision in ***Taylor v. Tailor***, (1875) LR I Ch D 426, which was subsequently followed by Lord Roche in ***Nazir Ahmad v. King Emperor***, AIR 1936 PC 253(2). But the said principle has been well recognized and holds the field till today ***in BabuVerghese v. Bar Council of Kerala (1999) 3 SCC 422***, and ***Zuari Cement Limited v. Regional Director, Employees' State insurance Corporation, Hyderabad and others, (2015) 7 SCC 690*** and the said principles has been referred to by this Court in ***ManguliBehera v. State of Odisha and others*** (W.P.(C) No. 21999 of 2014 disposed of on 10.03.2016)".

Similar view has also been taken in ***Rudra Prasad Sarangi v. State of Orissa and others***, 2021 (I) OLR 844 and ***Bamadev Sahoo v. State of Orissa***, 132 (2021) CLT 927.

14. It is well settled law laid down by the apex Court time and again that if power has been vested with a particular authority he has to exercise the same or not at all. Thereby, if the power has been vested with the controlling authority, namely, the Collector of the district, the same cannot be abrogated or misutilized by the Tahasildar, who may be the competent authority under the Rules.

15. In ***Dr. Smt. Kuntesh Gupta*** (supra), the apex Court holding that the Vice-Chancellor in considering the question of approval of an order ofdismissal of the Principal, acts as a quasi judicial authority and, as such, as per the provisions contained in Universities Act, 1973 or of the Statutes of theUniversity do not confer any power of review on theVice-Chancellor. Thereby, the Vice-Chancellor has acted wholly without jurisdiction in reviewing her order and, as such, the same is a nullity. If the order in question is nullity in the eye of law, availability of alternative remedy is not a bar to approach the Court by invoking extra ordinary jurisdiction under Article 226 of the Constitution of India. By holding so, in paragraph-12, of the said judgment, the apex Court held as under:

> *"The next question that falls for our consideration is whether the High Court was justified in dismissing the writ petition of the appellant on the ground of availability of an alternative remedy. It is true that there was an alternative remedy for challenging the impugned order by referring the question to the Chancellor under Sec.68 of the U.P. State Universities Act. It is well established that an alternative remedy is not an absolute bar to the maintainability of a writ petition. When an authority has acted wholly without jurisdiction, the High Court should not refuse to exercise its jurisdiction under Art. 226 of the Constitution on the ground of existence of an alternative remedy."*

16. In ***Whirpool Corporation*** (supra), the apex Court in paragraphs-20 and 21 of the said judgment, held as under:-

> *"20. Much water has since flown beneath the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the of the High Court in entrance a writ petition under Article 226 of the Constitution. In spite of the alternative statutory remedies. Is not affected, specially in a case where the authority against whom the writ is field is shown to have has no jurisdiction or has purported to usurup jurisdiction without any legal foundation.*

> *21. That being so, the High Court was not justified in dismissing the writ petition at the initial stage without examining the contention that the show cause notice issued to the appellant was wholly without jurisdiction and that the Registrar, in circumstances of the case, was not justified in acting as the "TRIBUNAL."*

17. In ***Godrej Sara Lee Limited*** (supra), the apex Court held that the question as to whether thenotification could have a retrospective effect or retroactive operation being a jurisdictional fact, should have been determined by the High Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India, as it is well known that when an order of an statutory authority is questioned on the ground that the same suffers from lack of jurisdiction, alternative remedy may not be a bar.

18. In ***Uttar Pradesh Power Transmission Corporation Limited*** (supra), the apex Court held as follows:-

> *"It is well settled that availability of an alternative remedy does not prohibit the High Court from entertaining a writ petition in an appropriate case. The High Court may entertain a writ petition, notwithstanding the availability of an alternative remedy, particularly: (i) where the writ petition seeks enforcement of a fundamental right; (ii) where there is failure of principles of natural justice or; (iii) where the impugned orders or proceedings are wholly without jurisdiction or; (iv) the vires of an Act is under challenge."*

19. Applying the above principles to the present case, this Court is of the considered view that the impugned order of cancellation of lease and forfeiture of security amount, having been passed by the Tahasildar, suffers from jurisdictional error. More so, the same is without jurisdiction, as it is the controlling authority, which can pass the order in terms of Rule-43 (3) of OMMC Rules, 2016. Thereby, the order dated 09.03.2021 passed under Annexure-9 cancelling the lease and forfeiting the security amount, cannot sustain in the eye of law and the same is liable to be quashed and is hereby quashed. Otherwise also, the said order has been passed contrary to the direction issued by this Court in W.P.(C) No.10449 of 2021 disposed of on 18.03.2021.

20. In the above view of the matter, this Court directs opposite party no.3-Tahasildar, Bonai to provide the certificates, as mentioned in sl.nos.6, 7 and 8 under Annexure-10, to the petitioner for getting the environment clearance, since he has already countersigned the documents produced before him, incompliance of the order dated 18.03.2021 passed in W.P.(C) No.10449 of 2021, as expeditiously as possible, preferably within a period of two weeks from the date of receipt of copy of this judgment.

21. In the result, the writ petition stands allowed. However, there shall be no order as to costs.

2022 (III) ILR - CUT-754

Dr. B.R. SARANGI, J & MISS. SAVITRI RATHO, J.

W.P.(C) NO. 10119 OF 2022

M/s. KAMALA AGENCIES ………Petitioner

.V.

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

(A) TENDER – Interference of the Court in exercise of power under Article 226 of the Constitution of India – Held, does not warrant – Tender in question was invited for supply of essential commodities, since amendment to clause 5.2 was made keeping larger public interest in mind and the same was meant for benefit of all the bidders, including the petitioner, such decision of tender committee, amending the clause was not objected by the petitioner either when it was published in the website or when it participated during the process of evaluation of financial bid – This court is of the considered view that the writ petition as the behest of the petitioner does not warrant interference of this Court in exercising the Jurisdiction under Article 226 of the Constitution of India. (Para -39)

(B) PRINCIPLE OF ESTOPPEL – The petitioner participate in the process of financial bid, without any objection with regard to the amendment made in clause 5.2 of the bid, subsequently he cannot be turn around and say that the amendment to clauses is arbitrary, unreasonable and contrary to the provision of law – Thereby he is stopped to challenge the same by filling present Writ Petition. (Para-13)

Case Laws Relied on and Referred to :-

1. (1994) 6 SCC 651 : Tata Cellular Vs. Union of India.
2. (2007) 14 SCC 517 : Jagdish Mandal Vs. State of Orissa.
3. (2020) 17 SCC 577 : Vidarbha Irrigation Development Corporation & Ors. Vs. Anoj Kumar Agarwala & Ors.
4. (2013) 2 SCC 355 (365) : B.L. Sreedhar Vs. K.M. Munireddy.
5. (2010) 12 SCC 458 : H.R. Basavaraj Vs. Canara Bank.
6. 2019 (I) ILR-CUT-214 : M/s. Balasore Alloys Ltd. &Anr. Vs. State of Odisha & Ors.
7. AIR 1986 SC 1043 : Om Prakash Sukla Vs. Akhilesh Kumar Sukla.
8. AIR 1995 SC 1088 : Madan Lal & Ors. Vs. State of Jammu and Kashmir & Ors.
9. (2011) 1 SCC 150 : Vijendra Kumar Verma Vs. Public Service Commission, Uttarakhand & Ors.
10. (2016) 16 SCC 818 : Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & anr.
11. 2005 (2) Supreme 615 : Secretary, A.P. Public Service Commission Vs. B. Swapna & Ors.

12. 100 (2005) CLT 465 : Mrs. Madhumita Das Vs. State of Orissa.
13. AIR 2000 SC 2272 : M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation.
14. AIR 2001 SC 682 : West Bengal Electricity Board Vs. Patel Engineering Co. Ltd.
15. AIR 2016 SC 3814 : Central Coalfields Ltd Vs. SLL-SML (Joint Venture Consortium)
16. AIR 1979 SC 1628 : Ramana Dayaram Shetty Vs. The International Airport Authority of India.

For Petitioner : Mr. Pitambar Acharya, Sr. Adv.
M/s. S. Rath & S.S. Tripathy.

For Opp. Parties : Mr. Ashok Kumar Parija, Advocate General.
Mr. P.P. Mohanty, Addl. Govt. Adv.

JUDGMENT Date of Hearing 02.05.2022 : Date of Judgment: 12.05.2022

Dr. B.R. SARANGI, J.

The petitioner, which is a proprietorship firm and registered dealer, whole-seller, supplier and distributor of veterinary drugs/medicines, chemicals, veterinary instruments and equipments, has filed this writ petition seeking to quash the decision taken by opposite parties no. 2 and 3 in the meeting of the tender committee under Annexure-4 dated 28.03.2022 and to declare the provisions of clause 5.2, more specifically clauses 5.2.5, 5.2.5.2 and 5.2.6.3 of the bid document, bearing reference No. 01/2021-22/DAHVS/Veterinary Instruments/ Equipments/ Chemicals/ Reagents/ Media dated 29.12.2021 as *void ab initio*. The petitioner further seeks direction to the opposite parties to consider the financial bids of the eligible bidders fulfilling the prequalification criteria of un-amended clause 5.2 and to reject the bids of ineligible bidders, which were otherwise ineligible before amendment of clause 5.2, more specifically clauses 5.2.5, 5.2.5.2 and 5.2.6.3 of the bid documents.

2. The factual matrix of the case, in brief, is that opposite party no.2 floated an e-tender call notice on 29.12.2021 under Annexure-2, inviting eligible bidders for *"supply of Veterinary Instruments, Equipments, Chemicals, Reagents & Media etc*. for the year 2021-22" vide Bid Reference No. 01/2021-22/DAHVS/ Veterinary Instruments/ Equipments/ Chemicals/ Reagents/ Media. The schedule of dates mentioned in the said notice were later on amended vide Corrigendum-II dated 25.01.2022 and some of the deadlines were relaxed. The petitioner duly participated in the tender process and submitted its bid within the stipulated time. Clause 5.2 of the tender document prescribed the pre-qualification criteria to participate in the tender process. As per such clause, only the distributors, who have experience in supplying the quoted items, as mentioned in the schedule of requirement, to any Govt. organization/Govt./Pvt. Hospitals / Other Agencies in

India are eligible to submit bid for the tender. Clause 6.13 of the bid documentcontains the provisions regarding grounds for rejection of the bids. It has been specifically mentioned therein that those bidders, who will not fulfill the requirement of clause 5.2, will be disqualified from participating in the tender process. After opening of the technical bids on 15.02.2022, opposite parties No.2 and 3 called a meeting of the tender committee on 28.03.2022 under the chairmanship of Director, AH & VS and decided to alter the pre-qualification criteria, as contained in clause 5.2 of the bid document, and waive off the requirement of filing the Performance Statement in the Format-T9. Much after the opening of the technical bid, in order to accommodate more number of responsive bidders, as there were limited business opportunities during COVID-19 pandemic, the tender committee decided for alternation of prequalification criteria prescribed under clause 5.2. As per the requirement of clause 5.2, the bidders were to submit copies of the purchase orders placed by purchasers for any two financial year during 2017-18, 2018-19, 2019-20 and 2020-21. Due to such decision of the tender committee in waving off the requirement of filing of the Performance Statement in Format-T9, an attempt was made to accommodate some non-serious and ineligiblebidders, which were otherwise ineligible as per the provisions of the unamended clause5.2. Alteration of the provisions of the bid documents, after opening of the technical bid, also runs contrary to clause 6.17 of the bid document, which prescribes the procedure for makingamendment in the bid document. The petitioner, having come out successful and eligible in technical bid by fulfilling the stringent pre-qualification criteria as mentioned in clause 5.2 of the bid document, was grossly prejudiced because of participation of ineligible bidders in the financial bid, which were otherwise ineligible as per the provisions of the unamended clause 5.2, more specifically clauses 5.2.5, 5.2.5.2 and 5.2.6.3 of the bid document. Being aggrieved by such action of the authorities, the petitioner has approached this Court by filing the present writ petition.

3. Mr. PitambarAcharya, learned Senior Advocate appearing along with Mr. S.S. Tripathy, learned counsel for the petitioner, vehemently contended that once an advertisement was issued inviting bids with certain terms and conditions, and on that basis the bidders were participated, after opening of the technical bid, the clauses of the such tender document should not havebeen relaxed. As such, the relaxation of such clauses, after opening of the technical bid, amounts to arbitrary and unreasonable exercise of power by the authorities, which amounts to violation of Articles 14 and 19 (1)(g) of the Constitution of India and runs contrary to theprinciple prescribed under Article 299 of the Constitution of India.

3.1 It is further contended that since the bids were invited under pre-amended provisions of clause 5.2, if any amendment is made to the said clause that too afteropening of the technical bid, that itself violates clause 6.17 of the bid document, and by this process the authorities have acted against the established principle in awarding government contract, that *"rules of the game cannot be changed mid-way"*.

3.2 His further contention is that the alternation of pre-qualification criteria was made much after the opening of the technical bid, in order to accommodate more number of responsive bidders, as there were limited business opportunities during COVID-19 pandemic, but that decision should have been taken before the notification was issued. However, after opening of the technical bid, the decision taken for change of theconditions of the bid, cannot sustain in the eye of law. More particularly, pursuant to pre-amended provisions of clause 5.2, many of the participants had already submitted their bids and their bids were under scrutiny and, as such, some of the bidders were qualified in the technical bid. Thereby, after technical bid was opened, the incorporation of new clauses under clause 5.2 shouldnot have been made in the midst of the tender process. Thereby, the action of the authorities is arbitrary, unreasonable and contrary to the provisions of law. To substantiate his contention, he has relied upon thejudgments of the apex Court in the cases of ***Tata Cellular v. Union of India***, (1994) 6 SCC 651; ***Jagdish Mandal v. State of Orissa***, (2007) 14 SCC 517; and ***Vidarbha Irrigation Development Corporation and others v. Anoj Kumar Agarwala and others***, (2020) 17 SCC 577.

4. Mr. Ashok Kumar Parija, learned Advocate General appearing along with Mr. P.P. Patnaik, learned Additional Government Advocate for the State-opposite parties, vehemently contended that notice was issued on 29.12.2021 inviting online bids through e-tender portal of Government of Odisha from the eligible bidders for "supply of Veterinary Instruments, Equipments, Chemicals, Reagents & Media etc. for the year 2021-22". Said notice was issued for procurement of 221 items, including 121 items in instruments &equipments category and 79 items in chemicals & reagents category. The technical bid was opened through online mode on15.02.2022 at 11.30 A.M. The preliminary verification of all the technical bids was carried out by the members of the duly constituted Tender Committee taking into consideration different parameters like acknowledgement copy of bid document cost of Rs.5600/- submitted through online mode, bid security declaration, annual average turnover statement by Chartered Accountant for any three consecutive financial years during 2017-18, 2018-19, 2019-2020 and 2020-21, i.e. Rs.4.00 crore in case of manufacture/importer and Rs.2.00 crore in case of authorized distributor, details

of items quoted with their specifications, details of bidder & service center, declaration in form affidavit in Form T5 before Executive Magistrate/ Notary Public, Manufacture's authorization form in a letter head- in case the bidder is the manufacturer (OEM), manufacture's authorization form in a letter head of the manufacturer- in case the bidder is the authorized importer/distributor of OEM along with other tender terms and conditions. After opening oftechnical bid, it was found that 11 number of bidders had participated pursuant to the notice inviting bid dated 29.12.2021, out of which bids of 2 number of bidders were rejected for non-fulfillment of the conditions laid down in the bid document. Therefore, total 9 number of bidders, including the petitioner, were selected and qualified for opening of financial bid.

4.1 It is further contended that the authorities observed, that 09 bidders, which were qualified during the technical bid evaluation and were eligible for financial bid evaluation, were actually qualified for 41 items out of 221 items enlisted in the bid document. In this circumstance, the purpose of inviting tender for supply of essential veterinary items was not fulfilled. Therefore, it was felt necessary to convene an urgent tender committee meeting, prior to opening of the financial bid, in order to ensure more responsive bidders in the tender process and to get the items at competitive price. Accordingly, the meeting was held on 28.03.2022 under the Chairmanship of Director, AH&VS, Odisha Cuttack. As there was limited business opportunity during COVID-19, it was decided in the meeting to relax some of the clauses of the bid, more specifically clauses 5.2.5, 5.2.5.2 and 5.2.6.3 of the bid in order to validate more number of responsive bidders.

4.2 The further submission of learned Advocate General is that the opposite parties have taken liberal stand by relaxing clauses of the bid document keeping larger public interest in mind and meant for benefit of all the bidders without any bias and prejudice. It was also emphatically submitted that the petitioner is in no way affected adversely by such relaxation. According to him, during the technical evaluation, the petitioner wasqualifying for 26 items, whereas, it was observed that the petitioner was qualifying for 160 items, after relaxation of the clauses of the bid, thereby, getting maximum advantages amongst the bidders.

4.3 The further stand of learned Advocate General is that, the petitioner kept silent and did not make any objection to the proceeding dated 28.03.2022, when it was uploaded in the website on 08.04.2022. The petitioner started complaining only after the evaluation of financial bid, which was carried on 12.04.2022. Thereby, raising of objection on financial bid is not bona fide, rather colored by

ulterior motive. As such, it is contended that the writ petition is liable to dismissed on the ground of principle of estoppel.

4.4 It is further contended that knowing fully well the decision taken by the tender committee on 28.03.2022, with regard to change of clause 5.2 which was uploaded on 08.04.2022, the petitioner remained silent, but he raised objection after the financial bid was opened on 12.04.2022 by filing the present writ petition on 20.04.2022. Thereby, the action of the petitioner cannot be considered above board. Having participated in the process of selection without any objection, after opening of the financial bid, challenging the amendment to clause 5.2 enabling more bidders to participate in the tender process, cannot sustain in the eye of law. Thereby, the writ petition is liable to be dismissed.

4.5 A further stand is taken that the petitioner has not impleaded the bidders who had participated in the process of tender, particularly when the tender process is going on and it has not been concluded, because of the interim order passed by this Court. As a consequence thereof, the writ petition is also liable to be dismissed on the ground of *non-joinder* of proper parties.

5. This Court heard Mr. Pitambar Acharya, learned Senior Advocate appearing along with Mr. S.S. Tripathy, learned counsel for the petitioner; and Mr. Ashok Kumar Parija, learned Advocate General appearing along with Mr. P.P. Mohanty, learned Additional Government Advocate for the State-opposite parties by hybrid mode, and perused the record. 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, as it is an urgent tender matter involving supply of medicines and other related items to various veterinary hospitals of the State.

6. The facts, which are undisputed, are that the Director of Animal Husbandry & Veterinary Services, Odisha-opposite party no.2 floated an e-tender call notice on 29.12.2021 under Annexure-2 inviting eligible bidders for "supply of Veterinary Instruments, Equipments, Chemicals, Reagents & Media etc. for the year 2021-22" vide Bid Reference No. 01/2021-22/DAHVS/ Veterinary Instruments/ Equipments/ Chemicals/ Reagents/ Media, for online bid through e-tender portal. As per the bid document, the schedule of dates for different steps to be taken were provided as follows:-

Sl. No.	*Particulars*	*Date and time*	
1.	*Date & time of release of bid*	*29/12/2021,3.00PM*	
2.	*Date & time of Submission of queries By E-Mail id-aodahvs@gmail.com*	*03/01/2022,upto12.30PM*	
3	*Date & time of Pre-bid meeting*	*05/01/2022, 3.00 PM (through on line: meeting link will be shared in the website.*	
4	*Date & time of Online Bid submission*	*Start Date & Time*	*End Date & Time*
		06/01/2022, 11.00AM	*27/01/2022, 5.00PM*
5.	*Date & time for Submission of Tender Documents*	*Start Date & Time*	*End Date & Time*
		10/01/2022, 11.00AM	*02/02/2022, 3.00PM*
6.	*Date & time of online Technical bid opening*	*03/02/2022,11:30AM*	
7.	*Date of demonstration of Equipment(if required by the Tender Inviting Authority for some equipments)*	*To be informed to those bidders whose bids are found to be technically responsive based on documents furnished in technical bid.*	
8.	*Date of opening of Financial bid*	*To be in formed to the Qualified bidders*	

7. The tender document in clause 5.2 deals with pre-qualification of bidders. The relevant part of clause 5.2 of the bid document, for an effective adjudication of the lis between the parties, is quoted hereunder:-

> *"5.2.5 Product must be BIS/CE/USFDA/IEC etc. (valid BIS/CE/US FDA/IEC certificate etc.) certified.*
>
> ***The bidder should have experience in supplying quoted items (as mentioned in schedule of requirement)** (execute directly by manufacturer/ importer or through distributor) of the equipment(s) mentioned in the schedule of requirement to any Govt. organization/Govt./Pvt. Hospitals and other Agencies in India and purchase order copies in support of that in any 2 financial years during 2017-18,2018-19,2019-20,2020-21 (As per Format T9-Items Wise)*
>
> *5.2.5.2 Must have any two years of experience in manufacturing /importing of similar items during 2017-18,2018-19,2019-20,2020-21.*
>
> *5.2.6.3. **The bidder should have experience in supplying quoted items (as mentioned in schedule of requirement)** to any Govt. organization/Govt. /Pvt. Hospitals / Other Agencies in India and purchase order copies in support of that in any 2 financial years during 2017-18, 2018-19, 2019-20, 2020-2021 (Format T9-Item wise.)"*

8. Clause 6.13 of the bid document deals with rejection of bids and clause 6.13.1 thereof prescribes as follows:-

> "6.13.1 The bids shall be rejected in case the bidder fails to meet the pre-qualification criteria as specified in Clause 5.2 of Section-V."

9. Clause 6.17 of the bid document deals with amendment of Bid Documents and clause 6.17.1 thereof prescribes as follows:-

> *"6.17.1 At any time prior to the deadline for submission of Bid, the Tender Inviting Authority may, for any reason, modify the bid document by amendment and publish it in e-tender portal & website of DAH&VS, Odisha."*

Termination of contract is provided under Clause 6.51 of the tender document.

10. The opposite parties issued Corrigendum-II on 25.01.2022, by re-scheduling the date and time, which reads as follows:-

Sl. No.	***Particulars***	***Date and time***	
1.	*Date & time of release of bid*	*29/12/2021,3PM*	
2.	*Date & time of Submission of queries By E-Mail id-aodahvs @ gmail.com*	*03/01/2022,up to 12.30 PM*	
3	*Date & time of Pre-bid meeting*	*05/02/2022,3pm (through online*	
4	*Date & time of On line bid submission*	*Start Date & Time*	*End Date & Time*
		06/01/2022, 11AM	*09/02/2022, 5.00PM*
5.	*Date & time for Submission of Tender Documents,Tender Document Fee of Tender Document*	*Start Date & Time*	*End Date & Time*
		10/01/2022, 11AM	*14/02/2022, 5.00PM*
6.	*Date & time of online Technical bid opening*	*15/02/2022,11:30AM*	
7.	*Date of demonstration of Equipment (if Required by the Tender InvitingAuthority for some equipments)*		
8.	*Date of opening of Financial bid*	*To be in for informed to be Qualified bidders.*	

11. Pursuant to the aforementioned re-scheduling of time and conditions stipulated in the tender documents, 11 number of bidders participated in thetender. Out of them, 02 number of bidders became ineligible and 09 number of bidders, including the petitioner, became successful in the technical bid. As such, on perusal of clauses 5.2.6 and 5.2.6.3, it appears that only the distributors, who have experience in supplying the quoted items, as mentioned in schedule of requirement, were eligible to submit the bid for the tender. After the technical bid was opened on 15.02.2022, through online mode, opposite parties No.2 and 3 called for a meeting of the tender committee on 28.03.2022under the Chairmanship of Director, AH&VS, Odisha Cuttack, who decided to alter the pre-qualification criteria as contained in the clause 5.2 of the bid documents and waived off the requirement of filing the Performance Statement in the Format-T9. Clause 3 (b) of the Brief Notes of the meeting held on 28.03.2022 reads as follows:-

> *(b) Clause No. 5.2.5, 5.2.5.2 & 5.2.6.3:- "Performance Statement in Format-T9 supported with the copies of Purchase orders placed by purchasers for any 2 financial years during 2017-18, 2018-19, 2019-20 and 2020-21" was ignored to validate more numbers of responsive bidders. The committee considered this case due to limited business opportunities during COVID-19 pandemic situation."*

12. On perusal of the above clause, it would be seen that there was an alternation of pre-qualification criteria, after the technical bid was opened on 15.02.2022, in order to accommodate more number of responsive bidders, since there was limited business opportunity during COVID-19 pandemic. But, as it reveals from the pre-amended clause 5.2, the bidders were required to submit copies of purchase orders placed by purchasers for any 2 financial years during 2017-18, 2018-19, 2019-20 and 2020-21. According to the petitioner, waiving off the requirement of filing of the performance statement in Format-T9 is nothing but an attempt to accommodate some non-serious and ineligible bidders, which were otherwise ineligible as per the provisions of the un-amended clause 5.2. Even if such amendment was undertaken on the basis of the decision of the tender committee dated 28.03.2022, the petitioner did not raise any objection before the authority concerned at the relevant point of time and on the basis of such amended provision of clause 5.2, steps were taken accordingly. The decision of the committee dated 28.03.2022 was uploaded in the website on 08.04.2022. Even though such amendment to clause 5.2 had been brought to the notice of the petitioner on 08.04.2022, no protest was raised by him. Not that that, on 12.04.2022, when evaluation of financial bid was carried out, the petitioner did not also raise any objection. He filed this writ petition only on 20.04.2022, challenging the action of the opposite parties.

13. Mr. Pitambar Acharya, learned Senior Advocate, vehemently contended that the amendment to clause 5.2 had never been brought to the notice of the petitioner. This contention cannot be accepted, in view of the fact that it is an e-tender process and everything was done through online basis. To be more specific, thedecision of the tender committee dated 28.03.2022 was uploaded on 08.04.2022, but the petitioner did not raise any objection to the same. Rather, he participated in the process of financial bid held on 12.04.2022. Havingparticipated in the process of financial bid, without any objection with regard amendment made to clause 5.2,subsequently, he cannot turn around and say that the amendment to clause 5.2 is arbitrary, unreasonable and contrary to the provisions of law. Thereby, he is estoppedto challenge such action by filing writ petition on20.04.2022 before this Court.

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

15. In ***B.L. Sreedhar v. K.M. Munireddy***, (2013) 2 SCC 355 (365), it has been held by the apex Court that 'estoppel' is based on the *maxim allegans contrarir non estaudiendus* (a party is not to be heard contrary) and is the spicy of presumption juries et de jure (absolute, or conclusive or irrebuttable presumption).

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

17. Similar view has also been taken by this Court in the case of ***M/s. Balasore Alloys Ltd. &Anr. Vs. State of Odisha & Ors***, 2019 (I) ILR-CUT-214.

18. In view of the aforesaid fact and law, it is made clear that a party is not to be heard contrary, meaning thereby the estoppel is a principle when one personinduces another or intentionally causes the other person to believe something to be true and to act upon such belief as to change his/ her position. In such a case, the former shall be stopped from going back on the word given.

Needless to mention here that the petitioner was all along silent, when there was amendment to clause 5.2, and participated in the financial bid evaluation held on 12.04.2022, even coming to know the fact of amendment of the provision as per the decision of the tender committee dated 28.03.2022, which was uploaded in the website on 08.04.2022. Therefore, he cannot subsequently turn around and assail the same by way of writ petition, after having participated in the process of tender.

19. In ***Om Prakash Sukla v. Akhilesh Kumar Sukla***, AIR 1986 SC 1043, the apex Court was pleased to hold that when the petitioner therein appeared at the examination without protest and when he found that he would not succeed in the examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.

20. In ***Madan Lal and others v. State of Jammu and Kashmir and others***, AIR 1995 SC 1088, the apex Court held that if a candidate takes a calculated chance and appears at the interview, then only because the result of the interview is not palatable to him he cannot turn round and subsequently contend that the process of interview was unfair or Selection Committee was notproperly constituted.

21. Similarly, in ***Vijendra Kumar Verma v. Public Service Commission, Uttarakhand and others***, (2011) 1 SCC 150, in paragraphs, 25 to 28, the apexCourt held as follows:

> *"25. In this connection, we may refer to the decision of the Supreme Court in G. Sarana (Dr.) v. University of Lucknow [(1976) 3 SCC 585 : 1976 SCC (L&S) 474] wherein also a similar stand was taken by a candidate and in that context the Supreme Court had declared that the candidate who participated in the selection process cannot challenge the validity of the said selection process after appearing in the said selection process and taking opportunity of being selected. Para 15 inter alia reads thus: (SCC p. 591)*
>
> *"15. … He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee."*
>
> *26. In P.S. Gopinathan v. State of Kerala [(2008) 7 SCC 70 : (2008) 2 SCC (L&S) 225] this Court relying on the above principle held thus: (SCC p. 84, para 44)*
>
> *"44. … Apart from the fact that the appellant accepted his posting orders without any demur in that capacity, his subsequent order of appointment dated 15-7-1992 issued by the Governor had not been challenged by the appellant. Once he chose to join the mainstream on the basis of option given to him, he cannot turn back and*

challenge the conditions. He could have opted not to join at all but he did not do so. Now it does not lie in his mouth to clamour regarding the cut-off date or for that matter any other condition. The High Court, therefore, in our opinion, rightly held that the appellant is estopped and precluded from questioning the said order dated 14-1-1992. The application of principles of estoppel, waiver and acquiescence has been considered by us in many cases, one of them being G. Sarana (Dr.) v. University of Lucknow [(1976) 3 SCC 585 : 1976 SCC (L&S) 474] ….”

27. In Union of India v. S. Vinodh Kumar [(2007) 8 SCC 100 : (2007) 2 SCC (L&S) 792] in SCC at para 18 it was held that: (SCC p. 107)

“18. … It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same.”

28. Besides, in K.H. Siraj v. High Court of Kerala [(2006) 6 SCC 395 : 2006 SCC (L&S) 1345] in SCC paras 72 and 74 it was held that the candidates who participated in the interview with knowledge that for selection they had to secure prescribed minimum marks on being unsuccessful in interview could not turn around and challenge that the said provision of minimum marks was improper, said challenge is liable to be dismissed on the ground of estoppel.”

22. Though some of the cases cited above relate to service matter, but the principle laid down therein by the apex Court is applicable to the present context. Therefore, by applying the said well settled principle of the apex Court to the present context, it can be construed that the petitioner, having been participated in the process of tender, should not have turned around and challenged the decision of the tender committee by filing this writ petition. As such, the writ petition at the instance of the petitioner is not maintainable.

23. Reliance was placed by the learned Senior Counsel appearing for the petitioner on ***Tata Cellular***(supra) wherein the apex Court categorically held that it shall always be the endeavour of the Government to prevent arbitrariness or favoritism. There is no doubt about such principle laid down by the apex Court. The ratio decided in the said case is of little help to the petitioner, as because in the case at hand the materials available on record reveal that the decision of the tender committee has been taken in the greater interest of the public and the petitioner is in no way affected adversely by such relaxation.

24. Similarly, in the case of ***Jagdish Mandal***(supra), the apex Court held as follows:-

“……….Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

> *i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.*
>
> *OR*
>
> *Whether the process adopted or decision made is so arbitrary and irrational that the court can say : 'the decision is such that no responsible authority actingreasonably and in accordance with relevant law could have reached";*
>
> *ii) Whether public interest is affected."*

25. This Court is conscious of the position of law laid down by the apex Court, as mentioned above, but the conduct of the petitioner is also to be considered in the light of the law laid down by the apex Court in various judgments. The petitioner should have immediately approached the authority, when the amendment with regard to clause-5.2 was placed on website on 08.04.2022, and could have protested the same, when he participated in the financial bid evaluation proceeding on 12.04.2022.Therefore, having participated in the process of tender without any objection, the petitioner is now precluded from challenging such amendment by filing the present writ petition.

26. In ***Vidarbha Irrigation Development Corporation*** (supra), the apex Court held that the tender documents cannot be ignored or treated as redundant or superfluous and they must be given meaning and their necessary significance. Given the fact that in the present case, an essential tender condition, which had to be strictly complied with, was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court.

27. On perusal of the writ petition, it is evident that the petitioner has not impleaded other bidders as parties to the writ petition.

In ***Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd. & another***, (2016) 16 SCC 818, the apex Court, at paragraph-18 thereof, has held as follows:-

> *"18. Before we conclude, it is necessary to point out that the High Court was of opinion that the eligible bidders were not entitled to be either impleaded inthe petition filed in the High Court by the ineligible bidder GYT-TPL JV or were not entitled to be heard. With respect, this is not the appropriate view to take in matters such as the present. There are several reasons for this, one of them being that there could be occasions (as in the present appeals) where an eligible bidder could bring to the notice of the owner or employer of the project that the ineligible bidder was*

> *ineligible for additional reasons or reasons that were not within the contemplation of the owner or employer of the project. It was brought to our notice by Afcons Infrastructure in these appeals that GYTTPL JV did not have any experience in the construction of a viaduct by the segmental construction method and that the translations of documents in Mandarin language filed in the High Court were not true English translations. Submissions made by learned counsel for Afcons Infrastructure in this regard are important and would have had a bearing on the decision in the writ petition filed in the High Court but since Afcons Infrastructure was not a party in the High Court, it could not agitate these issues in the writ petition but did so in the review petition which was not entertained. It is to avoid such a situation that it would be more appropriate for the constitutional Courts to insist on all eligible bidders being madeparties to the proceedings filed by an unsuccessfulor ineligible bidder."*

In view of the law laid down by the apex Court, as mentioned above, when the petitioner has not impleaded all the bidders as parties to this case, the writ petition is also not maintainable, as the same suffers from *non-joinder* of parties.

28. Mr. Pitambar Acharya, learned Senior Advocate appearing for the petitioner vehemently contended that amendment to clause-5.2 after opening of technical bid cannot sustain, being violative of the established principle in awarding government contract that "rules of the game cannot be changed mid-way".

29. This question no more remains *res integra*. In ***Secretary, A.P. Public Service Commission v. B. Swapna and others***, 2005 (2) Supreme 615, the Andhra Pradesh Public Service Commission had initially advertised for recruitment to eight posts of Asst. Public Relation Officers. Subsequently, seven more vacancies were advertised. Therefore, the recruitment was made for fifteen vacancies. The selection was finalized on 02.07.1996. During the currency of the waiting list, the competent authority again notified 14 more vacancies on 14.4.1997 to be filled up by the candidates from the waiting list. In that case, the apex Court held that there were two principles in service laws, which were indisputable. Firstly, there could not have been appointment beyond the advertised number and secondly, the norms of selection could not have been altered after the selection process had started. In paragraph-16 of the said judgment, the apex Court held as follows:-

> *"The High Court has committed an error in holding that the amended rule was operative. As has been fairly conceded by Learned Counsel for the applicantrespondent No.1 it was unamended rule, which was applicable. Once a process of selection starts, theprescribed selection criteria cannot be changed. The logic behind the same is based on fair play. A person who did not apply because a*

> *certain criteria e.g., minimum percentage of marks can make a legitimate grievance, in case the same is lowered, that he could have applied because he possessed the said percentage. Rules regarding qualification for appointment if amended during continuance of the process of selection do not affect the same. That is because every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the Rules showing the intention to affect existing rights the rule must be held to be prospective. If the Rule is expressed in a language which is fairly capable of either interpretation it ought to be considered as prospective only."*

30. Similar question had come up for consideration before this Court in ***Mrs. Madhumita Das v. State of Orissa, 100 (2005) CLT 465***, wherein the question before this Court was not that the modalities fixed by the Committee/Full Court were illegal, but the question was that once norms were published in the advertisement for notice of all, whether it could be changed at a later stage without notice to any of the candidates and general public and without issuing any corrigendum to the advertisement in question. In the said case, the Court opined that once an advertisement was issued to fill up a post in any office under the State, it is the duty of the recruiting authority to give necessary information to all in a precise and clear manner, and relying upon the judgment in ***Secretary, A.P. Public Service Commission*** (supra), the Court came to a conclusion, which reads as follows:-

> *"Once selection process was started the norms fixed in the advertisement could not have been changed and if they were liable to be changed then the same shouldhave been published in the like manner in which initial advertisement was published. Non-publication of thenorms changed subsequently after starting of the selection process was violative of Article 16 of the Constitution and thus is not sustainable in the eye of law."*

31. In ***M/s. Monarch Infrastructure (P) Ltd. v.Commissioner, Ulhasnagar Municipal Corporation***, AIR 2000 SC 2272, the apex Court held that if the term of a tender is deleted after the players entered into the arena, it is like changing the rules of the game after it had begun and, therefore, if the Government or the Municipal Corporation was free to alter the conditions, fresh process of tender was the only alternative permissible.

32. In ***West Bengal Electricity Board v. Patel Engineering Co. Ltd***, AIR 2001 SC 682, the apex Court held that tenders were invited only from the bidders who have satisfied in pre-qualification and the instructions to the bidders issued by the employer required the bidder to fill in rates and prices for all items of the works described in the bill of quantities both in figures and words and as

such errors been confined to a case of either recording in U.S Dollar equivalent to the unit rates already noted in Indian Rupee or vice versa, the mistakes could have been corrected. More so, if a mistake has been committed may, be unilateral or mutual, but it is always unintentional. If it is intentional, it ceases to be a mistake.

33. In ***Central Coalfields Ltd v. SLL-SML (Joint Venture Consortium)***, AIR 2016 SC 3814, the apex Court held that rejection of bid not accompanied by bank guarantee in format prescribed in bid documents treating it as non-responsive in view of the General Terms and Conditions governing bidding process, is not arbitrary, unreasonable or perverse. Therefore, it is not open to judicial review.

34. In ***Ramana Dayaram Shetty v. The International Airport Authority of India, AIR 1979 SC 1628***, the apex Court, while considering the terms of contract, the interpretation, deed and construction, held that on a proper construction what the notice required was that only a person running a registered IInd Class hotel or restaurant and having at least 5 years' experience as such should be eligible to submit a tender. This was a condition of eligibility and it is difficult to see how this condition could be said to be satisfied by any person who did not have five years' experience of running a IInd hotel or restaurant. The test of eligibility laid down was an objective test and not a subjective one. Therefore, the tender cannot be accepted of a person, who does notfulfill the requisite qualification.

35. Therefore, in view of the law laid down by theapex Court, as discussed above, this Court, adhering to the view taken by the apex Court and applying the same to the present context, makes it clear that the petitioner had never raised any objection to the amendment to clause 5.2, even though the same was placed in the website on 08.04.2022 and, more so, while participating in the process of tender, that is to say in the financial bid evaluation, he had also raised no objection. As a matter of fact, by such amendment no prejudice has also been caused to the petitioner, in view of the fact that 09 successful bidders were actually qualified for 41 items out of 221 items enlisted in the bid document and, thereby, the purpose of inviting the tender for supply of essential veterinary items was not fulfilled, as a consequence thereof, the tender committee, prior to opening of the financial bid took a decision to amend clause 5.2 to ensure more number of responsive bidders in the tender process and to get the items at competitive price, which the petitioner knows very well when the matter was placed in the website on 08.04.2022, and in such process, during the technical bid evaluation though the petitioner had qualified for 26 items, after clauses of the bid were relaxed it was observed that the petitioner qualified for 160 items

and, thereby, got maximum advantages amongst the bidders. Therefore, the petitioner is in no way adversely affected by such relaxation.

36. Considering from the other angle, it appears that e-tender notice was issued inviting bid documents from eligible bidders for "supply of Veterinary Instruments, Equipments, Chemicals, Reagents & Media etc. for the year 2021-22". In course of hearing, this Court made a query with regard to "for the year 2021-22". In reply, learned Advocate General, appearing for the State-opposite parties, contended that since the tender process was started on 29.12.2021 and it is still continuing, the mention of "for the year 2021-22", has no meaning. But fact remains, the year 2021-22 should have been clarified as to if the same stands for a "calendar year"; or "financial year"; or "assessment year"; or a year as applicable for the tender process. In absence of any such specific meaning attached to "for the year 2021-22", if normal presumption would be drawn, that the saidperiod relates to a financial year, then it starts from 01.04.2021 and ends on 31.03.2022. Since the tenderprocess is continuing beyond this period, the tender call notice cannot sustain in the eye of law. If the year is assumed to be a calendar year, which remains from 1st of January to 31st of December, the said period has also been over. Therefore, in normal parlance, wherever the word "year" or the word "month" is used, it is to be understood that the year of the month is to be reckoned according to British calendar.

37. In the above context, it is worthwhile to mention, in Section 3 of the Converts' Marriage DissolutionAct (21of1866), the "year" has to respectively mean "month" according to the British calendar. As per Section 3 (66) of General Clauses Act (10 of 1897), the "year" means, a year reckoned according to British calendar. As per Section 3 (n) of the Coffee Act (7 of 1942), "year" means the period of twelve months beginning with the first day of July and ending with thirtieth day of June next following. According to Section 2 (13) of the Electricity (Supply) Act (54 of 1948), the "year", in relation to the Board or a Generating Company, means, the year commencing on the 1st day of April. As per Section 2 (i) of the Chartered Accounts Act (38 of 1949), "year" means, the period commencing on the 1st day of April of any year and ending on the 31st day of March of the succeeding year. As per Section 2 (k) of the Central Sales Tax Act (74 of 1956), "year" in relation to a dealer, means the year applicable in relation to him under the general sales tax law of the appropriate State, and where there is no such year applicable the financial year. As per Section 2 (g) of the Sugar (Regulation of Production) Act (55 of 1961), "year" means, the year beginning on the first day of November and ending on the thirty-first day of October in the following year. Similarly, as per Section 2 (f) of Food Corporation Act (37 of 1964), year means the financial year.

38. Therefore, looking at the meaning of the year as defined under different provisions of law, this Court is of the considered view that, if the period of 2021-22 is already over, and the tender process, which was started at the end of the year, is still continuing, it can be safely construed that to favour some persons such an attempt has been made by the State functionaries. Meaning thereby, if it relates to a financial year, the process of tender should have been started before the month of March, 2021 and it should have been completed by end of March, 2021. But tender being invited in the month of December, 2021 for the year 2021-22 and till end of April, 2022 the process has not been concluded, that speaks volume on the action taken by the State functionaries, for which the government should be careful in future. Furthermore, in one hand, argument has been advanced, that the tender was invited for supply of essential commodities which cannot wait and should be supplied with all promptitude, but, on the other hand, delay has been caused at the level of the State authorities in inviting the tender. Therefore, it clearly indicates that it has been done to favour somebody, who is supplying the essential commodities, so that the continuity of supply should be made by such person. Thereby, this Court is of the considered view that the Government should be very careful while inviting tender for a particular year, may be financial year or may be British calendar year, and the tender process should have been started before the start or at the very beginning of the year itself, instead of waiting till the end of the year. Therefore, we hope and trust that Government should adhere to the principle, in letter and spirit.

39. Be that as it may, keeping in view the fact that the tender in question was invited for supply of essential commodities, since amendment to clause-5.2 was made keeping larger public interest in mind and the same was meant for benefit of all the bidders, including the petitioner, and that such decision of tender committee amending clause-5.2 was not objected to by the petitioner either when it was published in the website or when it participated during the process of evaluation of financial bid, this Court is of the considered view that the writ petition at the behest of the petitioner does not warrant interference of this Court in exercise of jurisdiction under Article 226 of the Constitution of India.

40. In view of the foregoing discussions, this Court does not find any merit in this writ petition, which is accordingly dismissed. No order as to costs.

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2022 (III) ILR - CUT- 772

Dr. B.R. SARANGI, J & G. SATAPATHY,J.

W.P(C) NO. 23416 OF 2022

ARUP KUMAR PATI ..…….Petitioner

.V.

UNION OF INDIA & ORS. ………Opp. Parties

CENTRAL ADMINISTRATIVE TRIBUNAL (PROCEDURE) RULES, 1987 – Rule 6(1)(ii) – Jurisdiction – The Tribunal rejected the application of petitioner on the ground of lack of territorial Jurisdictional, where as a major part of cause of action was arose in the state of Odisha – Whether rejection order of Tribunal is sustainable? – Held, No. – The Tribunal has Jurisdiction, as the Union of India has been made as party to the proceeding and a part of cause of action had been occurred within the territory of the state. (Para-16,17)

Case Laws Relied on and Referred to :-

1. AIR 1976 SC 2538 : State of Kerala Vs. The General Manager Southern Railway, Madras.
2. AIR 1964 SC 1348 : Raizada Vs. Gorakhram.
3. (2003) 6 SCC 220 : Dwarka Prasad Agarwal Vs. Ramesh Chandra Agarwal.
4. (2003) 6 SCC 151 : Sahebgouda Vs. Ogeppa.
5. (2007) 4 SCC 244 : Bhagubhai Dhonabhai Vs. State of Gujarat.
6. 2011 (I) ILR-CUT 398 : Chandrama Bhusan Sarangi Vs. Union of India & Ors.
7. (2014) 9 SCC 329 : Nawal Kishore Sharma Vs. Union of India.
8. 2016 (I) ILR CUT 738 : Subhaya Prusty Vs. Union of India & Ors.
9. 1998(5) Kar.L.J. 279 : Narayan Swamy G.V. Vs. Union of India.

For Petitioner : M/s. C.P. Sahani, P.K. Samal,
B.K. Samal & D.K. Mohanty

For Opp. Parties : Mr. D.R. Bhokta, Central Govt. Counsel

JUDGMENT Date of Judgment : 17.10.2022

Dr. B.R. SARANGI, J.

The petitioner, by way of this writ petition, seeks to quash the order dated 10.03.2022 passed in O.A No.570 of 2021, by which the Central Administrative Tribunal, Cuttack Bench, Cuttack, has dismissed the Original Application on the ground of territorial jurisdiction granting liberty to the petitioner to approach the appropriate forum of law, if so advised.

2. The factual matrix of the case, in brief, is that the Ministry of Railways, Govt. of India issued one centralized notification on 03.02.2018 for recruitment

to the posts of Assistant Loco Pilot & Technicians. The petitioner, having satisfied the eligibility criteria, applied for the post of Technician Gr.-III through online, but inadvertently his name was typed as 'Arup Pati' in place of 'Arup Kumar Pati'. The opposite parties entertained his application and issued call letter for the 1st stage of Computer Based Test, which was held on 29.08.2018 at Academy of Business Administration, Harida, Kuruda, Balasore, Odisha. Since there was mistake in his name in the application form, he brought to the notice of the departmental authorities and submitted all the required documents for rectification of the mistake. Consequentially, the opposite parties took the Form-3A from him for required correction during the 1st stage of examination, i.e., Computer Based Test.

2.1 The petitioner, having qualified in the 1st stage of Computer Based Test, was issued with call letter by the opposite parties for the 2nd stage of Computer Based Test, which was held on 21.01.2019. He appeared the 2nd stage of Computer Based Test and became successful by obtaining 52.08 normalized marks in Part-A. As per the method of recruitment, the mark obtained in Part-B in the 2nd Stage of Computer Based Test is only qualifying in nature and the mark obtained in Part-A has to be taken for preparation of merit list. Thereafter, the opposite parties issued call letter for document verification and medical examination, which was scheduled to 18.06.2019. When he appeared on the schedule date before opposite party no.2, his documents were verified and he was asked to submit one affidavit as per the instruction at Para-(xx) of Annexure-A/6 before his medical examination. Accordingly, he submitted anaffidavit of the date of 10.07.2019 and he was told by the authorities that they will intimate him later on regarding his medical examination.

2.2 In the above regard, since no communication was made to him, he repeatedly approached the departmental authorities. But he came to know that in the month of October, 2021 his candidature was rejected vide reject list dated 09.03.2021 due to mismatch of his name in the online application and Class-X certificate. Therefore, finding no other way, he approached the Central Administrative Tribunal, Cuttack Bench, Cuttack by filing O.A. No.570 of 2021, which was dismissed vide order dated 10.03.2022 on the ground of territorial jurisdiction. Hence, this writ petition.

3. Mr. P.K.Samal, learned counsel appearing for the petitioner vehemently contended that a part of cause of action arose within the State of Odisha. Meaning thereby, the petitioner, being a resident of Odisha, submitted his application from the State of Odisha and appeared in the 1st stage of Computer Based Test, which was held on 29.08.2018 at Academy of Business

Administration, Harida, Kuruda, Balasore, Odisha, in which he was eligible for 2nd stage of Computer Based Test. More so, the advertisement, which was issued by the Ministry of Railways, Govt. of India, was for a centralized recruitment and there was no provision for the petitioner to give any choice for any Railway Recruitment Board at the time of submission of his application. But, after qualifying the 1st stage of Computer Based Test held at Balasore, Odisha, he was asked to give his choice of Railway Recruitment Board considering the number of posts in the category available at different Railway Recruitment Boards, in response towhich he made his choice for RRB, Chennai. Since a part of cause of action had arisen in the State of Odisha, the Central Administrative Tribunal, Cuttack Bench, Cuttack has jurisdiction. It is further contended that as per Rule6(1)(ii) of the Central Administrative Tribunal (Procedure) Rules, 1987, an application shall ordinarily be filed with the Registrar of the Bench within whose jurisdiction the cause of action, wholly or in part, has arisen. More so, the East Coast Railway comes under the Ministry of Railways, Union of India. Therefore, the Central Administrative Tribunal, Cuttack Bench, Cuttack has jurisdiction to entertain the O.A. filed by the petitioner. Thereby, rejection of O.A. No.570 of 2021, vide order dated 10.03.2022, on the ground of territorial jurisdiction is absolutely misconceived and, therefore, he seeks for quashing of the same.

4. Mr. D.R. Bhokta, learned Central Government Counsel appearing for the opposite parties justifies the order passed by the Tribunal contending that the Tribunal lacks territorial jurisdiction to entertain the O.A. filed by the petitioner in view of specific condition stipulated in Clause-18.4 of the Centralized Employment Notice (CEN) No.01/2018 under Annexure-2 that any legal issues arising out of the CEN shall fall within the legal jurisdiction of respective Central Administrative Tribunals under which the RRB concerned is located. Thus, it is contended that since the petitioner had opted for RRB, Chennai and impugned order rejecting his candidature was passed by the RRB, Chennai, the Central Administrative Tribunal, Chennai Bench, Chennai has jurisdiction over the matter and, as such, the Central Administrative Tribunal, Cuttack Bench, Cuttack has rightly dismissed the O.A. on the ground of lack of jurisdiction.

5. This Court heard Mr. P.K. Samal, learned counsel appearing for the petitioner and Mr. D.R. Bhokta, learned Central Government Counsel appearing for the opposite parties in hybrid mode. Examining the materials on record and with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

6. There is no iota of doubt with regard to the stipulation made in Clause-18.4 of the Centralized Employment Notice (CEN) No.01/2018 that any legal

issues arising out of the CEN shall fall within the legal jurisdiction of respective Central Administrative Tribunal under which the RRB concerned located. There is also no doubt that the said CEN, vide Annexure-2 to the writ petition, was issued by the Government of India, Ministry of Railways, Railway Recruitment Boards. There is no dispute with regard to the fact that for the 2nd stage of Computer Based Test, the petitioner had opted for RRB, Chennai. Whether such exercise of option by the petitioner and putting a condition in the CEN issued by the Government of India, Ministry of Railways, Railway Recruitment Boards vide Annexure-2 will ipso factodisentitle him to invoke the jurisdiction of the Central Administrative Tribunal, Cuttack Bench, Cuttack is the sole question to be decided in this writ petition.

7. At the outset it may be noted with emphasis that the term 'railway administration', which has been defined in Section-3 (6) of the Indian Railways Act, 1890to mean the Manager of the railway, does not warrant the inference that a suit against the railway administration can be brought against the Manager of that railway.

8. In ***State of Kerala v. The General Manager Southern Railway, Madras***, AIR 1976 SC 2538, the apex Court held as follows:

> *"We have to bear in mind the distinction between the owner of the railway, namely the Union of India, and the authority which actually runs the railway and to whom duties have been assigned for this purpose by the Act. The manager of the railway under the Act is such authority. When, however, liability is sought to be fastened on the railway administration and a suit is brought against it on that account, the suit, in our opinion, would have to be brought against the Union of India because it is the Union who owns the railway and who would have the funds to satisfy the claim in case decree is awarded in such suit."*

As such, the petitioner has impleaded the Union of India represented through its General Manager, East Coast Railway, Bhubaneswar as opposite party no.1. Since the Union of India has been made as a party and the very same Government of India has issued the aforesaid CEN, even though petitioner had chosen RRB, Chennai, but a part of cause of action having arisen within the territorial jurisdiction of Odisha, mere putting a restriction in the CEN cannot take away the rights of the petitioner to approach the Central Administrative Tribunal, Cuttack Bench, Cuttack.

9. Furthermore, Rule-6 of Central Administrative Tribunal (Procedure), Rules, 1987 reads as follows:

> *"6. Place of filing applications.- (1) An application shall ordinarily be filed by an application with the Registrar of the Bench within whose jurisdiction. (i) the applicant is posed for the time being, or (ii) the cause of action, wholly or in part, has arisen: Provided that with the leave of the Chairman the application may be filed with the Registrar of the Principal Bench and subject to the orders under section 25, such application shall be heard and disposed of by the Benchwhich has jurisdiction over the matter.*
>
> *(2) Notwithstanding anything contained in subrule (1) persons who have ceased to be in service by reason of retirement, dismissal or termination of service may at his option file an applicationwith the Registrar of the Bench within whose jurisdiction such person is ordinarily residing at the time of filing of the application."*

A bare reading of Rule-6(1)(ii) of the Central Administrative Tribunal (Procedure) Rules, 1987, it is made clear that within whose jurisdiction the cause of action, wholly or in part, has arisen, the said Bench will have jurisdiction to entertain an application.

10. In ***Raizada v. Gorakhram***, AIR 1964 SC 1348, the apex Court held that the defendant by his defence cannot force the plaintiff to choose a forum different from one chosen by him.

11. In ***Dwarka Prasad Agarwal v. Ramesh Chandra Agarwal***, (2003) 6 SCC 220, while considering the scope of Section 9 of the Code of Civil Procedure with regard to jurisdiction, the apex Court held that Court would normally lean in favour of construction, which would uphold retention of jurisdiction of the civil court. The burden of proof in this behalf shall be on the party who asserts that the civil court's jurisdiction is ousted. Similar view has also been taken by the apex Court in ***Sahebgouda v. Ogeppa***, (2003) 6 SCC 151 and ***Bhagubhai Dhonabhai v. State of Gujarat***, (2007) 4 SCC 244.

12. In ***Bhagubhai Dhonabhai***, as mentioned supra, the apex Court held that a party having a grievance must have a remedy. Access to justice is a human right. When there exists such a right, a disputant must have a remedy in terms of the doctrine *ubi jus ibi remedium.*

13. So far as territorial jurisdiction of the Court is concerned, it is to be seen whether any part of the cause of action has arisen within the State of Orissa. The cause of action has been defined as every fact, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. Right to invoke Article 226 of the Constitution of India to enforce fundamental rights and other legal rights against the State or authority or its agency is a constitutional right. Such right should not be made illusory or unenforceable upon narrow construction of the concept of cause of action.

14. In ***Chandrama Bhusan Sarangi v. Union of India and others***, 2011 (I) ILR-CUT 398, this Court held that High Court can exercise power to issue writ, direction or order for enforcement of any of the fundamental rights conferred by Part-III of Constitution or for any other purpose, if cause of action wholly or in part has arisen within the territorial jurisdiction of High Court. The expression 'cause of action' means bundle of facts which petitioner must prove, if traversed, to entitle him to a judgment in his favour by the Court. Therefore, question of territorial jurisdiction must be decided on facts pleaded in petition. Similar view has also been taken by this Court in ***Girish Mohanty v. Union of India and others*** (O.J.C. No. 2607 of 2001 disposed of on 03.03.2015).

15 In ***Nawal Kishore Sharma v. Union of India***, (2014) 9 SCC 329, the apex Court categorically held that cause of action partly arose at his native place High Court within whose territorial jurisdiction, he received the letter has jurisdiction to entertain the application. Further it is held that as cause of action for the purpose of Article 226 (2) of Constitution of India must be assigned the same meaning of cause of action as given under Section 20 (c) of the Code of Civil Procedure, 1908. In that view of the matter, since all the correspondences have been made in the local address of the petitioner, which is within the territorial jurisdiction of this Court and part of cause of action arose within State of Orissa, this Court has got jurisdiction to entertain this application. Similar view has also been taken in ***Subhaya Prusty v. Union of India and others***, 2016 (I) ILR CUT 738.

16. It is of relevance to mention here that the Central Administrative Tribunal (Procedure) Rules, 1987 has been framed in exercise of powers conferred by Clauses (d), (e) and (f) of Sub-section (2) of Section 35 and Clause (c) of Section 36 of the Administrative Tribunals Act, 1985 (13 of 1985). Thereby, it has got statutory force and as a consequence thereof, if the statute prescribes under Rule-6 of Central Administrative Tribunal (Procedure) Rules, 1987 the place of filing application, where cause of action wholly or in part has arisen, in that case by putting a condition in an advertisement such statutory power cannot be taken away and such fact should not have been lightly considered by the Tribunal. More so, when the Union of India, which is the owner of the Railway and is the authority which actually runs the Railway and to whom duties have been assigned for this purpose by the Act, has been impleaded as a party, in view of an inequitable and impracticable condition stipulated in the advertisement, if the petitioner is relegated to the jurisdiction of the Central Administrative Tribunal, Chennai, he will be gravely prejudiced. Even though reliance has been placed by the Tribunal on the judgment of the ***High Court of Delhi in Ex. Rect./Gd Vinod Kumar v. Union of India*** and the judgment of the

High Court of Karnataka in ***Narayan Swamy G.V. v. Union of India***, 1998(5) Kar.L.J. 279 and the judgment of the apex Court in ***Oil andNatural Gas Commission v. Utpal Kumar Basu***, the same may not have application in the peculiar circumstances of the case at hand.

17. Therefore, in our considered opinion, the Central Administrative Tribunal, Cuttack Bench, Cuttack has jurisdiction, as the Union of India has been made as party to the proceeding and a part of cause of action had arisen within the territory of the State of Odisha, as per Rule-6(1)(ii) of the Central Administrative Tribunal (Procedure) Rules, 1987. Thereby, the order dated 10.03.2022 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.570 of 2021 cannot be sustained and is hereby quashed, The matter is remitted back to the Central Administrative Tribunal, Cuttack Bench, Cuttack for fresh adjudication of the grievance of the petitioner on merits.

18. The writ petition is thus allowed. However, there shall be no order as to costs.

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2022 (III) ILR - CUT- 778

ARINDAM SINHA, J.

W.P.(C) NO. 21162 OF 2022

RADHARANI PATRA & ANR. ………Petitioners

.V.

UNION OF INDIA & ORS. ………Opposite Parties

CONSTITUTION OF INDIA, 1950 – Article 227 – Exercise of supervisory power – An Arbitration Misc. Case was filed claiming the enhancement of the compensation for acquiring the land – An award enhancing the compensation and payment of interest was passed – Original petitioner died – The legal heirs filed three several petitions under Order XXII Rule 9 of the Code of Civil Procedure and an application under section 5 of the Limitation Act,1963 – All application were dismissed – However in the mean time Union of India deposited the amount for payment of the compensation by the State – Held, it is a fit case where exercising the power under Art. 227 of the Constitution, direction may be given to the executing court to execute the arbitral award in favour of the petitioners. (Para-10)

For Petitioners : Mr. Amit Prasad Bose,Mr. D. J. Sahu, Mr. S. Swain & Mr. D. Sahoo.

For Opp. Parties : Mr. K. C. Kar (Sr. Panel Counsel) Mr. A. K. Sharma, AGA.

JUDGMENT Date of Judgment : 10.10.2022

ARINDAM SINHA, J.

1. Mr. Bose, learned advocate appears on behalf of petitioners. He submits, his clients are legal heirs of petitioner/claimant before the Court below in Arbitration Misc. Case no.57 of 2009. Said petitioner died on 11th July, 2021. Prior thereto he had instructed his learned advocate to prosecute the arbitration case for enhancement of the compensation for acquiring his land.

2. The arbitration case was duly prosecuted by learned advocate engaged. There was award by judgment dated 26th March, 2022 enhancing the compensation and direction for payment of interest. On getting intimation thereof, petitioners applied for substitution, to be able to obtain the enhanced compensation. The substitution application made along with applications for condonation of delay and setting aside abatement, were rejected by impugned order dated 18th July, 2022. He submits further, no appeal has been preferred against said award, to knowledge of his clients.

3. Mr. Kar, learned advocate, Senior Panel Counsel appears on behalf of Union of India. On query from Court he submits, petitioners are the legal heirs and entitled to the enhanced compensation. His client has already deposited for disbursement. Mr. Sharma, learned advocate, Additional Government Advocate appears on behalf of State and submits, his client is the disbursing authority.

4. It appears, petitioners had made three several applications. The first was under order XXII rule 3 in Code of Civil Procedure. Second application was under order XXII rule 9, for setting aside abatement and the third, for condonation of delay under section 5 in Limitation Act, 1963. The applications were all dismissed. Reason given in impugned order is extracted and reproduced below.

> *"As it appears, from the facts and circumstances of the case, only due to absence of knowledge of the counsel with regard to the death of the petitioner, no proper step could be taken to set aside the abatement order. But on the other hand, the petitioners being the wife and son of the deceased-petitioner, they have sufficient knowledge with regard to death of the petitioner. From the aforesaid conduct of the petitioners, it appears that they don't bother to bring the matter of death of the petitioner to the notice of the Court and as such, the Court passed the final order. Considering the fact that despite the petitioners having their knowledge about the death of the deceased-petitioner remained silent for a long time, this*

Court found no sufficient reason to condone the delay and as such, the petition stands rejected and consequently, the petitions filed under Order-22 Rule-3 & 9 also cannot be entertained and as such, the same stand rejected."

5. On query from Court Mr. Bose points out the causes given by his clients for have not having informed fact of death during pendency of the case. Paragraphs 2 and 3 from the application under order XXII rule 9 are reproduced below.

"2. That, thereafter, when the counsels telephoned in the given number, the wife of the petitioner informed the counsel that her husband Ramesh Patra has already been passed away on 11.07.2021 i.e. the during the period of Covix-19 and deceased petitioner is survived by her as his wife and Sudip Kumar Patra as his son. She also told that after her husband's early death, she and her son were completely broken down and could not inform the counsels about said demise of Ramesh Patra.

3. That, in the event of death of the original petitioner Ramesh Patra on 11.07.2021 and without the substitution of has legal heirs in time, the case was automatically abated and order passed in favour of the deceased Ramesh Patra on 26.03.2022."

6. Order XXII rule 10-A provides for duty of pleader to communicate to Court, death of a party. In the arbitration case, the pleader did not have information that his client had died. He discharged his duty in belief that his client was alive. The case resulted in award dated 26th March, 2022, enhancing compensation payable on land of the deceased, acquired. There is no dispute that petitioners are the legal heirs and that they are entitled to the enhanced compensation. Petitioners in their application filed under order XXII rule 9 had applied on contention that there was automatic abatement in the meantime.

7. On yet further query from Court Mr. Sharma submits, last date of hearing in the arbitration case was on 14th March, 2022. As such, rule 6 in order XXII cannot come to aid of petitioners.

8. There is none before this Court, who urged that award dated 26th March, 2022 is a nullity. In execution, the only ground available under section 47 in the Code is that the decree is a nullity. Therefore, the award for enhanced compensation can be executed. So much so that Union of India has already deposited the amount, for it to be disbursed by State. Petitioners are undisputedly legal heirs of the land loser, since deceased.

9. In view of aforesaid, adjudication must depend on working of rule 10-A in order XXII. The rule is reproduced below.

*"**10-A. Duty of pleader to communicate to Court death of a party**.—whenever a pleader appearing for a party to the suit comes to know of the death of that party,*

he shall inform the Court about it, and the Court shall thereupon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist."

In the arbitration case, the pleader did not come to know of death of the party. The mandate upon him to inform the Court, therefore, could not be complied with. Further mandate on the Court to give notice of death to the other party, also could not be complied with. So it is that the case was argued and culminated in enhanced compensation by award dated 26th March, 2022.

10. In the facts and circumstance, this is a fit case where in exercise of power of superintendence under article 227 in the Constitution of India, there will be direction upon the executing Court, being the Court of the District Judge, Balasore, to permit petitioners to apply for execution of award dated 26th March, 2022 as legal heirs of Ramesh Patra, since deceased, in whose name the award was made. For the purpose, petitioners will produce this order at the time of filing the execution case.

11. The writ petition is disposed of.

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2022 (III) ILR - CUT- 781

ARINDAM SINHA, J.

W.P.(C) NO.18536 OF 2022

M/s. BHADRA PRODUCTS ....Petitioner

.V.

M/s. INDIAN FARMERS FERTILIZER CO-OPERATIVE LTD. ....Opposite Party

ARBITRATION AND CONCILIATION ACT, 1996 – Section 34 – Scope of interference – There was nil award by the arbitrator – The principal ground for rejecting the claim was that the invoices were not produced – The petitioner made an application under section 151 of C.P.C. and sought permission to produce the invoice as additional evidence – The application was rejected – Whether additional evidence can be adduced while challenging the award mounted under section 34 of the Act? – Held, Yes – In this case opposite party has contended that the

arbitrator held the invoices to be of no relevance – On the other hand the Court below by impugned order appears to have relied on the award to show that non-production of the invoices was one of the reason for the final award and the petitioner ought to have had produced them – In view of aforesaid it cannot be said that in spite of opportunity given or direction made in the reference, petitioner chose not to produce the invoices – The case appears to be an exceptional case warranting interference of judicial review. (Para -13,14)

Case Laws Relied on and Referred to :-

1. (2019) 9 SCC 462 : Canara Nidhi Ltd. .Vs. M. Shashikala.
2. (2018) 9 SCC 49 : M/s. Emkay Global Financial Services Ltd. Vs. Girdhar Sondhi.

For Petitioner : Mr. Nilamadhab Bisoi & Mr. D. Mohanty.

For Opp. Party : Mr. S. P. Mishra, Sr. Adv.
Mr. S. Grover, Mr.S. P. Sarangi & Mr. A. Das.

JUDGMENT Date of Judgment : 13.10.2022

ARINDAM SINHA, J.

1. Mr. Bisoi, learned advocate appears on behalf of petitioner and submits, there be judicial review over order dated 8th July, 2022, made by the Court below in hearing his client's challenge under section 34 in Arbitration and Conciliation Act, 1996. He submits, there was nil award. Principal ground for rejecting the claim was that the invoices were not produced. His client sought to produce them as additional evidence, by application made under section 151 in Code of Civil Procedure. The application was rejected by impugned order. He relies on, inter alia, judgment of the Supreme Court in ***Canara Nidhi Limited v. M. Shashikala, reported in (2019) 9 SCC 462*** to submit, on being allowed to produce the invoices there will be found apparent illegality in face of the award. Hence, this is an exceptional case, where the application ought to have been allowed.

2. Prayer (ii) in the writ petition is reproduced below.

> *"(ii) And, to direct the learned Court below to admit the Petitioner's Additional Documents/Additional Evidences [i.e. equivalent Annexure-P/7, Annexure-P/8 (Series) and Annexure-P/11 of the Arbitration Petition, pending adjudication before the learned Court below] and to accept the Additional Evidence-on-Affidavit, along with the Application under Section 151 CPC, 1908 filed before the Ld. Court below vide dtd.16.05.2022 under Annexure-8 (Series) of the instant writ application."*

3. On query from Court Mr. Bisoi submits, annexure P/7 is tender inquiry document dated 23rd January, 2006. Annexure P/8 series are third

copies of 166 tax invoices and annexure P/11 is authorization of the partner of petitioner.

4. Mr. Mishra, learned senior advocate appears on behalf of opposite party and draws attention to paragraph 72 in award dated 19th May, 2020, The paragraph is reproduced below.

> *"72. As a result, Claimant sent the Notice invoking arbitration to Respondent. Claimant herein is claiming an amount of Rs.6,27,08,886/- as the payment due along with Rs.11,15,25,204/- as interest @ 24% p.a., totaling to an amount of Rs.17,42,34,090/-. **Claimant is also seeking a correct interpretation of the terms and conditions mentioned in Purchase Order dated 24.01.2007**."*
>
> *(emphasis supplied)*

He submits, there was appreciation by the arbitrator that petitioner was also seeking correct interpretation of the terms and conditions mentioned in purchase order dated 24th January, 2007.

5. He then refers to paragraph 174 in the award to demonstrate that the arbitrator found the invoices had no relevance since payment was based on production of P2O5, irrespective of quantity of defoamer consumed in the process. He submits, the arbitrator held there is no merit in claimant's argument that per unit price for defoamer is mentioned in the purchase order thereby stipulating payments were to be made on quantity of defoamer supplied. He also relies on paragraph 183 in the award, reproduced below.

> *"183. In my considered opinion, after reading and analyzing all the above-cited excerpts, such a condition was placed because the Invoice value in the present arrangement held no significance, as the Invoices raised by Claimant were based on the quantity of Defoamer supplied to Respondent, whereas payment was based solely upon the production of P205. The reason behind such a condition itself further points towards the understanding that payments were to be based on the production of P205 and not the quantity of Defoamer supplied."*

6. Mr. Mishra, then refers to the purchase order dated 24th January, 2007. He relies on following extract therefrom, reproduced below.

> *"THE ORDER VALUE IS TENTATIVE AND ACTUAL PAYMENT SHALL BE MADE @ Rs.217.76 MT P205 PRODUCED (IN CASE THE MATERIAL IS SUPPLIED IN NON RETURNABLE PLASTIC DRUM OF 200KG). AND @ Rs.208.36 MT P205 PRODUCED (IF DEFOAMER IS SUPPLIED BY ROAD TANKER) IRRESPECTIVE OF CONSUMPTION OF DEFOAMER OR RECEIPT OF ACTUAL QUANTITY OF DEFOAMER WHICHEVER IS LESS. THE P205 PRODUCED SHALL BE CERTIFIED BY THE TECHNICAL DEPARTMENT."*

He submits, the payment term was earlier also stated in Letter of Intent (LoI) dated 2nd November, 2006. Relied upon paragraph in the letter is extracted and reproduced below.

> *"Accordingly, we are pleased to place Letter of Intent on you for 800 MT of Defoamer at a total value of Rs.6,72,60,880/- (Rupees Six Crore, Seventy Two Lakh, Sixty Thousand Eight Hundred Eighty only). The total value mentioned above is tentative and actual payment shall be made @ Rs.217.76 per tonne of P205 produced, irrespective of consumption of defoamer, based on the basic price of Rs.69,500/- per MT for the material supplied in 200 Kg. non-returnable plastic drums. If the Defoamer is supplied in Road Tankers, the payment shall be made @ Rs.208.36 per tonne of P205 produced based on the basic price of Rs.66,500 per MT."*

7. Referring to **Canara Nidhi Limited** (supra) Mr. Mishra relies on paragraph 20. He submits, the Court below correctly rejected the application to adduce additional evidence, as that would amount to retrial on merits of the issues decided by the arbitrator.

8. It must first be adjudicated as to whether, at all additional evidence can be adduced in the challenge to the award mounted under section 34. In paragraph 18 of **Canara Nidhi Limited** (supra) the Supreme Court quoted its earlier judgment in ***M/S. Emkay Global Financial Services Limited vs. Girdhar Sondhi****, reported in* ***(2018) 9 SCC 49***, paragraph 21. Said paragraph was quoted on emphasis supplied. The passage with emphasis is extracted and reproduced below.

> *"xx xxxx So read, we clarify the legal position by stating that an application for setting aside an arbitral award will not ordinarily require anything beyond the record that was before the arbitrator. However, if there are matters not contained in such record, and are relevant to the determination of issues arising under Section 34(2)(a), they may be brought to the notice of the court by way of affidavits filed by both parties. Cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth will emerge on a reading of the affidavits filed by both parties. xxxxxx "*

Having supplied the emphasis the Supreme Court then went on to sayas reproduced below.

> *"The legal position is thus clarified that section 34 application will not ordinarily require anything beyond the record that was before the arbitrator and that crossexamination of persons swearing in to the affidavits should not be allowed unless absolutely necessary."*

9. Keeping in mind above declaration of law Court perused impugned order. It appears therefrom, the Court below extracted paragraphs from the award to demonstrate that no bills/invoices had been brought on record by claiming to disprove the testimony. Court ascertained from opposite party that it had adduced oral evidence in the reference and there was no question of disputing the invoices therein since, they were not produced.

10. It is apparent from impugned order, it was passed on reliance in the award regarding omission to produce the invoices. Paragraphs from the award extracted in part and relied upon by the Court below, to reject petitioner's prayer for producing additional affidavit evidence, are observations made by the arbitrator on non-production of the invoices. Said Court went on to find that in the petition under section 151, no reasonable explanation had been cited by petitioner as to why the invoices had not been submitted during the arbitral proceeding and no convincing or cogent reason had been assigned by petitioner to show that the documents are relevant for just decision of the case. The Court below went on to find that annexures P/7 and P/11 were irrelevant. It transpires that the Court below found annexure P/8 series (third copies of the invoices) could not be accepted as additional evidence for two reasons, the other two annexures (P/7 and P/11) held to be irrelevant. The Court below refused to take on record annexure P/8 invoices on two grounds. Firstly, that no reasonable explanation had been cited as to why the invoices had not been submitted in the reference and secondly, no convincing or cogent reason had been assigned by petitioner to show the documents were relevant for just decision of the case. The second reason militates against said Court's reliance on the award, regarding non-production of the invoices. So, there is left for adjudication the first reason, of no reasonable explanation cited.

11. Petitioner had in paragraph 12 of the application stated explanation for non-production of the invoices in the reference. Two passages from the paragraph are extracted and reproduced below.

> *"12. That it is humbly submitted that the aforesaid Additional Documents could not be filed by the Applicant / Petitioner / Claimant / Seller along with the Statement of Claim (SoC) before the Delhi International Arbitration Centre (DAC), New Delhi for arbitration due to the fact that the Petitioner was unable to locate the said Additional Documents during the Arbitral Proceedings on account of Petitioner's frustration and suffering of trauma like mental stress and strain and imbalance of mental condition at the old age of 61 years, when Petitioner's Bank Account has been declared as Non-Performing Assets (NPA) by the Janata Sahakari Bank Ltd., Dadar, Mumbai, Maharashtra due to non-payment of loan amount, which was availed by the Petitioner on mortgage of residential house and factory of the Petitioner.*
>
> *xxx xxx xxx*

> *And, in the meantime, the residential house property and the plant / factory of the Petitioner has already been auctioned by the bank towards recovery of the default loan amount along with interest and, thereafter, the Petitioner is virtually in the middle of the street. And, the Petitioner is struggling till date with an expectation to get back its legitimate claim, raised in the aforesaid Claim Petition. And, the Petitioner filed the said "Tender Enquiry Document dtd.23.01.2006" and the "Counter foil of said total 166 Nos. of Tax Invoices" before this Hon'ble Court as additional documents after locating the same subsequently."*

This explanation was rejected out of hand by the Court below in saying that no reasonable explanation was cited. In simply saying so, the Court below did not advert to the explanation, to say why it wasunreasonable. Inference is, petitioner's explanation regarding inability to produce the documents in the reference was not noticed by the Court below.

12. Furthermore, reiteration by the arbitrator in the award, of omission on part of petitioner to have produced the invoices was relied upon by the Court below, to imply repeated opportunity given to petitioner to produce them in the reference. In this regard two sentences from impugned order are reproduced below.

> *"So, it apparent from the Final Award passed by the learned Arbitrator that, **though the learned Arbitrator repeatedly reflected that, no invoices has been filed by the claimant-petitioner** and the account summary lacked basic information about the bills, paid or unpaid. But, the petitioner-claimant has failed to bring the invoices before the learned Arbitrator during hearing."*
>
> *(emphasis supplied)*

There was reiteration by the arbitrator of omission of petitioner in producing the invoices. Impugned award does not disclose the arbitrator having said therein that opportunity was given to or direction made upon petitioner to produce the invoices.

13. Declaration of law in **Canara Nidhi Limited** (supra) as clarified is that a challenge under section 34 will not ordinarily require anything beyond record that was before the arbitrator and that cross-examination of persons swearing in affidavits should not be allowed unless absolutely necessary. In this case opposite party has contended that the arbitrator held the invoices to be of no relevance. On the other hand the Court below by impugned order appears to have relied on the award to show that non-production of the invoices was one of the reasons for the final award and that petitioner ought to have had produced them. In view of aforesaid it cannot be said that in spite of opportunity given or direction made in the reference, petitioner chose not to produce the invoices. The clause in the purchase order following the passage relied upon in the LoI says that quantity of defoamer and manner of its supply had to be taken into

consideration, to ascertain which rate was to be paid by opposite party. Court refrains from making any further comment.

14. The case thus appears to be an exceptional case warranting interference by judicial review of the challenge proceeding. Impugned order is set aside and quashed. The Court below is directed to admit annexure P/8 series, disclosed by the additional evidence affidavit, for purpose of adjudication of the challenge.

15. The writ petition is disposed of.

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2022 (III) ILR - CUT- 787

D. DASH, J.

SAO NO. 23 OF 2015
&
FAO NO. 320 OF 2003

DURGA SHARMA @ DURGA DEBI SHARMA (SINCE DEAD) THROUGH HER LRs. ....Appellants

.V.

CHIRANGILA SHARMA (SINCE DEAD) THROUGH HIS LRs. ....Respondents

CODE OF CIVIL PROCEDURE, 1908 – Order 41, Rule 23A to 25 – The First Appellate Court remand the matter without following the relevant provisions as contained in the order 23A to 25 – Effect of – Held, Not sustainable – The Appellate Court is required first to make an endeavour to answer the disputed findings and there after if no conclusion drawn either way, it would remand the suit for fresh trial – Such exercises are wholly missing in this case and thus the first Appellant Court`s Judgment cannot be sustained. (Para-7)

IN FAO NO.320 OF 2003

CHIRANGILAL SHARMA (SINCE DEAD) THROUGH HIS LRs. ....Appellants

.V.

SMT. DURGA SHARMA @ DURGA DEBI SHARMA (SINCE DEAD) THROUGH HER LRs ....Respondents

IN SAO NO.23 OF 2015

For Appellants : M/s. S.P. Mishra, Sr. Adv. S. Mishra, B. Jena, G.N. Parida, A. Agrawal, E. Agrawal & D.P. Dash

For Respondents : M/s.P.K.Rath,S.K. Pattanayak, A.Behera & S.K. Behera.

IN FAO NO.320 OF 2003

For Appellants : M/s. P.K.Rath,S.K. Pattanayak, A.Behera & S.K.Behera

For Respondents: ---

JUDGMENT Date of Hearing : 10.10.2022: Date of Judgment: 20.10.2022

D.DASH,J.

Since these two Appeals under Order 43 Rule 1(u) of the Code of Civil Procedure (for short, called as 'the Code') arise out of the judgment passed by the learned Additional District Judge (F.T.C.), Bhadrak in Title Ap`peal No.52/92, those had been taken up together for hearing for their disposal by this common judgment.

2. The Appeal as at Item No.(I) has been filed by the original Plaintiff of Title Suit No.131/84-I of the Court of the Sub-Judge, Bhadrak and the Appeal as at Item No.(II) has been filed by the original Defendant of the said suit. In both these Appeals, the challenge is to the open remand order passed by the First Appellate Court while disposing the Appeal preferred by the Defendant being aggrieved by the judgment and decree passed by the Trial Court in the said suit.

3. This Appeal has been admitted to answer the following substantial question of law:-

> **"**Whether the order of the First Appellate Court in remanding the suit to the Trial Court for fresh disposal stands to the legal sanctity?**"**

4. Mr. S.P. Mishra, learned Senior Counsel for the Appellants taking pain of placing the entire judgment under challenge submitted that the ultimate order of remand is not in consonance with the provision contained in Order 41, Rule 23A to 25 of the Code which prescribe as to under what circumstance and for what purpose an order of remand is permissible. He further submits that in the present case, the First Appellate Court has made absolutely no such endeavour to judge the sustainability of the findings returned by the Trial Court on the basis of the available evidence and without expressing any such difficulty on its part to proceed further in disposing the

Appeal on merit in accordance with law when the First Appeal is a continuation of the suit, such an order of remand cannot be sustained. He, therefore, submitted that it is a fit case to set aside the impugned order and to remit the Appeal to the First Appellate Court to decide the same on merit in accordance with law.

5. Mr. P.K. Rath, learned counsel for the Respondents inviting the attention of this Court through the judgment passed by the First Appellate Court also pointed out certain general observations, which have been made therein and contended that the Trial Court has not applied its judicial mind to the facts and circumstances as have emerged in evidence and without examining the documents available on record has mechanically passed the impugned order just for the sake of disposal of the Appeal before it. He, therefore, expressed no disagreement with the contention of the learned Senior Counsel for the Appellants that this Court by setting aside the impugned judgment should remit the Appeal to the First Appellate Court for a decision afresh in accordance with law.

6. Keeping in view the submissions made, having gone through the judgment passed by the First Appellate Court, this Court is not in a position to sustain the judgment under challenge as the reading reveals that the relevant provisions as to remand as contained in Order 23A to 25 of the Code have not been viewed in their proper prospective.

7. The First Appellate Court has not said that the Trial Court on the rival pleadings although was required to frame any issue/issues had not done so and as such has failed to answer the same with reference to the evidence and has not accordingly on saying that any party/parties have been prejudiced by that failure which is also not possible to be rectified at the stage of Appeal without remanding the matter in entirety as the finding on that issue having the bearing on other issues, all those findings are to be revisited by the Trial Court. It has also not said that on the available evidence, it is not possible to dispose of the Appeal on merit in judging the sustainability of the findings, which have been returned by the Trial Court. The judgment does not show that any such endeavour has been made by the First Appellate Court to first of all proceed to decide the matter on merit and that for the purpose certain hurdles being faced, it thus necessitates an open remand.

Thus, It appears that the provisions contained in Order 41 Rule 23-A to Rule 25 of the Code have not been followed in their letters and spirit in

passing such order of remand. The First Appellate Court appears to have kept the settled principles of law that the provision contained in Rule 23-A of Order 41 of the Code at the bay that said course is sparingly used since the public policy is that a litigation is to be concluded as early as possible and it is only when after judicial consideration and Rule 25 of Order 41 of the code is considered not to be adequate such an order of remand under Order 41 Rule 23-A of the Code is warranted.

The Appellate Court is required first to make an endeavour to answer the disputed findings and when in spite of such findings it would not be in a position to come to a conclusion either way, it would remand the suit for fresh trial. Such exercises are wholly missing in the case and thus the First Appellate Court's judgment cannot be sustained.

8. In view of all the aforesaid, the answer to the substantial question of law being returned in the negative, the judgment passed by the learned Additional District Judge, Bhadrak is hereby set aside and the Title Appeal No.52 of 1992 is remitted to the Court of the learned District Judge, Bhadrak for fresh disposal in accordance with law.

9. The Appeals are accordingly allowed without cost.

In order to arrest the running of time, learned counsels are requested to instruct their respective parties to appear in the Court of the learned District Judge, Bhadrak on 4th November, 2022 to receive further instruction in the matter of hearing of the Appeals for its early disposal.

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2022 (III) ILR - CUT-790

D. DASH, J.

S.A. NO.114 OF 1990

GANGADHAR PRADHAN ……...Appellant

.V.

BRUNDABAN PRADHAN (Since Dead)
BY HIS LRS & ORS. ……....Respondents

(A) HINDU LAW – Whether gift of undivided ancestral property belonging to Mitakshara joint family by the Karta or father of family

is void? – Held, No – Karta of a joint family may alienate joint family property in three situations, namely, (i) legal necessity (ii) benefit of the estate (iii) with the consent of all the coparceners of the family – Case law and relevant paras of Mulla Hindu Law in the regard discussed.
(Para -15-20)

(B) GIFT DEED – Whether it can be challenged in the second Appeal? – Held, No. (Para-25)

<u>Case Laws Relied on and Referred to</u> :-

1. AIR 1968 SC 253 : Dwarampudi Nagaratanamba Vs. Kunu Kurumaya & Ors.
2. 1988 (I) OLR 309 : China Sahuani & Anr. Vs. Rukuna Sahu & Anr.
3. AIR 1964 SC 5 : Guramma Vs. Mallappa.
4. AIR 1967 SC 569 : Ammathayee @ Perumalakkal & Anr. Vs. Kumaresan @ Balakrishnan & Ors.
5. AIR 1957 SC 434 : Kamla Devi Vs. Bechulal Gupta.
6. AIR 1963 Orissa 59 : Tara Sahuani Vs. Raghunath.
7. (2000) 7 SCC 409 : Thimmaiah & Ors. Vs. Ningamma & Anr.
8. 1988 (I) OLR 309 : Kishore Chandra Sahu & Anr. Vs. RukunaSahu & Anr.
9. AIR 1968 SC 253 : Dwarampudi Nagaratnamba Vs. Kunuku Ramayya & Ors.

For Appellant : Mr. Abhijit Pal

For Respondents: Mr. S.P. Mishra, Sr. Adv. & Mr. S.Chakravarthy.

JUDGMENT Date of Hearing: 16.08.2022 : Date of Judgment: 26.09.2022

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 decree dated 03.02.1990 and 17.02.1990 respectively passed by the learned Additional District Judge, Balesore in S.J.A. No.19/17 of 1988/86-I.

By the same, the Appeal filed by the original Respondent(Plaintiff) under section 96 of the Code in assailing the judgment and decree dated 10.01.1986 and 30.01.1986 respectively passed by the learned Additional Subordinate Judge, Balesore in O.S. No.167/115 of 1982-80 has been allowed. The First Appellate Court has thereby set aside the order of dismissal of the suit filed by the Respondent (Plaintiff)arraigning the Appellant as the Defendant and in turn has decreed the suit holding the suit land described in Schedule-Ka of the plaint to be a part and parcel of the property of the original Respondent (Plaintiff) by declaring the registered gift deed dated 28.04.1975 executed by the original Respondent (Plaintiff) in favour of the Appellant (Defendant) as illegal and inoperative.

At this stage, it may be stated that the original Respondent having died, his legal representatives having come on record as the Respondent Nos.1(a) to 1(h) had filed an application to implead two persons, namely, Kamala Kanta Malik, Amarendra Kumar Hota and Saraswati Sishu Vidya Mandir represented by its Secretary as the purchasers of the properties during this lis from the Appellant (Defendant) providing the details of the properties purchased by them in the schedules given therein in further stating that those have been sold by the Appellant (Defendant) by registered sale deeds.

This Court, upon hearing the parties, by order dated 23.12.2020, has allowed the same and accordingly those purchasers have been arraigned as Respondents 2 to 4 and they have entered appearance in this Appeal.

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. **Plaintiff's Case:-**

One day, finding the Defendant, then a four years male child, on the side of the village lane, being so abandoned, out of compassion and sympathy, the Plaintiff had brought him to his house and he with his wife took all his care and brought him up. The Plaintiff tried his best to educate the Defendant. However, the Defendant did not make much of progress in that line. When things stood thus, the Defendant, on attaining the age of 14-15 years, came out to help the Plaintiff in his cultivation operation and activities. He was also working as a field labour in the village at the time of need. In this way, while living with the Plaintiff, the Defendant reached at the age at which the rural youth normally go for marriage. The Plaintiff then sincerely wanted to get the Defendant married. Since the Plaintiff had no such landed property to his credit and his parentage being not known had no hope of inheriting/succeeding to the property therefrom, difficulties arose on the way of finding out a suitable bride for him as the questions come to be posed as to the future security and living. When the matter was proceeding in this way, one Babu Jena of Village-Kalyani came with a proposal to give his sister in marriage with the Defendant. But, subsequently, when he came to know that the Defendant had no land of his own, he wanted to withdraw.

The Plaintiff states that finding the above difficulty standing on the way of marriage of the Defendant, he executed a deed of gift in respect to Schedule-'Ka' property which is a part of his ancestral property in favour of the Defendant. This deed of gift is thus said to be a nominal one and only for the

purpose as above. The deed was executed on 28.04.1975 and it was registered. The purpose of this gift is said only to settle the marriage of the Defendant. The gift is said to have not been acted upon. The Defendant, after his marriage, lived with the Plaintiff in his house for some time and thereafter, due to dissention and dispute, he left the house of the Plaintiff. It is further stated that the deed of gift in original had been kept by the Plaintiff and when the Defendant left the house, he somehow managed to take away the said original deed of gift. He thereafter when attempted to transfer the land covered thereunder, the Plaintiff filed the suit for a declaration that the suit property is a part and parcel of his ancestral property and the so-called deed of gift dated 28.04.1975 is void, invalid and no such right, title and interest in respect of the suit land has been thereby been clothed upon the Defendant. Healso prayed for confirmation of his possession over the suit land.

4. The Defendant, in his written statement, while traversing the plaint averments, has denied the fact that the Plaintiff is in possession of the suit land. It is further stated that the Plaintiff, after consulting his relations, had executed the deed of gift and pursuant to the same had delivered the possession of the suit land to the Defendant. The Defendant thus claims to be in possession of the suit property by paying the rent to the State. He asserted that the gift was not at all a nominal one. He has also stated that he had not brought the original registered gift deed from the custody of the Plaintiff. It is stated that the Defendant intended to construct a house over the land in Schedule-'Ka' of the plaint and as then it was found that there was no passage to go over that land, he requested the Plaintiff to give him some land for passage but that was denied. So, at the intervention of village gentries, the Plaintiff agreed to exchange that land in Schedule-'Ka', with another piece of land and give it to the Defendant for his occupation and enjoyment in substitution of the gifted land. However, some time thereafter the Plaintiff played hide and seek even though the Defendant, accepting the arrangement, proceeded to the extent as required from him.

5. On the above rival pleadings, the Trial Court framed as many as six issues. Rightly proceeding first to answer issue nos.4 and 5 together, which are interlinked and mainly concern with the validity of the deed of gift and passing of title over the property covered thereudner; upon examination of evidence and their evaluation, the answer has been returned in upholding the said deed of gift and consequentially, the passing of the title over the property in question to the hands of the donee, the Defendant has been so held.

The suit thus being dismissed, the unsuccessful Plaintiff having carried the First Appeal has, however, been successful in getting all his prayers allowed and in obtaining a decree in the suit.

The First Appellate Court has passed the following order:-

> "The judgment and decree passed by the learned court below stand hereby set aside. Original Suit No.167/115 of 1982-80-I be and the same is hereby decreed on contest against the defendant. The suit land, as described in schedule "Ka' of the plaint, is hereby declared to be a part and parcel of the plaintiff's property and the registered gift deed dated 28.04.1975 executed in respect thereof by the plaintiff in favour of the defendant is declared to be illegal and inoperative against the interest of the plaintiff. Plaintiff's possession over the suit land is hereby confirmed. Under the circumstances of the case, parties to bear there own costs throughout."

6. The present Appeal has been admitted on 12.09.1990 to answer the substantial questions of law as raised in Ground-B and C of the Memorandum of Appeal. Those read as under:-

> "A. Whether gift of undivided interest of a Mitakshara joint family by the Karta or father of the family is void or not would depend on further case of the parties that such gift was with or without with the consent of other coparceners?; and
>
> B. Whether the learned lower appellate court was correct in holding that Ext.A being void in law, there is no question of application of law of limitation of three years."

Both the above questions concern with the validity of the deed of gift and thereby, the benefit accruing in favour of the donee, if any. This Court is, therefore, feels it apposite to proceed to examine as to whether the Plaintiff had the authority to execute the deed of gift and if by executing the said registered deed of gift (Ext.A) in respect of the properties covered thereunder, there being valid acceptance, as such the title over the properties, has passed on to the hands of the so-called donee, i.e, the Defendant.

7. Mr. Abhijit Pal, learned counsel for the Appellant submitted that here the First Appellate Court having not examined the very deed of gift (Ext.A) and the evidence concerning the execution of the said deed of gift as also to the dealing of the properties as well as the conduct of the parties as are emerging from evidence, has simply been swayed away by the proposition of law that the Plaintiff being the Karta of a joint undivided Hindu family governed by Mitakshara School of Hindu Lawcould not have gifted away the coparcenary property to the Defendant. He further submitted that the First Appellate Court having not examined as to whether the said deed of gift was with the consent of other coparceners, when has recorded the findings in favour of the Plaintiff in declaring the registered deed of gift void, the same is vulnerable. He also submitted that the principles of law as enunciated in the decisions referred to by

the First Appellate Court in case of ***Dwarampudi Nagaratanamba –V- Kunu Kurumaya and others***; AIR 1968 SC 253 and ***China Sahuani and another –V- Rukuna Sahu and another***; 1988 (I) OLR 309, have no applicability to the facts situation of the case at hand. He, therefore, submitted that here the First Appellate Court ought not to have held that the said registered deed of gift (Ext.A) as invalid in the eye of law. He thus submitted that by setting aside the order of dismissal of the suit filed by the Plaintiff as passed by the Trial Court, the First Appellate Court has erred both on facts and law.

8. Mr.S.Chakravarty, learned counsel for the Respondents 3 and 4, reiterating the above, contended that they having purchased the property from the Defendant, who is the owner/donee, who had got it by a valid gift, they have the right, title and interest over their respective purchased lands.

None appeared on behalf of the Respondent No.2 despite noticeand opportunity in that regard.

9. Mr. S.P. Mishra, learned Senior Counsel for the Respondents (the legal representatives of original Respondent (Plaintiff) submitted all in favour of the decision rendered by the First Appellate Court. Inviting the attention of this Court to the relevant averments made in the plaint as well as the written statement, he submitted that with the obtained evidence and since the gift made by the Plaintiff was not with the consent of other coparceners, keeping in view Para-256 of the Mulla's Principles of Hindu Law and the decisions referred to; the First Appellate Court is right in ruling that the said deed of gift is void and having said that the suit has been rightly held to be maintainable. He, therefore, submitted that the First Appellate Court did commit no mistake in decreeing the suit granting the reliefs as prayed for by the Plaintiff.

10. 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. This Court has also extensively travelled through the evidence on record, both oral and documentary.

11. It has been stated in paragraph-4 of the plaint that when the Plaintiff being interested to perform the marriage of the Defendant and was in search of a suitable bride for him, one Babu Jena agreed to givehis sister in marriage with the Defendant provided the Plaintiff givessome properties to the Defendant. Then the Plaintiff states that on 28.04.1975, he without the knowledge of his two sons executed a nominal deed of gift in favour of the Defendant in respect of Schedule-'Ka' property and got it registered.

The Defendant, while denying the fact that said gift was withoutthe knowledge of the sons of the Plaintiff, has asserted in paragraph-5 of the written statement that the Plaintiff with the knowledge of his wife, sons, relations and neighbours and as advised by them, had executed the said registered deed of gift and delivered the possession of the said land to the Defendant.

12. Indisputedly, the parties are Hindus and governed by the Mitakshara School of Hindu Law. It has been stated by the Plaintiff in the plaint that the properties described in Schedule-'Ka' of the plaint, which is the gifted land and as such covered under the deed of gift dated 28.04.1975 (Ext.A) are the ancestral properties. This has remained uncontroverted from the side of the Defendant.

13. Plaintiff is the Karta of the family consisting of himself, his wife and sons who had not been arraigned as parties to the suit. However, they have come on record during pendency of this second appeal and now support the judgment and decree passed by the First Appellate Court.

The Plaintiff, being the so-called donor in the present suit, has impeached the gift. The First Appellate Court has held the gift to be void and invalid for the reason that it was not with the consent of the coparceners of the family, i.e., the sons when admittedly the property is the ancestral joint family property. So, the first question arises is whether the gift made by the Plaintiff to the Defendant under the facts and circumstances is invalid for being so declared as void. The next one also arises as to whether the alienation of the joint family property in favour of the Defendant by way of gift by the Plaintiff is voidable only at the instance of the non-consenting sons of the Plaintiff, who are coparceners whose consent had not been obtained prior to said alienation as is said by the Plaintiff or it can also be so avoided by the Plaintiff-Donor too.

14. It is trite law that Karta/Manager of a joint family may alienate joint family property in three situations, namely, (i) legal necessity, or (ii) benefit of the estate or (iii) with the consent of all the coparceners of the family. In our given case, the gift of the portion of the joint family property under Ext.A was not with the consent of all the coparcerners as has been concurrently held by the Courts below.

15. At this place, before proceeding further, it would be apt to take a look at the principles of Hindu Law on the subject. We may refer to the relevant Paras of Mulla Hindu Law by Sir Dinshaw Fardunji Mulla (24th Edition). Coming to Para 256 which has been relied upon by learned Senior Counsel for the Respondent (Plaintiff) reads:-

> **"256. Gift of undivided interest:-**
>
> According to *Mitakshara* law as applied in all the states, no coparcener can dispose of his undivided interest in coparcenary property by gift. Such transaction being void altogether, there is no estoppel or other kind of personal bar which precludes the donor from asserting his right to recover the transferred property. He may, however, make a gift of his interest with the consent of other coparceners."

The above deals with disposition of a coparcerner's undivided interest in the coparcenary property by gift. We are not concerned with the gift of Plaintiff's (Donor) undivided interest in the coparcenery property. Here, the gift is in respect of specific property which is a part of the ancestral joint family property.

The Para-254 of Mulla Hindu Law by Sir Dinshaw Fardunji Mulla (24th Edition) reads as under:-

"**Alienation by father:**

> A Hindu father as such has special powers of alienating coparcenary property, which no other coparcener has. In the exercise of these powers he may:
>
> (1) make a gift of ancestral movable property to the extent mentioned in Para 223, and even of ancestral immovable property to the extent mentioned in Para 224;
>
> (2) sell or mortgage ancestral property, whether movable or immovable, including the interest of his sons, grandsons and great-grandsons therein, for the payment of his own debt, provided the debt was an antecedent debt, and was not incurred for immoral or illegal purpose (Para 294)
>
> Except as aforesaid, a father has no greater power over coparcenary property than any other manager, i.e., he cannot coparcenary property except for legal necessity or for the benefit of the family."
>
> Now Para 224 of Mulla Hindu Law by Sir Dinshaw Fardunji Mulla (24th Edition) says:-

"**224. Gift by father or other managing member of ancestral immovable property within reasonable limits**

> A Hindu father or other managing member has the power to make a gift within reasonable limits of ancestral immovable property for 'pious purposes'. However, the alienation must be by an act inter vivos, and not by will.

16. In ***Guramma Vrs. Mallappa;*** AIR 1964 SC 5, upon examination of the whole question, it has been held that it was competent for a father to make a gift

of immovable property to a daughter, if the gift is of a reasonable extent having regard to the properties held by the family. The emphasis here is on gift of a reasonable extent. If, on the facts, it is found that the gift was not within the reasonable limit, such a gift would not be upheld.

17. In case of ***Ammathayee @ Perumalakkal & another -v- Kumaresan @ Balakrishnan & Others;*** AIR 1967 SC 569, the Hon'ble Apex Court has summarized the Hindu Law on the question of gifts of ancestral properties in the following terms:-

> "Hindu law on the question of gifts of ancestral property is well settled. So far as moveable ancestral property is concerned, a gift out of affection may be made to a wife, to a daughter and even to a son, provided the gift is within reasonable limits. A gift for example of the whole or almost the whole of the ancestral moveable property cannot be upheld as a gift through affection. (See Mullas Hindu Law, 13th Edn., p.252, para 225). But so far as immovable ancestral property is concerned, the power of gift is much more circumscribed than in the case of moveable ancestral property. A Hindu father or any other managing member has power to make a gift of ancestral immovable property within reasonable limits for pious purposes; (see Mullas Hindu Law, 13th Edn.,para 226, p. 252). Now what is generally understood by pious purposes is gift for charitable and/or religious purposes. But this Court has extended the meaning of pious purposes to cases where a Hindu father makes a gift within reasonable limits of immovable ancestral property to his daughter in fulfillment of an ante-nuptial promise made on the occasion of the settlement of the terms of her marriage, and the same can also be done by the mother in case the father is dead. (See Kamala Devi v. BachuLal Gupta, 1957 SCR (AIR 1957 SC 434)".

18. In ***Kamla Devi Vrs. Bechulal Gupta***; AIR 1957 SC 434; the Apex Court considered the question of the extended meaning given in numerous decisions to be expression 'pious purpose'.

19. In fact, in case of ***Tara Sahuani V Raghunath***; AIR 1963 Orissa 59, our High Court has held that father can make a gift of a small portion of ancestral immovable property to his daughter at or after her marriage, if the extent is reasonable and particularly if she is in poor circumstances.

20. In case of ***Thimmaiah & others -V- Ningamma & another***; (2000) 7 SCC 409, it has been said:-

> "The Karta is competent or has the power to dispose of coparcenary property only if (a) the disposition is of a reasonable portion of the coparcenary property and (b) the disposition is for a recognized pious purpose. The High Court has not come to any conclusion as to whether the gift of items 3 to 6 by Hiri to the respondent No. 2 was

> within reasonable limits or in fulfillment of an ante nuptial promise made on the occasion of the settlement of the terms of the respondent No.2s marriage. It must be taken, therefore, that the findings of the lower Courts on both counts were accepted. That being so, Hiri could not have donated items 3 to 6 to respondent No. 2 and the deed of gift dated 9.6.71 was impermissible under Hindu Law. The question is - could such an alienation be made with the consent of the appellant No. 1? It is arguable that there is a distinction between a void disposition and a voidable one, and that the gift in favour of the respondent No. 2 being void cannot be made even with the consent of the appellant No.1. However, it is not necessary to decide the issue in the view that we have taken in this case. This Court in Guramma V. Mallappa AIR 1964 SC 510 has envisaged three situations of voidable transactions. It was held that a managing member may alienate joint family property in three situations namely: (i) legal necessity, or (ii) benefit of the estate or (iii) with the consent of all the coparceners of the family. Where the alienation is not with the consent of all the coparceners, it is voidable at the instance of the coparcener whose consent has not been obtained. Needless to say where there is only a sole surviving coparcener and no other member of the family who has a joint interest in the property, there are no fetters on the alienation of the property."

21. In our case at hand, if we trace the factual background from the very time of Defendant's entry to the Plaintiff's house, it is seen that the Plaintiff, out of compassion and sympathy, showing his great gesture as a pious personality of extra-ordinary quality, finding that abandoned male child, the Defendant, on the side of the road, instead of putting him in a place of shelter or elsewhere, had brought him to his own house where not only he, but his wife and all other members of the family joined together on the march in that direction in taking all care of the Defendant and the Defendant remained as a foster son to the Plaintiff. The Plaintiff, in order to discharge his moral obligation as such foster father, finally got him married by taking part therein as the Karta to which all other family members too had their full support and acceptance. Thereafter, the Plaintiff and his family members have allowed the married couple to continue in the said house as before as the members of the family. They having acted in such manner, the gift in question, in my view is certainly to be traced to a charitable and/or religious purpose, if we keep in mind what has been written in our Hindu Scriptures and preached by great Hindu Sages any many Great men that that "SERVICE TO MANKIND IS SERVICE TO GOD".

The gift at hand thus cannot be said to have been made out of love and affection which does not come within the scope of the term "Pious Purpose". The Defendant, although was a stranger to the family at the time of his birth, came to the family not at his desire or request nor with permission, but by voluntary act of the Plaintiff and under the situation, he lived, married and continued there for some time and when the Plaintiff, being the Karta of the

family and as the representative of the said family, performed his marriage in order to see that he is married, the property had been gifted. When the Plaintiff was facing the difficulty to arrange a bride for the Defendant as many a time the question as to the future security of the Defendant arose as he had then no such sufficient income of his own and was almost like a dependant of the Plaintiff and his parentage was not known, there was also no hope of inheriting/succeeding to any property from that source so as to inspire confidence upon the bride side to satisfy themselves that the couple would be satisfied that they would somehow have a smooth sail in future with the sense of security, the deed of gift has been executed by him. The Plaintiff has clearly stated that he wanted that the Defendant should get married and that he performed as the guardian to see that the Defendant had a happy married life. Even after the marriage, the Defendant with his wife stayed for some time in the house of the Plaintiff with the other members of the family as the members of the said family. Thus it is also seen to be a moral obligation of the Plaintiff, which he discharged by making such gift. Said gift, if we do not say to be for Pious Purpose, it would, in my view, be causing vidence upon the expression "Pious Purpose". Here, it is not a case of gift by the Plaintiff as the Karta of the family to the son or daughter-in-law or grandson or grand daughter, but to the Defendant about whose positioning and setting in the family has already been stated in detail and needs no repetition.

22. As has been said that it being a duty of the father or his representative to marry the daughter, any gift to the daughter in respect of reasonable portion of the joint family property being for pious purpose is valid when the daughter is no more remaining as a living member in the family being not for love and affection which is not so in case of a daughter-in-law becoming a member of the family of her father-in-law after marriage who is having her entitlement after her marriage in her own right to the ancestral immovable property in certain circumstances, I also find all the reasons that the gift of joint family immovable property made under Ext.A to this Defendant should also be treated at par with that as are held valid in the case of a daughter being done under the circumstances as noted above provided its extent is reasonable.

23. The decision cited by the learned Senior Counsel for the Respondent (Plaintiff) so as to support the conclusion arrived at by the First Appellate Court in case of China Sahuani and after her, ***Kishore Chandra Sahu & another -V- RukunaSahu& Anothe***r; 1988 (I) OLR 309 being carefully gone through is found to have been rendered totally on different factual settings of that case and the challenges there were also on so many counts. The facts and circumstance of the other case cited, i.e., "***Dwarampudi Nagaratnamba -V- Kunuku Ramayya &Others***; AIR 1968 SC 253" are quite distinguishable from our case as also the

considerations that we take up. Thus, the same do not come to the aid and assistance of the case of the Plaintiff.

24. Now, let us also proceed to the other point, which automatically arise for consideration and it appears that the Courts below perhaps not being so contended before them have not touched upon the same. The question here is whether the First Appellate Court, is right in holding straightway that since the immovable property being ancestral in nature, the Plaintiff had no authority/power to make a gift of the portion of the ancestral property in favour of the Defendant.

At this juncture, adverting to the earlier discussion made as regards reasonableness, the object is to see that the non-consenting coparceners are not prejudiced and face great deprivation. It may be kept in mind that the Plaintiff has not stated anywhere in the plaint or in his evidence as to what was the total extent of ancestral joint family properties and that has not been placed on the table of the Court in order to even remotely infer that the extent of property covered under the gift is not of a reasonable portion of the total holding of the family but is quite unreasonable in its extent, which in other way to take care of the plight of the non-consenting coparceners and the hardship that they have faced by any such serious deprivation, if any, in judging the impact. The Plaintiff having neither so pleaded as required nor proved; this gift also cannot be said to be not of reasonable portion of the total holding of the ancestral joint family.

25. Coming to another question, peculiar to the present case is that here Plaintiff being the donor has questioned the gift made by him and it is in a suit filed against the donee (the Defendant) without joining the other coparceners. Those coparceners had come to be joined as parties only at the stage of this Second Appeal in view of the death of the Plaintiff (Respondent). They are now supporting the case of the original Plaintiff; in other words now they say that they had no consent for the said gift made by their father, the Plaintiff.

It is settled law that where such gift is not made with the consent of all the coparceners, it is voidable at the instance of coparceners whose consent has not been obtained but it is not void abinitio as it is in case of gift of an undivided interest in the coparcenary property. Therefore, for the present even keeping aside the conclusion that I have already recorded favouring the gift in question as saved, this gift here was voidable at the instance of the coparceners, who are now the substituted Plaintiffs, but not at the instance of the original Plaintiff. The suit as framed for the reliefs claimed thus is not entertainable.

The registered deed of gift executed by the original Plaintiff in favour of the Defendant is dated 28.04.1975. The present Second Appeal has been filed on 18.04.1990. The legal representatives of the Plaintiff have come on record in the Second Appeal by order dated 03.04.1996. None of them have as yet filed any suit for declaration that the gift in question made by the original Plaintiff is void. Under the circumstance, now even the challenge of the gift from their side in this Second Appeal is not entertainable in law and is barred.

26. In view of the aforesaid, without least hesitation, this Court, dealing the case at hand, also holds that said gift by the Plaintiff could have only been challenged by the non-consenting coparceners in asserting that they had no consent, the same being voidable at their instance. By the time, when these substituted Plaintiffs have come on record, there has already been lapse of more than two decades since the gift, the challenge even by them as the suitors to the said gift here is not entertainable being wholly barred by limitation when also a fresh suit, at their instance, is barred. So, for this reason also, the suit is liable to be dismissed. The Courts below have clearly lost sight of all these aspects. The First Appellate Court, without going deep into the facts and circumstances, simply on the basis of the said decisions, as have been referred to, has decreed the suit.

27. For the discussion and the reasons stated above, the substantial questions of law being accordingly answered, I accept the Appeal and set aside the judgment and decree passed by the First Appellate Court. Consequently, the judgment and decree passed by the Trial Court are restored although for different reasons and the suit filed by the Plaintiff stands dismissed.

28. In the result, the Appeal is allowed. There shall, however, be no order as to cost.

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2022 (III) ILR - CUT- 802

BISWANATH RATH, J.

W.P.(C) NO. 4711 OF 2016

DEBENDRA PRASAD NAYAK & ORS. ....Petitioners

.V.

COMMISSIONER, CONSOLIDATION, BBSR & ORS. ....Opp. Party(s)

ORISSA CONSOLIDATION OF HOLDING AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Section 36 – Whether the revisional authority has power to make out a third case and can direct for recording the land in the name of the Government? – Held, No – The proceeding under Section 36 of the Act is an intra-party dispute – It is up to the Revisional Authority based on its own conclusion either to allow the revision or dismiss the same but in no circumstance, the Commissioner can execute its power available under Section 37 of the Act while conducting/deciding a case under section 36 of the Act.

(Para -6)

For Petitioners : Mr. S.S.Rao, Sr. Adv.

For Opp. Party(s) : Mr. S.Mishra, ASC, Mr. D.Tripathy & Mr. B.Baug.

ORDER Date of Order: 13.7.2022

BISWANATH RATH,J.

1. Heard learned counsel for the Parties.

2. The Writ Petition involves a challenge to the impugned order at Annexure-10 passed by the Revisional Authority in exercise of power under Section 36 of the OCH & PFL Act, 1972.

3. Taking this Court to the background of the case, Mr.S.S.Rao, learned senior counsel for the Petitioners contended that the Revision emanated from a proceeding under Section 9 of the OCH & PFL Act, 1972 was rejected and the Appeal proceeding under Section 12 of the OCH & PFL Act, 1972 being allowed, the private O.Ps. herein went in Revision. It is alleged, since the Revision was under Section 36 of the OCH & PFL Act, 1972, consideration involved therein should have been intra-Parties but it appears here the Revisional Authority while deciding the contest of the Parties A F R involved therein has made out a third case and while rejecting the Revision, has directed for recording the land involved in the name of the Government. It is in the premises, Mr. Rao, learned counsel for the Petitioners sought for interference in the impugned order and setting aside the same.

4. In his opposition, Mr. S. Mishra, learned Additional Standing Counsel for O.P.1 taking this Court to the findings of the Revisional Authority through Paragraph-9 submitted, the ultimate direction of the Commissioner is based on his conclusion came through Paragraph-9 and for the Revisional Authority having a wider power has passed the order remaining within his jurisdiction. In the circumstance, Mr. Mishra, learned Additional Standing Counsel defended the impugned order and sought for dismissal of the Writ Petition. There is, however,

no dispute by the learned State Counsel that power of the competent authority under Sections 36 & 37 of the Act is quite distinguishable.

5. There is also appearance for the private O.Ps. where learned counsel appearing for them toed the submission of Mr. S.S. Rao, learned senior counsel for the Petitioners.

6. Considering the rival contentions of the Parties, this Court finds, there is no denial by the Parties involved that the Revision exercise was undertaken by the Commissioner under the provision of Section 36 of the OCH & PFL Act, 1972. For relevancy of the provision at Sections 36 & 37 of the OCH & PFL Act, 1972, this Court takes note of both the provisions, which read as follows :-

> "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.
>
> 37. Power to call for records- (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.
>
> (2) The power under Sub-Section (1) may be exercised by the Director of Consolidation in respect of authorities subordinate to him."

Reading through the provision at Section 36 of the OCH & PFL Act, 1972, this Court finds, the proceeding under Section 36 of the Act is an intra-party dispute. It is up to the Revisional Authority based on its own conclusion either to allow the Revision or dismiss the same but in no circumstance, the Commissioner can exercise its power available under Section 37 of the OCH & PFL Act, 1972 while conducting a case under Section 36 of the Act. This Court here further finds, in the event the Revisional Authority comes to observe that there is involvement of a third party case, nothing prevented the Commissioner, Consolidation to ask the Party to involve such Party and decide the matter in terms of Section 37 of the OCH & PFL Act, 1972 providing full opportunity to the Parties likely to be affected and in absence of which this Court finds, the Revisional Authorityhas exceeded its jurisdiction beyond the provision of Section 36 of the OCH & PFL Act, 1972.

7. In the circumstance, this Court interfering with that part of the impugned order of the Commissioner directing the Tahasildar to prepare the Record of Rights sets aside the same. Revisional order, so far dismissal of the Revision otherwise, stands confirmed.

8. The Writ Petition succeeds but to the extent as indicated herein above. No cost.

2022 (III) ILR - CUT- 805

BISWANATH RATH, J.

WPC (OAC) NO. 3172 OF 2018

Dr. AMBUJA SATPATHY ....Petitioner

.V.

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

SERVICE LAW – Validity of a waiting list – Duration of its Operation – Held, a waiting list prepared by the competent authority is a list of eligible and qualified candidates who in order of merit are placed below to the last selected candidate – Usually it is linked with the selection or examination for which it is prepared – The authority should take a desired step that if one of the selected candidate in particular stream declines to join then the next candidate in such stream is to be selected – This Court here observes, once a selected panel is drawn up the same should be maintained till expiry of the valid period – Writ application allowed with certain direction. (Para- 21,22)

Case Laws Relied on and Referred to :-

1. 2015 (II) OLR, 367 : Sarojkanta Mohapatra & Ors. Vs. State of Orissa & Ors.
2. 1994 Supp. (2) SCC 591 : Gujarat State Dy. Executive Engineers' Association Vs. State of Gujarat & Ors.
3. (1989) 1 SCC 136 : Dr. M.C. Bindal Vs. R.C. Singh and Ors.
4. (2002) 4 SCC 726 : Vinodan T. and Ors. Vs. University of Calicut and Ors.
5. (2010) 4 SCC 301 : H.S. Vankani & Ors. Vs. State of Gujarat & Ors.
6. (2020) 2 SCC 582 : Mohd. Rashid Vs. Director, Local Bodies, New Secretariat & Ors.
7. 2015 (II) OLR 367 : Sarojkanta Mohapatra & Ors. Vs. State of Orissa & Ors.
8. 1994 Supp. (2) SCC 591 :Gujurat State Dy. Executive Engineers' Association Vs. State of Gujarat & Ors.

For Petitioner : M/s. M.Ku. Mishra, Mr. D.K. Patnaik, J. Sahoo, S. Das.

For Opp. Party No.1 : Mr. S. Mishra, Addl. Standing Counsel
For Opp. Party No.2 : Mr. S.B. Jena.

JUDGMENT Date of Hearing:23.09.2022: Date of Judgment:11.10.2022

BISWANATH RATH, J.

1. This application involves the following relief:-

"Relief Sought for:

It is, therefore, humbly prayed that this Hon'ble Tribunal may graciously be pleased to issue notice for show cause and call for the records and on perusal of the causes shown and upon insufficient causes shown be pleased to:

(i) quash the advertisement dtd.11.10.2018 under annexure-17 so far as filling up the post of Asst. Professor Surgery in Speciality Category is concerned.

(ii) Direct the respondents to recommend the name of the applicant in pursuance of the Advertisement No.15 of 2015-16 and give the applicant appointment in the post of Asst. Professor Surgery in Speciality Category with all consequential and financial benefits from the date of appointment of others selected candidates in same discipline.

(iii) and may pass such other order / orders as deemed just and proper.

And for this act of kindness, the applicant shall as in duty bound ever pray."

2. The applicant-Petitioner through the above relief in one hand while claiming for quashing of the advertisement dated 11.10.2018 vide Annexure-17 (Advertisement No.12 of 2018-19), also sought for appointment in the post of Asst. Professor, Surgery in Speciality category depending on her result pursuant to the Advertisement No.15 of 2015-16 also in terms of the recommendation made in her favour by the competent authority and further with grant of all consequential and financial benefit from the date of appointment of others in terms of the aforesaid advertisement.

3. Short background involved in this case is that the cause of action in bringing such application appears to be as an outcome through the advertisement dated 11.10.2018 (Annexure-17) while not showing full compliance to the selected candidates for the post of Asst. Professor, Surgery in Group-'A' of the Odisha Medical Education Service hereinafter in short be reflected as 'O.M.E.S' pursuant to the Advertisement No.15 of 2015-16 read together with the numbers of corrigendum and illegally involving the posts for which the selection is already made in the next advertisement vide Annexure-1. Such action of the State Authorities is also claimed to be illegal as it was contrary to the direction of the Tribunal in O.A. No.4124(C) of 2016 where by the interim order dated 9.06.2016 involving P.P. No.282(C) of 2016 and O.A. No.2064(C) of 2016 the Tribunal clearly directed for keeping one post of Asst. Professor, Surgery under General Category vacant. Through the pleadings the Applicant-Petitioner discloses that pursuant to the direction of the High Court dated 4.07.2013 in W.P.(C) No.13721 of 2013 the Selection Committee recommended the name of the Applicant-Petitioner along with others for appointment in different disciplines and it is pursuant to which the applicant was appointed as Asst. Professor but on ad.hoc basis in M.K.C.G Medical College and Hospital, Berhampur in the discipline of Surgery and she is continuing as such. Proof of the same is filed herewith at Annexure-1. It is claimed that while the ApplicantApplicant-Petitioner was continuing as such, the respondents therein issued Advertisement No. 15 of 2015-16 inviting applications from eligible

candidates for recruitment to the post of Asst. Professor in different disciplines including that of Surgery discipline. The advertisement also made it clear that the selection therein shall be madeas per the O.M.E.S (Methods of Recruitment and Condition of Service) Rules, 2009. So far as the discipline of Surgery is concerned; the advertisement contains fifteen numbers of post on that head and out of which three posts were reserved for S.T. (2 Male + 1 Woman), four posts were reserved for S.C.(3 Male+1Woman), eight posts were reserved for unreserved category (6 Male+2Women). For better appraisal the Applicant-Petitioner includes the advertisement at Annexure-2 requiring submission of application by 23.12.2015. The Applicant-Petitionerfinding herself eligible applied for the post of Asst. Professor (Surgery) specifically meant for women in unreserved category vide Annexure-3. It is needless to mention here that prior to undertaking of the selection process the Odisha Public Service Commission hereinafter in short be reflected as 'O.P.S.C' issued a corrigendum involving Advertisement No.15 of 2015-16 bringing in a restriction to the recruitment to the post of Asst. Professors at S.C.B. Medical College & Hospital, Cuttack, MKCG Medical College & Hospital, Berhampur and S.C.B. Dentistry College, Cuttack. Accordingly a revised vacancy position for the post of Asst. Professors in Group 'A' of O.M.E.S in different disciplines was published. The Applicant-Petitioner specifically pleaded that so far as the vacancies in the discipline of Surgery under specific category were concerned; a total number of eight vacancies were advertised for recruitment in the O.M.E.S site, which indicates out of fifteen number of posts available in the discipline of Surgery only eight vacancies in such discipline were carved out and bifurcating the same the reservation is made as such; two posts for S.T., two posts for S.C. and four posts for unreserved candidates. It was also made clear that the application sosubmitted pursuant to the Advertisement No.15 of 2015-16 shall also be considered for the above noted vacancies at S.C.B. Medical College & Hospital, Cuttack, M.K.C.G Medical College & Hospital, Berhampur and S.C.B. Dentistry College, Cuttack. This corrigendum is found place at Annexure-4. It appears, simultaneously the OPSE brought out an Advertisement bearing No.17 of 2015-16 for recruitment to the post of Asst. Professor in Super Specialty and Specialty in different disciplines for Veer Surendra Sai Institute of Medical Science and Researchhereinafter in short be reflected as 'VIMSAR'. The advertisement inviting further applications is at page 30 of the brief and the internal page 2 of the said advertisement shows, the balance seven vacancies in the Surgery stream has been assigned to VIMSAR. Through this advertisement the reservation was segregated as one post to S.C. category and the balance six posts to unreserved category including three womenand the application was required to be submitted by 30.01.2016 as appearing at Annexure-5. Applicant-Petitioner here being aggrieved for not providing reservation to women candidates in un-reserved

category from out of four posts meant for Surgery stream in the corrigendumrelating to the Advertisement No.15 of 2015-16 filed O.A. No.147(C) of 2016 before the State Administrative Tribunal seeking a direction therein to the Respondent No.2 to provide the reservation of two posts for women candidates in the Un-reserved category in terms of the Women Reservation Rules, 1994. It is claimed that the Tribunal while issuingnotice on 19.05.2016, in the interim directed, any appointment in the post of Asst. Professor in the discipline of Surgery will be subject to the result of the O.A. In the meantime the O.P.S.C. issued second corrigendum involving Advertisement No.15 of 2015-16 vide notice No.635 dated 3.02.2016 by modifying the vacancy position in respect of seven disciplines including the discipline of Surgery. It is claimed through this corrigendum that so far as the Surgery discipline is concerned; out of total eight vacancies in Surgery discipline two were reserved for S.C. category, two were reserved for S.T. category and four posts were reserved for Unreserved category. This time in the Un-reserved category it was segregated to three men and one woman. By this corrigendum the last date for submission of the application in respect of the modified vacancies through Online mode was extended till 17.02.2016. The 2nd corrigendum is filed herewith at Annexure-6. In the meantime there is issuing of 3rd corrigendum involving the Advertisement No.15 of 2015-16 vide notice No.3231 dated 25.05.2016 again carving out the vacancies in the Surgery stream and out of total eight vacancies two were reserved for S.T., one was reserved for S.C. and out of five un-reserved vacancies two were reserved for women. Here the date of submission of the application was again extended to 25.06.2016 vide Annexure-7 keeping reserve consideration of application already submitted involving the Advertisement No.15 of 2015-16. After all these developments taken place considering the suitability of the Applicant-Petitioner to at least appear in the interview on 22.08.2016 the Applicant-Petitioner was issued with a call letter vide Annexure-8 to remain present at viva-voce test in the Office of the Commission, as she was already provisionally selected to appear in the viva voce test vide Annexure-8. After completion of the viva voce test involving all the selected candidates a list was published by the O.P.S.C in their notice dated 21.09.2016 bringing out two separate select list i.e. one pursuant to the Advertisement No.15 of 2015-16 meant for O.M.E.S and the other one pursuant to the Advertisement No.17 of 2015-16 though exclusively meant for VIMSAR, but inadvertently indicating both for O.M.E.S. The notice dated 21.09.2016 is filed at Annexure-9. It is needless to mention here that though the Advertisement No.17 of 2015-16 was meant for VIMSAR, after publication of the result by the O.P.S.E it appears, the Government in Health and Family Welfare Department brought two separate notifications; one dated 31.10.2016 at Annexure-11 (series) at page 39 of the brief involving the select list of seven candidates in Surgery wing meant for

VIMSAR for appointment in the post of Asst. Professor, Surgery also indicating the women candidate Dr. Sucheta Panigrahi at Sl.No.1 and Dr. Ambuja Satapathy the present the Petitioner also in Un-reserved category at Sl.No.3 and the other notification dated 3.11.2016 brought out by the Government in Health & Family Welfare Department under the O.M.E.S appointment was forM.K.C.G Medical College & Hospital, Berhampur and S.C.B. Medical College & Hospital, Cuttack, where Dr. Sucheta Panigrahi again shown to be the only woman candidate under the Un-reserved category at Sl.No.4was directed to be posted in M.K.C.G. Medical College & Hospital, Berhampur under O.M.E.S. recruitment. The notification dated 31.10.2016 had no conditional attachment about pendency of any case, whereas in the notification dated 3.11.2016 at page 42 of the brief theappointment was directed to be made subject to the outcome in pendingP.P. No.282 (C) of 2016 filed by Dr. Swarupa Nanda Mallick & Anr. and O.A. No.2064(C) of 2016 filed by Dr. Amar Kumar Behera. It appears, in the meantime the present Applicant-Petitioner filed O.A. No.4124(C) of 2016 challenging non-consideration of her case for appointment in S.C.B. Medical College & Hospital, Cuttack, which could not be taken up on account of interim order passed in O.A. No.2064(C) of 2016 and P.P. No.282(C) of 2016, there the Tribunal appears to have passed the order on 11.11.2016 thereby directing for maintenance of status quo in respect of the position of the applicant as on 11.11.2016. In the meantime in another development through W.P.(C) No.5525 of 2016 this High Court by the order dated 18.04.2016 as an interim measure directed, the Applicant-Petitioner therein Dr. Amar Kumar Behera shall continue in the post of Asst. Professor (Adhoc.) in the Department of Surgery in VIMSAR till the next date. In the meantime the Applicant-Petitioner who was found to be selected pursuant to the Advertisement No.17 of 2015-16, while foregoing her appointment in VIMSAR, was constrained to bring this litigation with specific plea that Dr. Sucheta Panigrahi though selected under both the notifications dated 31.10.2016 & 3.11.2016 for VIMSAR as well as M.K.C.G, opted to continue as per the notification dated 31.10.2016 in VIMSAR, thus abandoned her posting pursuant to the appointment notification dated 3.11.2016 in M.K.C.G Medical College & Hospital, Berhampur. The Applicant-Petitioner thus claimedthat since the O.M.E.S advertisement continued through the Advertisement No.15 of 2015-16 read together with the 2nd & 3rd corrigendum clearly making two reservation for women out of five in Unreserved category, once Dr. Sucheta Panigrahi the only women candidate selected in the Un-reserved category in the Surgery stream and the Applicant-Petitioner Dr. Ambuja Satapathy having stood in number one in the wait list in Surgery stream, she automatically deserves to be posted at M.K.C.G Medical College & Hospital, Berhampur. Applicant Petitioner further pleaded that in the meantime during

pendency of O.A. No.4124(C) of 2016 the Government in Health & Family Welfare Department under the premises of large number of vacancies requestedthe O.P.S.C to recommend the names of eligible wait listed candidates on the basis of the Advertisement No.15 of 2015-16 for being appointed in the S.C.B. Medical College & Hospital, Cuttack and M.K.C.G Medical College & Hospital, Berhampur in order of their merit. The same is at Annexure-13(series) more particularly at page 44 of the brief. Pursuant to the above request, it appears, the O.P.S.C. vide its notice No.6047 dated 17.10.2017 recommended the names of 11 candidates in order of merit for their appointment against the post of Asst. Professor in all the seven disciplines and the list contains the name of the present ApplicantPetitioner at Sl. No.7 a candidate in Surgery stream under Un-reservedfemale category and one Dr. Sworupa Nanda Mallick a S.C. candidate but selected under Un-reserved. Applicant-Petitioner has the further pleadingthat while the matter stood thus one Dr. Uma Prasad Padhy moved O.A. No.1796 (C) of 2016 a candidate in Neurology stream again involving the Advertisement No.15 of 2015-16 for not being appointed against such vacancies in spite of foregoing to such posts by the selected candidates. This O.A. is finally disposed of by the order vide Annexure-14 therebydirecting for engagement of Dr. Uma Prasad Padhy as against the vacancies under Neurology stream pursuant to the Advertisement No.15 of 2015-16. For such direction of the Tribunal the O.P.S.C recommended the name of Dr. Uma Prasad Padhy to have been recruited as against the post of Asst. Professor, Neurology in Group 'A' of O.M.E.S pursuant to the Advertisement No.15 of 2015-16 vide Annexure-15. In the meantime there has been circulation of a communication dated 6th September, 2017clearly communicating therein that there has been declining by Dr. Sucheta Panigrahi to join at M.K.C.G Medical College & Hospital, Berhampur as against her selection as Asst. Professor on regular basis in Surgery stream involving the Advertisement No.15 of 2015-16 as appearing at Annexure-16. While the matter stood thus the ApplicantPetitioner here claims that for Dr. Amar Kumar Behera filed O.A. No.2064 (C) of 2016 & W.P.(C) No.5525 of 2016 joining as Asst. Professor, Surgery at M.K.C.G Medical College & Hospital, Berhampur, there has been two clear vacancies in the post of Asst. Professor, Surgery in Un-reserved category. Applicant-Petitioner while claiming that Dr. Amar Kumar Behera since is a male candidate, he cannot be considered in female candidate vacancy in Un-reserved category, thus claims that there is no reason for not providing appointment to her as she remains to be the only women candidate and not only selected in the selection process but also secured the position next to the eight selected candidatesand the only women selected candidate in Surgery stream. For there are two clear vacancies in the eight vacancies in the Surgery stream, the Applicant-Petitioner claims that looking to her position in the select list there should have been automatic positioning of her

pursuant to the Advertisement No.15 of 2015-16. Applicant-Petitioner alleges that even after the requisition of the State Government for sending the name of the next selected candidates in the waitlist and even after sending of her nameby the O.P.S.C vide Notice No.6047 dated 10.10.2017 at page 45 and for no posting of her, there is great level of injustice created to the Applicant-Petitioner.

4. The Applicant-Petitioner next pleaded that instead of working out on the restructuring of the select list looking to the allotment of seats taken together with the Advertisement No.15 of 2015-16 read with 2nd & 3rd corrigendum respectively, there was requirement of only repositioning of the candidates in the event some candidates in the select list choose not to join even after selection. The Applicant-Petitioner also pleaded that instead of working-out in terms of the condition in the Advertisement No.15 of 2015-16 the authority went on for another advertisement dated 11.10.2018 under the pretext of merger of vacancies after completion of the process initiated through the Advertisement No.15 of 2015-16 &Advertisement No.17 of 2015-16. The Applicant-Petitioner here claims that there is already involvement of a clear vacancy and undisputedly for Dr. Sucheta Panigrahi did not join in M.K.C.G Medical College & Hospital, Berhampur and not only that depending on above non-joining there has even been recommendation of the name of the ApplicantPetitioner in the Surgery stream. The Applicant-Petitioner thus claims that the Advertisement dated 11.10.2018 should not have included the vacancies considered in the process of Advertisement No.15 of 2015-16 and Advertisement No.17 of 2015-16 and so long as the process involving the above advertisements are fully completed, there should not have been any further advertisement.

5. The Applicant-Petitioner in the above background of the matter claims that the case involves working out of an existing right of a selected candidate and the role of the competent authority is in clear violation of Article 14 & 16 of the Constitution of India.

6. In the above background of the matter Mr. Mishra, learned Senior Advocate appearing on behalf of the Petitioner claimed that this Court ought to interfere in the Advertisement No.12 of 2018-19 and again for the whole background of the matter there should be a mandamus directing the competent authority to appoint the present Applicant-Petitioner as a selected candidate in women category in Surgery Speciality Stream pursuant to the Advertisement No.15 of 2015-16 and also by providing consequential benefits.

7. Mr. Mishra, learned senior Advocate appearing on behalf of the Petitioner on the basis of the above plea also attempted to take support of decision of this Court as well as the Hon'ble Apex Court such as in the case of

Sarojkanta Mohapatra and Ors. Vrs. State of Orissa and Ors. *as reported in 2015 (II) OLR, 367* and in the case of ***Gujarat State Dy. Executive Engineers' Association Vrs. State of Gujarat and Others*** as *reported in 1994 Supp. (2) SCC 591*.

8. In his opposition Mr. S. Mishra, learned State Counsel for the Opposite Party No.1 taking this Court to the counter plea of Opposite Party No.1 while not disputing the facts and the intention borne through the Advertisement No.15 of 2015-16 as well as the Advertisement No.17 of 2015-16 and development through the 1st, 2nd & 3rd corrigendum, contended that for the interim direction issued by the Tribunal in O.A. No.2064(C) of 2016 thereby directing for keeping one post of Asst. Professor, Surgery under general category vacant, one post in Unreserved category has not been recommended by the O.P.S.C. Thus Mr. S. Mishra, learned State Counsel contended that there is a justified reason in not recommending the name of Dr. Ambuja Satapathy by the O.P.S.C. involving the Advertisement No.15 of 2015-16, resulting no possibility of issuing an appointment order in her favour either at S.C.B. Medical College & Hospital, Cuttack or M.K.C.G Medical College and Hospital, Berhampur. It is further contended by Mr. S. Mishra, learned State Counsel that in the meantime on requisitioning of the State Government, the O.P.S.C, however, recommended the names of the 11 waitlisted candidates in seven different disciplines including the name of the Petitioner in Surgery Specialty stream. However for the subsequent development in response to the communication of the Health & Family Welfare Department dated 12.09.2017, the O.P.S.C was requested to recommend the names of eligible waitlisted candidates on the basis of the Advertisement No.15 of 2015-16 for S.C.B. Medical College & Hospital, Cuttack and M.K.C.G Medical College and Hospital, Berhampur andaccordingly the O.P.S.C. by its Notice No.6047/P.S.C. dated 17.10.2017 recommended the names of 11 waitlisted candidates in seven streams including that of the Petitioner, but in further development vide its letter dated 12.01.2018 the O.P.S.C. withdrew its Notice No.6047/P.S.C dated 17.10.2017 involving recommendation of Petitioner automatically got dropped. Mr. S. Mishra, learned State Counsel thus contended that since the letter withdrawing the recommendation of the O.P.S.C. dated 17.10.2017 has not been challenged any further, the recommendation through the letter dated 12.01.2018 has attended its finality and thereforethere cannot be revisiting to the earlier situation.

9. Mr. S. Mishra, learned State Counsel further on the premises that in the meantime there has already been a fresh Advertisement bearing No.12 of 2018-19 (Annexure-17), submitted that for the development already taken place through such advertisement there is no possibility of reopening of the selection

file pursuant to the Advertisement No.15 of 2015-16. Mr. S. Mishra, learned State Counsel apart from agitating all the grounds raised in the counter affidavit of the Opposite Party No.1 alsotook this Court to the following decisions to satisfy the case of the State involved herein:-

(1) In the case of ***Dr. M.C. Bindal Vrs. R.C. Singh and Ors***. :(1989) 1 SCC 136 (2) In the case of ***Vinodan T. and Ors. Vrs. University of Calicut and Ors***. : (2002) 4 SCC 726 (3) In the case of ***H.S. Vankani and Ors. Vrs. State of Gujarat and Ors***. : (2010) 4 SCC 301 (4) In the case of ***Mohd. Rashid Vrs. Director, Local Bodies, New Secretariat and Ors.*** : (2020) 2 SCC 582.

10. Reading through all the above decisions and more particularly the decision in the case of ***Dr. M.C. Bindal (supra***) Mr. S. Mishra, learned State Counsel attempted to submit that the Hon'ble Apex Court in the said decision has already held that the Public Service Commission is competent to cancel the recommendation and there is no scope for the High Court to entertain any such aspect involving such issue. Through the decision in the case of ***Vinodan T. and Others (supra)*** Mr. Mishra, learned State Counsel on the settled position of law therein submitted that the person selected for a post do not thereby acquire a right to be appointed to such posts and also contended that for there is issuance of further advertisement the waitlist has lost its force and thus an attempt is made to take support of the observation of the Hon'ble apex Court in paragraph Nos.12 & 13 therein. Mr. S. Mishra, learned State Counsel next taking this Court to the case of ***H.S. Vankani and Ors. (supra)*** contended that for the Hon'ble apex Court categorically held that once the aspect of seniority is already settled, it is decisive and if unsettled, it is bound to generate bitterness, resentment and hostility amongst the employees and attempted to take reliance of the observation of the Hon'ble Apex Court through paragraph no.38 therein. Referring to the decision in the case of ***Mohd. Rashid (supra***) Mr. S. Mishra, learned State Counsel reiterated that there is a clear judgment of the Hon'ble apex Court observing that mere participation of a candidate in the selection process and even upon being placed in the merit list does not create a right in such candidate.

11. Mr. S.B. Jena, learned counsel for the O.P.S.C-Opposite Party No.2 taking this Court to the counter affidavit of the Opposite Party No.2 attempted to establish the reason of withdrawal of the recommendation based on a direction of the State Government. While not disputing to the fact that since Dr. Sucheta Panigrahi dropped herself, Dr.Ambuja Satapathy was the next immediate candidate available in Surgery stream under Un-reserved women category and there was no difficulty in accommodating her the movement Dr. Sucheta

Panigrahi opted not to join as per the O.M.E.S Advertisement No.15 of 2015-16, Mr. S.B. Jena, learned counsel further submitted that it is only after finding thatDr. Sucheta Panigrahi is not willing to join under O.M.E.S advertisement, the O.P.S.C was all through ready to send the name of Dr. Ambuja Satapathy, but it is not known; as to why the Government did not takeany step to replace Dr. Sucheta Panigrahi at the relevant point of time. Mr. S.B. Jena, learned counsel also contended that once the select list is drawn in an interview held by the O.P.S.C. the select list is already dispatched to the concerned Department. Mr. Jena, learned counsel in the circumstance contended that it cannot be construed even that the concerned Department was unaware of the next possible selected candidate against the vacancy arose for not joining of Dr. Sucheta Panigrahi. Mr. S.B. Jena, learned Counsel for the O.P.S.C-Opposite Party No.2 concluded his submission saying that the O.P.S.C. being the examining authority has no role in appointment affairs, which comes under the clear domain of the Health & Family Welfare Department and thus requested this Court for passing direction in according with law.

12. From the factual submission and the counter submission of the parties this Court finds, there is no dispute that the Petitioner was continuing as an Ad.hoc Asst. Professor since 2013. It is at this stage of the matter, it appears, there has been floating of Advertisement No.15 of 2015-16. It appears, through page 22 under the vacancies 'II' the advertisement discloses the following vacancy position :-

Sl. No.	**Name of the Discipline**	**No. of vacancies reserved for**			**Un-Reserved**	**Total Vacancies**
		S.T.	**S.C.**	**S.E.B.C**		
(1)	**(2)**	**(3)**	**(4)**	**(5)**	**(6)**	**(7)**
20	Surgery	3(w-1)	4(w-1)	0	8(w-2)	15(w-4)

13. The first corrigendum vide Annexure-4 was issued bringing down the vacancies position in Surgery wing after bifurcating seven such seats to VIMSAR. The vacancies position under the O.M.E.S as published therein reads as follows:-

Sl. No.	**Name of the Discipline**	**No. of vacancies reserved for**			**Un-Reserved**	**Total Vacancies**
		S.T.	**S.C.**	**S.E.B.C**		
(1)	**(2)**	**(3)**	**(4)**	**(5)**	**(6)**	**(7)**
20	Surgery	2	2	0	4	8

14. It be stated here that the Advertisement No.17 of 2015-16 was specifically meant for VIMSAR and Sl.No.19 therein reflects the vacancy

position in the Surgery stream and the requirement was for all total 7,which included one S.C. and out of balance six Un-reserved category three were reserved for women. From the 2nd Corrigendum dated 3.02.2016 vide Annmexure-6 it appears, there has been further development to the vacancy position in Surgery stream and the vacancy position at Sl.No.6 therein reads as follows:-

Sl. No.	Name of the Discipline	No. of vacancies reserved for			Un-Reserved	Total Vacancies
		S.T.	S.C.	S.E.B.C		
(1)	(2)	(3)	(4)	(5)	(6)	(7)
6	Surgery	2	2	0	4(w-1)	8(w-1)

15. There is also a 3rd corrigendum on the Advertisement No.15 of 2015-16 vide Annexure-7. At this time there was a change in the reservation position in Medicine and Surgery. The vacancy position atSl.No.2 involving Surgery stream therein reads as follows:-

Sl. No.	Name of the Discipline	No. of vacancies reserved for			Un-Reserved	Total Vacancies
		S.T.	S.C.	S.E.B.C		
(1)	(2)	(3)	(4)	(5)	(6)	(7)
2	Surgery	2	1	0	5(w-2)	8(w-2)

16. It is here taking into consideration the appointment notificationdated 3.11.2016 prepared by the Government depending on the select list at Annexure-11 (series), this Court finds, the same runs as follows :-

"Government of Odisha
Health & Family Welfare Department
***
NOTIFICATION

No.23208/H., Dated the 03-11-2016
HFW-MEI-AP-0032-2016

On the recommendation of the Odisha Public Service Commission, the following candidtes are appointed temporarily as Assistant Professor in the discipline of **Surgery in the scale of pay of Rs. 15,600/- to 39,100/**- with AGP of Rs.8,000/- per month with other allowances as admissible from time to time on probation for a period of one year from the date of their actual joining the post or until further orders subject to the outcome of PP No-282(C)/2016 filed by Dr. Swarupa Nanda Mallick & another and OA No-2064(C) / 2016 filed by Dr. Amar Kumar Behera before the Hon'ble OAT, Cuttack Bench, Cuttack.

On such appointment, they are posted to the Medical Institutions as mentioned below against the vacant posts of Assistant Professor in the discipline of Surgery.

Sl. No.	Name of the Doctor	Category	Correspondence Address	Name of the Medical College to which posted
1	2	3	4	5
1	Dr. Subhabrata Das	UR	S/o.-Purusottam Das, Vijay Vihar 4th Lane, Berhampur,Ganjam, Odisha-760004	MKCG Medical College, Berhampur
2	Dr. Sarada Prasanna Sahoo	UR	PlotNo-4773/9, Chakeisiani, Rasulgarh, Bhubaneswar, Khurda, Odisha-751010	SCB Medical College, Cuttack
3	Dr. Niranjan Sahoo	UR	Qr. No-3R/15, MKCG Medical Campus, Berhampur Ganjam, Odisha-760004	MKCG Medical College, Berhampur
4	Dr. Sucheta Panigrahi	UR	Qr.No-D14,Doctors Colony, Burla, P.O-Burla, Sambalpur,Odisha-768017	MKCG Medical College, Berhampur
5	Dr. Haladhar Naik	ST	Kathagola Sahi, Near Good Luck Hospital, Mangalabag, Cuttack, Odisha-753001	SCB Medical College, Cuttack
6	Dr. Dhirendra Nath Soren	ST	Qr.No-3R/39,Doctors Colony, VSS Medical College,Burla, Sambalpur, Odisha-768017	MKCG Medical College, Berhampur. He is deployed to work at VIMSAR, Burla
7	Dr. Amar Kumar Behera	SC	Krishna Kunj Apartment, Flt No-204, Bhoi Nagar, Road-8,Unit-9, Bhubaneswar,Khurda, Odisha-751022	MKCG Medical College, Berhampur. He is deployed to work at VIMSAR, Burla

This Court here finds surprise in the preparation of such list as after the 3rd corrigendum. The select list should have contained in the minimum two women candidates, whereas this list contained one woman candidate in Un-reserved category at Sl.No.4. Otherwise also if Dr. Sucheta Panigrahi at Sl. No.4 did not join, this position at Sl. No.4 should have been taken over by Dr. Ambuja Satapathy-the present Petitioner being the next eligible women candidate already available.

17. Undisputedly the Advertisement No.15 of 2015-16 after introduction of 3rd corrigendum, total seat in Surgery Speciality stream remained at 8 including 5 Un-reserved with 2 women.

Considering the rival contentions of the parties, this Court here finds, as per the notification dated 3.11.2016 at page 42 of the brief Dr. Sucheta Panigrahi

was the only women candidate in the select list in the discipline of Surgery and for Dr. Sucheta Panigrahi having dropped herself and declined to join under the O.M.E.S appointment, there is clear vacancy in Surgery Speciality stream under the O.M.E.S recruitment. This Court thus observes, Dr. Sucheta Panigrahi admittedly having joined at VIMSAR pursuant to the Notification dated 31.10.2016 in the same recruitment process, was not available to be appointed under the O.M.E.S recruitment and for there is clear vacancy in the women Un-reserved category Dr. Ambuja Satapathy being the next immediate women candidate in the Un-reserved category in Surgery Speciality stream is found to have already been selected, there was no room for keeping Dr. Ambuja Satapathy away from being appointed. On Dr. Sucheta Panigrahi declining to join under the O.M.E.S., there should have been automatic induction of the Petitioner considering that she was the only woman selected candidate in line of selection. This Court finds, the action of the public authority in the above contingency not only appears to be arbitrary but also unconstitutional.

18. In the above circumstance, this Court finds, vacancy being created pursuant to non-joining of Dr. Sucheta Panigrahi should not have been included in the Advertisement bearing No.12 of 2018-19. This Court here finds, in entertaining the matter involved herein the Tribunal vide its order dated 20.12.2018 had passed the following interim direction.

> "List this matter after six weeks.
>
> Learned Standing Counsel is directed to obtain instruction regarding action taken in pursuance to notification as at Annexure-13 series. Till instruction is received one post of Asst. Professor in Speciality category of Surgery as advertised at Annexure-17 at Sl. No. 19 shall not be filled up without leave of the Tribunal."

It appears, the above interim order is operating till now leaving no impediment in accommodating the present Petitioner in such vacancy.

19. This Court here takes into account the fact that O.A. No.147(C) of 2016 was filed by the present Applicant-Petitioner finding no reservation for women in the Un-reserved Surgery stream. The Tribunal by its interim order dated 19.05.2016 directed; any appointment in the post of Asst. Professor in the discipline of Surgery will be subject to the result of the O.A. The second corrigendum brought on 3.02.2016 bearing No.635 vide Annexure-6 indicated four Un-reserved seats including one women. The third corrigendum dated 25.05.2016 bearing No.3231 vide Annexure-7 indicated five Un-reserved seats taking out one post from S.C. category in the Surgery wing and out of five Un-reserved seats two posts were reserved for women making total vacancies in the Surgery stream to 8. Since 3rd corrigendum brought two women posts in Un-

reserved category, this appears to have resolved the issue in O.A. No.147(C) of 2016 making the said O.A. infructuous as the issue therein is no more surviving.

20. This Court finds, since there involves a direction for not filling of one post under the Surgery stream for the pendency of some O.As, the appointment finally made only involving seven candidates and in theabove appointment list Dr. Sucheta Panigrahi was placed at Sl.No.4 andfor her opting to join at VIMSAR pursuant to appointment notification dated 31.10.2016, there remained a clear vacancy in Sl.No.4 in Unreserved women category for M.K.C.G Medical College & Hospital, Berhampur. This Court here takes into account the position of Dr. Ambuja Satapathy in Un-reserved female category meant for the Surgery stream as per the recommendation dated 17.10.2017 of O.P.S.C. This recommendation makes it clear that Dr. Ambuja Satapathy was the only eligible candidate available in Un-reserved female category meant for Surgery stream. Thus Dr. Sucheta Panigrahi since dropped herself, this position would have been maintained by Dr. Ambuja Satapathy, which is an automatic process and in the process there was no question of showing name of Dr. Ambuja Satapathy was in waitlist maintained by the O.P.S.C. This Court here finds, there is failure of further exercise by the State as well as by the O.P.S.C in revisiting to the selection position amongst the candidates in Surgery stream after Dr. Sucheta Panigrahi drops herself. This Court at the cost of repetition makes it clear that after Dr. Sucheta Panigrahi dropped herself, there was automatic elevation of Dr. Ambuja Satapathy being the next only selected women candidate.

21. This Court now proceeds to deal with the decisions cited by the respective parties as follows:-

(A) This Court going through the decision in the case of ***Dr. M.C. Bindal (supra***) finds, this decision involves cancellation/withdrawal of a provisional recommendation on finding some lacunas involving the candidates in the essential qualification. This is not the case at hand. Therefore this decision has no application to the case at hand.

(B) Similarly going through the decision in the case of ***Vinodant T. and Others (supra),*** this Court finds, there is clear difference in the fact position involved therein. Though the Hon'ble Apex Court through the above decision held that the persons merely selected for a post did not thereby acquire a right to be appointed to such post as well, but however, also came to observe in paragraph 14 therein that even if a vacancy exists, it is open to the authority concerned to decide how many appointment should be made and in that peculiar circumstance the Hon'ble Apex Court even went to the extent that the selected candidates have a right to compel such authority to work in a manner. Above decision rather supports the claim of the Applicant-Petitioner.

(C) This Court going through the decision in Mohd. Rashid (supra), finds, through this decision the issue involved therein was taken care of in paragraph no.2 therein, which reads as follows:-

> "2. The candidates who were initially appointed as Lower Division Clerks and promoted as Upper Division Clerks / Head Clerks invoked the jurisdiction of the Central Administrative Tribunal (for short, "the Tribunal") challenging Advertisement No.3 of 2013 dated 12-9-2013 whereby, the respondents set in process to fill up the posts advertised by way of direct recruitment. The argument was that the Recruitment Regulations for the post of Administrative Officer / Assistant Assessors and Collector in North, Sought and East Delhi Municipal Corporations, 2013 (for short, "the Recruitment Rules") contemplate that the vacancies for the posts in question are to be filled up by promotion failing which by direct recruitment. It was thus alleged that without resorting to promotion by convening meeting of the Departmental Promotion Committee (for short "DPC"), the alternative process of direct recruitment cannot be resorted to."

Reading the above it appears, there involves an issue of without resorting to women promotion by convening meeting of the Departmental Promotion Committee. The alternative process of direct recruitment cannot be resorted to. In paragraph no.14 therein answering to such issue the Hon'ble apex Court came to observe as follows :-

> "14. Since the selection process has not been completed and keeping in view the mandate of statutory rules, we find that the appellants have no right to dispute the action of the municipal bodies to fill up the posts either by way of promotion or by deputation as such posts are being filled up in terms of mandate of the Rules. It is always open to the municipal bodies to fill up the vacant posts by way of direct recruitment after the posts by way of promotion and/or deputation quota are not filled up either on the basis of recruitment process already initiated or to be initiated afresh."

Reading the issues involved therein and the decision of the Hon'ble apex Court this Court finds, the case involved therein is completely different to the case involved herein. Thus this decision has no application to the case at hand at all.

(D) Keeping in view the submissions and counter submissions of the parties this Court came across a decision in the case of ***Shankarsan Dash V. Union of India***, reported in (1991) 3 SCC 47 and finds, the Constitution Bench of the Hon'ble Apex Court through paragraph no.7 therein came to observe as follows:-

> "7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied.

> Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidtes, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subash Chander Marwaha; Neelima Shangala v. State of Haryana or Jatinder Kumar v. State of Punjab."*

This Court finds, the above decision through (1991) 3 SCC 47 has clear application to the case at hand.

(E) Similarly considering the decisions referred to by Mr. M.Ku. Mishra, learned Senior Advocate appearing on behalf of the Petitioner, this Court from the decision in the case of ***Sarojkanta Mohapatra & Ors. Vs. State of Orissa &Ors. 2015 (II) OLR 367*** finds, considering a further advertisement in the valid period of waitlist including clear vacancies of particular advertisement, this Court held, the action of the public authority in the circumstance was arbitrary. This Court in the above decision taken support of through the case of ***R.S. Mittal Vs. Union of India*** 1995 (1) SCC 444 and in the case of A.P. Aggarwal V. Government of National Capital Territory of Delhi and Anr. as reported in AIR (2000) S.C. 205. Both the decisions deprecate the action of the public authority for ignoring the select list remaining valid and also held, resorting to fresh selection in the above situation as bad. This Court, accordingly, in disposal of the case involving ***Sarojkanta Mohapatra & Ors. (Supra***) directed the public authority involved therein to provide appointment to the persons already there in the select list against the post already advertised in such selection process.

(F) This Court taking into account another decision in the case of ***Gujurat State Dy. Executive Engineers' Association V. State of Gujarat And Ors.*** as reported in ***1994 Supp. (2) SCC 591***, finds, the Hon'ble apex Court through the above decision came to decide the period for which the waiting list can remain operative. In paragraph no.8 therein the Hon'ble Apex Court held as follows :-

> "8.Coming to the next issue, the first question is what is a waiting list?; can it be treated as a source of recruitment from which candidates may be drawn as and when necessary?; and lastly how long can it operate? These are some important questions which do arise as a result of direction issued by the High Court. A waiting list prepared in service matters by the competent authority is a list of eligible and qualified candidates who in order of merit are placed below the last selected

> candidate. How it should operate and what is its nature may be governed by the rules. Usually it is linked with the selection or examination for which it is prepared. For instance, if an examination is held say for selecting 10 candidates for 1990 and the competent authority prepares a waiting list then it is in respect of those 10 seats only for which selection or competition was held. Reason for it is that whenever selection is held, except where it is for single post, it is normally held by taking into account not only the number of vacancies existing on the date when advertisement is issued or applications are invited but even those which are likely to arise in future within one year or so due to retirement etc. It is more so where selections are held regularly by the Commission. Such lists are prepared either under the rules or even otherwise mainly to ensure that the working in the office does not suffer if the selected candidates do not join for one or the other reason or the next selection or examination is not held soon. A candidate in the waiting list in the order of merit has a right to claim that he may be appointed if one or the other selected candidate does not join. But once the selected candidates join and no vacancy arises due to resignation etc. or for any other reason within the period the list is to operate under the rules or within reasonable period where no specific period is provided then candidate from the waiting list has no right to claim appointment to any future vacancy which may arise unless the selection was held for it. He has no vested right except to the limited extent, indicated above, or when the appointing authority acts arbitrarily and makes appointment from the waiting list by picking and choosing for extraneous reasons."

Through the above decision of the Hon'ble Apex Court, this Court here observes, when the case taken note hereinabove involves validity of a waiting list, the case at hand involves there should be a desired step, in the event one of the selected candidate in particular stream declines to join and when the next candidate in such stream is also a selected one. This Court here observes, once a selected panel is drawn up for the O.M.E.S., the same should be maintained till expiry of the valid period.

22. In the above background of the matter, this Court in disposal of this application involved while allowing the Petition issues the following directions :- (1) For the definite vacancies created in Surgery stream specifically in Un-reserved women category for no showing of interest by Dr. Sucheta Panigrahi, Dr. Ambuja Satapathy being the next selected women candidate in terms of the Advertisement No.15 of 2015-16 should be treated to have been appointed along with all such appointees in terms of the appointment pursuant to the notification dated 3.11.2016 and necessary formal order of appointment is directed to be issued in favour of Dr. Ambuja Satapathy at least within a period of ten days hence. (2)This Court also directs for placing Dr. Ambuja Satapathy in appropriate place along with rest persons appointed vide appointment notification dated 3.11.2016 and her seniority will also be maintained accordingly. (3)So far as the financial benefit and fitment of the Applicant-

Petitioner is concerned; the same will be made as per the fitment enjoyed by the other persons pursuant to the appointment notification dated 3.11.2016. (4) So far as arrear of the Petitioner is concerned; it will be treated notionally. (5) Result involving the Advertisement No.12 of 2018-19 in Surgery Speciality Stream, if not declared as yet, the same be declared except in respect of one post in Un-reserved Surgery stream as inclusion of such post in the next advertisement was illegal and directed to be filled up as against the Advertisement No.15 of 2015-16.

23. The WPC(OAC) succeeds. For compelling the Applicant-Petitioner to bring such litigation to get justice and for her suffering all through, this Court quantifies the litigation cost to be paid to the Applicant-Petitioner at Rs.10,000/- (rupees ten thousand) only, which be paid by the Opposite Party No.1 to the Applicant-Petitioner at least within a period of ten days.

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2022 (III) ILR - CUT- 822

S.K. SAHOO,J.

GCRLA NO. 13 OF 2016

STATE OF ODISHA (G.A. Vigilance) ....Appellant

RABINARAYAN PATRA ....Respondent

(A) PREVENTION OF CORRUPTION ACT, 1988 – Offences punishable under section 7 and section 13(2) read with section 13 (1)(d) of the Act – Basic requirements for statutory presumption under section 20 of the Act – Held, In a case of this nature, there is no dispute that the prosecution has to successfully prove the foundational facts i.e. the demand, acceptance of bribe money and recovery of the same from the accused, then only the statutory presumption under section 20 of the Act against the guilt of the accused would arise.
(Para-11)

(B) PREVENTION OF CORRUPTION ACT, 1988 – Section 7 – Essential ingredients in order to attract the culpability – Held, (i) the person accepting the gratification should be a public servant (ii) he should accept the gratification for himself and the gratification should be as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official function, favour or disfavour to any person. (Para-13)

(C) PREVENTION OF CORRUPTION ACT, 1988 – Section 13(1)(d) – Basic duty of the prosecution – To attract offences under this section the prosecution must establish that (i) the respondent as a public servant used corrupt or illegal means or otherwise abused his position as such public servant and (ii) he has obtained a valuable thing or pecuniary advantage for himself or for any other persons.

Case Laws Relied on and Referred to :-

1. (2015) 3 SCC 220 : Vinod Kumar Vs. State of Punjab.
2. (2020) 79 OCR (S.C.) 924 : Mukesh Singh & Ors. Vs. State (Narcotic Branch of Delhi)
3. (2006) 7 SCC 296 : Popular Muthiah Vs. State represented by Inspector of Police.
4. (2007) 4 SCC 415 : Chandrappa and Ors. Vs. State of Karnataka.
5. (2015) 10 SCC 152 : P. Satyanarayana Murthy Vs. District Inspector of Police, State of Andhra Pradesh.
6. 2014 CLJ 2433 : B. Jayaraj Vs. State of A.P.
7. (2022) 86 OCR (S.C.) 345 : K. Shanthamma Vs. State of Telengana.
8. A.I.R. 1979 SC 1408 : Suraj Mal Vs. The State (Delhi Administration).
9. A.I.R. 1960 SC 490 : State of Delhi Vs. Shri Ram Lohia.
10. A.I.R. 1976 SC 294 : Sat Paul Vs. Delhi Administration
11. 2020) 79 OCR (SC) 924 : Mukesh Singh Vs. State (Narcotic Branch of Delhi)
12. (2018) 17 SCC 627 : Mohan Lal Vs. The State of Punjab.
13. A.I.R. 1960 S.C. 490 : State of Delhi Vs. Shri Ram Lohia.
14. (2018) 69 OCR 925 : Kishore Kumar Swain Vs. State of Odisha (Vigilance)
15. A.I.R. 2013 S.C. 3368 : State of Punjab Vs. Madan Mohan Lal Verma.
16. (2009) 44 OCR 425 : State of Maharashtra Vs. Dnyaneshwar.
17. A.I.R. 2002 S.C. 486 : Punjabrao Vs. State of Maharashtra.
18. A.I.R. 2016 S.C. 2045 : V. Sejappa Vs. State.
19. A.I.R. 1979 S.C. 1191 : Panalal Damodar Rathi Vs. State of Maharashtra.
20. (2016) 64 OCR (S.C.) 1016) : Mukhitar Singh Vs. State of Punjab.

For Appellant : Mr. Sangram Das Standing Counsel (Vig.)
For Respondent : Mr. Sobhan Panigrahi.

JUDGMENT Date of Hearing: 15.09.2022 : Date of Judgment: 12.10.2022

S.K. SAHOO,J.

The respondent Rabinarayan Patra faced trial in the Court of learned Additional Special Judge (Vigilance), Bhubaneswar in T.R. No.16 of 1997 for offences punishable under section 7 and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereafter 'P.C. Act') on the accusation that on 30.06.1993 he being employed as a Junior Clerk in the office of the Sub-Registrar, Sakhigopal and being a public servant accepted for himself

illegal gratification amounting to Rs.200/- (rupees two hundred) other than legal remuneration and also accepted for himself gratification of Rs.500/- (rupees five hundred) other than the legal remuneration on 03.07.1993 from Sudarsan Behera (P.W.5) as a motive and reward for delivering two sale deeds to him and thus by corrupt and illegal means obtained for himself the gratification money at his office as pecuniary advantage by abusing his official position as such public servant without any public interest.

The learned trial Court vide impugned judgment and order dated 22.09.2009 has been pleased to hold that the investigation having been done by the trap laying officer who is an interested witness for the prosecution, the prosecution case is susceptible to reasonable doubt and accordingly held the respondent not guilty and acquitted him of all the charges.

The State of Odisha, G.A Vigilance has preferred this appeal challenging the aforesaid judgment and order of acquittal.

2. The prosecution case, as per the first information report lodged by Sudarsan Behera (P.W.5) of village Bira Rama chandrapur is that his brother-in-law Dhruba Charan Behera purchased two plots from Sasimani Jena and Dibakar Jena (P.W.2) by executing two separate sale deeds vide sale deed nos.849 and 850 in the office of Sub-Registrar, Sakhigopal after depositing all the required fees as per law and the vendors of both the sale deeds gave the receipts to P.W.5 to obtain the sale deeds from the office of the Sub-Registrar. As the sale deeds were to be delivered to the vendee within two to three days of its registration, on 30.06.1993 P.W.5 met the respondent who was the Junior Clerk in the office of the Sub-Registrar, Sakhigopal in his office and asked him to deliver the sale deeds, but the respondent demanded illegal gratification of Rs.2,200/- (rupees two thousand two hundred) from P.W.5 and told that if he would not pay such amount, both the sale deeds would be objected for registration on the ground of under-valuation for which P.W.5 shall have to pay an excess amount of Rs.4,500/- (rupees four thousand five hundred). Being apprehensive of under-valuation, P.W.5 agreed to give Rs.500/- to the respondent as gratificationagainst his will, but the respondent did not agree to it and threatened to send the sale deeds for under-valuation on the same day. However, after much persuasion of P.W.5, the respondent asked P.W.5 to give him Rs.1,200/- (rupees one thousand two hundred). P.W.5 paid Rs.200/- to the respondentin advance as gratification instantly and further assured the respondent to give the balance of Rs.1,000/- (rupees one thousand) within ten days against his will. P.W.5 then met the respondent on 02.07.1993 in the office of Sub-Registrar, Sakhigopal and expressed his inability in arranging the moneyand requested him to take Rs.500/-

(rupees five hundred) and to hand over both the sale deeds to him, however the respondent did not pay any heed to the request of P.W.5 and got annoyed and insisted for payment of Rs.1,000/- (rupees one thousand). Finding no way out, P.W.5 told the respondent that he wouldarrange Rs.500/- (rupees five hundred) and give the same to him on 03.07.1993 in the afternoon and the balance amount of Rs.500/- (rupees five hundred) would be paid within five days thereafter for taking the sale deeds. P.W.5 requested the respondent not to under-value the sale deeds to which the respondent agreed. P.W.5 reported in writing the matter to the Superintendent of Police, Vigilance, Cuttack on 02.07.1993 for taking necessary action against the respondent.

On the basis of such first information report, the Superintendent of Police, Vigilance, Cuttack directed the officer in charge of the Vigilance Police Station, Cuttack to register a case and accordingly, Cuttack Vigilance P.S. Case No.34 dated 02.07.1993 was registered on under section 13(2) read with section 13(1)(d) and section 7 of the P.C. Act and Sri U. Rama Rao, Inspector of Vigilance, Cuttack was directed to lay a trap for detection of the case against the respondent and to take up investigation of the case.

Sri U. Rama Rao, Inspector of Vigilance, Cuttack laid a trap and after preparation in the Vigilance Office, Puri, the trap party proceeded to Sub-Registrar's Office, Sakhigopal along with P.W.5 and two official witnesses, out of which one was the overhearing witness Siva Narayan Acharya (P.W.4) and the other was Sanat Kumar Pattanayak (P.W.6). After the respondent demanded and received the tainted money from P.W.5, P.W.4passed signal to the raiding party who rushed to the spot and apprehended the respondent and his hand washes was taken. The tainted money was recovered from the table of the respondent which was covered by some blank challan form and the number and denomination of the tainted currency notestallied with the number and denomination of the tainted notes mentioned in the preparation report. Thereafter, the solution bottles, tainted money, four fold white paper and copy of the preparation report were seized by the Inspector of Vigilance, Cuttack at the spot and finally a detection report was prepared and also the original sale deeds were seized from the office of Sub-Registrar. The brass seal used in sealing the bottles was given in zima of P.W.6 with a direction to produce the same before the Court as and when required and on completion of investigation, charge sheet was submitted on 24.08.1994 against the respondent under section 7 and section 13(2) read with section 13(1)(d) of the P.C. Act.

3. The defence plea of the respondent is one of denial. It is pleaded that on the relevant date and time of occurrence, while he was talking with staff, namely,

Khageswar Sahu and Guru Charan Das, four to five persons entered inside the office of Sub-Registrar and caught hold of both his hands and told him to count some money and thereafter, took his hand washes. The respondent denied to have demanded or accepted any bribe money from P.W.5.

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

P.W.1 Bijay Kumar Nand was the Additional District Magistrate -cum-District Registrar, Puri, who accorded sanction for prosecution of the respondent.

P.W.2 Dibakar Jena is one of the vendors, who had sold the land to the brother-in-law of P.W.5 and executed a sale deed on 23.06.1993.

P.W.3 Satyananda Maharana was the Assistant Director of S.F.S.L., Rasulgarh, Bhubaneswar, who examined the exhibits of the case and proved the C.E. Report marked as Ext.3.

P.W.4 Siva Narayan Acharya was working as Junior Clerk in the Office of the C.T.O. Circle-I, Puri who acted as over hearing witness and he accompanied with the raiding party and gave signal to the raiding party after the respondent accepted the tainted money from P.W.5. He is also a witness to the seizure of three bottles, currency notes, two sale deeds and the counter foils of the receipts given to P.W.5 for receiving the sale deeds by the vendees, purse and amount of the respondent, paper of tainted money and the detection report.

P.W.5 Sudarsan Behera is the informant in the case. He supported the prosecution case to a great extent but he was declared hostile.

P.W.6 Sanat Kumar Patnaik was the Addl. C.T.O., Puri and he is a witness to the preparation report (Ext.4) in the Vigilance Office, Puri. He further stated about the recovery of tainted money from the table of the respondent. He verified and compared the numbers of the currency notes noted in a paper with the numbers of seized tainted money. He further stated about the hand wash of the appellant taken in the sodium carbonate solution to have turned to pink. He also took zima of the brass seal from the I.O. which he produced before the learned trial Court. He further stated that as the respondent had held the currency notes in his right hand, his right hand so also his left hand was washed with liquid solution which turned pink colour. He further stated that after counting of the currency notes, his hand was also washed with liquid solution and it turned pink colour and the pink colour liquid solution were preserved in bottles and sealed and the cash and the solution bottles were also sealed at the spot.

P.W.7 Sarat Kumar Paramguru was the Inspector, Vigilance, Cuttack Division, Cuttack and he was the member of trap party. Inspector U. Rama Rao was the Investigating Officer of the case who on completion of investigation, submitted charge sheet against the respondent, but since he died, P.W.7 proved the entire trap formalities and investigation carried out by Inspector U. Rama Rao.

The prosecution exhibited twenty documents. Ext.1 is the sanction order, Ext.2 is the sale deed, Ext.3 is the C.E. Report, Ext.4 is the preparation report, Ext.5 is the seizure list relating to bottles, Ext.6 is the seizure list relating to solution bottle, Ext.7 is the seizure list relating to currency notes, Ext.8 is the seizure list relating to two sale deeds and counter foil, Ext.9 is the seizure list relating to purse and amount, Ext.10 is the seizure list relating to paper of tainted money, Ext.11 is the detection report, Ext.12 is the F.I.R., Ext.13 is the seizure list, Exts.14 and 14/1 are the receipts, Exts.15 to 15/4 are the G.C. Notes, Ext.16 is the sale deed, Ext.17 is the four fold paper, Ext.18 is the receipt prepared by U. Rama Rao, Ext.19 is the forwarding report along with signature of U. Rama Rao and Ext.20 is the rough spot map.

The material objects i.e. glass bottles containing some colourless solution whereas the other two are empty have been marked as M.O.I to M.O.V and the brass seal has been marked as M.O.VI on behalf of the prosecution.

The respondent examined one witness as D.W.1, namely, Rama Chandra Sethi, who was peon at Sub-Registrar Office, Sakhigopal and he stated that while he was standing near the seat of the respondent, three to four persons entered inside the office room, caught hold of both the hands of the respondent to which they protested and they disclosed their identity as Vigilance Officers.

5. The learned trial Court formulated the following twopoints for determination:-

> (i) Whether the accused Sri Patra being a public servant had accepted for himself illegal gratification of Rs.200/- (rupees two hundred) and Rs.500/- (rupees five hundred) on 30.06.1993 and 03.07.1993 respectively from complainant Sudarsan Behera as a motive and reward for delivering two registered sale deeds to him, which was his official act?
>
> (ii) Whether Sri Patra, being a public servant, by corrupt and illegal means had obtained for himself cash of Rs.200/- (rupees two hundred) and Rs.500/- (rupees five hundred) from Sri Behera on 30.06.1993 and 03.07.1993 respectively at his office as pecuniary advantage by abusing position as public servant without any public interest?

6. After analyzing the evidence on record, the learned trial Court has been pleased to hold that there are tell-tale circumstances which do indicate that there must have been a demand and therefore, the circumstances discussed rendered support to the statement of P.W.4 that the demand at the time of visit of P.W.5 to the respondent on 03.07.1993 must be pursuant to his earlier demand. The learned trial Court observedthat after carefully scrutinizing the oral and documentary evidence led by the prosecution as well as the C.E. Report and the defence plea, the prosecution has succeeded to bring home the charges against the respondent under section 7 and section 13(2) read with section 13(1)(d) of the P.C. Act. However, the learned trial Court held that the Vigilance Inspector late U. Rama Rao was the trap laying officer in the vigilance raid and he was also the Investigating Officer and the investigation of the case by the trap laying officer himself is not desirable in as much as there is possibility of tainted investigation in order to boost up a prosecution case, so as to create evidence which may enable the Court to record a conviction. It was further held that the investigation having been done by the trap laying officer who is an interested witness for the prosecution, the prosecution case is susceptible to reasonable doubt and on that ground, the learned trial Court acquitted the respondent of all the charges.

7. Mr. Sangram Das, learned Standing Counsel for the Vigilance Department challenging the impugned judgment and order of acquittal of the respondent contended that the learned trial Court has not properly appreciated the evidences of P.Ws.4, 5 and 7 who are consistent and there is no reason to discard their evidence. He further urged that P.W.5 in his chief examination has supported the prosecution story in its entirety but in the cross-examination, he has taken the path of prevarication and it is no more res integra that even if a witness is characterized as a hostile witness, his evidence is not completely effaced and such evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence. He further argued that the evidence of P.W.5 has got corroboration from the shadow witness (P.W.4) who in all material particulars has stated about the factum of demand and acceptance of the tainted money by the respondent and its recovery. The evidence of P.W.7, the member of the raiding party also lends support and renders immense assistance in establishing the case of the prosecution case with regard to the factum of recovery of the tainted money from the possession of the respondent. He further argued that the chemical examination report (Ext.3) unequivocally corroborates the trustworthy evidence of P.Ws.4, 5 and 7 and thus, the ocular testimony gets duly corroborated by documentary evidence for which the prosecution has proved its case relating to demand, acceptance and recovery of the tainted money from the respondent to

the hilt. He further argued that the findings of the learned trial Court at paragraph-10 of the impugned judgment that the prosecution has succeeded to bring home the charges against the respondent, neither suffer from any perversity nor can be faulted with. With regard to the findings of the learned trial Court that the investigation having been done by the trap laying officer, the respondent is entitled for acquittal, learned Standing Counsel submitted that in the instant case, though the investigation has been done by the trap laying officer who was a member of the raiding party yet, in fact, nothing has been elicited that he was in anyway personally interested to get the respondent convicted inasmuch as there is no clinching evidence on record to point out any circumstances by which the investigation caused prejudice or was biased against the respondent. He further submitted that the investigation though done by the trap laying officer yet he was not in any way personally interested in the case and there is also nothing on record to indicate any sort of bias in the process of investigation and thus, such findings recorded in para-11 of the impugned judgment are neither defensible nor legally sustainable. He further submitted that the reasonings assigned by the learned trial Court for acquitting the respondent is quite faulty and unreasonable and since the impugned judgment of the learned trial Court is highly unreasonable and the view taken therein is not sustainable, the same should be set aside and the respondent should be convicted of the offence charged. In support of such contention, he has relied upon the decision of the Hon'ble Supreme Court in the case of ***Vinod Kumar -Vrs.-State of Punjab reported in (2015) 3 Supreme Court Cases 220 and Mukesh Singh and others -Vrs.- State (Narcotic Branch of Delhi) reported in (2020) 79 Orissa Criminal Reports (S.C.) 924***.

Mr. Sobhan Panigrahi, learned counsel for the respondent, on the other hand, supported the impugned judgment and submitted that though the respondent was acquitted, but the learned trial Court after analyzing the evidence available on record came to a conclusion that theprosecution has succeeded in bringing home the charges against the respondent under section 7 and section 13(2) read with section 13(1)(d) of the P.C. Act which is against the weight of the evidence available on record. He further submitted that the prosecution has miserably failed to prove any demand for the alleged illegal gratification and the essential ingredients of the offences both under section 7 and section 13(2) read with section 13(1)(d) of the P.C. Act are conspicuously absent. He further submitted that P.W.5 is a wholly unreliable witness and the brother-in-law of P.W.5 was also not examined for reasons best known to the prosecution which creates suspicion. He further argued that mere acceptance and recovery of tainted currency notes from an accused without proof of demand would not establish an offence under section 7 as well as section 13 (1)(d)(i) & (ii) of the P.C. Act. In the

absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be proved. The proof of demand is an essential and permeating mandate for an offence under sections 7 and 13 of the P.C. Act. Section 20 of the P.C. Act which permits a presumption to be raised relates to an offence only under section 7 P.C. Act and not to those under section 13(1)(d)(i) & (ii) of the P.C. Act. In absence of proof of demand, legal presumption under section 20 of the P.C. Act would not arise. He further argued that the prosecution miserably failed to establish the proof of demand by the respondent. The investigation by the trap laying officer caused prejudice to the respondent, but the biasness of the I.O. could not be brought on record as he could not be examined on account of his death and therefore, if at this stage almost after thirty years of the date of occurrence, the order of acquittal is interfered with, it would cause serious miscarriage of justice and therefore, the GCRLA should be dismissed. In support of such contention, he has relied upon the decisions of the Hon'ble Supreme Court in the cases of ***Popular Muthiah -Vrs.- State represented by Inspector of Police reported in (2006) 7 Supreme Court Cases 296, Chandrappa and others -Vrs.-State of Karnataka reported in (2007) 4 Supreme Court Cases 415, P. Satyanarayana Murthy -Vrs.- District Inspector of Police, State of Andhra Pradesh reported in (2015) 10 Supreme Court Cases 152, B. Jayaraj -Vrs.-State of A.P. reported in 2014 Criminal Law Journal 2433, K. Shanthamma -Vrs.- State of Telengana reported in (2022) 86 Orissa Criminal Reports (S.C.) 345, Suraj Mal -Vrs.- The State (Delhi Administration) reported in A.I.R. 1979 Supreme Court 1408, State of Delhi -Vrs.- Shri Ram Lohia reported in A.I.R. 1960 Supreme Court 490 and Sat Paul -Vrs.- Delhi Administration reported in A.I.R. 1976 Supreme Court 294.***

8. Adverting to the contentions raised by the learned counsel for both the parties, there is no dispute that the order of acquittal has been passed on the sole ground that investigation having been done by the trap laying officer who is an interested witness for the prosecution and therefore, the prosecution case is susceptible to reasonable doubt.

In the case of ***Vinod Kumar*** (supra), the Hon'ble Supreme Court held as follows:-

> "30. In the instant case, P.W.8, who was a member of the raiding party had sent the report to the police station and thereafter carried the formal investigation. In fact, nothing has been put to him to elicit that he was anyway personally interested to get the appellant convicted. In our considered view, the decision in ***S. Jeevanatham (Ref: (2004) 5 Supreme Court Cases 230)*** would be squarely applicable to the present case and, accordingly, without any reservation we repel the submission so assiduously urged by Mr. Jain, learned Senior Counsel for the appellant."

In the case of ***Mukesh Singh -Vrs.- State (Narcotic Branch of Delhi) reported in (2020) 79 Orissa Criminal Reports (SC) 924***, which is a five-Judge ConstitutionBench decision constituted to decide the correctness of the ratio laid down in the case of ***Mohan Lal -Vrs.- The State of Punjabreported in (2018) 17 Supreme Court Cases 627***, it was held that whether the investigation conducted by the concerned informant was fair investigation or not is always to be decided at the time of trial. The concerned informant/investigator will be cited as a witness and he is always subject to cross-examination. There may be cases in which even the case of the prosecution is not solely based upon the deposition of the informant/informantcum-investigator but there may be some independent witnesses and/or even the other police witnesses. The testimony of police personnel will be treated in the same manner as testimony of any other witness and there is no principle of law that without corroboration by independent witnesses, his testimony cannot be relied upon. It has also been held that there is no reason to doubt the credibility of the informant or the entire case of the prosecution solely on the ground that the informant has investigated the case. Solely on the basis of some apprehension or the doubts, the entire prosecution version cannot be discarded and the accused is not to be straightway acquitted unless and until the accused is able to establish and prove the bias and the prejudice. While concluding, it was observed that 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. It was held that 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. It was held that a contrary decision in the case of **Mohan Lal** (supra) 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.

Therefore, the sole ground of acquittal of the respondent passed by the learned trial Court is not acceptable. However, the submission of the learned Standing Counsel for the Vigilance Department that in view of the finding of the learned trial Court that the prosecution has succeeded to bring home the charges against the respondent, which does not suffer from any perversity, the respondent should be convicted of the offences charged, requires thorough consideration.

9. The crux of the matter is whether a finding arrived at by the trial Court against an accused in a case of acquittal can be reappreciated and reconsidered where the judgment and order of acquittal has been challenged in an appeal by the State.

In the case of ***Popular Muthiah*** (supra), the Hon'ble Supreme Court held as follows:-

> "27. While exercising its appellate power, the jurisdiction of the High Court although is limited but, in our opinion, there exists a distinction but a significant one being that the High Court can exercise its revisional jurisdiction and/or inherent jurisdiction not only when an application therefor is filed but also suomotu. It is not in dispute that suomotu power can be exercised by the High Court while exercising its revisional jurisdiction. There may not, therefore, be an embargo for the High Court to exercise its extraordinary inherent jurisdiction while exercising other jurisdictions in the matter. Keeping in view the intention of Parliament, while making the new law the emphasis of Parliament being 'a case before the Court' in contradistinction from 'a person who is arrayed as an accused before it' when the High Court is seized with the entire case although would exercise a limited jurisdiction in terms of Section 386 of the Code of Criminal Procedure, the same, in our considered view, cannot be held to limit its other powers and in particular that of Section 482 of the Code of Criminal Procedure in relation to the matter which is not before it."

In the case of ***Chandrappa*** (supra), the Hon'ble Supreme Court held as follows:-

> "42. From the above decisions, in our considered view, the following general principles regarding powers of Appellate Court while dealing with an appeal against an order of acquittal emerge:
>
> (1) An Appellate Court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.
>
> (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an Appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
>
> (3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an Appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasize the reluctance of an Appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

> (4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.
>
> (5) If two reasonable conclusions are possible on the basis of the evidence on record, the Appellate Court should not disturb the finding of acquittal recorded by the trial court."

Therefore, the finding of the learned trial Court that the prosecution has succeeded to bring home the charges against the appellant under section 7 and section 13(2) read with section 13(1)(d) of the P.C. Act is not final and this Court can reconsider and reappreciate the evidence on record and canreach its own conclusion, both on questions of fact and of law. Asan Appellate Court, there is no limitation, restriction or condition on exercise of power of reconsideration and reappreciation of evidence on record and also the reasoning given by the trial Court. This Court has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage.Once the appeal is entertained against the order of acquittal, the High Court is entitled to re-appreciate the entire evidence independently and come to its own conclusion. An Appellate Court while dealing with an appeal against acquittal passed by the learned trial Court, is required to bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

10. Now, on the basis of the aforesaid rival legal contentions urged on behalf of the parties, the following points would arise for consideration of this Court:-

> i) Whether the demand, acceptance and recovery of gratification are proved by the prosecution and whether the presumption of offence alleged to have been committed by the respondent would arise in this case?
>
> ii) Whether the findings and reasons recorded on the charges by the learned trial Court are based on proper appreciation of legal evidence on record and within the legal parameters laid down by the Hon'ble Supreme Court and this Court in its decisions?

11. In a case of this nature, there is no dispute that the prosecution has to successfully prove the foundational facts i.e. the demand, acceptance of bribe money and recovery of the same from the accused and then only the statutory presumption under section 20 of the P.C. Act against the guilt of the accused would arise and the accused has to adduce evidence relating to the rebuttal of such presumption. Demand of illegal gratification is sine qua non for constituting the offence under section 7 and section 13(2) read with section 13(1)(d) of the P.C. Act. Mere receipt of amount by the accused is not sufficient to fasten the guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Mere recovery of tainted money from the possession of the accused is not sufficient to convict him, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as bribe.

In the case of ***P. Satyanarayana Murthy*** (supra), the Hon'ble Supreme Court held as follows:-

> "23. The proof of demand of illegal gratification, thus, is the gravamen of the offence under Sections 7 and 13(1)(d)(i) & (ii) of the Act and in absence thereof, unmistakably the charge therefor, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under Section 7 or 13 of the Act would not entail his conviction thereunder.
>
> 26. In reiteration of the golden principle which runs through the web of administration of justice in criminal cases, this Court in ***Sujit Biswas -Vrs.- State of Assam : (2013) 12 SCC 406*** had held that suspicion, however grave, cannot take the place of proof and the prosecution cannot afford to rest its case in the realm of "may be" true but has to upgrade it in the domain of "must be" true in order to steer clear of any possible surmise or conjecture. It was held, that the Court must ensure that miscarriage of justice is avoided and if in the facts and circumstances, two views are plausible, then the benefit of doubt must be given to the accused."

In the case of ***B. Jayaraj*** (supra), the Hon'ble Supreme Court held as follows:-

> "7. Insofar as the offence under Section 7 is concerned, it is a settled position in law that demand of illegal gratification is sine qua non to constitute the said offence and mere recovery of currency notes cannot constitute the offence under section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. The above position has been succinctly laid down

> in several judgments of this Court. By way of illustration reference may be made to the decision in ***C.M. Sharma -Vrs.- State of A.P***. : **(2010) 15 SCC 1 and C.M. GirishBabu -Vrs.- C.B.I. : (2009) 3 SCC 779.**
>
> 8....We are, therefore, inclined to hold that the learned trial Court as well as the High Court was not correct in holding the demand alleged to be made by the accused as proved. The only other material available is the recovery of the tainted currency notes from the possession of the accused. In fact such possession is admitted by the accused himself. Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section 7. The above also will be conclusive insofar as the offence under Section 13(1)(d)(i)(ii) is concerned as in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established."

In the case of ***K. Shanthamma*** (supra), the Hon'ble Supreme Court held as follows:-

> "7....The offence under Section 7 of the PC Act relating to public servants taking bribe requires a demand of illegal gratification and the acceptance thereof. The proof of demand of bribe by a public servant and its acceptance by him is sine quo non for establishing the offence under Section 7 of the PC Act."

12. Keeping the above principles in view, let me now examine the materials on record to judge whether the prosecution has successfully proved the foundational facts i.e. the demand, acceptance of bribe money voluntarily by the respondent from P.W.5 and recovery of the same from the respondent.

P.W.5, the decoy has stated that his brother-in-law Dhruba Charan Behera had purchased two plots on 23.06.1993 under different sale deeds which were to be registered in the Office of Sub-Registrar, Satyabadi and he was authorized by his brother-in-law to receive the two sale deeds under authorization ticket. He further stated that he came to the Sub-Registrar Office at Satyabadi on 30.06.1993 and approached the respondent and the respondent asked him to pay Rs.4,000/- (rupees four thousand) or else the sale deeds might be undervalued. P.W.5 further stated that he came back and informed the same to his brother-in-law and on the same day, he again came to the Office of the Sub-Registrar with his brother-in-law and approached the respondent and the respondent told them to pay Rs.2,200/-(rupees two thousand two hundred) and to take back the sale deeds and since the respondent compelled them to pay the money, they agreed and paid him Rs.200/- in advance. He further stated that he came to Vigilance Office at Cuttack on 02.07.1993 and lodged the written report (Ext.12).

The evidence of P.W.5 is contrary to what he has mentioned in the F.I.R. wherein he has stated that the initial demand by the respondent was Rs.2,200/- (rupees two thousand two hundred) and not Rs.4,000/- (rupees four thousand) as stated in his evidence. In the evidence, P.W.5 has stated that the bribe amount was settled at Rs.2,200/- (rupees two thousand two hundred) whereas in the F.I.R., it is mentioned that it was settled at Rs.1,200/- (rupees one thousand two hundred). In the F.I.R., though P.W.5 mentioned that on 02.07.1993 he met the respondent in the Office of Sub-Registrar and told him that he would arrange Rs.500/- (rupees five hundred) and give the same to him on 03.07.1993 in the afternoon and the balance amount of Rs.500/- (rupees five hundred) would be paid within five days thereafter for taking the sale deeds, but no such statement has been made by P.W.5 while deposing in Court.

Though in his evidence, P.W.5 has stated that on 30.06.1993, he approached the respondent in his office for two times and on the second time, his brother-in-law was there with him and the demand amount was settled at Rs.2,200/- (rupees two thousand two hundred) in the presence of his brother-in-law, but no such thing has been mentioned in the F.I.R. The brotherin-law of P.W.5 has neither been cited as a witness in the charge sheet nor examined in Court and the prosecution has offered no explanation for the same. It cannot be denied that the brotherin-law of P.W.5 is a very vital witness and it is he who had purchased the plots and applied for registration of sale deeds and the demand of bribe was made in that connection. In a criminal trial, the prosecution must act fairly and honestly and must never adopt the device of keeping back the witnesses from the Court only because the evidence is likely to go against the prosecution case. It is the duty of the prosecution to assist the Court in reaching to a proper conclusion in regard to the case which is brought before it for trial. It is no doubt open to the Prosecutor not to examine some witnesses cited in the charge sheet and to make a selection of witnesses, but the selection must be made fairly and honestly and not with a view to suppress inconvenient witnesses from the witness box. If the material witnesses aredeliberately kept back and no explanation is offered, the Court may draw an adverse inference against the prosecution and may, in a proper case, record the failure of the prosecution to examine such witnesses as constituting a serious infirmity in the proof of the prosecution case.

It is of course correct that P.W.5 has been declared hostile by the prosecution and the learned Special Public Prosecutor was allowed by the Court to put leading questions and on being confronted with his previous statement, he has admitted to have stated to the I.O. that when the respondent demanded Rs.2,200/-, he (P.W.5) asked him to pay only Rs.1,200/- and that he paid

Rs.200/- and Rs.500/- on two different dates and promised to pay the balance amount of Rs.500/- on a subsequent date. In my humble view, such admission cannot be used as substantive evidence in the case.

In the case of ***State of Delhi -Vrs.- Shri Ram Lohia reported in A.I.R. 1960 S.C. 490***, it is held as follows:-

> *"13....Statements recorded under Section 164 of the Code are not substantive evidence in a case and cannot be made use of except to corroborate or contradict the witness. An admission by a witness that a statement of his was recorded under Section 164 of the Code and that what he had stated there was true would not make the entire statement admissible much less that any part of it could be used as substantive evidence in the case."*

A statement recorded under section 161 Cr.P.C. is not a substantive piece of evidence. In view of the proviso to sub-section (1) of section 162 Cr.P.C., the statement can be used only for the limited purpose of contradicting the maker thereof in the manner laid down in the said proviso. Such a statement cannot be treated as evidence in the criminal trial but may be used for the limited purpose of impeaching the credibility of a witness. Therefore, the admission made by P.W.5 with reference to his previous statement made before the I.O. would not make such statement admissible, much less be used as substantive evidence in the case.

In the case of **Sat Paul** (supra), it is held that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the Court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such crossexamination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as matter of prudence, discard his evidence in toto.

No doubt, P.W.5 has stated in the chief examination that the respondent demanded bribe from him at two instances prior to the date of trap, but in the cross-examination, he has stated that on 30.06.1993 he was not present when his brotherin-law paid Rs.200/- to the respondent and that the monetary dealing was

with his brother-in-law and not with him and even on 02.07.1993 the discussion about the monetary transaction was made with his brother-in-law and not with him. P.W.5 further stated that on 02.07.1993 his brother-in-law came to him at about 12 noon and told him that the respondent was demanding money and doing mischief to give the sale deed and further asked him to approach the vigilance office to give him a lesson. In view of such evidence adduced by P.W.5 in the crossexamination, it can be said that he had no direct knowledge about the alleged demand of bribe money or acceptance of Rs.200/- by the respondent in that connection and since he came to know about the same from his brother-in-law, who has not been examined during trial, the evidence of P.W.5 in that respect is hearsay one and it is not admissible. Section 60 of the Evidence Act mandates oral evidence must in all cases should be direct, thereafter in the section, direct evidence has been explained that a fact capable of being seen would be relevant only when it is deposed by a witness, who saw it, so is the case with a fact which could be heard or which could be perceived, the emphasis is on the mode by which a fact by whatever can be heard or perceived by any person, only that person's deposition would be treated to be relevant to prove it. Hearsay evidence is that evidence which a witness is merely reporting not what he himself saw or heard, not what has come under the immediate observation of his own bodily senses, but what he had learnt respecting the fact through the medium of a third person. Hearsay, therefore, properly speaking is secondary evidence of any oral statement. What was deposed to by P.W.5 regarding demand and acceptance of bribe money of Rs.200/- by the respondent prior to the date of trap was the information conveyed to him by his brother-in-law would remain hearsay unless the author of the information is examined in the case and is subjected to cross-examination. In the latter contingency, the objection of hearsay would disappear and the Court will have to weigh the relative merits and demerits of the respective versions deposed to by the concerned witnesses.

After carefully analysing the evidence of P.W.5, it is found that he has made inconsistent statements at different stages and therefore, in view of the ratio laid down in the case of **Suraj Mal** (supra) by the Hon'ble Supreme Court, his evidence becomes unreliable and unworthy of credence. Since the prosecution adduced the evidence of P.W.5 only to prove the demand aspect before the date of trap and such evidence is hit by section 60 of the Evidence Act being hearsay in nature and moreover it is full of inconsistent statements, I am of the humble view that the prosecution has miserably failed to prove the demand of bribe made by the respondent before the date of trap.

13. Let me now discuss the evidence adduced by the prosecution as to what happened on the date of trap in the Office of Sub-Registrar, Satyabadi. P.W.4,

the overhearing witness has stated that he stayed at the door of the office and was watching the proceeding and another clerk Prasanna Das asked the respondent to return Rs.200/- to P.W.5 saying that he was not interested in making payment and at this P.W.5 told that he had come to make payment of the balance amount and then the respondent asked him to pay the money and P.W.5 then took out the money kept folded in the paper and handed over the same to the respondent and the respondent counted the money and kept under a paper on his table. In the cross-examination, P.W.4 has stated that on his arrival at Vigilance Office, he reported to the D.S.P., Vigilance and after signing the preparation report (Ext.4), he left the Vigilance Office and did not do any other act. Such a statement made in the cross-examination creates doubt about the presence of P.W.4 in the Office of Sub-Registrar.

P.W.5 has stated that when he approached the respondent in his office, two to four persons were there and the respondent was talking with one or two persons and when he told the respondent that his brother-in-law had sent the money and asked him to give the sale deed, the respondent enquired from him as to who he was and asked him to send his brotherin-law and the respondent did not pay attention to him and engaged in talking with two staff. P.W.5 has further stated that seeing the vigilance staff and the witnesses approaching, he put the money below the files on the table of the respondent. He further stated that the respondent probably had not seen him keeping the money on his table under the files or else he would have forbade him. The Special Public Prosecutor had the freedom and right to put such questions as it deemed necessary in reexamination to elucidate certain answers from P.W.5 to explain the matters which were brought in the cross-examination and inconsistent with the examination in chief. The same having not been done, the evidence has to be read as a whole and merely because P.W.5 has stated something against the respondent in the chief examination, this Court cannot ignore the materials, which have been brought out in the cross-examination in favour of the respondent and the same goes against the prosecution case of demand and acceptance of bribe money by the respondent from P.W.5.

Thus the evidence of P.W.4 and P.W.5 relating to the demand and acceptance of bribe money on the date of trap is quite contradictory to each other.

P.W.6 is another witness who accompanied the vigilance staff to the Office of Sub-Registrar on the date of trap and though in the chief-examination, he has stated that the table of the respondent was searched and money in question was recovered from below the file, but in the cross-examination, he has

stated that he had not seen the recovery of tainted money and the tainted money was given to him by the D.S.P. He has also stated that he had not seen when the respondent had handled the tainted money.

In order to attract the culpability of section 7 of the P.C. Act, the essential ingredients are (i) the person accepting the gratification should be a public servant (ii) he should accept the gratification for himself and the gratification should be as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official function, favour or disfavour to any person. So far as section 13(1)(d) of the P.C. Act is concerned, the prosecution must establish that (i) the respondent as a public servant used corrupt or illegal means or otherwise abused his position as such public servant and (ii) he should have obtained a valuable thing or pecuniary advantage for himself or for any other persons.

In the case of ***Kishore Kumar Swain -Vrs.- State of Odisha (Vigilance) reported in (2018) 69 Orissa Criminal Reports 925***, it is held that whether all the ingredients of the offences i.e. demand, acceptance and recovery of illegal gratification have been satisfied or not, the Court must take into consideration the facts and circumstances brought on the record in its entirety and the standard of burden of proof on the accused vis-à-vis the standard of burden of proof on the prosecution would differ. It is only when this initial burden regarding demand and acceptance of illegal gratification is successfully discharged by the prosecution, then burden of proving the defence shifts upon the accused. The proof of demand of illegal gratification is the gravamen of the offences under sections 7 and 13(1)(d) of the P.C. Act and in absence thereof, the charge would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would not be sufficient to bring home the charge under these two sections of the P.C. Act. (Ref:- ***State of Punjab -Vrs.- Madan Mohan LalVerma reported in A.I.R. 2013 S.C. 3368, State of Maharashtra -Vrs.- Dnyaneshwar reported in (2009) 44 Orissa Criminal Reports 425, Punjabrao -Vrs.- State of Maharashtra reported in A.I.R. 2002 S.C. 486, V. Sejappa -Vrs.- State reported in A.I.R. 2016 S.C. 2045, PanalalDamodarRathi -Vrs.- State of Maharashtra reported in A.I.R. 1979 S.C. 1191, Mukhitar Singh -Vrs.- State of Punjab reported in (2016) 64 Orissa Criminal Reports (S.C.) 1016***).

14. In view of the foregoing discussions, I am of the humble view that the finding and reasons recorded on the charges and the observation made by the learned trial Court that the prosecution has succeeded to bring home the charges against the respondent under section 7 and section 13(2) read with section

13(1)(d) of the P.C. Act is clearly erroneous. There is no acceptable evidence regarding demand and acceptance of bribe money by the respondent from P.W.5 and mere recovery of tainted money from the table of the respondent is not sufficient to prove such charges. Even though for the reasons assigned by the learned trial Court in acquitting the respondent are not acceptable, but the impugned judgment and order of acquittal is otherwise sustainable.

Accordingly, the GCRLA being devoid of merits, stands dismissed.

It appears that the respondent has been released on bail by the learned trial Court as per the order dated 19.01.2017 of this Court. The respondent is discharged from the liability of the bail bond. The personal bond and surety bonds stand cancelled.

The trial Court records with a copy of this judgment be sent down to the concerned Court forthwith for information.

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2022 (III) ILR - CUT- 841

S.K. SAHOO, J.

CRLREV NO. 618 OF 2018

ASOK @ ASHOK MOHANTY ………Petitioner

.V.

REPUBLIC OF INDIA ………Opposite Party

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Sections 227, 239 – Whether an accused is justified in law in filing a petition for discharge under section 239 Cr.P.C. before the learned trial Court even though earlier he did not challenge the F.I.R. or the order of cognizance – Held, Yes. – Justified choice of challenging the proceeding at a particular stage lies with the accused and if it is legally permissible, then the Court has to entertain the same and consider the same in accordance with law and cannot reject the petition merely on the ground of not challenging the same earlier. (Para -8)

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 239 – Discharge – Scope, ambit and duty of magistrate discussed with reference to case laws. (Para -9)

(C) CODE OF CRIMINAL PROCEDURE, 1973 – Section 227 – Discharge – "There is not sufficient ground" implication of – Held, Section 227 in the new Code confers special power on the Judge to discharge an accused at the threshold if upon consideration of the records and documents, he find that "there is not sufficient ground" for proceeding against the accused – The provision was introduced in the Code to avoid wastage of public time when a prima facie case was not made and to save the accused from avoidable harassment and expenditure.

(D) INDIAN PENAL CODE,1860 – Sections 120-B,405,415,420,468 and 471 – The basic ingredients/requirements of the offences indicated with case laws. (Para 11-14)

(E) REASON ORDER – The learned trial Court rejected the discharge petition in a slipshod manner on some fallacious ground without even limited evaluation of materials and documents – Effect of – Held, failure to record reasons can amount to denial of Justice. (Para -9)

<u>Case Laws Relied on and Referred to</u> :-

1. (2010) 2 SCC 398 : P. Vijayan Vs. State of Kerala.
2. (2008) 10 SCC 394 : Yogesh Vs. State of Maharastra.
3. A.I.R. 1963 SC 1572 : Dr. Vimla Vs. Delhi Administration.
4. (2019) 10 SCC 623 : Rajendra @ Rajesh @ Raju Vs. State (NCT of Delhi)
5. (2009) 14 SCC 696 : Dalip Kaur & Ors. Vs. Jagnar Singh & Anr.
6. (2021) 3 SCC 751 : Archana Rana Vs. State of Uttar Pradesh & Anr.
7. 2022 SCC On line (SC) 1061 : M.N.G. Bharateesh Reddy Vs. Ramesh Ranganathan.
8. 2021 SCC On line (SC) 1232 : N. Raghavender Vs. State of Andhra Pradesh (CBI).
9. 2001 SCC Online Del 270 : State Vs. Siddarth Vashisth.
10. A.I.R. 1960 Raj 213 : Brij Ballabh Goyal Vs. Shri Satya Dev & Anr.
11. (2005) 30 OCR (SC) 177 : State of Orissa Vs. Debendra Nath Padhi.
12. A.I.R. 1980 S.C. 52 : Superintendent and Remembrancer of Legal Affairs West Bengal Vs. Anil Kumar Bhunja & Ors.
13. A.I.R. 1997 S.C. 2041 : State of Maharashtra Vs. Priya Sharan Maharaj & Ors.
14. 1977 CLJ 1606 : State of Bihar Vs. Ramesh Singh.
15. (2004) 1 SCC 547 : State of Punjab Vs. Bhag Singh.
16. 2021 SCC On Line SC 7 : Rajeev Suri Vs. Delhi Development Authority & Ors.

For Petitioner : Mr. Santosh Kumar Mund, Sr. Adv.

For Opp. Party : Mr. Sarthak Nayak, Special Public Prosecutor (C.B.I.)

ORDER Date of Hearing: 20.09.2022 : Date of Order: 26.10.2022

S.K. SAHOO, J.

The petitioner Asok @ Ashok Mohanty who is the former Advocate General of Odisha has filed this criminal revision petition under section 401 of

the Code of Criminal Procedure, 1973 (hereafter 'Cr.P.C.') to set aside the impugned order dated 27.06.2018 passed by the learned Special C.J.M. (C.B.I), Bhubaneswar in S.P.E. No.42 of 2014 in rejecting the petition filed by him under section 239 of Cr.P.C. for discharge and posting the case for consideration of charge. The petitioner has been charge sheeted under sections 120-B, 406, 409, 411, 420, 468, 471 of Indian Penal Code (hereafter 'I.P.C.') read with sections 4, 5 and 6 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978 (hereafter '1978 Act'). The said case arises out of CBI, SPE, SCB, Kolkata F.I.R. No.RC.47/S/2014-SCB/KOL dated 05.06.2014.

2. The aforesaid F.I.R. dated 05.06.2014 of the case was registered by treating first information reports of eight cases as original F.I.R. instituted in different police stations of the State of Odisha against the Artha Tatwa (AT) Group of Companies (hereafter 'Company') pursuant to the directions of the Hon'ble Supreme Court dated 09.05.2014 passed in Writ Petition (Civil) No.401 of 2013 filed by Shri Subrata Chattoraj and Writ Petition (Civil) No.413 of 2013 filed by Shri Alok Jena.

In their first information reports, the informants of those eight cases alleged, inter alia, that they along with the other depositors paid huge amounts to the Company for getting higher returns in terms of interests and incentives under various schemes floated by the Company and cheap flats/plots under various projects undertaken by the Company represented by its Chief Managing Director Pradeep Kumar Sethy. The company neither refunded the amount due to the depositors/investors as agreed upon nor constructed the flats as per agreement and also did not sell the alleged land to the investors/depositors. On being asked by the depositors/investors to refund the money paid to the company by them, accused Pradeep Kumar Sethy and other Directors of the Company closed down the branch offices at various places of Odisha as well as head office of the Company located at SCR-29, Kharvelnagar, Unit-III, Bhubaneswar and fled away and accordingly, the depositors have been cheated by the Company.

In the said case, charge sheet was submitted on 11.12.2014 against the petitioner and other accused persons for commission of offences as aforesaid keeping the further investigation open under section 173(8) of Cr.P.C. In the charge sheet, it is stated against the petitioner that he was the Advocate General of Odisha during the period from June 2009 to September 2014. He had purchased a building located at plot No.11-3B/1332,Category-B measuring 4000 Sq.ft. in Sector-11, Bidanashi, Cuttack from the accused Pradeep Kumar Sethy. As per records, accused Pradeep Kumar Sethy had purchased the said building from one of the Hon'ble Judge of this Court for consideration of

Rs.1,00,00,000/- (rupees one crore) during April 2011 out of the money flown from the accounts of the Company and later, transferred the said plot to the petitioner. Though the sale transaction was shown to be of Rs.1,01,00,000/- (rupees one crore one lakh), but in fact an amount of Rs.70,00,000/- (rupees seventy lakhs) only was paid by the petitioner to the accused Pradeep Kumar Sethy. During the course of investigation, two money receipts were seized from the official premises of the petitioner indicating the payment of Rs.1,01,00,000/- (rupees one crore one lakh) towards consideration. The said money receipts bore the forged signatures of accused Pradeep Kumar Sethy. During the relevant period of time i.e. during October 2012, when the above transaction took place, agitations were going on in Odisha against the accused Pradeep Kumar Sethy so also against the Company by the depositors which was evident from the registration of the 1st F.I.R. against the Company on 06.10.2012 following which the accused Pradeep Kumar Sethy moved an anticipatory bail application before this Court on 09.10.2012 and during the relevant time, it is the prosecution case that the petitioner entered into a criminal conspiracy with accused Pradeep Kumar Sethy and in furtherance thereof, he extended his hospitality towards the said accused as a result of which anticipatory bail was granted to the said accused on 18.10.2012. During the course of investigation, two separate agreements for sale of the said plots were recovered/seized from the possession of the petitioner. In the said two agreements, the consideration agreed upon was rupees one crore and one lakh which was contrary to the consideration amount mentioned in the affidavit dated 03.10.2012 submitted before the Cuttack Development Authority (hereafter 'C.D.A.') for transfer of ownership of the said property. It may be mentioned here that in the said affidavit dated 03.10.2012, the consideration amount was mentioned as rupees one crore and one thousand. As per the charge sheet, the petitioner misappropriated the balance amount of rupees thirty one lakhs that he was supposed to pay to the accused Pradeep Kumar Sethy.

3. In the discharge petition and written notes of submission filed before the learned trial Court, it was urged on behalf of the petitioner that on a bare perusal of the police papers supplied to the petitioner by the prosecution, it appeared that the prosecution has relied upon the following materials:

> (i) The statements of one Tapan Kumar Mohanty and UmashankarAcharya to identify the false signatures of Pradeep Kumar Sethy in the money receipts seized from the office chamber of the petitioner;
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> (ii) The statement of one Jibankanta Patnaik to the effect that the accused Pradeep Kumar Sethy was introduced by the petitioner to him and also to prove that the petitioner was the Advocate General of Odisha when accused Pradeep Kumar Sethy had applied and got the anticipatory bail;

(iii) The statement of one Baisnab Ch. Das, the Branch Manager of State Bank of India, Tulasipur Banch to prove that Rs.70,00,000/- (rupees seventy lakhs only) was withdrawn from the account of the petitioner vide cheques mentioned in the money receipts recovered from the office of the petitioner;

(iv) The statement of one Dillip Kumar Mohanty to prove payment of Rs.70,00,000/- (rupees seventy lakhs) by the petitioner to Pradeep Kumar Sethy;

(v) The file of Cuttack Development Authority bearing No.Estt-LIC-BD-119/07 in respect of Plot No.11-3B/1332 and the agreements for sale dated 28.12.2012 and 09.01.2013 between the petitioner and Pradeep Kumar Sethy.

It was further urged on behalf of the petitioner that from the sum total of the aforesaid materials, it would be seen that the crux of the allegation against the petitioner is that though the sale transaction was shown to have been made for Rs.1,01,00,000/- (rupees one crore one lakh), but in fact an amount of Rs.70,00,000/- (rupees seventy lakhs) was paid by the petitioner to the accused Pradeep Kumar Sethy. It further shows that during the course of investigation, some money receipts were seized indicating the payment of Rs.1,01,00,000/- towards the consideration, but on query, it was found that the money receipts bore the forged signatures of accused Pradeep Kumar Sethy. The prosecution has also tried to establish that during the relevant period of time i.e. October 2012 when the above transaction took place, agitations were going on in Odisha against accused Pradeep Kumar Sethy so also against the Company by the depositors which would be evident byregistration of the first F.I.R. against the Company on 06.10.2012, following which the accused Pradeep Kumar Sethy moved an application for anticipatory bail before this Court on 09.10.2012 and during the relevant time, the petitioner was the Advocate General and he entered into criminal conspiracy with the said accused Pradeep Kumar Sethy and in furtherance thereof extended his hospitality towards the accused for which his application for anticipatory bail was allowed on 18.10.2012.

It was further urged in the discharge petition that during the course of investigation, the I.O. seized two separate agreements for sale of the said plot from the possession of the petitioner. In the said agreements, the consideration amount as agreed upon by the parties was Rs.1,01,00,000/- (rupees one crore and one lakh) which was contrary to the consideration amount mentioned in the affidavit dated 03.10.2012 of the accused Pradeep Kumar Sethy made in connection with transfer of ownership of the said property in favour of the petitioner. In the said affidavit dated 03.10.2012, consideration amount mentioned was Rs.1,00,01,000/- (rupees one crore and one thousand), but the petitioner paid only Rs.70,00,000/- (rupees seventy lakhs) to the accused Pradeep Kumar Sethy and thereby he had misappropriated the remaining amount of Rs.31,00,000/- (rupees thirty one lakhs) which he was supposed to pay to accused Pradeep Kumar Sethy.

It further urged in the discharge petition that though the petitioner was the Advocate General of Odisha during the relevant time, but it was humanly impossible for him to verify each and every case and to know the facts and points of law involved in the case and particularly in criminal cases, who were the accused persons and what were the accusation against them. The accused Pradeep Kumar Sethy was involved in a criminal case and he filed an application for anticipatory bail through his counsel which was duly opposed to by the State counsel, but the bail application was disposed of. The allegation made by the prosecution to the effect that the petitioner had got acquaintance with the accused Pradeep Kumar Sethy before filing of the case for which he had shown undue favour is nothing but based on surmises and conjectures.

It was further urged in the discharge petition that considering the case of the prosecution, none of the ingredients of any of the offences alleged are made out against the petitioner. Though in the concluding part of the charge sheet filed against the petitioner, it was mentioned that the petitioner misappropriated the balance amount of Rs.31,00,000/- (rupees thirty one lakhs) that he was supposed to pay to the accused Pradeep Kumar Sethy, in view of the definition of 'criminal breach of trust' as per section 405 of the I.P.C., it would be seen that to constitute an offence of criminal breach of trust, it is essential that the prosecution should prove that the accused was entrusted with some property and that in respect of such property so entrusted, there was dishonest misappropriation or dishonest use or dishonest conversion by the accused, that the ownership of the property in respect of which criminal breach of trust is alleged to have been committed, was with some persons other than the accused and the later must held it on account of some persons or in some way for benefit. In other words, there must be an entrustment and the word 'any' occurring in the section do not enlarge the meaning of term 'entrustment' and it would arise whenever something whether be it money or any other thing is given to someone with some direction, but the same was not done in the same line. The person aggrieved is the person, whose property has been misappropriated by the accused and he should have set the law into motion to put an accused in the ambit and scope of section 405 of the I.P.C. Accused Pradeep Kumar Sethy with whom the petitioner allegedly entered into an agreement to pay certain amount is not the informant nor he had made any allegation that his property was misappropriated by the accused on a wrong notion. Bereft of that, the document seized by the prosecution from the office of the petitioner to the effect that Rs.31,00,000/- (rupees thirty one lakhs) has been paid to accused Pradeep Kumar Sethy was not utilized by the petitioner in any manner and it was still lying in the Bank, which would show that his intention was not deliberate or dishonest to cheat or to misappropriate the money of accused Pradeep Kumar Sethy. Thus, the

ingredients of section 405 of the I.P.C. are not attracted in the case inasmuch as to attract this section, there must be entrustment plus misappropriation and as such charge sheet under sections 406/420 of the Indian Penal Code against the petitioner is not tenable either in fact or in law. Here, there is no allegation by the prosecution as to who had entrusted the property to the petitioner and to whom the money was not been paid as per the contract.

It was further urged that there is no evidence that prior to the execution of the agreements dated 28.12.2012 and 09.01.2013 and at the time of filing bail application by the accused Pradeep Kumar Sethy, the petitioner had entered into a criminal conspiracy with the accused. The allegation in the charge sheet is that the petitioner entered into criminal conspiracy with accused Pradeep Kumar Sethy to facilitate grant of bail is totally misconceived. The grant of bail is a judicial order passed by one Hon'ble Judge of this Court and therefore, it is very difficult to suggest that the bail order was the outcome of a criminal conspiracy and as such submission of chargesheet under section 120-B of the I.P.C. is not tenable either in the fact or in law. It was further urged in the discharge petition that the other offences as per the charge sheet are not applicable against the petitioner in the facts and circumstances of the case.

In appears from the impugned order that the learned counsel for the petitioner cited certain decisions of the Hon'ble Supreme Court in the cases of ***P. Vijayan -Vrs.- State of Kerala reported in (2010) 2 Supreme Court Cases 398 and Yogesh -Vrs.- State of Maharastra reported in (2008) 10 Supreme Court Cases 394*** during course of hearing of the discharge petition.

4. No objection to the discharge petition was filed by the prosecution.

5. After hearing the learned counsel for both the parties, the learned trial Court while rejecting the discharge petition observed as follows:-

> "Admittedly, the petitioner is raising the aforesaid issues as averred in his petition for thefirst time and that too much after submission of charge sheet. Absolutely, not a single scrap of paper is available with the case record to show that if at all the petitioner has ever challenged the propriety of the investigation from the day it was registered under the above mentioned penal sections of law. That apart, it is unascertainable as to why and under what circumstance the petitioner did not chose to challenge the order of taking cognizance after submission of charge sheet. Moreover, the alleged overtacts have been committed in pursuance of criminal conspiracy by the petitioner along with other accused persons. Needless to say, this Court has taken cognizance of the offences under sections 120-B, 406, 409, 411, 420, 468, 471 of I.P.C. read with sections 4, 5 and 6 of the 1978 Act in this case being satisfied with the existence of a prima facie case. Further on perusal of the case record, it is found that the above petitioner is involved in the activities of M/s. Artha Tatwa Group of Companies and there exists prima facie materials to proceed against him.

> In the above view of the matter, this Court finds no material in the petition filed on behalf of the accused-petitioner namely Ashok Mohanty as such the same is liable to be rejected in the facts and circumstances of this case for the reasons herein before stated."

6. Mr. Santosh Kumar Mund, learned Senior Advocate appearing for the petitioner challenging the impugned order contended that the entire reasoning assigned by the learned trial Court in rejecting the discharge petition are fallacious. The trial Court seems to be thoroughly confused regarding the scope of section 239 of Cr.P.C. for which it could not adjudicate the contentions raised from the side of the petitioner properly and in accordance with law. Certain documents were produced by the learned Special Public Prosecutor in this Court during the hearing of the criminal revision petition which were not available in the trial Court at the time of consideration of discharge petition and those documents are letter of the Investigating Officer dated 30.10.2017 addressed to Government Examiner of Question Document, Forensic Examination Report dated 30.11.2017, purported petition filed by the prosecution before the learned trial Court on 21.05.2018 along with the documents annexed thereto, 161 Cr.P.C. statement of one Pradyumna Keshari Praharaj and 164 Cr.P.C. statement of Durga Prasad Dhal recorded on 07.11.2017 and his 161 Cr.P.C. statements recorded on 13.10.2017 and 26.10.2017. The learned counsel further submitted that the additional documents submitted by the prosecution in course of hearing of the criminal revision petition though was produced on 21.05.2018 by the I.O. but those were taken away and there is absolutely no reference to such documents in the impugned order and therefore, when at the time of consideration of the discharge petition under section 239 Cr.P.C., the trial Court was supposed to consider the police report and the documents sent with it under section 173 of Cr.P.C. and the additional documents produced here before this Court were not available with the learned trial Court, the same should not be taken into account at all. According to Mr. Mund, entertaining new materials produced by the learned Special Public Prosecutor before this Court in exercise of revisional jurisdiction would not be proper and justified as the petitioner got no scope to go through those documents at the time of consideration of the discharge petition by the learned trial Court to have his say. Learned counsel almost reiterated the submissions which were made in the discharge petition and written note of submission filed before the learned trial Court and apart from the decisions which were relied upon in the trial Court, he placed reliance in the cases of ***Dr. Vimla -Vrs.- Delhi Administration reported in A.I.R. 1963 Supreme Court 1572, Rajendra @ Rajesh @ Raju -Vrs.- State (NCT of Delhi) reported in (2019) 10 Supreme Court Cases 623, DalipKaur and others -Vrs.- Jagnar Singh and another reported in (2009) 14 Supreme Court Cases 696, Archana Rana -Vrs.- State of Uttar Pradesh and another reported in (2021) 3***

Supreme Court Cases 751, M.N.G. Bharateesh Reddy -Vrs.- Ramesh Ranganathan reported in 2022 Supreme Court Cases Online (SC) 1061, N. Raghavender -Vrs.- State of Andhra Pradesh (CBI) reported in 2021 Supreme Court Cases Online (SC) 1232, State -Vrs.- Siddarth Vashisth reported in 2001 Supreme Court Cases Online Del 270 and BrijBallabh Goyal -Vrs.- ShriSatyaDev and another reported in A.I.R. 1960 Raj 213.

7. Mr. Sarthak Nayak, learned Special Public Prosecutor appearing for the C.B.I., on the other hand, submitted that the close nexus between the petitioner with co-accused Pradeep Kumar Sethy is evident from the statements of Shri Jiban Kanta Pattanaik, Senior Private Secretary to Advocate General along with Shri Durga Prasad Dhal, Advocate and Shri Pradyumna Keshari Praharaj. Shri Jiban Kanta Pattanaik has specifically stated that the petitioner telephonically called him to his residence during the evening hours on 11.01.2013 and asked him to attest the signatures of accused Pradeep Kumar Sethy, who was present at his residence at that time. This indicates that the accused Pradeep Kumar Sethy, C.M.D. of the Company was so close to the petitioner that he was even having access to the residence of the petitioner. Witness Durga Prasad Dhal, Advocate in his statement recorded under section 164 Cr.P.C. has also clearly stated before the learned J.M.F.C., Bhubaneswar that accused Shri Devasis Panda, the then Additional Government Advocate, who was close to the accused Pradeep Kumar Sethy, was also very close to the petitioner and similarly, Shri Pradyumna Keshari Praharaj has stated that the property at C.D.A., Cuttack was given to the petitioner free of cost so that he would help the company at High Court in case any legal problem arose in future. He has also stated that when series of allegations were leveled against the petitioner for the above property, the petitioner paid only Rs.70.00 lakhs during January March, 2013 through cheques and remaining amount were never paid by the petitioner.

Mr. Nayak further argued that during the course of investigation, searches were conducted at the residential as well as office premises of the petitioner and two separate agreements for sale of the said plot with building, both executed between the petitioner and accused Pradeep Kumar Sethy were recovered/seized from the possession of the petitioner. In the said two agreements dated 28.12.2012 and 09.01.2013, the consideration agreed upon was Rs.1,01,00,000/- (rupees one crore and one lakh) which was contrary to the consideration amount as mentioned in another affidavit dated 03.10.2012 submitted to the C.D.A. for transfer of ownership of the said property.

The statement of account of the petitioner collected from the bank during the course of investigation revealed that only Rs.70.00 lakhs was paid by the

petitioner to the accused Pradeep Kumar Sethy and balance amount of Rs.31.00 lakhs was never paid by the petitioner. Thus, it is clear that the petitioner in criminal conspiracy with the accused Pradeep Kumar Sethy misappropriated Rs.31.00 lakhs that he had in fact collected from the victim depositors of company.

Mr. Nayak further submitted that the investigation further revealed that the petitioner had submitted another affidavit dated 05.01.2013 to the C.D.A. Though the said affidavit was shown to have been sworn before the Executive Magistrate, Sadar, Cuttack, but investigation revealed that the signature of the Executive Magistrate on the affidavit was forged. Relevant facts and the evidence to prove the offence of forgery and using a forged document as genuine have already been submitted as relied upon documents before the learned trial Court. Therefore, the petitioner is liable for commission of offences of using forged documents (valuable security) as genuine knowing the same to be forged.

Mr. Nayak further submitted that during course of investigation, the file relating to the transfer of the property located at plot No.11-3B/1332, Category-B, measuring 4000 Sq.ft. in Sector-11, Bidanashi, Cuttack was seized from the office of the C.D.A. and the said file contained affidavits dated 03.10.2012 sworn by accused Pradeep Kumar Sethy and another affidavit dated 03.10.2012 sworn by the petitioner before the Executive Magistrate, Sadar, Cuttack. Investigation revealed the signatures of Shri Durga Prasad Dhal as well as the Executive Magistrate on the affidavit dated 03.10.2012 sworn by the petitioner are forged. This fact has also been proved from the statement of Shri Durga Prasad Dhal, Advocate recorded under section 164 Cr.P.C. This clearly indicates that the petitioner, right from the beginning, got prepared forged documents namely the affidavits and used the said forged affidavits for transfer of the property from accused Pradeep Kumar Sethy in his name knowing the same to be forged.

He further argued that during course of investigation, searches were conducted at the residential and office premises of the petitioner. During course of search, a bunch of documents including two money receipts both dated 25.03.2013 towards receipt of total amount Rs.1,01,00,000/- (rupees one crore and one lakh) through cheques indicating cheques numbers (Rs.81.00 lakhs for land and building + Rs.20.00 lakhs for furniture, fixtures in respect of plot No.113-B/1333-2, Sector-11, Markat Nagar, Cuttack) were seized. The said two money receipts bore forged signatures of accused Pradeep Kumar Sethy. Shri Tapan Kumar Mohanty, a witness who was acquainted with the handwritings of

accused Pradeep Kumar Sethy has stated that the signatures of the said accused on both the money receipts dated 25.03.2013 were forged.

While supporting the impugned order, it was argued that at the stage of framing of charge, a detailed inquiry and detailed appreciation of defence argument is impermissible. The Court is required to see whether a prima facie case regarding the commission of certain offences is made out. The question whether the charges will eventually stand proved or not can be determined only after the evidence is adduced in the case.

Mr. Nayak further argued that as per the agreement for sale dated 28.12.2012 and 09.01.2013 executed between accused Pradeep Kumar Sethy and the petitioner, the total consideration money for sale of the scheduled property has been mentioned as Rs.1,01,00,000/- (rupees one crore and one lakh) whereas investigation revealed that only Rs.70.00 lakhs was paid by the petitioner. During the course of interrogation, the accused Pradeep Kumar Sethy revealed before C.B.I. that the remaining amount of Rs.31.00 lakhs was never paid and the same was misappropriated by the petitioner.

It was further argued that the petitioner not only prepared the forged affidavits dated 03.10.2012 and 05.01.2013 shown to be sworn before the Executive Magistrate, Cuttack Sadar, Cuttack but also used those affidavits as genuine by submitting the same to the C.D.A. authorities for transfer of the property from the accused Pradeep Kumar Sethy to his name. C.F.S.L. expert, after forensic examination, has opined that the signature of the identifier is forged on the affidavit dated 03.10.2012 submitted by the petitioner and therefore, the petitioner is liable for commission of offences punishable under sections 468 and 471 of the Indian Penal Code.

Mr. Nayak emphatically argued that on holding thepost of Advocate General, it was the duty of the petitioner to ensure that such a matter of grave public importance like the anticipatory bail of accused Pradeep Kumar Sethy be properly represented before this Court so that the accused, who had allegedly cheated the innocent public at large, should not get anticipatory bail. As Advocate General of the State, he cannot take the plea that he was not having any knowledge about such a case of grave public importance in which state-wide public agitations were going on. The petitioner, as Advocate General, was responsible for proper representation of the facts before this Court so that the accused Pradeep Kumar Sethy would not have got anticipatory bail, but in criminal conspiracy with the said accused, the petitioner intentionally did not do it for which anticipatory bail was granted to the accused by a cryptic order.

While concluding his argument, Mr. Nayak contended that the impugned order is just and proper in the eyes of law and hence, the revision petition filed by the petitioner should be dismissed in the interest of justice. Reliance was placed upon the decisions of the Hon'ble Supreme Court in the cases of ***State of Orissa -Vrs.-Debendra Nath Padhi reported in (2005) 30 Orissa Criminal Reports (SC) 177, Superintendent and Remembrancer of Legal Affairs West Bengal -Vrs.- Anil Kumar Bhunja and others reported in A.I.R. 1980 S.C. 52 and State of Maharashtra -Vrs.- Priya Sharan Maharaj and others reported in A.I.R. 1997 S.C. 2041.***

8. Before adverting to the contentions raised by the learned counsel for the respective parties carefully, on perusal of the impugned order passed by the learned trial Court, it seems that the discharge petition was rejected on the following grounds:-

> (i) The petitioner is raising the issues as averred in his petition for the first time and that too much after submission of charge sheet. Absolutely, not a single scrap of paper is available with the case record toshow that if at all the petitioner had ever challenged the propriety of the investigation from the day it was registered under the above mentioned penal sections of law;
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> (ii) This Court has taken cognizance of the offences under sections 120-B, 406, 409, 411, 420, 468, 471 of I.P.C. read with sections 4, 5 and 6 of the 1978 Act on being satisfied with the existence of a prima facie case. It is unascertainable as to why and under what circumstance, the petitioner did not chose to challenge the order of taking cognizance after submission of charge sheet;
>
> (iii) The alleged overtacts have been committed in pursuance of criminal conspiracy by the petitioner along with other accused persons;
>
> (iv) On perusal of the case record, it is found that the petitioner is involved in the activities of M/s. Artha Tatwa Group of Companies.

The first two reasonings assigned in the impugned order, in my humble view are quite fallacious. Non-challenging of the propriety of investigation from the day the F.I.R. was registered so also the order of taking cognizance after submission of charge sheet, cannot be a ground to reject the discharge petition. Obviously, when the F.I.R. was registered on 05.06.2014 treating the first information reports of eight cases as original F.I.R. of the case in view of the direction of the Hon'ble Supreme Court, the name of the petitioner was not there in the first information report. Where was the necessity for the petitioner to challenge the registration of the F.I.R. lodged on 05.06.2014 immediately after its registration when he was not named as an accused in the said F.I.R.? An accused can challenge the F.I.R. so a lso the submission of charge sheet and

taking of cognizance at different stages but merely because he did not do that, he is not deprived in filing the petition for discharge before the learned trial Court either under section 227 Cr.P.C. or under section 239 of Cr.P.C. at the appropriate stage. In other words, it would be quite unjustified to hold that the accused who challenges the F.I.R. after its registration and the order of taking cognizance after submission of charge sheet can only file the discharge petition in the trial Court. This scope of interference with the criminal proceeding is different at different stages. Both the sections 227 and 239 of Cr.P.C. confer valuable right on the accused to file petition for discharge before the learned trial Court. Obviously, if he files such a petition and serves a copy of the same on the learned Public Prosecutor, the latter is at liberty to file objection to such petition and even without filing any written objection, the Public Prosecutor can oppose the discharge petition filed by the accused. There is no bar on the part of the Public Prosecutor in raising oral objection to the discharge petition even though he has not filed the written objection. Mere non-filing of written objection by the Public Prosecutor cannot be a ground on the part of the learned trial Court not to consider the oral objection raised in that behalf. Therefore, I am of the humble view that the petitioner as an accused is quite justified in law in filing a petition for discharge under section 239 Cr.P.C. before the learned trial Court even though earlier he did not challenge the F.I.R. or the order of taking cognizance. Choice of challenging the proceeding at a particular stage lies with the accused and if it is legally permissible, then the Court has to entertain the same and consider the same in accordance with law and cannot reject the petition merely on the ground of not challenging the same earlier.

So far as the fourth reasoning assigned by the learned trial Court that the petitioner is involved in the activities of M/s. Artha Tatwa Group of Companies, learned counsel for both the sides fairly submitted there is no such material on record in that respect.

The third reasoning assigned by the learned trialCourt that the alleged overtacts have been committed in pursuance of criminal conspiracy by the petitioner along with other accused persons, will be discussed later.

9. At the very outset, it would be apt to discuss the scope and ambit of section 239 of Cr.P.C. which comes under Chapter XIX of the Code and deals with the power of the Magistrate to discharge the accused in the trial of warrant cases.

In the case of ***Debendra Nath Padhi*** (supra), it is held that section 239 of Cr.P.C. requires the Magistrate, to consider ' the police report and the documents sent with it under section 173' and, if necessary, examine the accused and after

giving accused an opportunity of being heard, if the Magistrate considers the charge against the accused to be groundless, the accused is liable to be discharged by recording reasons thereof. There can only be limited evaluation of materials and documents on record and sifting of evidence to prima facie find out whether sufficient ground exists or not for the purpose of proceeding further with the trial, have so held with reference to materials and documents produced by the prosecution and not the accused. The material as produced by the prosecution alone is to be considered and not the one produced by the accused. In our view, clearly the law is that at the time of framing charge or taking cognizance, the accused has no right to produce any material.

In the case of ***Anil Kumar Bhunja*** (supra), it is held that the case was at the stage of framing charges and the prosecution evidence had not yet commenced. The Magistrate was therefore, to consider the above question on a general consideration of the materials placed before him by the investigating police officer. At this stage, as was pointed out by this Court in ***State of Bihar -Vrs.- Ramesh Singh 1977 Criminal Law Journal 1606***, the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise is not exactly to be applied at the stage of section 227 or 228 of the Cr.P.C. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as the existence of the factual ingredients constituting the offence alleged, may justify the framing of charge against the accused in respect of the commission of the offence.

In the case of ***Priya Sharan Maharaj*** (supra), it is held that at the stage of framing of the charge, the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction.

In the case of ***P. Vijayan*** (*supra*), it is observed that if two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal. Further, the words "not sufficient ground for proceeding against the accused" clearly show that the Judge is not a mere Post Office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the

prosecution. In assessing this fact, it is not necessary for the Court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the Court, after the trial starts. At the stage of section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the Court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him. Section 227 in the new Code confers special power on the Judge to discharge an accused at the threshold if upon consideration of the records and documents, he find that "there is not sufficient ground" for proceeding against the accused. In other words, his consideration of the record and document at that stage is for the limited purpose of ascertaining whether or not there is sufficient ground for proceeding against the accused. If the Judge comes to a conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228, if not, he will discharge the accused. This provision was introduced in the Code to avoid wastage of public time when a prima facie case was not disclosed and to save the accused from avoidable harassment and expenditure.

In my humble view, when the allegations are baseless or without foundation and no prima facie case are made out, it is just and proper to discharge the accused to prevent abuse of process of the Court. If there is no ground for presuming that accused has committed an offence, the charges must be considered to be groundless. The ground may be any valid ground including the insufficiency of evidence to prove the charge. When the materials at the time of consideration for framing the charge are of such a nature that if unrebutted, it would make out no case whatsoever, the accused should be discharged. Appreciation of evidence is an exercise that this Court is not to undertake at the stage of consideration of the application for discharge. The truth, veracity and effect of the materials proposed to be adduced by the prosecution during trial are not to be meticulously adjudged. The likelihood of the accused in succeeding to establish his probable defence cannot be a ground for his discharge.

Keeping in view the ratio laid down by the Hon'ble Supreme Court in the aforesaid cases, when so many points were canvassed not only in the discharge petition and written note of submission filed by the petitioner and contentions were also raised during the hearing of the discharge petition citing decisions, it was not proper on the part of the learned trial Court to reject the same in a slipshod manner on some fallacious grounds without even limited evaluation of materials and documents and sifting the evidence to prima facie

find out whether sufficient grounds exist or not for the purpose of proceeding against the petitioner. What prompted the learned trial Court to hold that the alleged overt act have been committed in pursuance of criminal conspiracy by the petitioner along with other accused persons, is not borne out from the impugned order. Failure to record reasons can amount to denial of justice, as the reasons are live links between the minds of the decision taker to the controversy in question and the decision or conclusion arrived at. Requirement of a speaking order is judicially recognized as an imperative. Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the 'inscrutable face of the sphinx', it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudicating the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out. (*Ref:-**State of Punjab -Vrs.- Bhag Singh : (2004) 1 Supreme Court Cases 547, Rajeev Suri -Vrs.- Delhi Development Authority and others : 2021 SCC On Line SC 7).***

The conclusions arrived at by the learned trial Court in the impugned order without assigning any cogent reasons reflects non-application of mind. In view of fact that the learned trial Court has passed the impugned order in a mechanical manner, though I was contemplating of sending the matter on remand to the said Court to decide the matter afresh by passing a reasoned order discussing the contentions raised but as the matter is pending in this Court since 2018 and the further proceeding in the trial Court has been stayed and taking note of the same, the Hon'ble Supreme Court in its order dated 12.09.2022 passed in SLP (Crl.) Nos.5366-5367 of 2022 requested this Court to dispose of this revision petition in an expeditious manner, it would be proper on my part to deal with the submissions raised by the respective parties in favour of discharge and against it instead of remanding the matter to the trial Court to cut short any further delay.

10. There is no dispute that the Hon'ble Supreme Court in its order dated 09.05.2014 passed in the aforesaid two writ petitions filed by Sri Subrata Chattoraj and Sri Alok Jena superficially directed to C.B.I. to look into the larger conspiracy aspect and money trail. The investigation revealed which is also not disputed by the learned counsel for the petitioner that the petitioner purchased a building located in C.D.A. Sector-11, Bidanasi, Cuttack from the accused Pradeep Kumar Sethy who had purchased the same from one of the Hon'ble

Judge of this Court during April 2011. The prosecution case is that the purchase of the property was made from the money flown from the accounts of the company which was latter transferred to the petitioner. On 03.10.2012 an application for 3rd party transfer was filed before C.D.A. by accused Pradeep Kumar Sethy and petitioner also filed application before Secretary, C.D.A. enclosing necessary documents and affidavit in prescribed format for transfer of the plot. On 06.10.2012 Balasore P.S. Case No.352 of 2012 was instituted against accused Pradeep Kumar Sethy and others for commission of offences under sections 420/506/34 of the I.P.C. along sections 4, 5 and 6 of 1978 Act. Accused Pradeep Kumar Sethy approached this Court for anticipatory bail in BLAPL No.27162 of 2012 on 09.10.2012 and the bail application was allowed as per order dated 18.10.2012. An agreement was entered into by the accused Pradeep Kumar Sethy with the petitioner for sale of property for an agreed consideration of Rs.1,01,00,000/- (rupee one crore and one lakh) only. In the said agreement, it was mentioned that advance amount of Rs.20,00,000/- (rupees twenty lakh) was paid vide cheque no.041990 dated 28.12.2012. Out of the agreed consideration, Rs.81 lakhs was towards the cost of land and building and Rs.20 lakhs was towards cost of furniture, fixtures and electrical and electronic fittings. On 09.01.2013 another agreement was entered into between accused Pradeep Kumar Sethy and the petitioner. The necessity for execution of fresh agreement arose as the cheque bearing no.041990 dated 28.12.2012 could not be encashed and it was refunded for which Rs.20 lakhs was paid as advance through two cheques bearing nos.407101 and 407102 dated 09.01.2013. This amount of rupees twenty lakh was debited from the account of the petitioner on 11.01.2013 as per the statement of witness Gouranga Charan Das, Branch Manager, S.B.I., Tulasipur Branch, Cuttack. Another cheque bearing no.407103 dated 08.02.2013 amounting to Rs.10 lakhs was paid to the accused Pradeep Kumar Sethy by the petitioner and on 11.02.2013 the said amount was debited from the account of the petitioner. On 22.03.2013 C.D.A. allowed transfer and allotted the plot in favour of the petitioner and on 25.03.2013 lease deed was executed before the District Sub-Registrar, Cuttack between the C.D.A and the petitioner. On 25.03.2013 the petitioner paid rupees seventy one lakh through eight cheques to accused Pradeep Kumar Sethy, out of which seven cheques were of the value of rupees ten lakh each and another one was of rupees one lakh. Accused Pradeep Kumar Sethy acknowledged the receipt of eight cheques and sent a money receipt to the petitioner, out of which he encashed the cheque bearing nos. 407107, 407108, 407109 and 407110 on 30.03.2013, but did not encash cheque nos.407111, 407112, 407113 and 407114. It is the prosecution case that though the said transaction between the petitioner and the accused Pradeep Kumar Sethy were shown to be Rs. 1,01,00,000/-, but in fact an amount of Rs.70,00,000/- was paid by the petitioner to the said accused.

When a submission was made on the last date of hearing of this revision petition that the documents which were produced by the learned Special Public Prosecutor before this Court were also produced before the learned trial Court, but those documents were taken away by the Investigating Officer for which those were not available with the Court at the time of passing the impugned order, in order to ascertain the correct state of affairs, this Court vide order dated 20.09.2022 called for the relevant order sheets and the same was sent by the learned trial Court which indicated on 21.05.2018 on the strength of an advance petition filed by the learned Public Prosecutor, C.B.I., the I.O. filed a petition along with some documents in compliance to the order dated 17.04.2018 and another memo was filed by the learned Public Prosecutor with a prayer to take back those documents/statements to keep in safe custody in C.B.I. Malkhana after perusal of the same by the Court in order to facilitate smooth investigation of the case. The learned trial Court allowed the prayer and the I.O. was directed to supply those documents/statements to the learned defence counsel before 26.05.2018 and the original documents/statements were handed over to the I.O. with a direction to keep the same in safe custody. The learned Special Public Prosecutor produced documentary proof to indicate that on 22.05.2018 the learned counsel appearing for the petitioner in the trial court received such documents. The learned counsel for the petitioner also did not dispute the same. Therefore, the documents which were produced before this Court by Mr. Nayak, the learned Special Public Prosecutor were not only produced before the learned trial Court and perused by the Court on 21.05.2018 but also the copies were supplied to the learned defence counsel appearing for the petitioner in the trial Court on 22.05.2018 which was much prior to the passing of the impugned order on 27.06.2018.

Though the learned counsel for the petitioner placed reliance in the case of ***Siddarth Vashisth*** (supra), wherein it was held that the High Court while exercising revisional jurisdiction must not admit further evidence which was not the basis of the view taken by the learned trial Judge and also in the case of ***Brij Ballabh Goyal*** (supra), wherein it was held that a new question of fact cannot be allowed to be raised in revision, but in my humble view, when certain important statements and documents which were collected after submission of first charge sheet during course of further investigation under section 173(8) of Cr.P.C. were filed in trial Court and copies of the same were also supplied to the learned defence counsel for the petitioner in the trial Court prior to the consideration of discharge petition, this Court can very well look into such statements and documents at this stage when the rejection of the discharge petition is under challenge as it cannot be said the filing of the documents by the learned Special

Public Prosecutor has taken the petitioner for surprise and he has been seriously prejudiced there by.

The statements of witnesses Jiban kanta Pattanaik, Durga Prasad Dhal, Pradyumna Keshari Praharaj indicate about close nexus between the petitioner and accused Pradeep Kumar Sethy, C.M.D. of the Company. The consideration amount for sale of property as mentioned in two agreements dated 28.12.2012 and 09.01.2013 was contrary to the consideration amount mentioned in the affidavit dated 03.10.2012 submitted to the C.D.A. authorities for transfer of ownership of the property. It is strange that in the aforesaid affidavit dated 03.10.2012, accused Pradeep Kumar Sethy has mentioned to have received the consideration money amounting to Rs.1,00,01,000/- (rupees one crore and one thousand) only as agreed between them. In fact, not a single pie had been paid by the petitioner to the accused Pradeep Kumar Sethy as on 03.10.2012. The first cheque was paid by the petitioner to the said accused Pradeep Kumar Sethy vide cheque no.041990 dated 28.12.2012 which is mentioned in the agreement dated 28.12.2012. The cheque bearing no.041990 dated 28.12.2012 could not be encashed and it was refunded for which another two account payee cheques bearing nos.407101 and 407102 dated 09.01.2013 of rupees ten lakhs each were issued by the petitioner in favour of the said accused which is mentioned in the agreement dated 09.01.2013. This amount of rupees twenty lakhs was debited from the account of the petitioner on 11.01.2013. A big question mark is raised as to why without receiving a single pie towards the transfer of property, accused Pradeep Kumar Sethy mentioned in his affidavit dated 03.10.2012 submitted to the C.D.A. authorities that he had received consideration money amounting to Rs.1,00,01,000/- (rupees one crore and one thousand) only from the petitioner as agreed between them. Why in spite of receiving eight cheques from the petitioner on 25.03.2013 for total amount of Rs.71,00,000/- (rupees seventy one lakhs), he only presented four cheques for encashment and not the other four cheques of carrying total amount of Rs.31,00,000/- (rupees thirty one lakhs). When search was conducted at the residential and office premises of the petitioner, two money receipts, both were dated 25.03.2013 stated to have been issued by the accused Pradeep Kumar Sethy, one for an amount Rs.81 lakhs and the other for Rs.20 lakhs were seized, but as per the statement of Tapan Kumar Mohanty, those money receipts bore the forged signatures of accused Pradeep Kumar Sethy. An affidavit dated 05.01.2013 was submitted by the petitioner to the C.D.A. authorities which was allegedly sworn before the Executive Magistrate, Sadar, Cuttack but the investigation revealed that the signature of the Executive Magistrate on the affidavit was forged. Relevant documents and statements to that effect have also been filed before the learned trial Court. The file relating to transfer of property was seized the office of C.D.A. which

contained one affidavit dated 03.10.2012 of the accused Pradeep Kumar Sethy and the other affidavit dated 03.10.2012 of the petitioner, but investigation revealed that the signatures of Durga Prasad Dhal as well as the Executive Magistrate on the affidavit of the petitioner were forged. The statement of Durga Prasad Dhal recorded under section 164 of Cr.P.C. substantiates the same.

The charge sheet reveals that in view of the promise of higher returns in terms of interest and incentives under various schemes floated by the Company, the depositors invested huge amount with the Company for the purchase of cheap flats/plots under various projects/schemes undertaken by the Company represented by its Chief Managing Director i.e. accused Pradeep Kumar Sethy. The Company failed to deliver on its promise and neither did it return the amount due to the depositors/investors as agreed upon nor did it construct the flats as agreed upon. When the investors/depositors attempted to contact the representatives of the Company seeking refund of the money, the accused Pradeep Kumar Sethy and others so connected to the Company fled from the office, thereby cheating the investors/depositors of their hard earned money and savings. After collecting such deposits from the innocent depositors for some period, the Company allegedly completely stopped functioning and thus in that process many investors who had invested money with the company were duped. When agitations were going on against the Company and against the accused Pradeep Kumar Sethy, in view of the close nexus between the said accused with the petitioner, it is the prosecution case that there was no stiff objection from the side of the State during the hearing of the bail application and even case diary was not called for and no prayer was made from the side of the State before the concerned Court seeking time to call for the case diary and that facilitated the accused Pradeep Kumar Sethy to get anticipatory bail. What happened between the petitioner and the accused Pradeep Kumar Sethy prior to the grant of bail and after that are very much relevant for the purpose of making out a prima facie case against the petitioner relating to the offences under which charge sheet has been submitted against him.

11. Coming to the accusation of criminal conspiracy against the petitioner as per section 120-B of I.P.C., in the case of ***Yogesh (supra***), it is held that the basic ingredients of the offence of criminal conspiracy are: (i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. It is, therefore, plain that meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is sine qua non of criminal conspiracy. It is manifest that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is sine qua

non of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. But the incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn. It is well settled that an offence of conspiracy is a substantive offence and renders the mere agreement to commit an offence punishable even if an offence does not take place pursuant to the illegal agreement.

In the case of ***Rajendra @ Rajesh @ Raju*** (supra), it is held that in order to establish the charge of conspiracy, three essential elements must be shown i.e. a criminal object, a plan or scheme embodying means to accomplish that object, and an agreement between two or more persons to cooperate for the accomplishment of such object. Admittedly, the incorporation of section 10 to the Indian Evidence Act, 1872, suggests that proof of a criminal conspiracy by direct evidence is not easy to get.

There are important statements and material documents which were collected during course of investigation against the petitioner to substantiate criminal conspiracy aspect. There are strong suspicion founded upon such materials which lead this Court to form a presumptive opinion as to the existence of factual ingredients constituting such offence. Whether those statements and documents would be sufficient to hold the petitioner guilty is not to be decided in this revision petition. In view of the limited scope of evaluation of such materials and documents on record and sifting of evidence at this stage and since there is prohibition against meticulous assessment of truth, veracity and effect of the evidence adduced by the prosecution, it would not be proper to enter into that arena.

12. Coming to the offences under sections 468 and 471 of I.P.C., the basic requirements are 'forgery' as defined under section 463 of I.P.C. and making a false document as defined under section 464 of I.P.C. In the case of **Dr. Vimla** (*supra*), while analysing the provisions under sections 463 and 464 of I.P.C., it is held that the expression "defraud" involves two elements, namely, deceit and injury to the person deceived. Injury is something other than economic loss that is, deprivation of property, whether movable or immovable, or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied.

I find that there are prima facie materials on record to show how forged signatures of accused Pradeep Kumar Sethy and an advocate and even the Executive Magistrate were made in creating documents and utilised in connection with transfer of the property in the name of the petitioner. The report of C.F.S.L. expert also lends corroboration to the same. Therefore, there is no dearth of material to prima facie constitute the ingredients of such offences.

13. Coming to the offence under section 420 of the I.P.C., it appears that such accusation is mainly against accused Pradeep Kumar Sethy who allegedly cheated the innocent depositors/investors of their hard earned money. The section requires that a person must commit the offence of cheating as defined under section 415 of I.P.C. and the person cheated must be dishonestly induced to (i) deliver property to any person; or (ii) make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security.

In the case of ***Dalip Kaur*** (supra), while discussing the provisions under sections 405, 415 and 420 of I.P.C., it is held that an offence of 'cheating' would be constituted when the accused has fraudulent or dishonest intention at the time of making promise or representation. A pure and simple breach of contract does not constitute an offence of cheating. The ingredients of section 420 of the I.P.C. are: (i) Deception of any persons; (ii) Fraudulently or dishonestly inducing any person to deliver any property; or (iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.

In the case of ***Archana Rana*** (supra), it is held that a fraudulent or dishonest inducement is an essential ingredient of the offence under section 415 Indian Penal Code. A person who dishonestly induced any person to deliver any property is liable for the offence of cheating.

In the case of ***M.N.G. Bharateesh Reddy*** (supra), it is held that the ingredients of the offence under section 415 emerge from a textual reading. Firstly, to constitute cheating, a person must deceive another. Secondly, by doing so the former must induce the person so deceived to (i) deliver any property to any person; or (ii) to consent that any person shall retain any property; or (iii) intentionally induce the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived and such an act or omission must cause or be likely to cause damage or harm to that person in body, mind, reputation or property.

There is no material against the petitioner that such cheating to the innocent depositors/investors made by the accused Pradeep Kumar Sethy was in connivance with the petitioner and therefore, the ingredients of offence under section 420 of the Indian Penal Code are not attracted against the petitioner.

14. Coming to the offence under section 406 and 409 of the I.P.C., there is no dispute that while the former deals with punishment for criminal breach of trust, the latter deals with criminal breach of trust by public servant or by others as mentioned in that section.

In the case of ***N. Raghavender*** (supra), it is held that the entrustment of public property and dishonest misappropriation or use thereof in the manner illustrated under section 405 I.P.C. are a sine qua non for making an offence punishable under section 409 I.P.C. The crucial word used in section 405 I.P.C. is 'dishonestly' and therefore, it pre-supposes the existence of mensrea. In other words, mere retention of property entrusted to a person without any misappropriation cannot fall within the ambit of criminal breach of trust. Unless there is some actual use by the accused in violation of law or contract, coupled with dishonest intention, there is no criminal breach of trust. The second significant expression is 'misappropriates' which means improperly setting apart for ones use and to the exclusion of the owner. Unless it is proved that the accused, a public servant or a banker etc. was 'entrusted' with the property which he is duty bound to account for and that such a person has committed criminal breach of trust, section 409 I.P.C. may not be attracted. 'Entrustment of property' is a wide and generic expression. While the initial onus lies on the prosecution to show that the property in question was 'entrusted' to the accused, it is not necessary to prove further, the actual mode of entrustment of the property or misappropriation thereof.

It is the prosecution case that the accused Pradeep Kumar Sethy was entrusted with public money which he had collected from the depositors/investors of the Company under various schemes. He was supposed to account for the same. It is the further prosecution case that such money was utilised in purchasing the property of one of the Hon'ble Judge of this Court and subsequently sold to the petitioner. The documents and affidavits utilised in connection with the transfer of property in the name of the petitioner falsely indicate that the consideration money was more than rupees one crore. It is the further prosecution case that by making actual payment of Rs.71 lakhs, the petitioner got the property worth of rupees more than one crore and the paper transaction also falsely reflected the valuation of the property to be more than one crore. When being entrusted with the property or dominion over the property

which was purchased by utilizing the public deposits, without receiving the full amount, accused Pradeep Kumar Sethy disposed of the property by way of sale to the petitioner for his use for alleged obvious reasons and thereby the petitioner was benefited by Rs.31 lakhs and in that process, the public money of Rs.31 lakhs was misappropriated and according to the prosecution, such thing happened on account of criminal conspiracy between the two and since the prosecution has collected materials to substantiate such conspiracy, it cannot be said there are complete absence of prima facie materials to constitute the ingredients of the offence under section 409 of I.P.C. which is the aggravated form of criminal breach of trust. The expression 'dishonestly' is defined under section 24 of the Indian Penal Code which states that whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing 'dishonestly'. In view of the materials on record, there has been wrongful gain of Rs.31 lakhs to the petitioner.

15. In my humble view, however, there are no prima facie materials against the petitioner for commission of offence under section 411 I.P.C. which deals with dishonestly receiving stolen money so also for the offences under sections 4, 5 and 6 of 1978 Act.

16. In view of the foregoing discussions, though not for the reasons assigned by the learned trial Court, but on a careful scrutiny, serious deliberations and analysis of the materials on record, it cannot be said that the accusation levelled against the petitioner by the prosecution particularly for the commission of offences under sections 120-B, 409, 468 and 471 of the Indian Penal Code are groundless and that there are no sufficient grounds for proceeding against the petitioner for such offences.

17. Accordingly, the CRLREV petition being devoid of merits, stands dismissed. Consequently, the stay order dated 14.08.2018 which was extended from time to time stands vacated. The learned trial Court shall do well to expedite the framing of charges if there are no other impediments. Since the case is of the year 2014, the learned trial Court shall do well to conclude the trial preferably within one year from the date of framing of charges keeping in view the provision under section 309 of Cr.P.C. which provides, inter alia, that in every inquiry or trial, the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded and that no adjournments shall be granted at the request of a party, except where the circumstances are beyond the control of that party.

Before parting, I would like to place it on record by way of abundant caution that whatever has been stated hereinabove in this order has been so said only for the purpose of disposing of the prayer for discharge of the petitioner. Nothing contained in this order shall be construed as expression of a final opinion on any of the issues of fact or law arising for decision in the case which shall naturally have to be done by the trial Court at the appropriate stage of the trial.

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2022 (III) ILR - CUT- 865

K.R. MOHAPATRA, J.

CMP NO. 438 OF 2019

KAMAL KUMAR BHAWASINKA ……..Petitioner

.V.

SMV BEVERAGES PVT. LTD. ………Opp. Party

CODE OF CIVIL PROCEDURE, 1908 – Order 1 Rule 10 – Whether a defendant can file an application under Order-1 Rule-10 CPC to implead a party? – Held, the plaintiff has the liberty to choose the party against whom he claim relief – The necessary conclusion would be that non-joinder of party is at the risk of the Plaintiff – It cannot be compelled to implead parties unless the Court suo motu direct so.

Case Law Relied on and Referred to :-

1. 2022 SCC Online SC 1234 : Sudhamayee Pattnaik & Ors. Vs. Bibhu Prasad Sahoo & Ors.

For Petitioner : Mr. A.Kejriwal
For Opp. Party : Mr. N.P.Patra

ORDER Date of Order : 19.09.2022

K.R. MOHAPATRA, J.

1. This matter is taken up through Hybrid mode.

2. Though this matter is listed for orders today, on the consent of learned counsel for the parties, the same is taken up for hearing and final disposal.

3. Petitioner in this CMP seeks to assail order dated 24th December, 2018 (Annexure-5) passed by learned 3rd Additional Civil Judge (Senior Division),

Cuttack in CS No.3272 of 2014, whereby an application under Order 1 Rule 10 CPC filed by Defendant / Opposite Party has been allowed.

4. Mr. Kejriwal, learned counsel for the Petitioner submits that the suit has been filed for recovery of amount from the Opposite Party/Defendant for supply of sugar and for other consequential reliefs. By allowing an application under Order XVIII Rule 1 CPC filed by the Plaintiff, the Defendant has been directed to begin hearing of the suit. The Defendant while leading evidence in the matter, filed an application under Order 1 Rule 10 CPC to implead one Laxmi Enterprisers, a proprietorship firm as a party to the suit on the ground that it has purchased the sugar from said Laxmi Enterprisers and paid the consideration amount. As such, said laxmi Enterprisers is a necessary part to the suit. Considering the said application, learned trial Court rightly allowed the application under Order 1 Rule 10 CPC. Hence, this CMP has been filed.

4.1 Learned counsel for the Petitioner relied upon a decision in the case of ***Sudhamayee Pattnaik and others Vs. Bibhu Prasad Sahoo*** and others, reported in 2022 SCC Online SC 1234, wherein Hon'ble Supreme Court held as under:-

> *"11. At the outset, it is required to be noted that the defendants in the suit filed application under Order 1 Rule 10 CPC and prayed to implead the subsequent purchasers as party defendants. The suit is for declaration, permanent injunction and recovery of possession. As per the settled position of law, the plaintiffs are the dominus (sic) litis. Unless the court suomotu directs to join any other person not party to the suit for effective decree and/or for proper adjudication as per Order 1 Rule 10 CPC, nobody can be permitted to be impleaded as defendants against the wish of the plaintiffs. Not impleading any other person as defendants against the wish of the plaintiffs shall be at the risk of the plaintiffs. Therefore, subsequent purchasers could not have been impleaded as party defendants in the application submitted by the original defendants, that too against the wish of the plaintiffs."*

5. In that view of the matter, learned counsel for the Petitioner submits that the Court has power to impelad a party to the suit *suo motu*. In absence of such a direction, the Plaintiff is *dominus litis* and he cannot be compelled to impelad parties against whom he does not claim any relief. It is his submission that the Petitioner does not claim any relief against said Laxmi Enterprisers. Hence, the impugned order is not sustainable as said laxmi Enterprisers is neither a necessary nor a proper party to the suit. Hence, he prays for setting aside the impugned order under Annexure-5.

6. Mr. Patra, learned counsel for the Opposite Party on the other hand submits that since the price of sugar supplied to it has been paid to said Laxmi Enterprisers from whom it has received the sugar, said Laxmi Enterprisers is a

necessary party to the suit and in its (Laxmi Enterprises) absence, there cannot be any effective adjudication of the suit. Therefore, learned trial Court has not committed any error in passing the impugned order.

7. Upon hearing learned counsel for the parties and on perusal of case law cited by learned counsel for the Petitioner, this Court is of the considered opinion that the Plaintiff being *dominus litis* has the liberty to choose the party against whom it would claim relief. The necessary conclusion would be that non-joinder of party is at the risk of the Plaintiff. It cannot be compelled to implead parties unless the Court *suomotu* directs for impletion of party. But in no circumstances, the Defendant can compel the Plaintiff to impelad party to the suit. In the instant case, the Court has passed the order on an application filed by the Defendant. When the Plaintiff does not claim any relief against said Laxmi Enterprisers, it cannot be compelled to contest litigation against said party.

8. Accordingly, the impugned order is not sustainable in the eyes of law. Consequentially, the CMP deserves to be allowed, which I direct.

9. Since the suit is of the year 2014, learned trial Court shall make an endeavour for early disposal of the suit. Parties are directed to cooperate learned trial Court in that regard.

10. Interim order dated 30th April, 2019 passed in IA No.481of 2019 stands vacated.

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2022 (III) ILR - CUT- 867

K.R. MOHAPATRA, J.

W.P.(C) NO. 9307 OF 2022

SEBATI TUDU ………Petitioner

.V.

AUTHORIZED OFFICER, INDIAN OVERSEAS BANK, BHUBANESWAR & ORS. ………Opp. Parties

SECURITIZATION OF RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 – Section 13(4) r/w Rule 9(7) of Security Interest Enforcement Rule, 2003 – Whether the sale of the Security Asset on public auction as per Section 13(4) of SARFAESI Act, which ended in issuance of a sale certificate as per rule

9(7) of 2003 Rule as a complete and absolute sale for the purpose of 2002 Act or whether the sale would became final only on the registration of the sale certificate ? – Held, execution and registration of sale deed is no more required after issuance of sale certificate.

(Para-7)

Case Laws Relied on and Referred to :-

1. 2022 SCC OnLine SC 634 : Indian Overseas Bank Vs. RCM Infrastructure Ltd. & Anr.
2. 2019 STPL 9872 SC : Shakeena & Anr. Vs. Bank of India & Ors.
3. (2007) 5 SCC 745 : B. Arvind Kumar Vs. Govt. of India & Ors.

For Petitioner : Mr. Niranjan Lenka.

For Opp. Parties : Mr. Aurovinda Mohanty, (For Opp. Party No.1)

ORDER Date of Order:14.10.2022

K.R. MOHAPATRA,J.

1. This matter is taken up through hybrid mode.

2. The Petitioner in this writ petition seeks for a direction to the Opposite Party Nos.1 and 2, namely, Authorized Officer, Indian Overseas Bank, Bhubaneswar and Branch Manager, Indian Overseas Bank, Baripada Branch, Mayurbhanj to execute the sale deed in respect of land and building standing over Plot No. 1555/1885 to an extent of Ac.0.150 decimals under Khata No.266/103 situated in mouza Chandua under Baripada Tahasil in the district of Mayurbhanj (for short 'the case land') and present the same before the District Sub-Registrar, Baripada-Opposite Party No.3 for registration.

3. It is submitted by Mr. Lenka, learned counsel for the Petitioner that the case land was purchased by the Petitioner pursuant to the auction held under the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act'). Although sale certificate has already been issued in respect of the land in question since 4th December, 2019 (Annexure-3) in favour of the Petitioner, but the sale deed in respect of the case land has not yet been executed by the Bank for which the Petitioner is suffering a lot.

4. Learned counsel for the Opposite Party No.1-Bank submits that when sale certificate is issued in an auction sale under the provisions of SARFAESI Act, there is no requirement of execution or registration of the sale deed, as it is a document of sale. He, therefore, submits that relief, as prayed for in this writ petition, merits no consideration.

5. The Hon'ble Apex Court in the case of ***Indian Overseas Bank –v- RCM Infrastructure Ltd. and another,*** reported in 2022 SCC OnLine SC 634, has held at paragraphs-30, 32 and 33 as under:

> *"30. In the case of B. Arvind Kumar (supra), the property in question was a suit property and was sold in a public auction. The sale was confirmed by the District Judge, Civil and Military Station, Bangalore. What has been held by this Court is that when a property is sold by public auction in pursuance of the order of the court and the bid is accepted and the sale is confirmed by the court in favour of the purchaser, the sale becomes absolute and the title vests in the purchaser. It has been held that a sale certificate is issued to the purchaser only when the sale becomes absolute. It was held that when the auction purchaser derives title on confirmation of sale in his favour and a sale certificate is issued evidencing such sale and title, no further deed of transfer from the court is contemplated or required. Additionally, in the said case, the Court found that the sale certificate itself was registered.*
>
> *31. xxx xxx xxx*
>
> *32. It is further to be noted that the present case arises out of a statutory sale. The sale would be governed by Rules 8 and 9 of the said Rules. The sale would be complete only when the auction purchaser makes the entire payment and the authorised officer, exercising the power of sale, shall issue a certificate of sale of the property in favour of the purchaser in the Form given in Appendix V to the said Rules.*
>
> *33. In the case of Shakeena v. Bank of India10, which was a case arising out of SARFAESI Act, this Court has held that the sale certificate issued in favour of the respondent No. 3 did not require registration and that the sale process was complete on issuance of the sale certificate. The same has been followed by this Court in the case of S. Karthik (supra)."*

Further, in the case of ***Shakeena and another –v- Bank of India and others,*** reported in 2019 STPL 9872 SC, the Hon'ble Supreme Court relying upon the decision in Indian Overseas Bank (supra) amongst other has framed the following question for consideration.

> *"16. Reverting to the impugned judgment of the Division Bench of High Court, it essentially considered three points as noted in paragraph 8 of the impugned judgment. The same reads thus:*
>
> *(i) Whether the sale of the secured asset in public auction as per section 13(4) of SARFAESI Act, which ended in issuance of a sale certificate as per rule 9(7) of the Security Interest (Enforcement) Rules, 2003 (in short "the rules") is a complete and absolute sale for the purpose of SARFAESI Act or whether the sale would become final only on the registration of the sale certificate?*
>
> xxx xxx xxx

6. And answering to the aforesaid question, the Hon'ble Supreme Court relying upon the decision in ***B. Arvind Kumar -v-Govt. of India and others,*** reported in (2007) 5 SCC 745 and applying the principle set out therein,

concluded that execution and registration of sale deed is no more required after issuance of a sale certificate. It is thus held as under:

> *"10.17 The ratio laid down by the Division Bench of this court in Arumugham, S. v. C.K. Venugopal Chetty and the Supreme Court in B. Arvind Kumar v. Government of India, referred supra, squarely applies to the case on hand and we, therefore, have no incertitude to hold that the sale which took place on 19.12.2005 has become final when it is confirmed in favour of the auction purchaser and the auction purchaser is vested with rights in relation to the property purchased in auction on issuance of the sale certificate and he has become the absolute owner of the property. Further, as held by the Division bench of this court in Arumugham, S. v. C.K. Venugopal Chetty and the Supreme Court in B. Arvind Kumar v. Government of India, referred supra, the sale certificate issued in favour of the appellant does not require any registration in view of section 17(2)(xii) of the Registration Act as the same has been granted pursuant to the sale held in public auction by the authorized officer under SARFAESI Act.*
>
> *10.18 The finding of the learned Single Judge that the sale is not complete without registration of sale certificate, therefore, is not sustainable in law and the same is liable to be set aside.*
>
> *10.19 If the argument of the borrowers that even after the issuance of the sale certificate, prior to registration, they are entitled to redeem the property is accepted, it would make the provisions of the SARFAESI Act redundant and the very object of the SARFAESI Act enabling the Banks and financial Institutions to realize long term assets, manage problems of liquidity, asset liability mismatch and to improve recovery of debts by exercising powers to take possession of securities, sell them and thereby reduce non performing assets by adopting measures for recovery and reconstruction would fail and would open a pandora's box for the litigations upsetting the sale confirmed in favour of the bonafide auction purchasers, who invested huge money.*
>
> *10.20 In view of our finding on this point, we hold that the sale of the secured asset in public auction as per section 13(4) of SARFAESI Act, which ended in issuance of a sale certificate as per rule 9(7) of the Rules is a complete and absolute sale for the purpose of SARFAESI Act and same need not be registered under the provisions of the Registration Act."*

7. In view of the above, there can be no iota of doubt that once sale certificate pursuant to the auction held under the provisions of SARFAESI Act is issued, execution and registration of the sale deed in respect of the said property is not required. Accordingly, the Petitioner, if so advised, may file mutation application in respect of the case land in proper format enclosing the sale certificate issued under Annexure-3 before the concerned Tahasildar for mutation of the case land in his favour and in that event, the concerned Tahasildar acting upon the sale certificate shall take appropriate steps to mutate the case land in his favour, if there is no legal impediment.

8. With the aforesaid observation, this writ petition is disposed of.

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2022 (III) ILR - CUT- 871

B.P. ROUTRAY, J.

CRLMC NO. 322 OF 2022

GUPTESWAR MEHER ………Petitioner

.V.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent Power – When warranted – Held, High Court can exercise its inherent power under section 482 of Cr.P.C. either to prevent abuse of process or otherwise to secure the ends of justice – It can also exercise where uncontroverted allegations made in the F.I.R. or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out case against the accused.
(Para-13)

Case Laws Relied on and Referred to :-

1. (2005) 6 SCC 1 :Jacob Mathew Vs. State of Punjab & Anr.
2. AIR 2010 SC 1050 :Kusum Sharma & Ors. Vs. Batra Hospital and Medical Research Centre & Ors.
3. AIR 1992 SC 604 : Bhajan Lal's case i.e., State of Haryana Vs. Bhajan Lal.

For Petitioner : Mr.B.P.B.Bahali

For Opp. Parties : Mr.K.K.Das, Addl. Standing Counsel & Mr. G.C. Sahu

JUDGMENT Date of Judgment: 10.10.2022

B.P. ROUTRAY,J.

1. The Petitioner, who is serving as Pharmacist, has prayed for quashing of criminal proceeding in G.R.Case No.237 of 2021 arising out of Birmaharajapur P.S.Case No.116 of 2021 pending on the file of the learned S.D.J.M., Birmaharajpur.

2. It is alleged that the Petitioner gave one injection to the minor son (aged about 5 years) of the informant and then he turned convulsion and died. As per the prosecution case, on 3rd June, 2021 the deceased was suffering from skin infection and the Petitioner being the Pharmacist of local hospital, i.e. the Primary Health Centre, Kotsamalai was called for treatment. The Petitioner injected some medicine to the deceased. After some time froth came out from the mouth of the deceased and he became unconscious. The deceased was then shifted to District Headquarters Hospital, Subarnapur and died there. Upon completion of investigation, charge-sheet was submitted and based on the same, learned S.D.J.M, took cognizance of offences under Sections 419/304 of the I.P.C.

3. As per the submissions made on behalf of the Petitioner, he was serving in the PHC for last 21 years and not a single allegation of negligence or unauthorized statement has been made against him except the present one. In Kotsamalai PHC, doctors were not there on many occasions and the patients coming there were given first hand treatment by the Petitioner in absence of the doctor. On 3rd June, 2021 it was a COVID infected period and many persons of the locality were infected. The Petitioner was busy in treatment of such Covid patients, when the parents of the deceased approached him regarding illness of their son. He was suffering from skin infection and limping. So the Petitioner being a Pharmacist gave Ceftriaxone Injection 250 to the deceased, which is a known medicine for skin infection. It is therefore submitted that the action of the Petitioner was with bona fide belief for treatment and being a Pharmacist, he is authorized to treat patients in absence of doctor as per the Health Department Circular No.6129534/H dated 23.9.2003 and Circular No.12524/H dated 21.5.2008 of Government of Odisha. It is thus submitted that none of the ingredients of either offence is attracted and therefore, the proceeding should be quashed.

4. From the certified copy of the charge-sheet as well as the averments made in the petition, it reveals that administration of injection by the Petitioner to the deceased on 3rd June, 2021 is not disputed. The status of the Petitioner as a Pharmacist and suffering of the deceased with skin infection is also not disputed. Admittedly, the Petitioner gave treatment to the minor child (deceased) as a Pharmacist on the request of the parents. Administration of injection to the deceased by the Petitioner as a responsive treatment given to him on the request of the parents is admitted. The informant has filed an affidavit before this Court stating that as their son (deceased) was badly suffering from skin infection, they requested the Petitioner to come to their house as many of Covid patients were being treated at the hospital.

5. The Medical Officer of Ulunda CHC enquired into the matter and submitted his report dated 30th November, 2021 to the C.D.M.O., Subarnapur under Annexure-4. As per the said report, the Petitioner used injection Ceftriaxone, injection Dexamethason and injection Pheniramine for treatment and said injections given to the deceased by the Petitioner was taken from Niramaya, the Government supplied medicine shop, with Batch No.CF119030, Exp.7/2021. The injection Dexamethasone and injection Pheniramine were brought from a medicine shop. The report further speaks that no regular medical officer has been posted in Kotasmalai PHC for a long time.

6. The statement of different witnesses recorded in course of investigation reveals that the Petitioner was serving as a Pharmacist of Katasmalai PHC and in

that capacity, he used to give medical treatment to different person at different points of time. The medical register of the said CHC also reveals that the deceased on other earlier occasions was also treated by the Petitioner.

7. From the above narration of facts, it reveals that the action of the Petitioner in giving him treatment is admittedly in the capacity of Pharmacist of local health center. Therefore it appears to be a case of medical negligence at best and not a case of 'culpable homicide not amounting to murder' as presented by the prosecution. When the admitted case of the prosecution is that the Petitioner gave treatment to the deceased as a Pharmacist and no material could be collected in course of investigation to opine otherwise, the action of the Petitioner giving treatment to the deceased can never be said anything more than medical negligence and therefore, the ingredients of offence of 'culpable homicide not amounting to murder' are never attracted. Therefore the offence under Section 304 of the I.P.C. which is meant for 'culpable homicide not amounting to murder' on either part, is found grossly illegal and without material ingredient.

8. Next, if the action of the Petitioner is treated as medical negligence, then the offence under Section 304-A is attracted. The main ingredient for satisfaction of the offence under Section 304-A is rash and negligent act not amounting to culpable homicide. As stated earlier, the facts and materials collected in course of investigation do not qualify the case of culpable homicide. For medical negligence, the Supreme Court in the case of ***Jacob Mathew vrs. State of Punjab and another, (2005) 6 SCC 1***, has concluded as follows:

"Conclusions summed up

48. We sum up our conclusions as under:-

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: "duty", 'breach' and "resulting damage".

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also

available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in Bolam's case, WLR at p.586 holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304-A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304-A of the IPC has to be read as qualified by the word 'grossly'.

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) *Res ipsa loquitur* is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence."

9. Further, in the case of ***Kusum Sharma and others vrs. Batra Hospital and Medical Research Centre and other, AIR 2010 SC 1050***, the Supreme Court held as follows:

"94. On scrutiny of the leading cases of medical negligence both in our country and other countries specially United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well known principles must be kept in view:-

I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting

uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals."

10. Coming back to facts of the instant case, first, it needs to be examined that, whether the Petitioner as a Pharmacist is authorized to medically treat the deceased?

11. In this regard, Circulars of Health Department, Government of Odisha dated 23rd September, 2013 and 21st May, 2008 are important. In those Circulars, it is stated that Government after careful consideration have been pleased to decide that the Pharmacists are entrusted with such kinds of aliments and drugs as per the list enclosed with the Circulars, for treatment in absence of the doctor. The list enclosed to the Circular dated 23rd September, 2003 (Annexure-6 series) includes skin diseases. The Circular dated 21st May, 2008 of Health Department authorizes the Pharmacist to administer injection and conduct dressing to surgical patients independently and further authorizes the Pharmacists to undertake minor ailments and prescribe drugs for treatment in absence of doctors. It is therefore clear from the above two circulars that the Petitioner being a Pharmacist is authorized to medically treat a patient of skin disease.

12. The gravity of situation on 3rd June, 2021 due to prevalence of Covid infection has been well said by all such witnesses as per the police investigation report. The enquiry report of the medical officer on the incident as submitted to the Chief District Medical Officer under Annexure-4 is clear to the extent that there was no Medical Officer posted in Kotasamali PHC for a long time and therefore on most occasions patients were managed by the Petitioner as Pharmacist. It is further clear from the said inquiry report that in case of emergency, the petitioner being called by the villagers used to visit their houses for primary treatment. On the date of occurrence the Petitioner, who was busy in treatment of Covid patients, was called by the parents of the deceased for treatment of the deceased. In other words, the Petitioner was invited by the parents to give treatment to the deceased as per the affidavit furnished by the informant before this Court, for the sufferings of the deceased due to skin infection. So it is not the case that the Petitioner has either induced or deceived the parents of the deceased for treatment of the deceased or he was unauthorized to give treatment to a patient of skin disease. Accordingly, the offence of cheating is not attracted against the petitioner.

13. In ***Bhajan Lal's case i.e., State of Haryana v. Bhajan Lal, AIR 1992 SC 604***, the Supreme Court while categorizing the nature of cases to exercise inherent powers of the High Court under Section 482, either to prevent abuse of process or otherwise to secure the ends of justice, has laid down the guidelines. Those seven principles laid down in Bhajan Lal's case include a case where uncontroverted allegations made in the F.I.R. or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out case against the accused. Further, as explained in the case of ***Jacob Mathew*** (supra), if the definition of 'gross' with the expression of 'rash and negligent act' occurring in Section 304-A IPC is applied to the facts of the instant case, the medical negligence on the part of the Petitioner in the death of deceased in the alleged incident for the offence under Section 304-A IPC is completely ruled out.

14. In view of the discussions made above, it can safely be concluded that none of the offences alleged against the Petitioner is made out and thus, the criminal proceeding initiated against the Petitioner is quashed to secure ends of justice.

15. In the result, the petition is allowed and the criminal proceeding stated above initiated against the petitioner is quashed.

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2022 (III) ILR - CUT- 877

B.P. ROUTRAY, J.

FAO NO.1035 OF 2019

MANAGER, MAGMA HDI GENERAL INSURANCE COMPANY LTD. ……….Appellant

.V.

PUSPALATA SAHOO & ORS. ……….Respondents

(A) EMPLOYEES COMPENSATION ACT, 1923 – Compensation – Petitioner/ Insurance Company contended that the deceased has been murdered and therefore the case does not fall under the purview of accidental death – Held, law is well settled that if the employee is murdered in connection with employment while discharging his duties, the same is covered within the purview of Employees Compensation Act to get the compensation. (Para-5)

(B) RECOVERY OF COMPENSATION – When the owner of the vehicle had knowledge about the possession of fake D.L. by the deceased/driver and the owner deliberately allowed the deceased to drive the vehicle without testing his competency, whether the insurer has a right to recover the compensation amount? – Held, Yes. – The Insurer has the right to recovery of the compensation from the owner. (Para-7)

(C) COMPENSATION – Interest – Effective date – Held, the position has been settled that the interest is payable on the compensation amount from the date of accident. (Para-11)

Case Laws Relied on and Referred to :-

1. (2000) 5 SCC 113 : Smt.Rita Devi & Ors. Vs. New India Assurance Co. Ltd.
2. (2004) 3 SCC 297 : National Insurance Co. Ltd. Vs. Swaran Singh & Ors.
3. (2020) 4 SCC 49 : Nirmala Kothari Vs. United India Assurance Company Ltd.
4. AIR 1976 SC 222 : Pratap Narain Singh Deo Vs. Srinivas Sabata & Anr.
5. AIR 1999 SC 3502 : Kerala State Electricity Board & Anr. Vs. Valsala K. & Anr.
6. 2019 (2) T.A.C. 461 (Ori.) : Senior Divisional Manager, National Insurance Company Ltd. Vs. Suresh Kumar Behera & Anr.

For Appellant : Mr. A.A.Khan
For Respondents : Mr. S.K.Mohanty

ORDER Date of Order: 27.10.2022

B. P. ROUTRAY,J.

1. The matter is taken up through Hybrid mode.

2. Heard Mr.Khan, learned counsel for the Appellant and Mr.Mohanty, learned counsel for Respondent No.1.

3. Present appeal by the Insurer is against the judgment dated 27th November, 2019 of the Commissioner for Employee's Compensation-Cum-Divisional Labour Commissioner,Cuttack, in E.C.Case No.163-D/2015, wherein compensation to the tune of Rs.7,36,680/- has been granted with effect from the date of filing of the claim application on account of death of the deceased in course of his employment as a driver of Scorpio Vehicle bearing Registration No.OR-05-AV-5462.

4. Mr.Khan contends that the deceased, who was driving the offending vehicle, was not having a valid D.L. on the date of accident. The copy of D.L. shown to have been possessed by the deceased is a fake D.L. Secondly, it is contended that the deceased has been murdered and therefore, the case does not fall under the purview of accidental death.

5. The facts of the case reveal that the deceased was a driver of the offending Scorpio vehicle bearing Registration No.OR-05-AV-5462. On the fateful day when he was returning from Puri with unknown passengers, who were the culprits in the guise of passengers, they killed the deceased and left the dead body in a lonely place. The employment of the deceased under the owner is not disputed and his murder while in employment as driver of the vehicle is also not disputed. Law is well settled that if the employee is murdered in connection with his employment while discharging his duties, the same is covered within the purview of Employees' Compensation Act to get compensation. In the case of ***Smt.Rita Devi and Ors. Vs. New India Assurance Co. Ltd.,(2000) 5 SCC 113***, the Supreme Court has held:

> "10. The question, therefore, is can a murder be an accident in any given case? There is no doubt that murder, as it is understood, in the common parlance is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But there are also instances where murder can be by accident on a given set of facts. The difference between a murder which is not an accident and a murder which is an accident, depends on the proximity of the cause of such murder. In our opinion, if the dominant intention of the Act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simplicitor, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder.
>
> .. .. XX .. .. XX .. ..
>
> 14. Applying the principles laid down in the above cases to the facts of the case in hand, we find that the deceased, a driver of the auto rickshaw, was duty bound to have accepted the demand of fare paying passengers to transport them to the place of their destination. During the course of this duty, if the passengers had decided to commit an act of felony of stealing the auto rickshaw and in the course of achieving the said object of stealing the auto rickshaw, they had to eliminate the driver of the auto rickshaw then it cannot but be said that the death so caused to the driver of the auto rickshaw was an accidental murder. The stealing of the auto rickshaw was the object of the felony and the murder that was caused in the said process of stealing the auto rickshaw is only incidental to the act of stealing of the auto rickshaw. Therefore, it has to be said that on the facts and circumstances of this case the death of the deceased (Dasarath Singh) was caused accidentally in the process of committing the theft of the auto rickshaw. XX .. .."

6. Therefore, no such force remains in the contention of Mr.Khan not to treat this as an accidental death.

7. So far as the submission regarding fake D.L. is concerned, it is seen that the document under Ext.A has been adduced from the side of the Insurer to support the evidence of O.P.W.1, the Dy.Manager of the Insurance Company that the deceased possessed a fake D.L. Nonetheless, no material is brought on record to the effect, whether the owner had knowledge of possession of fake D.L. by the deceased and he deliberately allowed the deceased to drive the

vehicle without testing his competency. In absence of such materials and in absence of any rebuttal evidence with regard to incompetency of the deceased to drive the Scorpio vehicle, and applying the principles decided in the case of ***National Insurance Co. Ltd. vrs. Swaran Singh and others, (2004) 3 SCC 297 and Nirmala Kothari vrs. United India Assurance Company Ltd., (2020) 4 SCC 49***, the Insurer is granted right of recovery of the compensation amount from the owner.

8. A further challenge is advanced from the side of the Insurer-Appellant questioning the quantum of compensation. Mr.Khan contends that remuneration of the deceased as the driver should be limited to the count of the minimum wages prevailing on the date of accident. This submission of Mr.Khan has no force. It is for the reason that the Tribunal has restricted the income of the deceased at Rs.8,000/- keeping in view the prescription made in Section 4 of the Employees' Compensation Act against the claim of the applicant about remuneration of the deceased at Rs.9,000/- per month plus Rs.50/- per day towards food allowance.

9. Considering the date of accident and normal wages paid to a driver, no such unusuality or excessiveness is seen in the assessment of income made by the Tribunal. Therefore, the sum of Rs.8000/- as taken by the Tribunal towards remuneration of the deceased is confirmed. Further, no such illegality is seen in the computation of the compensation amount which is determined applying the age factor '184.17'. It needs to be mentioned here that the age of the deceased as forty years is never disputed by the Insurance Company.

10. The claimant-Respondent No.1 has filed crossobjection for enhancement of the compensation amount and to grant interest on the same. As per the claimant, she is entitled to interest @12% per annum from the date of accident.

11. 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.)*** have clarified the position upon an elaborate discussion of the decisions of the Supreme Court. This Court also in FAO No.535 of 2014, disposed of on 4th May, 2022 have reiterated the principle holding that the interest is payable on the compensation amount from the date of accident. In view of such authoritative pronouncements, the claimants are found entitled to interest @12% per annum from the date of accident.

12. The appeal is thus disposed of with a direction to the Insurer to pay the total compensation amount of Rs.7,36,680/- along with interest @12% per annum from the date of accident, i.e. 30th August, 2014, where-after the same shall be disbursed in favour of the claimant by the Commissioner on such terms and proportion to be suitably fixed.

13. At this stage, it is submitted that the entire compensation amount has already been deposited before the Commissioner in terms of its direction. Thus, the InsurerAppellant is directed to deposit the balance amount towards interest before the Commissioner in terms of the direction of this Court within a period of two months from today.

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2022 (III) ILR - CUT- 881

Dr. S.K. PANIGRAHI, J.

W.P.(C) NO. 3908 OF 2022

Dr. RAMESH CHANDRA SAMAL ....Petitioner

.V.

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

(A) CONSTITUTION OF INDIA, 1950 – Article 226 – Power and Scope of judicial review – Whether the court should interfere the views determined in the internal Audit Report of the Special Audit Team – Held, No – It has been well established that the court should not delve into the matters attended by third party experts unless there is an element of illegality or arbitrariness. (Para-29,36)

(B) NATURAL JUSTICE – Whether the principle of natural justice is mandatory in case of administrative proceeding – Held, Yes.

Case Laws Relied on and Referred to :-

1. 1954 AIR 207 : K.S. Rashid and Sons Vs. Income Tax Investigation Commission & Ors.
2. 1955 AIR 425 : Sangram Singh Vs. Election Tribunal, Kotah and Ors.
3. 1957 AIR 882 : Union of India Vs.T.R. Varma.
4. 1958 AIR 86 : State of U.P. and Ors. Vs. Mohammad Nooh.
5. 1966 AIR 1089 : K.S. Venkataraman and Co. (P) Ltd. Vs. State of Madras.
6. 2015 (2) SCC 610 : Union of India (UOI) Vs. P. Gunasekaran.
7. AIR 1963 SC 1723 : State of Andhra Pradesh and Ors. Vs. S. Sree Rama Rao.
8. (2003) 4 SCC 289 : Federation of Railway Officers Association & Ors. Vs. Union of India.

9. (2007) 4 SCC 737 : Directorate of Film Festivals & Ors. Vs. Gaurav Ashwin Jain & Ors.
10 (2015) 8 SCC 519 : Dharampal Satyapal Ltd. Vs. Deputy Commissioner of Central Excise,Gauhati & Ors.

For Petitioner : Dr. Binoda Kumar Mishra

For Opp. Parties : Mr. Saswat Das, AGA.
Mr. Bijaya Kumar Routray

JUDGMENT Date of Hearing:12.08.2022:Date of Judgment:20.09.2022

Dr. S.K. PANIGRAHI, J.

1. The petitioner has filed this writ petition challenging the illegal recovery of Rs.2,66,469/-, the amount arbitrarily determined in the Interim Audit Report of the Special Audit of the Golden Jubilee function of the college and the order to deposit the same amount vide Order No. 2514 dated 27/11/2021. He further seeks to challenge the illegal Order of the Principal I/C vide Order No. 40 dated 05/01/2022 to deduct 10,000 rupees from the salary of the Petitioner with effect from December, 2021.

I. Facts of the case:

2. The present Petitioner is serving as a Reader in Commerce of V.N. (Auto) College, Jajpur Road, Jajpur. Being aggrieved by the order dated 27.11.2021 passed by the Principal, V.N. (Auto.) College, Jajpur Road, Jajpur requesting the Petitioner to deposit Rs.2,66,469/- towards Audit recovery vide Special IAR No.04/2019-20 and finding no other equally efficacious remedy, the Petitioner is constrained to invoke the extra ordinary jurisdiction of this Court under Articles 226 of the Constitution of India. He assails the illegal recovery of Rs. 2,66,469/- (Two Lakhs sixty six thousand four hundred sixty nine only) as suggested by the Interim Audit Report of the Special Audit to the Golden Jubilee celebration of the V.N, Autonomous College, Jajpur Road, Jajpur and its recovery through deduction from salary.

3. The Golden Jubilee of the College in question was celebrated during 2019-20. Major repair works of the College infrastructure were undertaken for such celebration. After the event was over, some local people who were unrelated to the institution, lodged a complaint with the Department of Higher Education alleging excess and irregular expenditure on account of the event. Taking cognizance, the Higher Education Department ordered a Special Audit into the expenditure leading to the event. The Special Audit in its Interim Audit Report suggested recovery of irregular expenditure to the tune of Rs.49,94,360/- against an apparent irregular expenditure of Rs. 45,47,051/-. The suggested

recovery is Rs.2,66,469/- excess than the apparent irregular expenditure. The Department of Higher Education vide its letter No 1635/HE dated 12.01.2021 forwarded the Interim Audit Report of the Special Audit to the Opposite Party No.4/ Principal, V.N. (Auto) College, Jajpur Road, Jajpur requesting "to furnish para wise compliance report". Pursuant to the said letter, the Opposite Party No.4/ Principal, V.N. (Auto) College, Jajpur Road, Jajpur issued a show cause notice vide order No.938, dated 08.06.2021 to the Petitioner owing to the fact that the Petitioner was officiating as the Accounts Bursar of the College during the relevant period to comply with the explanation in writing as to why an amount of Rs.2,66,469/- shall not be recovered from him against apparent irregular expenditure identified by the Special Audit. Complying with the said notice of the Opposite Party No.4, the Petitioner furnished his written reply vide his letter dated 25.06.2021, wherein he pointed out that the apparent irregularities and the said attribution to the position of Accounts Bursar are irrational and illogical. Illustratively, it was mentioned that in point 3 (a) of the Report, the Special Audit has fixed the liability of Rs.1,27,050/- on the then Principal, the then Accounts Bursar (the Petitioner) and the Dealing Assistant (Rs.66,701/- each) on account of non distribution of Souvenirs printed on the occasion of the Golden Jubilee. The Interim Audit Report is irrational in finding irregularities and fixing accountability. The Department of Higher Education had sought para wise compliance from the incumbent Principal I/C/ Opposite Party No.4. It was mentioned that the Petitioner was unaware as to whether the Opposite Party No.4 had complied with the same or not. The Petitioner submitted his response to the Show Cause notice issued to him by the Opposite Party No.4. However, the Petitioner received the Order No.2514 dated 27.11.2021, asking him to deposit Rs.2,66,469/- sent by the Opposite Party No.4.

II. Submissions advanced on behalf of the Petitioner:

4. Learned counsel for the Petitioner submits that in response to the above-mentioned letter, the Petitioner submitted a representation dated 06.12.2021 stating therein that he has already complied with the Show Cause Notice No.938 dated 08.06.2021 and the Opposite Party No.4 was to file the compliance with the Department of Higher Education in that light. However, the order to deposit Rs.2.66,469/- against the suggestion in the Interim Audit Report is irrational and arbitrary and demanded the production of any recovery letter if issued by the Department of Higher Education.

5. He further submitted that the Opposite Party No.4, instead of responding to the representation of the Petitioner, issued Order No.40 dated 05.01.2022 stating therein that "in pursuance of the Governing Body Resolution dated 30.10.2021 and by order of the President Governing Body, Rs.10,000/- shall be

deducted from his salary every month with effect from December, 2021 through HRMS towards recovery of Rs.2,66,469/-..." It is contended that the action of the Opposite Party No.4 directing deduction of Rs.10,000/ from the Petitioner's salary towards the recovery of Rs.2,66,469/- is illegal, arbitrary, without jurisdiction and possibly taking false grounds. It was mentioned that the Order of deduction vide Order No.40 dated 05.01.2022 shows that the decision of deduction has been taken by the Governing Body in its meeting dated 30.10.2021. It was pointed out that such decision of the Governing Body finds no mention in the earlier order of the Opposite Party No.4 issued to the Petitioner vide Order No.2514 dated 27.11.2021.

6. He further submitted that the Opposite Party No.4 with an intention to harass the Petitioner for reasons best known to him, has issued such illegal deduction letter towards recovery of expenditure identified by the Special audit and their flawed attribution to the Petitioner, the then Accounts Bursar, is purely illegal, arbitrary and needs to be interfered with in the interest of justice and fair play. The Opposite Party No.4, instead of waiting till the final report has issued the said deduction notice on the false ground that such a resolution was taken in the meeting of the Governing Body held on 30.10.2021. It is contended that the Governing Body resolution is contrary to the claim of the Opposite Party No.4, as in the said Resolution the Governing Body has strictly instructed the Opposite Party No.4 to comply with the letter of the Higher Education Department issued vide letter No.1635 dated 12.01.2021 with para wise comments positively by 15th November.

7. It is also submitted that such illegal misrepresentation of the resolution of the Governing Body by the Opposite Party No.4 is highly illegal and intended only to harass the Petitioner. The Opposite Parties have also withheld the salary of the Petitioner from the month of December, 2021. Therefore, the petitioner is constrained to approach this Court for redressal of his grievance. In such view of the matter, he submitted that the letters dated 27.11.2021 and 05.01.2022 issued by the Opposite Party No.4 be quashed and the Opposite Parties be directed to release full salary of the Petitioner forthwith which has been kept withheld from December, 2021.

III. Submissions of the Opposite Parties

8. Learned Additional Government Advocate submitted that the Petitioner in this Writ petition has challenged the recovery of Rs.2,66,469/- determined in the Internal Audit Report (IAR) of the Special Audit of Golden Jubilee function of the College vide Order No. 25814 dated 27.11.2021 issued by the Opposite Party No.4 and also Order No. 40 dated 05.01.2022 with regard to recovery of the audited amount from his monthly salary @ Rs. 10,000/-.

9. He further submitted that on receipt of a mass petition from one namely Nihar Ranjan Jena & Others pertaining to misuse, mismanagement and misappropriation of college funds over the period from February, 2016 to May, 2019 relating to the Golden Jubilee celebration of the College in question as well as income vis-à-vis the expenditure of the college hostel, a Special Audit was conducted vide Govt. Order No.21668/HE., dated 16.10.2019.

10. It is contended that the Special Audit audited the accounts of the Principal of the College during the period with effect from 22.10.2019 to 06.02.2020 consuming 58 working days. After completion of the work, the Head of the Audit Party handed over the Draft Special Audit Report to the Government and after review of the same by the Audit Officer of the Government, it was then approved by the Principal Secretary to Government, Higher Education Department. After approval of the final Audit Report No.04/2019-20, it was sent to the Opposite Party No.4/Principal V.N. (Auto) College, Jajpur Road, Jajpur vide Letter No.1635/HE., dated 12.01.2021 for taking appropriate action and to furnish Para wise Compliance report to Govt. within 30 days period of receipt of the Audit Report.

11. He further submitted that as per the audit report the total expenditure for conducting the Golden Jubilee celebration came out to be Rs.45,47,051/-. Out of the said amount the Governing Body of the college accorded approval for expenditure to the tune of Rs.20,00,000/- whereas the balance amount of Rs.25,47,051/- was found to be spent unauthorizedly, for which the Principal was made aware of the fact and it was also suggested to take appropriate action as deemed proper against the concerned employee for such unauthorised and misutilization of the funds generated specifically by the students money. Therefore, objection was raised in the Special Audit Report showing it as unauthorized expenditure/ misappropriation to the tune of Rs.25,47,051/- from the college funds. The audit report thereby, reflected the Principal, the Accounts Bursar and the Dealing Assistant in charge of the college to have been responsible for such lapses. On receipt of the Audit Report, the Opposite Party No.4 issued office order No.2514, dated 27.11.2021 instructing the Petitioner to deposit Rs.2,66,469/-. Further, vide office Order No.40, dated 05.01.2022 the Opposite Party No.4 instructed for deduction of Rs.10,000 per month from the salary of the Petitioner with effect from December, 2021 towards recovery of Rs. 2,66,469/- till final recovery of the aforesaid amount. It is also submitted that while issuing the Order dated 05.01.2022, it was reflected that pursuant to Resolution of the Governing Body dated 30.10.2021 and in compliance with the order of the President of the Governing Body's direction of such deduction was made. It is also contended that the Opposite Party Nos.1 and 2 are no way

concerned to get attracted with imposition of such recovery on the Petitioner. In case, the objection is complied satisfactorily on production of documentary evidence, with due approval from the Governing Body, the recovered amount can be refunded to the Petitioner.

IV. Rejoinder affidavit by the Petitioner:

12. A rejoinder affidavit has been filed by the petitioner herein it has been stated that the Petitioner is not seeking immunity from any "just" recovery (if any) fixed under appropriate jurisdiction and under proper rules and following proper procedure. The Petitioner rather prays for protection from the arbitrary amount of recovery imposed on him in the most manipulative manner; by misrepresenting Governing Body resolution(s) and hoodwinking the Court's order and deceiving higher authorities. The Opposite Party No.4 has started a process of recovery from the Petitioner and other colleagues which is the most blatant misuse of the Audit Report admittedly sent by the Higher Education Department to him vide Government Letter No. 1635/HE, dated 12.01.2021 for para-wise compliance report to the Government within 30 days.

13. It is further stated that the audit report by the Opposite Party No.4 begins from fixing the recovery amount. The Opposite Party No.4 and the Opposite Party No.5/ President, Governing Body have enclosed a Note sheet of suggested recovery in lieu of Audit Report No.04/2019-20. The note sheet was approved by the Opposite Party No.4 and it suggested recovery an amount of Rs.73,69,206/-. The AR No.04/2019-20 has suggested a recovery of Rs.31,20,155/. This speaks volumes of the arbitrariness of the Opposite Party No.4 in fixing the recovery amount in apparent reference to the AR No. 04/2019-20.

14. At the cost of repetition, it is stated that the Opposite Party No.4 has not calculated the amount he has imposed for recovery vide the impugned letters on the basis of the AR No.04/2019-20. A detailed description of the manipulated figures has been submitted to this vide IA No.5438/2022.

15. It is further stated that in paragraph 3(a) of the Audit Report under the heading Non-distribution of Souvenirs led to wasteful expenditure of Rs.66,701/-, suggests that "... responsibility may be fixed against the concerned Principal, Account Bursar, Dealing Assistant and the members of the Purchase Committee for such lapses and step needs to be taken to recover Rs.66,701/- from them in equal share under intimation to Government". But the incumbent Principal fixed the responsibility on the then Principal, Account Bursar, Dealing Assistant only

and not on the entire members of the Purchase Committee. It shows the malafide intention of the Opposite Party No.4 in transferring the liability only to the Petitioner along with two others.

16. It is also stated that in the compliance report the Opposite Party No.4 has undertaken that "recovery of Rs. 66,701/- shall be made from Sri H.K. Rout, the then Principal for wasteful expenditure". However, the Opposite Party No.4 has imposed one-third of the amount on the Petitioner. In paragraph 5 of the Audit Report under the heading Fictitious Expenditure of Rs.1.96.653/- towards repairing of College Building, the Audit Report suggests that, "..steps needs to be taken to recover Rs.1,96,653/ from the concerned Principal, Account Bursar, Dealing Assistant and other person(s) in-change of repairing work and compliance with furnished to government with all supporting records". But the malafide intention of the Opposite Party No.4/Principal V.N. (Auto) College, Jajpur Road, Jajpur is further accentuated by the fact that the responsibility was fixed only on the then Principal, the Accounts Bursar and the Dealing Assistant for the above-mentioned recovery and not on the entire team of the Purchase Committee.

17. It is stated that under paragraph 6 (c) Excess Payment made to Supplier Rs.49,603/- is held under objection because of some missing vouchers and the same vouchers could have been traced or the supplier could have been asked to supply the supporting vouchers. The vouchers dated 17.01.2018 for the said expenditure were very much available with the supplier. The Opposite Party No.4/Principal V.N. (Auto) College, Jajpur Road, Jajpur was not interested in setting the records right or do anything as instructed. He was happy in imposing penalties on the Petitioner along with the then Principal and the Dealing Assistant, which is illegal and unfair.

18. It is further mentioned that in paragraph 8(b) under the heading Non distribution of TDS of Rs.20,000/-, the AR suggests that,"...step need to be taken for deduction of TDS amount of Rs.20,000/- from the concerned agencies and deposit the same amount as per the section-194 C of Income Tax Act and the fact intimated to Government with supporting document". However, the Opposite Party No.4 has imposed a recovery of Rs.6,667 which is 1/3 of the recovery amount under 8(b) despite there being no such suggestion in the AR to recover the amount from the Petitioner, which is a clear demonstration of inappropriate use of authority to embroil the Petitioner in unnecessary economic offences and harm him.

19. It is also stated that that, in paragraph 21(b) under the heading “Irregularities In construction and repairing of hostel building (West, East &

Boys Hostel)", the AR strictly instructed the Principal to collect the TDS and cess from the contractor and deposit the same to the Government. But the The Opposite Party No.4 has imposed a recovery of an arbitrary and imaginary amount Rs.3,539/- on the Petitioner, there being no suggestion of recovery of any amount from the Petitioner. Rather to quote the AR, "The Principal is strictly instructed to recover the tax as well as cess from the contractor and deposit the same with the concerned authorities under intimation to Government with all supporting records". It is also mentioned that the incumbent Principal, instead of complying with the AR suggestion and taking steps to recover the tax and cess from the contractor, has transferred the liability of Rs.3,539/- in an act with malafide intention to somehow implicating the Petitioner.

20. It is further stated that in the developmental activities of the College leading to Golden Jubilee Celebration were undertaken under the supervision of various Committees constituted by the Governing Body. The list of the Committees published vide Notice No.95, dated 11.01.2018. But none of the others involved in the event has been covered by the unscrupulous recovery imposed by the Opposite Party No.4.

21. Apart from arbitrarily fixing the recovery amount, Opposite Party No. 5 has made a mockery of the administrative principles and procedures. At Para 5 of the counter affidavit filed by Opposite Party No. 4 and 5, it was asserted that the recovery was resolved in the meeting of the Governing body held on 30.10.2021 and 30.10.2022. It is contended that 30.10.2022 is yet to arrive. Secondly, the meeting resolution as annexed to the counter affidavit (pages 33-36), there is no mention of any recovery to be made from the Petitioner. On the contrary, in the relevant resolution, it is clearly mentioned that:

> *"Compliance to the show cause notices served to the persons held responsible by Audit Team has been submitted to the Government/DLFA. But Para-wise comments have not been given by the college to that effect. So accounts section/Principal is strictly instructed to submit the same to appropriate quarters positively by 15th November, 2021."*

The resolution of the GB is unambiguous and there is no resolution to recover Rs.2,66,469/-. However, the Opposite Party No.4 has invoked this Governing Body's resolution in imposing a specific amount of Rs.2,66,469/- on the Petitioner which is not permitted under any Law of this Land. The intent behind such misrepresentation can only be hostile and directed at harassing the Petitioner.

22. It is also stated that in the same above-mentioned Para of the same counter affidavit, it is asserted that the recovery was suggested by the Account Officer, Department of Higher Education in a meeting dated 25.12.2021. It is mentioned that no document showing the minutes of the meeting with the claimed suggestion of recovery of Rs.2,66,469/- from the Petitioner. Secondly, it my kindly be recalled that the letter for recovery was issued by the Opposite Party No.4 on 27.11.2021, i.e. much prior to 25.12.2021. Thus, claiming by the Higher Department Authorisation "post-facto" the action of the Opposite Party No.4 only amounts to gross misuse of the name of Higher Authorities. Such action by the Opposite Party No.4/Principal V.N. (Auto) College, Jajpur Road, Jajpur is only a desperate measure to draw (untenable) legitimacy to his illegal action. It is pertinent to mention here that, Opposite Party No.1 (the Higher Education Department) in his signed instruction to the Office of the Advocate General, vide letter no.20671/HE dated 21.05.2022 at para-5 clearly mentioned:

> *"That it is the Principal of the college who has issued letters at annexure 5 & 7 of the Petition er for recovery of the amount of Rs.2,66,469/ after obtaining approval of the Governing Body of the said college. The Opposite Party No. 1&2 are in no way concerned with imposing such recovery on the petitioner. (Copy of the letter no.20671/HE dated 21/05/2022 is enclosed as Annexure-15)."*

23. It is clear that the Opposite Party No.4 has imposed the recovery without the mandate or consent of Higher Education Department as claimed in the counter affidavit of Opposite Party Nos.4 and 5 and such order must be set aside for being issued without jurisdiction and being claimed to have been issued under the consent of the Higher Education Department.

24. It is also stated that the counter affidavit is accompanied by two pages, i.e. page 10 named "Governing Body Meeting, dated 30.01.2022; and Page 11 containing apparent resolutions beginning from 12. In the same page at paragraph 14, it is mentioned that Rs.10,000/ shall be deducted from the salary of the petitioner. It is to humbly submit that the Governing Body meeting is not signed by the members present and secondly the meeting being held after issuance of recovery notice by the Opposite Party No.4 can easily be construed to be a desperate act to legalise the illegal action of the Opposite Party No.4. It is most important to point out that nowhere in the resolution talks about recovering Rs.10,000/- per month from the salary of the petitioner from the month of December, 2021. It may be appreciated that in his determination to impose financial penalty on the Petitioner as per his sweet will, the Opposite Party No.4/Principal V.N. (Auto) College, Jajpur Road, Jajpur has misguided the

Governing Body and misused the resolution apparently passed by the Governing Body. It is also mentioned that Opposite Party No.4's determination to impose financial cost on the Petitioner was so strong that he did not hesitate to hoodwink the Sub-Collector-cum Counter Signing Authority and the treasury.

25. It is also stated that the Petitioner preferred an appeal before the Collector and District Magistrate to which the Collector and District Magistrate was pleased to mark the same to the Sub-Collector. Thereafter, the Sub-Collector wrote to the Principal to release the salary of the Petitioner along with others without any deduction from their salaries.

26. It is also mentioned that there has been a mention of "by the order of the President GB". No Document has been adduced where the President GB has been entrusted with the task of ordering recovery with reference to the Special Audit. Nor is there any document to show the President to have authorized the Opposite Party No.4 to recover Rs. 2,66,469/- through instalment of Rs.10,000/-. All that has been adduced in the name of Order of the President but the email from the President does not mention either the amount or the instalment.

27. It is stated that the entire illegal recovery imposed vide the impugned letters are Opposite Party No.4's own doing with only mala fide intentions of harassing the Petitioner and such actions of a person holding the most responsible position in a temple of knowledge must be taken serious view of.

VI. Conclusion and Order:

28. Heard learned counsel for the parties.

29. Constitution Benches of the Supreme Court in ***K.S. Rashid and Sons v. Income Tax Investigation Commission and Ors.***[1]***, Sangram Singh v. Election Tribunal, Kotah and Ors.***[2]***, Union of India v. T.R. Varma***[3]***, State of U.P. and Ors. v. Mohammad Nooh***[4]***, and K.S. Venkataraman and Co. (P) Ltd. v. State of Madras***[5], held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

1. 1954 AIR 207, **2.** 1955 AIR 425, **3.** 1957 AIR 882 , **4.** 1958 AIR 86, **5.** 1966 AIR 1089

30. Additionally, in the case of ***Union of India (UOI) vs. P. Gunasekaran***[6]**,** the Hon'ble Supreme Court once again explaining the scope and interference in service matters and disciplinary proceedings, which was only permissible in case of perversity, held thus:

> *"12. Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the disciplinary proceedings, re-appreciating even the evidence before the enquiry officer. The finding on Charge No. I was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers Under Article 226/227of the Constitution of India, shall not venture into re appreciation of the evidence. The High Court can only see whether:*
>
> *a. the enquiry is held by a competent authority;*
>
> *b. the enquiry is held according to the procedure prescribed in that behalf;*
>
> *c. there is violation of the principles of natural justice in conducting the proceedings;*
>
> *d. the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;*
>
> *e. the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;*
>
> *f. the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;*
>
> *g. the disciplinary authority had erroneously failed to admit the admissible and material evidence;*
>
> *h. the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;*
>
> *i. the finding of fact is based on no evidence."*

31. In one of the earliest decisions in ***State of Andhra Pradesh and Ors. v. S. Sree Rama Rao***[7], many of the above principles have been discussed and it has been concluded thus:

> *"7....The High Court is not constituted in a proceeding Under Article226of the Constitution a court of appeal over the decision of the authorities holding a departmental enquiry against a public servant: it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty*

6. 2015 (2) SCC 610, **7.** AIR 1963 SC 1723

to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ Under Article 226 to review the evidence and to arrive at an independent finding on the evidence. The High Court may undoubtedly interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion, or on similar grounds. But the departmental authorities are, if the enquiry is otherwise properly held, the sole judges of facts and if there be some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ Under Article 226 of the Constitution."

32. It is settled law that policy decisions of the State are not to be disturbed unless they are found to be grossly arbitrary or irrational. In this context reference may be had to the judgment of the Supreme Court in the case of ***Federation of Railway Officers Association & Ors. Vs. Union of India***[8], where the court held as follows:

"12. In examining a question of this nature where a policy is evolved by the Government judicial review thereof is limited. When policy according to which or the purpose for which discretion is to be exercised is clearly expressed in the statute, it cannot be said to be an unrestricted discretion.

On matters affecting policy and requiring technical expertise the Court would leave the matter for decision of those who are qualified to address the issues. Unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of power, the Court will not interfere with such matters."

33. Reference may also be had to the judgment of the Supreme Court in the case of ***Directorate of Film Festivals & Ors. Vs. Gaurav Ashwin Jain & Ors.***[9], where the Court held as follows:

"16. The scope of judicial review of governmental policy is now well defined. Courts do not and cannot act as Appellate Authorities examining the correctness, suitability and appropriateness of a policy nor are courts Advisors to the executive on matters of policy which the executive is entitled to formulate."

34. Learned Additional Government Advocate had clarified that that the Petitioner in this Writ petition has challenged the recovery of Rs.2,66,469/- determined in the Internal Audit Report (IAR) of the Special Audit of Golden

8. (2003) 4 SCC 289, **9.** (2007) 4 SCC 737

Jubilee function of the College vide Order No. 25814 dated 27.11.2021 issued by the Opposite Party No.4 and also Order No. 40 dated 05.01.2022 with regard to recovery of the audited amount from his monthly salary @ Rs. 10,000/-

35. It is contended that the Special Audit audited the accounts of the Principal of the College during the period with effect from 22.10.2019 to 06.02.2020 consuming 58 working days. After completion of the work, the Head of the Audit Party handed over the Draft Special Audit Report to the Government and after review of the same by the Audit Officer of the Government, it was then approved by the Principal Secretary to Government, Higher Education Department. After approval of the final Audit Report No.04/2019-20, it was sent to the Opposite Party No.4 vide Letter No.1635/HE., dated 12.01.2021 for taking appropriate action and to furnish Para wise Compliance report to Govt. within 30 days period of receipt of the Audit Report.

36. In this regard, this Court does not deem fit to interfere with the points determined in the Internal Audit Report (IAR) of the Special Audit Team. It has been well established that the Court should not delve into the matters attended by third party experts unless there is an element of illegality or arbitrariness. In the present case, Higher Education Department ordered a Special Audit owing to several complaints and due procedure has been followed to review the Internal Audit Report (IAR). Moreover, the Petitioner has not been able to prove illegality and his involvement with regards to the Internal Audit Report (IAR).

37. However, the Court finds inconsistencies in regards to the meetings and penalizing attitude of the Governing Body headed by the Opposite Party no.4. It is pertinent to note that the petitioner was penalized by the Governing Body without the preparation of the final report and without considering the representation dated 06.12.2021 filed by the petitioner. It has been well established that the principle of natural justice have to be mandatorily followed even in cases of administrative proceedings.

38. In ***Dharampal Satyapal Ltd. v. Deputy Commissioner of Central Excise***,***Gauhati and Others***[10], this Court has highlighted that procedural fairness is essential for arriving at correct decisions, by observing:

> *"27. It, thus, cannot be denied that the principles of natural justice are grounded in procedural fairness which ensures taking of correct decisions and procedural fairness is fundamentally an instrumental good, in the sense that procedure should be designed to ensure accurate or appropriate outcomes. In fact, procedural fairness is valuable in both instrumental and non-instrumental terms."*

10. (2015) 8 SCC 519

39. Considering the facts of the case and the precedents cited herein, this Court is not inclined to decide on the conclusion of the Internal Audit report. However, this Court quashed the Order No.40 dated 05.01.2022 to deduct Rs.10,000/- from the salary of the Petitioner with effect from December, 2021.

40. Accordingly, this Writ Petition is disposed of.

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2022 (III) ILR - CUT- 894

Dr. S.K. PANIGRAHI, J.

WPC (OAC) NO. 3125 OF 2016

RANJAN KUMAR JIT ………Petitioner

.V.

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

BIAS – Likelihood of bias – No man can be judge in his own cause if there is a reasonable likelihood of bias – The basic principle underlying this rule is that justice must not only be done but must also appear to be done – Case law discussed. (Para-11 to 17)

Case Laws Relied on and Referred to :-

1.1987 AIR 454 : Ashok Kumar Yadav Vs State of Haryana & Ors.
2. (1969) 2 SCC 262 : A.K. Kraipak Vs. Union of India.
3.2000 (Suppl.I) SC 346 : Badrinath Vs. Government of Tamil Nadu & Ors. J.T.

For Petitioner : Mr. Jayant Kumar Rath, Sr. Adv. Mr. Amit Ku. Saa.

For Opp. Parties : Mr. Saswast Das, AGA
Mr. Kaushik Anand Guru.

JUDGMENT Date of Hearing:30.08.2022 :Date of Judgment: 20.09.2022

Dr. S. K. PANIGRAHI, J.

1. The petitioner in the aforementioned Writ Petition has challenged the impugned office order dated 25.08.2016 issued by the Opp.party No. 2 wherein the Opposite Party no.2 without issuing any show cause or notice as contemplated under Article 311 (2) of the Constitution of India, passed an order for deletion of the name of petitioner which tantamount to disengagement of the petitioner from the post of Forester which is in gross violation of Principles of Natural Justice.

I. FACTUAL MATRIX OF THE CASE:

2. An advertisement was issued by Opposite Party No.4 for appointment of Forester as well as Forest Guard under the Bamra Wild Life Division and in respect of the post of Forester is concerned, the eligibility qualification has been prescribed that a person should qualify +2 with Science. The petitioner who was having the qualification of B.Sc and MBA and is otherwise eligible offered his candidature and thereafter the petitioner was duly selected as against the said post. Accordingly, the Opposite Party No.4 in his office order No.63 dated 04.04.2012 issued appointment order in favour of the petitioner for the post of Forester.

3. Pursuant to issuance of such appointment order dated 04.04.2012 in favour of the Petitioner, he submitted his joining report on 05.04.2012 and continuing in service till date as against the said post of Forester under Opposite Party No.4 smoothly with utmost satisfaction of the authority. In the meantime, the service book has already been opened where the date of joining of the petitioner has been clearly indicated as "05.04.2012" against the post of Forester.

4. In the month of July, 2016, the petitioner came to know that an ex parte enquiry was conducted by the Opposite Party No.3 on the basis of an allegation levelled against his selection process which was held way back in the year 2011-12. The based of the enquiry was that during the selection process the father of the petitioner who was at that time continuing as Deputy Range Officer evaluated the examination paper of the petitioner and basing on which the petitioner got selected. Subsequently, the father of the petitioner sought for certain information under the RTI Act regarding the name of the post whose written examination was held on 25.09.2011 and whose answer sheetshave been evaluated by him. Further, he also sought for information as to whether he had evaluated the answer sheets of the written examination for recruitment of Forester in Bamra Wild Life Division. He also sought for information regarding the name of the Forest Division and Code of the examination paper evaluated by him.

5. The Office of Opposite PartyNo.3 issued information on 18.07.2016 where only a list of officers selected for evaluation of answer papers for recruitment examination held on 25.09.2011 has been furnished wherein it was indicated that a list of officers where the name of the father of the petitioner finds place under Bamra Wild Life Division. However, as can be seen on a bare perusal of the list of officers for evaluation of answer sheet, the father of the petitioner was a Deputy Range Officer, Bamra Wild Life Division, but nowhere it indicates that he has evaluated or allotted to evaluate the answer papers in

respect of Bamra Wild Life Division. Rather, admittedly, the father of the petitioner has evaluated the examination paper only in respect of Forest Guard but not in respect of Forester and that too he was allotted to evaluate the answer papers in respect of the recruitment held in respect of Sambalpur South Division and not in respect of Bamra Wild Life Division.

6. The First Appellate authority i.e. Opposite Party No.3 disposed of such First Appeal preferred by the father of the petitioner on 25.08.2016. Though the Opposite Party No.3 referred to the detailed particulars of the document sought for by him and clarified that the information sought for by the appellant is not available in this office, therefore, it is not possible to supply the same and accordingly said appeal has been disposed of. However, admittedly the document as sought for by the father of the petitioner was not furnished neither by the PIO nor by the First appellate authority.

7. While the matter stood thus, the petitioner was shocked to know that on 25.08.2016 an office order has been issued by Opposite Party No.2 which has been passed in the guise of implementation of the order passed by this Tribunal in an original application filed by one Rajanikanta Patel. In the said office order it was held that the name of the petitioner, who has been selected in the Forester Recruitment examination held during 2011-12 be deleted from the select list as his father Dhaneswar Jit, Deputy Ranger was the evaluator of the aforesaid examination. It was further held that the mark awarded to the said Rajanikanta Patel during Forester Recruitment Examination, 2011-12 may be revised to 68 insteadof 66 and revised select list be prepared accordingly. After revision of mark if the name of Rajanikanta Patel finds place in the merit list then he may be issued appointment order. Further the explanation be sought for from the Officer concerned for appointing the father of the petitioner as Evaluator while his son was one of the applicants for the Forester Recruitment examination. Prudent man should have rescued from the said selection process which the father of the petitioner did not do. Admittedly, though as against the finding given by OppositeParty No.2, the petitioner was aggrieved by such observation but before passing such order, no notice whatsoever has been given to him and no procedure has been followed. Based on a false and frivolous allegation levelled against the father of the petitioner, such office order has been passed which is not at all sustainable in law. On being aggrieved by the same, the petitioner has filed this writ petition.

II. PETITIONERS' SUBMISSIONS:

8. Learned counsel for the Petitioner(s) earnestly made the following submissions in support of their contentions:

(i) On bare perusal of the impugned office order dated 25.08.2016 which has been passed by Opposite Party No.2 in the guise of implementation of the order passed by the Tribunal which was filed by one Rajanikanta Patel in O.A.No.880 (C) of 2012. The said original application which was disposed of on 18.04.2016 with a direction of the Opposite Party No.2 to conduct an enquiry to ascertain whether the evaluation has been done by the father of the petitioner or not and if so, take appropriate action deleting the name from the select list. Accordingly, direction was issued to prepare a fresh merit list and in the event the name of Rajanikanta Patel finds place in the merit list, he may be issued with appointment order. However, admittedly neither in the said original application nor before the Opposite Party No.2, the petitioner has been arrayed as party. Even he was not given any notice nor has he been given any opportunity of hearing. In this respect, law is well settled that any order passed against the person who is not a party to the said proceeding is not binding on the said person concerned. In the instant case, though said Rajanikanta Patel has specifically alleged against the appointment of the present petitioner, but he has not arrayed the petitioner as party in the said original application. The Tribunal while disposing of the original application on the basis of the prayer made by Sri Patel and directed the authority (Opposite Party No.2) to conduct an inquiry. Even though the so-called enquiry was conducted bythe Opposite Party No.3, but the petitioner was not afforded opportunity to participate in the said enquiry and without hearing the petitioner, the impugned order dated 25.08.2016 has been passed.

(ii) Moreover, since the petitioner has not been arrayed as party in the said original application and the subsequent order passed by the Opposite Party No.2 dated 25.08.2016 where the petitioner has also not been issued any notice even though specific order has been passed against the petitioner which is not only adversely affecting his service career, but also for that office order he will be disengaged by the appointing authority. Hence in no circumstances the impugned office order dated 25.08.2016 is allowed to sustain and is liable to be quashed.

(iii) Admittedly, the father of the petitioner who was serving as Deputy Range Officer at the time of selection of the petitioner, but he was only allotted for evaluating the answer papers in respect of the recruitment of Forest Guard and not for the recruitment of the Forester. Further, he has been allotted to evaluate the answer papers in respect of Sambalpur South Division, but the petitioner was selected as Forester in Bamra Wild Life Forest Division. Therefore, there is no occasion for the father of the petitioner to evaluate the answer papers of the petitioner as alleged in the said original application based on which the present impugned order has been passed.

(iv) It is the duty of the Opposite Party No.2 to conduct a proper enquiry and to issue notice to the person concerned, who are involved in the said matter. However, in the instant case, as it appears though the name of the petitioner in the select has been deleted by Opposite Party No.2 vide impugned order dated 25.08.2016, but before passing such order no notice whatsoever has been given to the present petitioner nor to his father, therefore, the very order passed by the Opposite Party No.2 dated 25.08.2016 is not only illegal, arbitrary but also contrary to law. Law is well settled that before passing any adverse order against a person, the said person is required to be given fair chance to defend his case and principles of natural justice arerequired to be followed before passing any order which has been a clear go-by in the instant case. Therefore, the impugned order is not sustainable and the same is liable to be quashed.

III. SUBMISSION OF OPPOSITE PARTIES 2, 3 & 4:

9. *Per contra*, learned counsel for the Opp. party intently made the following submissions:

(i) A recruitment test was conducted in Bamra Wildlife Division during the year 2011-12 for recruitment of 6 number of Foresters. One petitioner namely; Shri Rajani Kanta Patel, Son of Shri Manbhanjan Patel was not selected in the said Foresters' recruitment test. Being aggrieved by the decision of the Divisional Forest Officer, Bamra Wildlife Division, he filed an Original Application before the learned Odisha Administrative Tribunal, Cuttack Bench, Cuttack vide O.A. No.880 (C)/2012 with a prayer to direct the Opposite Parties to appoint him as Forester.

(ii) While disposing of O.A. No.880 (C)/2012 the Orissa Administrative Tribunal, Sambalpur Circuit Bench vide order dated 18.04.2016 directed the Opposite Party No.1 i.e. Principal Chief Conservator of Forests, Odisha as under:

> *"In view of the above discussion, instead of directing appointment of the petitioner or cancelling the examination, the Opposite PartyNo.1 is directed to conduct an inquiry to ascertain whether evaluation has been done by the father of Ranjan Kumar Jit and, if so, take appropriate action deleting his name from the select list. Further, mark as per the scheme of examination, be awarded to the petitioner in mathematics as in no case, petitioner can secure 66 marks, which is not multiple of 4. Accordingly, a fresh merit list be prepared and, in the event, the name of the petitioner finds place in the merit list, he may be issued with appointment order. The entire exercise be completed, with a period of four months from the date of receipt of a copy of this order."*

(ii) The father of the petitioner, Sri Dhaneswar Jit, Deputy Range Officer, while working in Bamra Wildlife Division was selected for the evaluation of answer paper of Forester/ Forest Guard candidates held on 25.09.2011 vide memo No.2305 dated 26.09.2011 of the Regional Chief Conservator of Forests, Sambalpur. He had attended the evaluation at Regional Chief Conservator of Forests, office as per aforesaid memo. The Regional Chief Conservator of Forests, Sambalpur (Opposite Party No.3) conducted the enquiry in this respect as per direction of the Principal Chief Conservator of Forests, Odisha (Opposite Party No.2) and submitted his enquiry report. After due verification of the enquiry report, the Principal Chief Conservator of Forests, Odisha (Opposite Party No.2) passed the order vide his Office Order No.969 dated 25.08.2016. Hence, the impugned order passed by the Opposite Party No.2 is sustainable in the eye of law.

(iv) As per order dated 18.04.2016 of the O.A.T. in O.A. No.880(C) of 2012 the Opposite Party No.2 duly authorized Opposite PartyNo.3 who has conducted the enquiry on recruitment of Foresters in Bamra Wildlife Division. The evaluation of Answer papers of the candidates of different divisions were conducted in the office the Regional Chief Conservator of Forests, Sambalpur by the evaluators selected by the Regional Chief Conservator of Forests, Sambalpur (The Opposite PartyNo.3 i.e. the Regional Chief Conservator of Forests, Sambalpur Circle communicated enquiry report to Opposite Party No.2 vide memo No.2850 dated 03.08.2016). Therefore, the enquiries conducted by the Principal Chief Conservator of Forests, Odisha (Opposite PartyNo.2) through his authorized representative namely; the Regional Chief Conservator of Forests, Sambalpur quashed and then after due verification passed the order dated 25.08.2016 which is sustainable and not liable to be quashed.

(v) The PIO and First Appellate Authority have supplied information to the father of the petitioner which are to be supplied as per provision of the Right to Information Act, 2005 subject to availability of information in his office. Hence, the plea of not supplying any information by the PIO and First Appellate Authority of selected and appointed as the Sambalpur Circle is not tenable. Further, the Opposite Party No.3 has conducted the enquiry duly authorized by Opposite Party No.2 as per direction of the O.A.T. Hence, conducting the enquiry by Opposite Party No.3 and order dated 25.08.2016 passed by Opposite Party No.2 is not illegal and arbitrary and the same is based on records which has the required sanctity and cannot be quashed.

IV. SUBMISSION OF OPPOSITE PARTYNO.5:

10. Learned counsel for the Opposite Party No.5 made the following submissions:

(i) The father of the petitioner, namely Dhaneswar Jit was posted as Deputy Range Officer, Bamra and Copy Ad (Wild Division) at the relevant point of time i.e. when the petitioner was selected as the Forester under Bamra Wild Life Division. Moreover, the father of the petitioner was appointed as an invigilators for the examination for appointment of Forester and as well as Forest Guard, in which examination, the petitioner was selected and appointed as the Forester.

(ii) The Regional Chief Conservator of Odisha, Sambalpur vide its Memo No.2283 dated 20th September 2011 issue guideline for selection of candidate to fill up the vacancies under the direct recruitment quota in Grade of Forest Guard during 2011 in the Office of the Regional Chief Conservator of Forests, Sambalpur circle. In the said circular, it is categorically stated that, the DFOS should not engage the staffs whose son/daughter/ relations are to appear the said recruitment test. Such direction was issued to avoid legal complicacy in future but the petitioner's father knowing fully well about such circular participated in the selection process.

(iii) In spite of such specific directive, the father of the present petitioner was nominated and worked as Examiner. *Prima facie*, the fact that the petitioner was applied for the examination had been either suppressed or deliberately over looked the guidelines for obvious reasons. The evaluation of answer papers in Mathematics and MIL (Oriya) appears to have been manipulated to award less marks to the answering Respondent's even though he has done excellent in the answer papers. It is further submitted that the selection list of candidates prepared under Rule-11 of the Odisha Sub-ordinate Forest Service (Method of Recruitment and Conditions of Service of Forests) Rules, 1998 and approved by the appointing authority for appointment, prima facie is based on the manipulation of answer papers in evaluation of awarding higher marks to the selected candidates.

V. COURT'S REASONING AND ANALYSIS:

11. It is one of the fundamental principles of service jurisprudence that no man can be a Judge in his own cause and that if there is a reasonable likelihood of bias it is "in accordance with natural justice and common sense that the justice likely to be so biased should be incapacitated from sitting". The question is not whether the judge is actually biased or in fact decides partially, but whether there is a real likelihood of bias. What is objectionable in such a case is not that the

decision is actually tainted with bias but that the circumstances are such as to create a reasonable apprehension in the mind of others that there is a likelihood of bias affecting the decision. The basic principle underlying this rule is that justice must not only be done but must also appear to be done and this rule has received wide recognition in several decisions of this Court. The participation of the father of the petitioner in the selection process smacks bias. The guidelines were clear regarding this issue but he has violated by ignoring such guidelines.

12. The Supreme Court explained 'likelihood of bias' in the case of ***Ashok Kumar Yadavvs State of Haryana And Ors***.[1] where it was held that:

> *"It is also important to note that this rule is not confined to cases where judicial power strict sensu is exercised. It is appropriately extended to all cases where an independent mind has to be applied to arrive at a fair and just decision between the rival claims of parties. Justice is not the function of the courts alone; it is also the duty of all those who are expected to decide fairly between contending parties. The strict standards applied to authorities exercising judicial power are being increasingly applied to administrative bodies, for it is vital to the maintenance of the rule of law in a welfare state where the jurisdiction of administrative bodies in increasing at a rapid pace that the instrumentalities of the State should discharge their functions in a fair and just manner. This was the basis on which the applicability of this rule was extended to the decision-making process of a selection committee constituted for selecting officers to the Indian Forests Service in* ***A.K. Kraipak v. Union of India***[2] *happened in this case was that one Naquisbund, the acting Chief Conservator of Forests, Jammu and Kashmir was a member of the Selection Board which had been set up to select officers to the Indian Forest Service from those serving in the Forest Department of Jammu and Kashmir. Naquisbund who was a member of the Selection Board was also one of the candidates for selection to the Indian Forest Service. He did not sit on the Selection Board at the time when his name was considered for selection but he did sit on the Selection Board and participated in the deliberations when the names of his rival officers were considered for selection and took part in the deliberations of the Selection Board while preparing the list of the selected candidates in order of preference. This Court held that the presence of Naquishbund vitiated the selection on the ground that there was reasonable likelihood of bias affecting the process of selection."*

13. The Supreme Court has emphasised that it was not necessary to establish bias but it was sufficient to invalidate the selection process if it could be shown that there was reasonable likelihood of bias. The likelihood of bias may arise on account of proprietary interest or on account of personal reasons, such as, hostility to one party or personal friendship or family relationship with the other. Where reasonable likelihood of bias is alleged on the ground of relationship, the question would always be as to how close is the degree of relationship or in other words, is the nearness of relationship so great as to give rise to reasonable apprehension of bias on the part of the authority making the selection. In the present case, the relationship is father-son and the father was actively involved in the selection process.

1.1987 AIR 454 , **2.** (1969) 2 SCC 262

14. Learned Counsel for the Opposite Parties have put forth the argument that there was no direct link considering that the father of the petitioner was evaluating the answer sheets of different paper. However, considering that the petitioner's answer sheet was also being evaluated in the same place and the order in place invalidating presence of relatives during the evaluations, validates the contention of Opposite Parties. In ***Badrinath v. Government of Tamil Nadu and Ors. J.T.***[3] the Apex Court has held that unless there is a statute or statutory rule compelling the person to take a decision and there is no legally permissible alternative to substitute the adjudicator by another adjudicator, the doctrine of necessity cannot be pressed into service. For ready reference important paragraph of the decisionis reproduced as under:

> *"83. It may be noticed that where a statute or a statutory rule constitutes a designated authority to take administrative or quasi-judicial decisions and where the person concerned is disqualified to take a decision on the principle of likelihood of bias, then the law (in certain circumstances explained below) makes an exception in the situation and the said person is entitled to take a decision notwithstanding his disqualification for otherwise no decision can he taken by anybody on the issue and public interest will suffer. But the position in the present case is that there is no statute or statutory rule compelling the Chief Secretary to be a member of the Screening Committee. If the Committee is constituted under an administrative order and a member is disqualified in a given situation vis-a-vis a particular candidate whose promotion is in question, there can be no difficulty in his 'recusing' himself and requesting another senior officer to be substituted in his place in the Committee, Alternatively, when there are three members in the Committee, the disqualified member could leave it to the other two - to take a decision. In case, however, they differ, then the authority, which constituted the Committee, could he requested to nominate a third member. These principles are well settled and we shall refer to them."*

15. The question that confronts the Court in the above facts is whether the participation of Dhaneswar Jit in the evaluation process vitiates the selection of the petitioner on the ground of bias. The doctrine of bias is a unique judicial innovation consistent with the principle that the justice delivery system must be rooted in the confidence of the people and justice must not only be done but also appear to have been done. Proof of actual bias is difficult to come by. Hence, the Courts have consistently held that even the possibility of bias would suffice to nullify an order passed or an action taken. In the present case, the possibility of bias on the part of Dhaneswar Jit, the father of the petitioner, as against the other candidates in the fray and leaning in favour of his son, loans large.

16. The Supreme Court in the case of ***PK Ghosh v. JG Rajput***[4] observed hereasunder-

3. 2000 (Suppl.I) SC 346, **4.** 1995SCC (6) 744

"A basic postulate of the rule of law is that "justice should not only be done but it must also be seen to be done". If there be a basis which cannot be treated as unreasonable for a litigant to expect that his matter should not be heard by a particular Judge and there is no compelling necessity, such as the absence of an alternative, it is appropriate that the learned Judge should recuse himself from the Bench hearing that matter.

This step is required to be taken by the learned Judge not because he is likely to be influenced in any manner in doing justice in the cause, but because his hearing the matter is likely to give rise to a reasonable apprehension in the mind of the litigant that the mind of the learned Judge — maybe subconsciously — has been influenced by some extraneous factor in making the decision, particularly if it happens to be in favour of the opposite party.

Credibility in the functioning of the justice delivery system and the reasonable perception of the affected parties are relevant considerations to ensure the continuance of public confidence in the credibility and impartiality of the judiciary. This is necessary not only for doing justice but also for ensuring that justice is seen to be done."

17. In light of the aforesaid discussion and having regard to the present position of law, this Court has no hesitation in coming to the conclusion that the Petitioner cannot be granted any relief by way of a Writ and the present Writ Petition is liable to be dismissed.

18. Accordingly, this Writ Petition is dismissed.

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2022 (III) ILR - CUT- 903

MISS. SAVITRI RATHO,J.

TRP (CRL) NO. 82 OF 2021

PRADEEP KUMAR DAS ....Petitioner

.V.

DEEPTIMAYEE DAS @ PUTHAL ....Opposite Party

CODE OF CRIMINAL PROCEDURE,1973 – Section 407 – Petitioner/ husband prayed for transfer of D.V. Misc. Case No. 130 of 2020 filed by Opp. Party wife before the SDJM, Balasore to the Court of Learned SDJM, Bhubaneswar – The petitioner filed C.P. No.495/2020 for divorce in the court of the Learned Judge Family Court, Bhubaneswar, C.P. no. 301/2020 was filed by wife for restitution of conjugal rights in the Court of the learned Judge, Family Court, Balasore – Both the C.P. have been transferred to Learned Judge, Family Court, Bhadrak pursuant to order of High Court – Whether prayer to transfer the D.V. Case to Bhubaneswar should be allowed? – Held, since two civil proceedings

involving the parties have already been transferred to Bhadrak, it would be expedient in the interest of Justice to transferred the D.V. Misc.Case to the court of Learned SDJM, Bhadrak with certain direction. (Para -12-14)

Case Laws Relied on and Referred to :-

1. (2006) 9 SCC 197 : Anindita Das Vs. Srijit Das.
2. 2022 SCC Online SC 1199 : N.C.V Aishwarya Vs. A.S. Saravana Karthik Sha.
3. (TRP(C) No. 324 of 2017) : Anuva Choudhury Vs. Biswajit Mishra.
4. TRP (CRL) No. 98 of 2021 : Biswajit Mishra Vs. Anuva Choudhury.

For Petitioner : Mr. Samir Kumar Mishra.

For Opp. Party : Mr. Smruti Ranjan Mohapatra

JUDGMENT Date of Judgment : 26.10.2022

MISS. SAVITRI RATHO, J.

This transfer application under Section 407 of the Code of Criminal Procedure (in short "the Cr.P.C") has been filed by the petitioner - husband- Pradeep Kumar Das for transfer of D.V. Misc. Case No.130 of 2020 filed by the opposite party (in short "opp.party") - wife Deeptimayee Das @ Puthal, under Section 12 (2) read with Section 17 (1), Section 18, Section 19(1), Section 20 & Section 22 of the Protection of Women from Domestic Violence Act, 2005 (in short "the DV Act") in the Court of learned S.D.J.M., Balasore, to the Court of learned S.D.J.M., Bhubaneswar.

2. I have heard Mr Samir Kumar Mishra learned counsel for the petitioner-husband and Mr S.R. Mohapatra learned counsel for the Opposite Party – wife.

3. Learned counsel for the petitioner submitted that the petitioner is presently posted in Rayagada District working as Deputy Manager of Technical Department in Utkal Alumina International Ltd, a unit of Aditya Birla Group at Kuchia Padar, Nuapada Township, Kasipur, District Rayagada which is about 400 Kms from Bhubaneswar. It would take about 12 to 14 hours for the petitioner to reach from Kasipur Bhubaneswar and 5 to 6 more hours to go to Balasore from Bhubaneswar. The petitioner has further submitted that the opposite party is presently working in Puri as Project Manager in Mecon India Pvt. Ltd. As Puri is only 62 KM away from Bhubaneswar, it will not be inconvenient for the Opp. Party to attend the proceeding at Bhubaneswar whereas the comparative inconvenience faced by the petitioner- husband is more if he is compelled to attend the case at Balasore . He has also submitted that C.P. No. 495 of 2020 and C.P. No. 310 of 2020 (involving the parties) have been

transferred to the Court of the learned Judge, Family Court Bhadrak pursuant to orders passed in TRP (C) No. 210 of 2020 and TRP(C) No. 138 of 2021, respectively. In support of his submission that women are misusing the leniency being shown to them in matters of transfer and each petition has to be considered on its own merit and inconvenience caused to the husband should also be considered , he has relied on the decision of the Supreme Court in the case of ***Anindita Das vs Srijit Das reported in (2006) 9 SCC 197.***

4. Instead of filing an objection or a counter affidavit, a date chart / short note of argument accompanied by an affidavit dated 29.08.2022 has been filed on behalf of the opp. party- wife on 29.08.2022, where it has been stated that C.P. No. 495 of 2020 filed by the petitioner – husband for divorce in the Court of the learned Judge, Family Court Bhubaneswar and C.P.No. 310 of 2020 filed by the respondent – wife for restitution of conjugal rights in the Court of the learned Judge, Family Court, Balasore, have both been transferred pursuant to the orders passed by this Court, to the Court of the learned Judge, Family Court Bhadrak vide order dated 17.02.2021 passed in TRP(C) No. 210 of 2020 and order dated 12.04.2022 passed in TRP (C) No. 310 of 2020 respectively. It has also been averred that CRLMC No 1211 of 2022 filed by the petitionerhusband in order to quash the order of cognizance passed by the learned SDJM Nilgiri in C.T. No. 466 of 2020, arising out of Berhampur P.S. Case No 65 of 2020, is still pending in this Court. CRLMC 1211 of 2022 filed by the petitioner-husband challenging the criminal proceeding in C.T. No. 466 of 2020, arising out Berhampur P.S. Case No 65 of 2020 has been dismissed as withdrawn by the order dated 12.07.2022. It is also stated in the written note that the petitioner – husband is working as Deputy Manager at Kashipur, Rayagada and staying there and the opp. party - wife is at present staying at Bhalukaposi in Nilagiri, in Baleswar District and she is presently unemployed. She will face inconvenience, if the DV Misc case is transferred to the Court of the SDJM, Bhubaneswar and its not safe for her to visit Bhubaneswar which is at a long distance from her residence.

It is not known why the opp. party – wife has not filed a objection or counter affidavit. That apart the averments made by the petitioner in the transfer application regarding employment of the petitioner in MECON and posting at Puri, has not been specifically denied but a bald statement has been made stating that the petitioner is presently unemployed and stating in Bhalukaposi. In the affidavit attached to the date chart /note of argument, specific reference has not been made to date chart / written note.

5. In the affidavit dated 18.09.2022 filed on 24.09.2022 on behalf of the petitioner, copies of the information sheets provided under the RTI Act , postal

receipts and tracking report have been brought on record as Annexure 1 Series and copies of the written statement filed by the opp. party - wife in C.P.No. 83 of 2021 and petition in D.V.Misc Case No, 130 of 2020 as Annexure 2 Series. Referring to letter dated 20.05.2021 of GM I/C (HR) & CPIO (Annexure 1 Series), learned counsel for the petitioner has submitted that the opp. Party – wife had drawn Rs 56,100/- in the month of March, 2021.Further, referring to Registration receipt in respect of RO 033783950IN addressed to the Opp. party at Puri and the track consignment report, it has been contended that the notice sent to the Opp party at her office address in Puri has been delivered to her. Referring to paragraph 17 of the petition in D.V. Misc. Case No. 130 of 2020, the learned counsel for the petitioner has stated that the opp. Party – wife is working in MECON India, at Bhubaneswar and continued the job after her marriage.

6. From a perusal of the averments in D.V. Misc. Case No. 130 of 2020, it appears that the opp party - wife was serving at Bhubaneswar in an office named and styled as ‘MECON LIMITED’ as Asst. Project Engineer on a contractual basis, prior to her marriage. It has also been stated therein that after marrying the petitioner,she continued in her job as her in-laws permitted her to do so.

7. Perusal of the order dated 12.04.2022 passed in TRP(C) No. 138 of 2021 filed by the present petitioner for transfer of C.P.No. 310 of 2020 filed by the opp.party – wife for restitution of conjugal rights, reveals that the contention of the learned counsel for the petitioner had been that the opp.party – wife was staying in Puri for which no prejudice would be caused to her if C.P. No. 310 of 2020 was transferred to Puri. It was also noted that the learned counsel for the opp. party – wife did not dispute that she was staying and working in Puri. But direction was passed for transfer of C.P.No. 310 of 2020 to Bhadrak as C.P.No. 495 of 2020 filed by the petitioner for a decree of divorce had already been transferred to Bhadrak pursuant to order dated 17.02.2021 passed in TRP(C) No. 210 of 2020.

8. After hearing the learned counsels and after perusal of the averments in the transfer application, the affidavit dated 18.09.2022filed on behalf of the petitioner-husband, the date chart along with the affidavit filed on behalf of the opp party - wife and on appreciating the submissions of the learned counsels, it is apparent that :

(a) A proceeding for divorce and a proceeding for restitution of conjugal rights are pending in Bhadrak, pursuant to orders passed by this Court in two transfer applications.

(b) the petitioner is working in Kashipur in the District of Rayagada, which is more than 500 Kms from Balasore.

(c) The opp party-wife was admittedly working in MECON India and was posted at Puri.

(d) In August 2022, the opp.party – wife claims to be unemployed without giving any details about when she left her job or the reasons for doing so.

9. In the case of ***Anindita Das (supra***) the Supreme court has held as follows :

> *...“3. Even otherwise, it must be seen that at one stage this Court was showing leniency to ladies. But since then it has been found that a large number of transfer petitions are filed by women taking advantage of the leniency taken by this Court. On an average at least 10 to 15 transfer petitions are on Board of each Court on each admission day. It is, therefore, clear that leniency of this Court is being misused by the women.*
>
> *4. This Court is now required to consider each petition on its merit. In this case the ground taken by the wife is that she has a small child and that there is nobody to keep her child. The child, in this case, is six years old and there are grand parents available to look after the child. The Respondent is willing to pay all expenses for travel and stay for the Petitioner and her companion for every visit when the Petitioner is required to attend the Court at Delhi. Thus, the ground that the Petitioner has no source of income is adequately met.*
>
> *5. Except for stating that her health is not good, no particulars are given. On the ground that she is not able to come to Delhi to attend the Court on a particular date, she can always apply for exemption and her application will undoubtedly be considered on its merit. Hence, no ground for transfer has been made out.*
>
> *6. Accordingly, we dismiss the Transfer Petition. We, however, direct that the Respondent shall pay all travel and stay expenses of the Petitioner and her companion for each and every occasion when she is required to attend the Court at Delhi”….*

In the case of ***N.C.V Aishwaryavs A.S. Saravana Karthik Sha*** **Civil Appeal No.(s).4894 of 2022(Arising out of S.L.P.(C) No (s).16465 of 2021)** decided on 18.07.2022 : **2022 SCC Online SC 1199**,the Supreme Court has held as follows :

> *.....“9. The cardinal principle for exercise of power under Section 24 of the Code of Civil Procedure is that the ends of justice should demand the transfer of the suit, appeal or other proceeding. In matrimonial matters, wherever Courts are called upon to consider the plea of transfer, the Courts have to take into consideration the economic soundness of both the parties, the social strata of the spouses and their behavioural pattern, their standard of life prior to the marriage and subsequent thereto and the circumstances of both the parties ineking out their livelihood and under whose protective umbrella they are seeking their sustenance to life. Given the prevailing socioeconomic paradigm in the Indian society, generally, it is the wife’s convenience which must be looked at while considering transfer.*

10. Further, when two or more proceedings are pending in different Courts between the same parties which raise common question of fact and law, and when the decisions in the cases are interdependent, it is desirable that they should be tried together by the same Judge so as to avoid multiplicity in trial of the same issues and conflict of decisions."…..

This Court in the case of **Anuva Choudhuryvs Biswajit Mishra** (***TRP(C)No. 324 of 2017***) decided on 05.09.2022 alongwith **Biswajit Mishra vs Anuva Choudhury** TRP (CRL) No. 98 of 2021, after referring to a number of decisions of the Supreme Court and this High Court has held as follows:

"….8. While deciding an application for transfer of a matrimonial case, it has been the usual practice to consider the inconvenience which is likely to be faced by the wife while turning a deaf ear and blind eye to the difficulties faced by the husband, on account of the accepted position of law that convenience of the wife is of paramount consideration in matrimonial cases. This is because women were considered to belong to the weaker sex and dependent on a male for their survival and security, be it the father, brother, husband or son. But now, after 75 years of independence, the situation has changed and the emancipation of women is clearly visible. Women are being given equal opportunity and representation in all spheres. They have become self dependent and many are no longer dependent on their husband/parents/brothers or sons for their survival and security. They have become the sole breadwinners in some families. They are able to bring up a child on their own. Some are part of the law making and law enforcing agencies. They are able to travel alone in connection with their work and recreation. Unfortunately, there are still many exceptions, as many women are still dependent on their family members for their survival on account of lack of education, lack of support and as some men still have not learnt to respect women for which women are still victims of eve teasing and sexual harassment in educational institutions, public transport and even in their work place. Travelling alone for long distances by road or train for a woman is often fraught with risk. Likewise, due to a variety of reasons, the role and responsibilities of men have undergone a sea change. Many men have to single handedly take care of aged and ailing parents and young children, for which there are sometimes constraints on their time and movement. Their job requirements may also be a stumbling block. So in the present situation, an application for transfer of a matrimonial case has to be considered on its own facts without mechanically or blindly allowing the application of the wife. For the same reasons, the earlier decisions have also to be viewed in the same light. A balance has to be struck, so that each party is able to fight/defend his/her case in the trial court. Many Courts have been provided with video conferencing facilities, which can also be utilised by all the parties for their convenience."…..

….."10. From the aforesaid cases, it is apparent that although the Supreme Court hase held that the convenience of the wife is of paramount consideration, but prayers for transfer have been considered taking into account the facts of the particular case. In other words, the convenience of one party only should not be considered. But a balanced view should be adopted, keeping in mind the convenience of both the parties, but giving more weightage to the convenience of the wife."…

10. The D.V. Act was enacted as Act 43 of 2005 and came into force on 26.10.2006 .It has been enacted with the following objective : -

"An Act to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto" …

In the Statement of Objects and Reasons appended to the Act, it has been interalia stated :

> *"3. It is, therefore, proposed to enact a law keeping in view the rights guaranteed under articles 14,15 and 21 of the Constitution to provide for a remedy under the civil law which is intended to protect the woman from being victims of domestic violence and to prevent the occurrence of domestic violence in the society."*

Section 2 (i) of the DV Act defines "Magistrate" to be:-

> *"the Judicial Magistrate of the first class or as the case may be the Metropolitan Magistrate exercising under the Code of Criminal Procedure 1973 (2 of 1974) in the area where the aggrieved person resides temporarily or otherwise or the respondent resides or the domestic violence is alleged to have taken place ."*

11. The decisions referred to above were cases filed under Section –24 and 25 of the Cr.P.C., but as they deal with matrimonial cases, the same principles will apply when deciding a case of transfer of a case filed under the provisions of the DV Act as the said Act provides for a remedy under the civil law to protect women from domestic violence.

12. In the present case, the opp party-wife who is the aggrieved person therefore had the option to file the case in Puri where she was working, or in Bhubaneswar where most of the opp. parties in the D.V. Misc case reside and where the domestic violence was allegedly perpetrated. If the opp – party wife had now been working and staying in Puri, considering the provisions of the DV Act and the comparative convenience / inconvenience of the parties, I would have transferred the case to Puri, but in view of the specific averment of the Opp party –wife which is supported by an affidavit, that she is unemployed and is staying in Bhalukaposi in District – Balasore andsince two civil proceedings involving the parties have already been transferred to Bhadrak, I feel it would be expedient in the interest of justice, if D.V. Misc. Case No.130 of 2020 is also transferred to the Court of learned S.D.J.M., Bhadrak.

13. The learned S.D.J.M., Balasore is therefore directed to transmit the records of D.V. Misc. Case No.130 of 2020 (***Smt. Deeptimayee Das @ Puthalvrs. Sri Pradeep Kumar Das & Others***) filed by the opposite party-wife under the D.V.Act, to the Court of the learned S.D.J.M.,Bhadrak by 09.11.2022. The parties undertake to appear before the Court on 14.11.2022, as it is submitted by Mr. Mishra learned counsel for the petitioner that the C.P. is posted on that date in Bhadrak.

14. Keeping in mind the fact that the petitioner husband has to come all the way from Rayagada to contest the case, in order to mitigate the inconvenience which will be faced by him , the learned SDJM, Bhadrak is directed to post the

DV Misc case on the dates to which the two civil proceedings are posted in the Court of the learned Judge, Family Court, Bhadrak if there is no other legal impediment and the learned SDJM shall not insist on the personal appearance of the petitioner – husband, if the same is not absolutely necessary. Liberty is granted to the petitioner – husband to apply to the Court for cross examining the witnesses of the Opp party – wife and adducing his evidence and that of his witnesses through video conferencing mode. If such an application is filed, the same shall be considered in accordance with law by the learned SDJM, Bhadrak.

15. The TRP (CRL) is disposed of with the aforesaid directions.

16. Copy of this order be sent to the Court of the learned SDJM, Balasore, by the Registry.

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2022 (III) ILR - CUT- 910

R.K. PATTANAIK, J.

CRLMC NO. 437 OF 2022

GANAPATI SAHU ……..Petitioner

.V.

STATE OF ODISHA ……..Opposite Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 457 r/w Rule 6 of the Odisha Motor Vehicle (Accidental Claim Tribunal) Rule, 2018 – When there was no insurance Coverage and the vehicle met with an accident, whether the petitioner was entitled to its release and on what condition? – Held, Yes. – The court is of the view that petitioner should have been directed to furnish security as per Rule 6 of the Rule in view of the decision of *Nabaratna @ Nabaratan Agrawal*. (Para-13)

Case Laws Relied on and Referred to :-

1. (2021) 81 OCR 635 : Ramakrushna Mahasuar Vs. State of Odisha.
2. JT 2009 (15) SC 443 : Jai Prakash Vs. M/s. National Insurance Company & Ors.
3. (2002) 10 SCC 283 : Sunderbhai Ambalal Desai Vs. State of Gujarat.

For Petitioner : Mr. Prasanna Kumar Mishra

For Opp Party: Mr. S.S. Mohapatra, ASC.

JUDGMENT Date of Judgment:12.10.2022

R.K. PATTANAIK,J.

1. Instant petition under Section 482 Cr.P.C. is at the behest of the petitioner challenging the impugned orders under Annexures-1 and 2 whereby the vehicle in question owned by him was not released in his favour having been involved in an accident with registration of G.R. Case No.101 of 2021 pending in the file of learned S.D.J.M., Gunupur, Rayagada.

2. The petitioner moved an application under Section 457 Cr.P.C. in respect of the seized vehicle (No.OD-10-F-8237) involved in the aforesaid case registered under Sections 279 and 304A IPC which was rejected by the learned S.D.J.M., Gunupur by order dated 9th September, 2021 under Annexue-1 on the ground that the vehicle was having no valid insurance against 3rd party risks citing Rule 6 of the Odisha Motor Vehicles (Accident Claims Tribunal) Rules, 2018 (hereinafter referred to as 'the Rules'). Being aggrieved, the petitioner then approached the court of Additional Sessions Judge, Gunupur in Criminal Revision No.04 of 2021 which was disposed of by order dated 9th December, 2021 vide Annexure-2 confirming the order of rejection. While dismissing the revision, the learned Sessions Court concluded that the alleged vehicle since was not insured as on the date of accident, it cannot be released in view of Rule 6 (supra) and decision of this Court in ***Ramakrushna Mahasuar Vrs. State of Odisha reported (2021) 81 OCR 635***. So to say, the learned courts below declined to release the seized vehicle in favour of the petitioner on the aforesaid ground.

3. Mr. Mishra, learned counsel for the petitioner submits that the seized vehicle should have been handed over to the custody of the petitioner in terms of Rule 6 of the Rules accepting security from him. According to Mr. Mishra, in so far as Rule 6 is concerned, it only demands security in absence of insurance coverage. An order dated 13th December, 2021 in CRLMC No.2040 and two other cases (***Nabaratna @ Nabaratan Agrawal Vrs. State of Odisha etc.***) is cited by Mr. Mishra by contending that the learned courts below could have asked for security in terms of Rule 6. Mr. Mohapatra, learned ASC, on the other hand, submitted that since the vehicle was not validly insured, the courts below rightly rejected prayer for its release in favour of the petitioner and therefore, the impugned orders under Annexures-1 and 2 cannot be faulted with and disturbed.

4. Admittedly, the learned courts below did not demand any security from the petitioner and simply rejected release of the vehicle in view of Rule 6 of the Rules and by referring to the decision in ***Ramakrushna Mahasuar*** (supra). Whether the courts below rightly refused release of the seized vehicle? Whether

there has been due compliance of Rule 6 of the Rules while rejecting the claim of the petitioner for taking custody of the seized vehicle moved as per Section 457 Cr.P.C?

5. The contention of the petitioner that the payment for renewal of insurance was made on 4th April, 2021 and hence, the coverage should be with effect from 5th April, 2021 cannot be entertained as it was never disputed before. That apart, such a question cannot also be a subject matter of adjudication in the present proceeding. When there was no insurance coverage when the vehicle met with an accident, whether the petitioner was entitled to its release and on what condition. Mr. Mishra, learned counsel for the petitioner submits that in view of the decision in ***Nabaratna @ Nabaratan Agrawal*** (supra), the petitioner could be directed to furnish security in terms of Rue 6 or to the extent of the present market value of the seized vehicle as per the aforesaid decision.

6. At this juncture, it is apposite to refer Rule 6 of the Rules which is reproduced herein below:

> "6. Prohibition against release of motor vehicle involved in accident:(1) No court shall release a motor vehicle involved in an accident resulting in death or bodily injury or damage to property, when such vehicle is not covered by the policy of insurance against third party risks taken in the name of registered owner or when the registered owner fails to furnish copy of such insurance policy despite demand by investigating officer unless and until the registered owner furnishes sufficient security to the satisfaction of the court to pay compensation that may be awarded in a claim case arising out of such accident.
>
> (2) Where the motor vehicle is not covered by a policy of insurance against third party risks, or when registered owner of the motor vehicle fails to furnish copy of such policy in circumstance mentioned in sub-rule(1), the motor vehicle shall be sold off in public auction by the magistrate having jurisdiction over the area where accident occurred, on expiry of three months of the vehicle being taken in possession by the investigating officer and proceeds thereof shall be deposited with the Claims Tribunal having jurisdiction over the area in question, within fifteen days for purpose of satisfying the compensation that may have been awarded, or may be awarded in a claim case arising out of such accident."

7. According to Rule 6(1), no court shall release a motor vehicle involved in an accident when it is not covered by the policy of insurance against 3rd party risks taken in the name of registered owner, who also fails to furnish a copy thereof despite a demand for the same during investigation unless and until the registered owner furnishes sufficient security to the satisfaction of the court to pay compensation that may be awarded by a Tribunal in a claim case arising out of such accident. The second part of the Rule suggests that sufficient security should be the need and demand, the purpose being to ensure payment of compensation which may at last be

awarded by the Tribunal. As per Sub-rule (2) of Rule 6, in case of the vehicle having no insurance cover and the registered owner fails to furnish copy of such policy as per Sub-rule (1) thereof, the vehicle shall be disposed of in public auction and the sale proceeds shall be deposited with the Claims Tribunal having jurisdiction over the area in question. The above procedure is to be followed with regard to release or disposal of a motor vehicle involved in an accident resulting in death or bodily injury or damage to property in absence of insurance coverage or when the registered owner fails to furnish a copy of policy on a demand during investigation. If Rule 6 of the Rules is read and understood properly, it puts a rider in place while releasing a motor vehicle which is not insured provided the registered owner submits sufficient security to the satisfaction of the court to pay compensation that may finally be awarded by the Claims Tribunal.

8. This Court in ***Nabaratna @ Nabaratan Agrawal*** (supra) referred to the decisions of the Apex Court, such as, ***Jai Prakash Vrs. M/s. National Insurance Company and others***: JT 2009 (15) SC 443 and ***Ushadevi and Anr. Vrs. Pawan Kumar and others*** decided in Civil Appeal No.9936-9937 of 2016 and disposed of on 13th September, 2018. In ***Nabaratna @ Nabaratan Agrawal***, the owners were directed to furnish security adequate to cover the compensation and if the court is unable to quantify, it may call upon them to submit security at least to the extent of the market value of the vehicles by concluding that the aforesaid aspect was not raised and dealt with in ***Ramakrushna Mahasuar*** case.

9. In so far as the impugned orders under Annexures-1 and 2 are concerned, the Court does not find that the learned courts below ever demanded any such security from the petitioner who claims to be the registered owner of the vehicle sufficient to pay the compensation which may be awarded by the Claims Tribunal later on. Rather it is made to appear that the courts below rejected release of the vehicle on the premise that it had no valid insurance by the time of the accident. But considering Rule 6 of the Rules, despite having no policy of insurance, a vehicle may be released in favour of the registered owner, if he submits sufficient security to the satisfaction of the court to pay the compensation which may be awarded in a claims case arising out of the accident. Having not demanded any security from the petitioner, in the opinion of the Court, the learned courts below were not justified by simply rejecting release of the vehicle in his favour when such a provision is envisaged in Rule 6 of the Rules.

10. In the case of ***Nabaratna @ Nabaratan Agrawal***, this Court has taken judicial notice of the earlier decision in ***Ramakrushna Mahasuar*** and held that

the correctness of the order challenged therein was confined to the ground of absence of insurance policy whereas the owners of the vehicle in that case were willing to abide the provisions of Rule 6 of the Rules by furnishing security. In fact, in the case of ***Nabaratna @ Nabaratan Agrawal,*** a decision of Delhi High Court in FAO No.842 of 2003 (***Rajesh Tyagi and others Vrs. Jaibir Singh and others***) and disposed of on 8th June, 2009 was cited and held that a similar course of action may be adopted directing the owner of the vehicle to furnish sufficient security to the satisfaction of the court to pay the compensation or at least equal to the value of the vehicle if the court is unable to quantify the same. In the aforesaid case, the ratio of the Supreme Court's judgment in ***Sunderbhai Ambalal Desai Vrs. State of Gujarat reported in*** (2002) 10 SCC 283 was taken note of and finally held that the vehicle should be released after complying requirements of Rule 6 and if the court is not able to quantify the security may direct the owners at least to furnish security to the extent of the present market value of the vehicles while releasing it in their favour imposing such other conditions as found to be necessary and expedient.

11. In the present case, the Court is of the view that the petitioner should have been directed to furnish security as per Rule 6 of the Rules which the learned courts below did not do and accomplish, rather, straightaway declined to release the vehicle in his favour on the ground that it was not validly insured as on the date of the accident. Thus, the Court is of the ultimate conclusion that the learned S.D.J.M., Gunupur so also the revisional court should have examined the matter in its proper perspective and ought to have passed appropriate orders accordingly and therefore, the impugned orders under Annexures-1 and 2 cannot be sustained in law.

12. Accordingly, it is ordered.

13. In the result, the petition under Section 482 Cr.P.C. stands allowed. As a necessary corollary, the impugned orders under Annexures-1 and 2 are hereby quashed. Consequently, the learned S.D.J.M., Gunupur is hereby directed to consider release of the vehicle bearing registration No.OD-10F-8237 in the light of Rule 6 of the Rules and in view of the decision of ***Nabaratna @ Nabaratan Agrawal*** accepting security sufficient to pay the compensation and if it is unable to quantify the same, to accept such security at least to the extent of its present market value subject to other conditions imposed as it may deem fit and proper in the facts and circumstances of the case and to complete the entire exercise preferably within a fortnight from the date of receipt of a copy of the above order after providing due opportunity of hearing to both the sides.

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2022 (III) ILR - CUT- 915

R.K. PATTANAIK,J.

CRLMC NO. 2033 OF 2022

SK. EIMAT @ BIDHIA ....Petitioner

.V.

STATE OF ODISHA ....Opp. Party

CRLMC NO. 2428 OF 2022

SK. MAMMAT @ SK. MOHAMMAD HOSEN @ HUSEN ....Petitioner

.V.

STATE OF ODISHA ....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 167(2),173,173(8) – At the time of taking cognizance of offence no chemical examination reports was submitted along with charge sheets – Preliminary charge sheets have been filed before expired of 180 days keeping the investigation open as per section 173(8) of Cr.P.C. – Whether the petitioners are entitled to default bail in terms of section 167(2) of Cr.P.C. despite the preliminary charge sheets have been filed – Held, No. – The accused cannot plea for default bail, the court shall have to consider the bail of the accused as per section 309(2) of Cr.P.C.

Case Laws Relied on and Referred to :-

1. MANU/PH/3829/2014 : Ravinder Vs. State of Haryana.
2. MANU/MH/0356/2002 : Sunil Vasantrao Phulbande & Ors. Vs. State of Maharastra:
3. MANU/PH/0275/2019 : Tarlok & Ors. Vs. State of Haryana.
4. MANU/SC/1035/2018 : Achpal @ Ramswaroop & Ors. Vs. State of Rajasthan.
5. (2017) 15 SCC 67 : Rakesh Kumar Paul Vs. State of Assam.
6. (2001) 5SCC 453 : Uday Mohanlal Acharya Vs. State of Maharastra.

CRLMC NOS.2428 & 2033 OF 2022

For Petitioners : Mr. Chandan Samantaray
For Opp. Party : Mr. S.S. Mohapatra, ASC

JUDGMENT Date of Judgment:12.10.2022

R.K. PATTANAIK,J.

1. Since a common question of law is involved, both the cases have been clubbed and taken up together for disposal.

2. CRLMC No.2033 of 2022: The petitioner herein was arrested in connection with an incident dated 10th September, 2021 towards recovery and seizure of 264 grams of contraband substance suspected to be Brown sugar which corresponds to Special Case No.235 of 2021 pending in the file of learned Special Judge, Balasore and was remanded to judicial custody and later chargesheeted, whereupon, the court took cognizance of an offence under the NDPS Act. The petitioner thereafter moved an application for bail under Section 167(2) Cr.P.C. on the ground that the preliminary chargesheet though filed but is incomplete, since it is not accompanied with a Chemical Examination Report and hence, he entitled to default bail. However, the learned Special Judge, Balasore rejected the plea of the petitioner by impugned order dated 15th July, 2021.

3. CRLMC No.2428 of 2022: In the instant case, the petitioner was alleged to be involved in possession of 325 grams of Brown sugar which was recovered from him and for that, he was forwarded in connection with Special Case No.34 of 2022 pending before the court of learned Special Judge, Balasore. Like the other case, the petitioner applied for default bail under Section 167(2) Cr.P.C. but the same was rejected.

4. The petitioners pleaded for release on a common ground that though the chargesheets have been submitted but without Chemical Examination Reports, hence, are incomplete and therefore, both are entitled to default bail.

5. The learned counsel for the petitioners contends that when there were no complete chargesheets, on expiry of the stipulated period of detention, the petitioners should have been granted bail in terms of Section 167(2) Cr.P.C. however the learned Special Judge, Balasore declined it on the ground that cognizance has already been taken of the offence, a decision which is legally not tenable and therefore, deserve to be interfered with. While contending so, Mr. Samantaray, the learned counsel for the petitioners cited the following decisions, such as, **Ravinder Vrs. State of Haryana: MANU/PH/3829/2014; Sunil Vasantrao Phulbande & Ors Vrs. State of Maharastra**: MANU/MH/0356/2002; **Tarlok and Others Vrs. State of Haryana**: MANU/PH/0275/2019; and **Achpal @ Ramswaroop and Others Vrs. State of Rajasthan:** MANU/SC/1035/2018. The contention of Mr. Samantaray is made to suggest that the investigation cannot be said to be complete as the preliminary chargesheets were filed though within the stipulated period but not in confirmity with Section 173(5) Cr.P.C. and therefore, the petitioners are entitled to default bail which is inevitable being an indefeasible right statutorily mandated.

6. Mr. Mohapatra, learned ASC on the other hand submits that the learned Special Judge, Balasore rightly declined to release the petitioners for having already taken cognizance of the offence on the basis of the materials submitted along with the preliminary chargesheets and therefore, the impugned orders cannot be found fault with and hence, not to be disturbed.

7. It is not denied by the State that at the time of taking cognizance of the offence, there was any Chemical Examination Reports submitted with the preliminary chargesheets. Admittedly, the preliminary chargesheets were filed, whereafter, cognizance of the offence was taken against the petitioners, who thereafter moved the learned court below for release in terms of Section 167(2) Cr.P.C. but were denied. So the seminal question is, whether, in such a situation, the preliminary chargesheets are to be held as incomplete so as to enable the petitioners to claim default bail? Mr. Samantaray would contend that in view of the decisions (supra), the chargesheets could not be treated as complete despite being filed within the statutory period and therefore, the petitioners were bound to be released on bail on its expiry.

8. Let us browse the decisions which have been placed reliance on by Mr. Samantaray. To begin with, in **Ravinder** (supra), the chargesheet was filed without Chemical Examiner's Report and in that case, not only cognizance of the offence was taken but also charge against the accused was framed and under such circumstances, while calling for a report from the trial court and adjourning the case to a future date, released the accused on bail. In **Sunil Vasantrao Phulbande and Others** (supra), the Nagpur Bench of Bombay High Court, however, allowed release of the accused in terms of Section 167(2) Cr.P.C. by holding that the chargesheet was not complete without the Chemical Examination Report for not being a report in confirmity with Section 173(5) Cr.P.C. In **Tarlok and Others** (supra), the Punjab & Haryana High Court held that since the chargesheet is not accompanied with FSL report, the accused is entitled to be released on bail which was though with a reference to Section 167(2) Cr.P.C. The Apex Court in **Achpal @Ramswaroop and Others** (supra), in the peculiar facts and circumstances of the case, held and observed that since there was no chargesheet before the court when the default bail was applied in the sense that though it had been filed earlier but returned due to non-compliance of the High Court's direction which could not have been treated as extension of investigation, the accused is therefore entitled for a relief under Section 167(2) Cr.P.C. however towards the end approved the view expressed in **Rakesh Kumar Paul Vrs. State of Assam reported in (2017) 15 SCC 67** to the effect that even after such release, there is no bar or prohibition as such to arrest or re-arrest the accused on cogent grounds.

9. In **Ravinder** (supra), the accused was released on bail pending final decision as to how the trial court could frame charge when there was no Chemical Examiner's Report. But, it not an authority to say that a chargesheet is no chargesheet in the eye of law without such scientific report and hence, assuming that there is no report in terms of Section 173(5) Cr.P.C. being on record, default bail is to be allowed. However, such a view appears to have been expressed in **Sunil Vasantrao Phulbande and Others** (supra) and in that case, the accused was released on default bail. The decision in Tarlok and Others (supra) is again not an authority to hold the view that the accused shall be eligible for bail in terms of Section 167(2) Cr.P.C. since the report under Section 173 Cr.P.C. is no chargesheet in the eye of law. In **Achpal @Ramswaroop and Others** (supra), the Apex Court, as mentioned before, held absence of a chargesheet with the court when the accused applied for default bail, in the peculiar facts, should not have been disallowed.

10. In the instant case, in fact, preliminary chargesheets have been filed before expiry of 180 days keeping the investigation open as per Section 173(8) Cr.P.C. The question before the Court is whether the petitioners are entitled to default bail despite preliminary chargesheets have been filed? The decision of ***Achpal @ Ramswaroop and Others*** (supra) is inapplicable to the case at hand since there was no chargesheet so to say before court by the time default bail was asked for and hence, it was held that the accused would be eligible for release in terms of Section 167(2) Cr.P.C. As held earlier, decisions in **Ravinder and Tarlok and Others** (supra) do not lay down the law that despite a chargesheet is filed, it would not be treated to be a report under Section 173 Cr.P.C. and therefore, the accused shall be entitled to default bail. However, the Court with due respect is in disagreement with the view expressed in **Sunil Vasantrao Phulbande and Others** (supra) for the fact that once a chargesheet is filed, on completion of investigation, notwithstanding absence of a document like the Chemical Examination Report which may at times be very crucial and assumes importance especially in cases involving contraband substance, it shall have to be treated as a report received under Section 173 Cr.P.C. Once a chargesheet so submitted and received and not refused, the court shall have to consider the bail of the Sk. Eimat @ Bidhia and accused as per Section 309(2) Cr.P.C. and there the accused cannot plead for default bail. In fact, on default bail, it is well settled that if the chargesheet is not submitted within the stipulated period and the accused applies for it, as has been held in the Constitution Bench judgment of the Apex Court in **Uday Mohanlal Acharya Vrs. State of Maharastra reported in (2001) 5SCC 453**, such an invaluable and indefeasible right is not lost even after receipt of report under Section 173 Cr.P.C. unless he after having availed of the right under Section 167(2) Cr.P.C. could not be able to furnish the

bail bond, where, in such situation, the right which had accrued shall stand extinguished.

11. So far as the present case is concerned, the investigation stood completed with respect to the petitioners though the investigation is kept open since some other accused persons involved are yet to be apprehended and as such, preliminary chargesheets have been filed. The preliminary chargesheets are final for the purpose of investigation vis-à-vis the petitioners. Admittedly, no permission was sought for in terms of Section 36A(4) of NDPS Act seeking extension of the period for the investigation not able to be concluded within the stipulated period. So to say, no such application was moved for extending the period, rather, the preliminary chargesheets were filed on completion of investigation. Hence, for all intent and purpose, there was completion of investigation with the filling of preliminary chargesheets which were received as reports under Section 173 Cr.P.C. As a necessary, corollary, the petitioners did not have any scope for availing such a right of default bail in terms of Section 167(2) Cr.P.C. So the option which was left for the petitioners was to apply for regular bail with a pleading that the chargesheets since are not accompanied with the Chemical Examination Reports, no offence under the N.D.P.S. Act could possibly be made out. Interestingly, the preliminary chargesheets were received and the learned court below took cognizance of the offence without the Chemical Examination Reports. It cannot be gainsaid that a Chemical Examination Report is a document of strong relevance as it renders immense assistance to a court in forming a definite opinion when offence is with respect to any contraband substance. Having reached thus far, the Court reaches at a logical conclusion that the petitioners would not be eligible to demand bail in terms of Section 167(2) Cr.P.C. for having the preliminary chargesheets filed which are final as against them and the remedy which is left open is to plead for regular bail for having no conclusive proof of recovery of contraband substance, such as, Brown sugar in absence of Chemical Examination Reports to substantiate it.

12. If the court below did not have the Chemical Examination Reports, a claim which has remained unchallenged, it is not easily comprehended as to how for an offence under N.D.P.S. Act, cognizance was taken. Whether other materials submitted along with the preliminary chargesheets were sufficient for the court below to form an opinion that the contraband substance to be Brown sugar? Anyways, in the given situation, the petitioners could have claimed bail on such ground. It is not known, if in the meantime, the Chemical Examination Reports have been received by the court below. In aforesaid backdrop, the Court is of the opinion that the case of the petitioners for regular bail should be examined and it shall be by the learned court below considering the Chemical

Examination Reports, if it is available and in case, the same could not be found, to release both of them on bail subject to such conditions unless it is fully convinced that the contraband substance is nothing but Brown sugar. But while taking a decision in that regard, the significance of the Chemical Examination Report and its absence should not be lost sight of which in fact play a dominant role and a deciding factor in reaching at a conclusion as to the nature of the contraband substance. However, in the event the Chemical Examination Reports are received later to the release of the petitioners with a positive result that the seized substance is Brown sugar, the learned court below shall have the jurisdiction to ensure cancellation of bail but in accordance with law.

13. It is ordered accordingly.

14. In the result, the petitions filed under Section 482 Cr.P.C. at the behest of the petitioners stand dismissed. However, the learned Special Judge, Balasore is hereby directed to consider release of the petitioners on regular bail in the light of the directions issued herein above and pass appropriate orders soon after receipt of a copy of this order.

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2022 (III) ILR - CUT- 920

SASHIKANTA MISHRA, J.

W.P.(C) NO. 21781 OF 2022

PRINCIPAL-IN-CHARGE OF JATESWAR DEV COLLEGE OF EDUCATION AND VOCATIONAL,SAGADA & ANR. ....Petitioners

.V.

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

ODISHA EDUCATION ACT, 1969 – Section 6-B (1)(a), 6 B(5) – Withdrawal of recognition was recommended on the ground that the institution had not fulfilled the conditions stipulated under Section 6-B(1)(a) of the Odisha Education Act – Petitioner challenges the same in Writ application – Whether Writ is maintainable? – Held, No. – As the order is appealable as provided under Section 6-B (5) of the Act, Writ application is not maintainable. (Para -9)

For Petitioner : M/s. Sameer Kumar Das & N. Jena.
For Opp. Parties : Mr. B. Mohanty, Standing Counsel for S & ME Dept.

JUDGMENT Date of Judgment 21.10. 2022

SASHIKANTA MISHRA, J.

Petitioner Nos.1 &2 claim to be the Principal-incharge and Governing Body respectively of Jateswar Dev College of Education and Vocational, Sagada in the district of Puri. The writ petition has been filed claiming the following relief:

> "Under the above circumstances, it is therefore humbly prayed that this Hon'ble Court be graciously pleased to quash the decision of the HPC dtd.05.08.2021 communicated on 09.08.2021 under Annexure-17, the consequential administrative order dtd.31.08.2021 of the Director under Annexurre-18, the order of restricting admission of students in the institution by showing the status of the institution to be closed as reflected in the website of the Student Academic Management System (SAMS) under Annexure-15, the report dtd:19.07.2021 under Annexure-16 and the order dtd:01.11.2021 under Annexure-19;
>
> And/or pass any other writ/writs, order/orders/direction/directions in the fitness of the case."

2. The facts of the case are that Jateswar Dev College of Education and Vocational, Sagada was established by the local inhabitants in the year 1990 and application for grant permission was submitted by its founder Secretary, Agadhu Charan Senapati. Permission was however, granted in the name of "Jateswar Dev College of Education", omitting the words, "and Vocational". It is alleged that taking advantage of this omission, one Subash Chandra Pratihari claimed to have established the Jateswar Dev College of Education, Sagada. A series of litigations are said to have been fought between Agadhu Charan Senapati, the State Government and Subash Chandra Pratihari and ultimately after enquiry, the Director, Higher Education effected necessary correction in the name of the institution and restored permission in the name of "Jateswar Dev College of Education and Vocational, Sagada" vide order dated 30.07.1994. By order dated 12.01.1999, after enquiry, the Government held that the institution established by Agadhu Charan Senapati is the original College and he is the real Secretary thereof. Accordingly, temporary recognition was granted to the institution by the order of the State Government dated 20.12.2001 followed by permanent recognition vide order dated 09.07.2004 of the prescribed authority. Permanent affiliation was also granted by CHSE, Odisha vide letter dated 18.07.2012 from the session 2003-04. It is stated that some miscreants attempted to create disturbance in the functioning of the institution and tried to destabilize the management and close the institution. It is further stated that the Governing Body was approved on 09.08.2018. Several litigations were fought and ultimately, after hearing all the parties, the Director, vide order dated 13.03.2020 held that the institution established by Agadhu Charan Senapati is the real institution, which has been functioning with the approved Governing Body by

order dated 09.11.2018, which was upheld and other claims were rejected. While the matter stood thus, the Director, Higher Education issued a notice dated 19.07.2021 to the institution to submit reasons for non-fulfillment of conditions of recognition regarding land and building under the threat of withdrawal of recognition. The Principal, in his letter dated 11.08.2021 submitted all necessary details of the institution specifically stating that permanent recognition was granted because all the conditions as required by the State were fulfilled but because of cyclone 'Fani', a portion of the building had collapsed, which had been reconstructed. There was no further response from the Director in the matter. While the matter stood thus, the opposite party no.3, Student Academic Management System (SAMS) in its website restricted admission to the petitioners' institution for the session 2021-22 by showing it as 'closed'. SAMS code issued in favour of the institution was also omitted from the website. As such, the institution was debarred to conduct admission of the students. The petitioners challenged such action of the SAMS in W.P.(C) No. 25222 of 2021, in which a counter affidavit was filed by the opposite partyauthorities annexing a report dated 19.07.2021 by the Deputy Director and Joint Director in the Directorate of Higher Secondary Education, Odisha, wherein withdrawal of recognition was recommended on the ground that the institution had not fulfilled the conditions stipulated under Section 6-B(1)(a) of the Odisha Education Act, 1969. It was also stated that another institution in the same name is functioning 500 meters away from the petitioner institution. In view of such facts having come to light, the writ petition was permitted to be withdrawn with liberty file a better application, pursuant to which, the present writ petition has been filed.

Further, the matter relating to the petitioners' institution was placed before the High Power Committee in its meeting dated 05.08.2021, wherein a decision was taken to close down the institution. Basing on such decision, the Director, vide letter dated 31.08.2021, directed closure of the institution. Several other facts relating to inter-se dispute between the petitioners and other persons claiming to the in-charge of the management of the institution have been averred in the writ petition at length but this Court is of the view that the same not being germane to the main issue at hand, need not be gone into in detail. It would suffice to observe that there are rival claims by several quarters relating to position of President and Secretary of the Governing Body of the institution with each side claiming to be representing the real Governing Body.

3. Originally, an affidavit was filed by the Director, Higher Secondary Education challenging the maintainability of the petitioners to file the writ application on the ground that they are not legally authorized persons to represent the institution. It was further stated that the decision of the High Power

Committee and the consequential administrative order was passed more than a year back and the institution has been closed ever since. On such ground it is contended that the writ petition is not maintainable on the ground of delay and laches. It is also stated that the impugned order is appealable under Section-6-B(5) of the Act, 1969 and therefore, the writ petition is also not maintainable on the ground of availability of alternative statutory remedy. It is further stated that the institution was closed in August, 2021. However, taking into consideration the fact that 2nd year students were prosecuting studies in the institution, the Director, vide office order dated 20.12.2021 approved reconstitution of the Governing Body as per Rule-23 of the 1991 Rules for a particular period i.e. till completion of HSC Examination, 2022. Since the reconstitution of the Governing was challenged before this Court, the Director, vide order dated 06.05.2022 appointed the Tahasildar, Nimapada to act as Special Officer of the institution till completion of the Annual +2 Examination, 2022, which has since been completed. Therefore, presently, the institution is defunct. On such ground also, the writ petition is said to be not maintainable. It is further stated that the authority, by invoking Section 6-B of the Act, 1969 closed down the institution which amounts to de-recognition since 2021 and such order cannot be said to be withdrawal of permission. It is further stated that the status of the institution being shown as 'closed' in the website of SAMS is in terms of the decision taken by the High Power Committee. Presently, not a single student is prosecuting his studies in the institution.

4. A detailed counter affidavit was also filed by opposite party no.2 reiterating the facts stated in the earlier counter. In addition, it is stated that the writ petition deserves to be dismissed on the ground of suppression of material facts. It is further stated that two appeals have been filed before the State Government against the order dated 31.08.2021, which are pending adjudication. One of the appeals being Appeal No. 45 of 2021 has been filed by one Trilochan Sahoo claiming to be the Secretary of the Governing Body and another appeal has been filed by one Nabaghana Mallik, who is also claiming to be the Secretary of the Governing Body. Since the impugned order is already under challenge before the appellate authority, the writ petition is not maintainable.

Justifying the action taken against the institution it is stated that at the time of enquiry the petitioner no.1 could not produce the land records in original before the enquiry officers. The institution does not have the required building and infrastructure to run classes as per Section 6-A(1)(a) of the Act. It is stated that another institution in the same name and style within 500 meters radius is running in a dilapidated building situated on Government land having no students. Though the institution received permanent recognition, till date it has

failed to comply with the mandatory condition prescribed under Section 6-A for which the authority rightly decided to close it down. It is also stated that several persons claiming to be authorities of the College have come forward and that several litigations pending in the matter. It is reiterated that both the petitioners are neither the valid Principal-incharge nor the valid Secretary of the Governing Body.

5. Heard Mr. S.K. Das, learned counsel for the petitioner and Mr. B. Mohanty, learned Standing Counsel for School and Mass Education Department.

6. Mr. Das has argued at length in his attempt to convince the Court that the impugned order which purports to close down the institution is not tenable in the eye of law for the reason that there is no provision in law by which an institution, which has once been permitted to function, can be closed down though the authority has the power to withdraw the recognition already granted. While withdrawal of recognition is a temporary measure which can be reversed upon removal of the deficiencies, closure, on the other hand, is a permanent measure. On such ground, Mr. Das would forcefully contend that the remedy of appeal provided under Section 6-B(5) of the Act, 1969 is available only in respect of an order withdrawing or suspending the recognition of an educational institution but no remedy of appeal is provided against an order of closure. It is further contended that the High Power Committee and the Director having specifically used the word 'closure' in the impugned decision/order, the opposite parties cannot improve upon their stand in the counter to contend that it was not closure but withdrawal of recognition. It is alternatively argued by Mr. Das that even otherwise, as per the statutory mandate the High Power Committee was duty bound to grant an opportunity ofhearing to the representative of the institution before taking the impugned decision. It is also contended by Mr. Das that initially temporary recognition was granted to the institution subject to fulfillment of necessary conditions relating to infrastructure etc. Permanent recognition was granted only because the institution fulfilled all the said conditions. It is a fact that certain buildings got damaged in the cyclone 'Fani' which are being reconstructed. This, according to Mr. Das, cannot be treated as violation of the condition of recognition so as to prompt the authorities to take the impugned decision.

7. Per contra Mr. B. Mohanty, learned Standing Counsel for School and Mass Education Department has raised the issue of maintainability of the writ petition on several grounds. Firstly, it is contended that there being no provision for closure as such, in the present case, it has to be construed as an order of withdrawal of recognition which is evident from the reference in order dated

31.08.2021 to Section-6-B. Therefore, if the petitioner was aggrieved he should have preferred an appeal as provided under Section 6-B(5) of the Act. Secondly, challenging the decision of the High Power Committee and the consequential order dated 31.08.2021, two appeals have been filed before the State Government and therefore, entertaining the writ application would amount to conducting parallel proceedings by two different authorities, which is not permissible in law. Thirdly, the impugned order was passed way back on 31.08.2021. The present writ petition was filed almost after a year and that too without explaining the reasons for such delay. Fourthly, there being no Governing Body as such after conclusion of the +2 Annual Examination, 2022, the petitioners cannot be treated as authorized persons to represent the institution to question the correctness of the impugned order. Fifthly, in view of the fact that there are several claimants disputants as regards management of the institution coupled with the fact that no genuine interest was shown by any of them to act for the welfare of the students which is evident from the poor infrastructure and non-availability of the requisite facilities despite being established way back in the year 1990. The decision to close down the institution must therefore, be held to have been rightly taken and hence, the same does not warrant any interference whatsoever.

8. The question of maintainability of the writ petition having been raised, it is imperative to decide the same at the outset as it goes to the root of the matter.

It has been argued on behalf of the petitioners that there being no provision for closure of the institution, there is no remedy of appeal against such order. On the other hand, it is contended by learned State Counsel that notwithstanding the use of the word 'closure', the impugned order is nothing but an order of withdrawal of recognition as contemplated under Section 6-B of the Act for which the remedy of appeal is provided under subSection (5) thereof. A reading of the minutes of the High Power Committee meeting held on 05.08.2021 reveals that the impugned decision was taken under the agenda "Closure of Higher Secondary Schools". It is stated that committee has considered and allowed closure of the Higher Secondary Schools. The consequential administrative order passed by the Director on 31.08.2022 also shows that the Government after careful consideration has been pleased to allow the closure of Jateswar Dev Higher Secondary School of Education and Vocational, Sagada, District Puri. Now the question is, whether this amounts to closure or withdrawal of recognition. The genesis of this decision is to be treated to the show cause notice dated 19.07.2021, the copy of which has been enclosed as Annexure-12 to the writ application. In the said letter, the subject is "Show cause notice on non fulfillment of condition of recognition". After

referring to the alleged acts of non-fulfillment of the conditions of recognition, the Management was called upon to show cause "as to why the recognition already awarded to your institution shall not be withdrawn under Section 6-B of OE Act, 1969 on the aforesaid ground". Therefore, the notice was issued under the provisions of Section 6-B of the Act. Under the Scheme of the Act, Section 6 governs recognition of educational institutions and Section 6-A lays down the conditions for recognition. Section-6-B relates to withdrawal of recognition and provides that recognition accorded under the Act may be withdrawn on one or more the grounds enumerated therein. Clause-(a) of Sub Section(1) of Section 6-B is the ground that the educational institution no longer fulfills the conditions for recognition.

Therefore, this matter was placed for consideration by the High Power Committee. Instead of deciding to withdraw the recognition it was stated 'closure of the institution'. Significantly, the consequential order dated 31.08.2021 was passed in purported exercise of power conferred under Section 6-B(1) of the Act. In the said order also, instead of stating withdrawal of recognition, it was mentioned 'closure'. If the matter is considered as a whole, it would be apparent that notwithstanding the use of the word 'closure', what the High Power Committee intended to decide was to withdraw the recognition granted to the institution. In fact, the consequential order also purports to have been passed under Section 6-B(1) of the Act.

9. The word 'closure' appears to have been used loosely in view of the fact that no institution can be allowed to run without recognition and therefore, in the instant case what the authorities intended to convey is, withdrawal of recognition amounts to closure of the institution. Having regard to the grounds and the provision of law involving which the very process was initiated, i.e., alleged non fulfillment of the conditions of recognition as provided under Section 6-B(1)(a), this Court is of the view that the use of the word 'closure' in the impugned decision of the High Power Committee as also in the consequential order is nothing but an order withdrawing recognition. Such being the interpretation, it is evident that the impugned order is appealable as provided under Section 6-B(5) of the Act.

10. Even assuming that having misconstrued the impugned order as being closure and not withdrawal of recognition, the petitioner had wrongly approached this Court then also it is to be noted while the impugned order was passed on 31.08.2021, the instant writ petition was filed on 24.08.2022, which is after a gap of nearly a year. Not a word has been whispered in the writ petition to explain such delay.

11. It has been brought on record that two appeals have been filed challenging the very same order before the appellate authority (State Government) by two sets of persons claiming to be in-charge of the management of the Institution. While learned State Counsel submits that the appeals are pending, learned counsel appearing for the appellants, who have sought intervention in the present writ petition, submit that both the appeals have been dismissed. The orders of dismissal of the appeals have not been produced before this Court but fact remains that two appeals were filed. If such is the case, there is no reason why this Court shall entertain the writ application to consider the correctness of the impugned order when the appropriate statutory authority is in seisin over the matter or has already rendered a finding thereon.

12. Apart from the facts narrated hereinbefore, it has also been argued at length that the petitioners are the true representatives of the institution and therefore, they only are competent to challenge the impugned order. This Court would not like to enter into the factual controversy for the reason that if such is the case as claimed by the petitioners then they should approach the competent authority (Director, Higher Secondary Education) to resolve the inter se dispute, if any, and to obtain necessary declaration as to their status as claimed. Certainly, it is not for this Court to delve into the factual disputes for the purpose of making a declaration as regards the actual status of the petitioners vis-à-vis the management of the institution.

13. Since for the reasons indicated hereinbefore, this court holds that the writ petition is not maintainable, it is no longer necessary to go into the contentions advanced by the petitioners questioning the correctness of the impugned order. The writ petition therefore, deserves to be dismissed.

14. It would be proper at this stage to decide the two applications filed for intervention in the present writ application being I.A. No. 12983 of 2022 and I.A. No.13843 of 2022. I.A. No. 12983 of 2022 has been filed by one Bichitrananda Senapati claiming to be the Principal of the institution. I.A. No. 13843 of 2022 has been filed by the Governing Body of the institution represented through its president, Jalandhar Senapati and Trilochan Sahoo. Both the proposed intervenors have claimed that they are the validly approved Governing Body members of the institution. Several claims and counter claims have been made. The common ground however, in both the applications is that the present petitioners are not authorized to represent the institution. Considering the lis involved in the present writ application this Court fails to see as to how the proposed intervenors could be treated as necessary parties to the writ application. Furthermore, the proposed intervention in I.A. No.13843 of 2022

has referred to an order passed by a coordinate Bench of this Court in W.P.(C) No. 1226 of 2022, wherein the Director has been directed to take a decision within four months in accordance with law regarding reconstitution of the Governing Body. It is stated at the bar that the Director has not taken any decision as yet. The proposed intervenor in I.A. No. 12983 of 2022 has stated that he had filed an appeal challenging the impugned order being SME-HGS-3 of 2022, which is still pending.

Taking into consideration all the above facts, this Court finds no reason to entertain the intervention applications. I.A. No. 12983 of 2022 and I.A. No.13843 of 2022 are therefore, dismissed.

15. Before parting with the case, this Court deems it proper to observe that in the quagmire of controversies, disputes and unhealthy competition between the rival contenders to take control over an educational institution as evidenced by the spate of litigations among them a dire situation has come to pass in which the intended object behind setting up the institution, i.e. spread of education has become the unfortunate casualty. While the warring contenders vie for the perceived lucrative control over the management of the institution, the interest and welfare of the students has been given a complete go-bye. This is an unfortunate situation which can only have a negative bearing on the development of education in the State. Having regard to the conduct of the parties as can be gleaned from the facts of the case narrated above this Court refrains from observing anything more.

16. For the foregoing reasons therefore, this Court finds the writ petition not maintainable for which, the same is dismissed.

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2022 (III) ILR - CUT- 928

SASHIKANTA MISHRA, J.

W.P.(C) NO.15435/2019, W.P.C (OAC) NO.922/2019,
W.P.(C) NO.16065/2019, W.P.C.(OAC) NO.704/2019,
W.P.(C) NO.17550/2019 & W.P.(C) NO.14777/2019.

Dr. PRAJYOTI SWAIN & ORS. ....Petitioners

.V.

STATE OF ODISHA & ANR. ....Opposite Parties

IN W.P.C (OAC) NO.922/2019

Dr.PRAJYOTI SWAIN & ORS. ………Petitioners
.V.
STATE OF ODISHA & ORS. ……...Opp. Parties

IN W.P.(C) NO.16065/2019

Dr.PRADEEP KUMAR PAIKRAY & ORS. ………Petitioners
.V.
STATE OF ODISHA & ORS. ……….Opp Parties

IN W.P.C(OAC) NO.704/2019

Dr.PRADEEP KUMAR PAIKRAY ………Petitioner
.V.
STATE OF ODISHA & ORS. ………Opp. Parties

IN W.P.(C) NO.17550/2019

Dr.SANJAY KUMAR PANI & ORS. ……...Petitioners
.V.
OPSC & ANR. ………Opp. Parties

IN W.P.(C) NO.14777/2019

Dr.SANTOSH RANJAN JENA ………Petitioner
.V.
STATE OF ODISHA & ORS. ………Opp. Parties

ODISHA MEDICAL AND HEALTH SERVICES (Method of Recruitment and Conditions of Service) Rules, 2017 and Clause-3 of the Advertisement No. 18 of 2018 – The Petitioners have secured more than the cut-off marks, but were not selected as they had applied in SEBC category for which no vacancy was exist – Hence, their candidature was rejected and written scores were not taken into account – Whether mere mentioning of the category as SEBC deprive the petitioners from being considered on their own merit under the UR category? – Held, every person is first a general category candidate, notwithstanding the fact that the petitioners belong to the SEBC category, their candidature cannot be ignored if they are found eligible on their own merit.

(Para-16)

Case Laws Relied on and Referred to :-

1.(2019) 9 SCC 276 : Pradeep Singh Dehal Vs. State of Himachal Pradesh & Ors.
2.(2010) 3 SCC 119 : Jitendra Kumar Singh & Anr.Vs. State of Uttar Pradesh & Ors.

IN W.P.(C) NO.15435/2019

For Petitioners : Mr.Sameer Kumar Das

For Opp. Party No.1 : Mr.N.K.Praharaj, G.A.
For Opp. Party No. 2 : Mr. Sanjib Swain

<u>IN W.P.C (OAC) NO.922/2019</u>

For Petitioners : Mr.Sameer Kumar Das.

For Opp. Party No.1 : Mr.N.K.Praharaj, G.A.
For Opp. Party No. 2 : Mr. Sanjib Swain

<u>IN W.P.(C) NO.16065/2019</u>

For Petitioners : Mr.J.Pattnaik, Sr.Adv. & Ms. S. Pattnaik

For Opp. Party No.1 : Mr.N.K.Praharaj, G.A.
For Opp. Party No. 2 : Mr. Sanjib Swain

<u>IN W.P.C(OAC) NO.704/2019</u>

For Petitioner : Mr.Manmaya Ku.Dash

For Opp. Party No.1 : Mr.N.K.Praharaj, G.A.
For Opp. Party No. 2 : Mr. Sanjib Swain

<u>IN W.P.(C) NO.17550/2019</u>

For Petitioners : Mr. Pratik Dash.

For Opp Party No.1 : Mr. P.K.Mohanty, Sr. Adv
For Opp. Party No. 2 : Mr.N.K.Praharaj, G.A

<u>IN W.P.(C) NO.14777/2019</u>

For Petitioner : Mr.Gautam Misra, Sr. Adv.

For Opp. Party No.1 : Mr. Sanjib Swain
For Opp. Party No. 7 : Mr.N.K.Praharaj, G.A.

JUDGMENT Date of Judgment:14.10.2022

SASHIKANTA MISHRA,J.

All these Writ Petitions involve similar facts and common questions of law. As such, the Writ Petitions were heard together and are being disposed of by this common judgment.

2. Before proceeding to narrate the facts, it would be proper to indicate the reliefs claimed in each of these Writ Petitions, which are enumerated as follows:

<u>In W.P.(C) No.15435/2019</u>

"Under the above circumstances, it is therefore humbly prayed that the Hon'ble Court be graciously pleased to quash the order dated 1st July, 2019 under Annexure-7 and further the Hon'ble Court be pleased to issue a writ in the nature of mandamus or any other appropriate writ/writs, direction/ directions, order / orders."

In W.P.C (OAC) No.922/2019

"Under the above circumstances, it is therefore humbly prayed that the Hon'ble Court be graciously pleased to quash the final merit list published by the OPSC on 2.3.2019 under Anneuxre-4 and the consequential Govt. Notification dated 8.3.2019 under Annexure-5 and to direct the Opposite Parties 1 and 2 to select and appoint the Petitioners as Asst. Surgeon pursuant to the advertisement under Annexure-1 and grant them all consequential service and financial benefits within a stipulated period."

In W.P.(C) No.16065/2019

"It is therefore prayed that Your Lordship would be graciously pleased to admit this writ petition and issued Rule Nisi calling upon the Opposite Parties as to why the Selection list dated 2.3.2019 annexed under Annexure-5 issued by the Opposite Party No.1 shall not be quashed/set aside. There shall not be a direction to the Opposite Party No.1 to issue appointment order in favour of Petitioners for the post of Medical Officers (Asst. Surgeons) pursuant to Advertisement dated 5.1.2019 under Annexure-1. The action of Opp. Parties shall not be declared as illegal, arbitrary and in violation of Articles 14 and 16 of the Constitution of India".

In W.P.C (OAC) No.704/2019

"The Hon'ble Court be pleased to admit the Writ Petition and direct the Opposite Parties to include the name of the Petitioner in the select list at Annexure-5, relaxing the age limit as per Rule-7 of the 2017 Rule and consequently direct the Opposite Party No.1 to issue appointment order in favour of the Petitioner for the post of Medical Officer (Asst. Surgeon pursuant to Advertisement dated 5.1.2019."

In W.P. (C) No.17550/2019

"It is, therefore, prayed that this Hon'ble Court may be graciously pleased to issue a rule Nisi calling upon the Opp. Parties to show cause as to why the OPSC shall not directed to furnish a fresh list against the 107 vacant posts as per Annexures-7 and 8 and the State Government shall not be directed to make appointment of the Petitioners against the vacant post of Asst. Surgeons, Group-A(Junior Branch) in Odisha Medical Service Cadre."

In W.P. (C) No.14777/2019

"Under the facts and circumstances as narrated above, this Hon'ble Court may graciously be pleased to issue notice to the Opp. Parties and after hearing the parties be pleased to direct the concerned Opp. Parties to recommend and then give appointment to the Petitioner to the post of Asst. Surgeon in pursuance to the Advertisement No.18 of 2018-10 under Annexure-1 within a stipulated time period as he has secured 103 marks which is 14 marks more than the cut-off marks (89 marks) and further be pleased to pass any other order/orders as deemed fit and proper."

Thus, the common grievance of the Petitioners in all these Writ Petitions is non-inclusion of their names in the select list for being recommended for appointment as Medical Officers (Asst. Surgeons) pursuant to the advertisement dated 5th January, 2019.

3. For convenience, however, W.P.(C) No.15435/2019 is considered as the lead case as facts of this case are identical to the other Writ Petitions also.

4. An advertisement was published by the Odisha Public Service Commission (OPSC) being advertisement No.18/2018-19 for recruitment to 1950 posts of Medical Officers (Asst. Surgeons) in Group-A (Junior Branch) of Odisha Medical and Health Services Cadre. The Petitioners, who were appointed as Asst. Surgeons on ad hoc basis by the State Government and were working in different PHCs of the State for 4 to 5 years, submitted their applications. It is stated that the Petitioners had crossed the upper age limit for entry into the service i.e. 32 years, but in view of Clause-3 of the advertisement wherein age relaxation upto the maximum of five years was provided for doctors already in service of the Government contractually or on ad hoc basis, the Petitioners submitted their applications. Out of 1950 posts, 838 posts were unreserved and the rest was reserved for SC and ST categories. There was no post reserved for SEBC category. The Petitioners belong to the SEBC category and as such, claimed age relaxation of 3 years also. The Petitioners appeared in the written examination, the result of which was published on 28th February, 2019 wherein the names of the Petitioners did not find place. On 2nd March, 2019 the final list of 938 candidates, who were selected for appointment, was published and the name of the Petitioners also did not find place therein. Subsequently, the OPSC published the cut-off mark of different categories and also the marks secured by individual candidates in the written test. From the marks so published, the Petitioners came to know that despite securing more than the cut-off mark i.e. 89 in UR category, they had not been included in the select list. It is the case of the Petitioners that even though they belong to SEBC category they having secured more marks than the cut-off, are entitled to be selected on the basis of their merit under the unreserved category. The Petitioners therefore, approached the State Government against such illegality but without result. Therefore, they moved the State Administrative Tribunal, Cuttack in O.A. No.922(C)/2019 seeking the following reliefs:-

> *"Under the above circumstances, it is therefore humbly prayed that the Hon'ble Court be graciously pleased to quash the final merit list published by the OPSC on 2.3.2019 under Anneuxre-4 and the consequential Govt. Notification dated 8.3.2019 under Annexure-5 and to direct the Opposite Parties 1 and 2 to select and appoint the Petitioners as Asst. Surgeon pursuant to the advertisement under Annexure-1 and grant them all consequential service and financial benefits within a stipulated period."*

In the mean time the Tribunal was abolished and the said O.A. has been transferred to this Court and registered as W.P.C (OAC) No.922/2019. Since all the vacant posts were about to be filled up, the Petitioners approached this Court in the present writ applications seeking the relief as already indicated under paragraph-2 of this judgment.

5. Counter affidavit has been filed on behalf of the State Government (Opposite Party No.1). It is stated that out of 1950 posts of Asst. Surgeons, a list of 938 selected candidates was received from the OPSC. Out of such 938 candidates, 107 candidates belonging to different categories did not join. Since the State is running with acute shortage of doctors and the Government is taking additional measures to fill up the vacant posts of doctors in all peripheral Hospitals of the State, the OPSC was requested by letter dated 6th April, 2019 to provide a list of 107 selected candidates. In response, the OPSC in its letter dated 29th April, 2019 refused to provide the same. Subsequently, the Government again requested the OPSC vide letter dated 1st July, 2019 (Annexure-7 to the Writ Petition) to provide a list of 107 selected candidates. It is further stated that recruitment process of Asst. Surgeon has been continuing every year. In view of the recruitment held for the previous years, it was found that the total sanctioned posts of SEBC category being 414 against the total sanctioned strength of 3683 posts of Asst. Surgeons, 452 Medical Officers belonging to the SEBC category were in position. Thus, 38 doctors belonging to the SEBC category were in position more than the sanctioned strength. For such reason, the position of SEBC category was shown as zero and the vacancy of UR category was shown as 838 deducting the 38 SEBC posts from 876 posts of UR category. It is further stated that there was no upper age relaxation for SEBC category in Advertisement No.18 of 2018-19 issued by the OPSC. It is further stated that the impugned order under Annexure-7 is not in force in view of refusal by the OPSC to provide the list of 107 selected candidates and the said 107 vacancies have already been included in the requisition of 3278 vacancies decided by the Government for recruitment. Therefore, the prayer of the Petitioners for quashment of Annexure-7 has become infructuous.

6. Counter affidavit has also been filed by the OPSC. While reiterating the undisputed facts relating to the recruitment process such as number of vacancies belonging to each category etc. it is stated that the Petitioners had submitted their online applications within the stipulated period clearly indicating therein that their candidatures are to be considered under SEBC category and that they had also indicated with regard to their past service as Medical Officers under the State Government to their credit in order to get preference with regard to relaxation of age. Rule 7 of the Odisha Medical and Health Services (Method of Recruitment and Conditions of Service) Rules, 2017(for short, "2017 Rules") and Clause-3 of the advertisement have also been referred to. It is admitted that the Petitioners have secured more than the cut-off marks of 89, but were not selected as they had applied as SEBC category for which no vacancy exists. Hence, their candidature was rejected and written scores were not taken into account. It is also stated that in view of the procedure adopted by the UPSC,

OPSC issued a notice dated 19th January, 2018 to the effect that a reserved category candidate availing relaxation in age is to be considered only for the reserved posts and that reserved category candidate, who has not availed any relaxation and also qualifies as per general standard is to be considered for the open category post as a meritorious reserved category candidate. Therefore, the names of the Petitioners could not have been recommended to the State Government.

7. Heard Mr. S.K.Das, Mr. J. Pattnaik, Sr. Advocate, Ms. S. Pattnaik, Advocate, Mr. M.K.Dash, Mr. Pratik Dash and Mr. GautamMisra, Sr. Advocate, learned counsels appearing for the Petitioners in all the cases, Mr.N.K.Praharaj, learned Government Advocate for the State, and Mr.P.K.Mohanty, Sr. Advocate, Mr. S.B.Jena and Mr. Sanjib Swain, learned counsels appearing for the OPSC.

8. Leading the arguments on behalf of the Petitioners, Ms. S. Pattnaik, would argue that the Petitioners had never claimed to be considered under the SEBC category, but had only indicated the category to which they belong against the appropriate column in the application form. Further, the Petitioners claimed age relaxation as per Rule 7 of the 2017 Rules read with Clause-3 of the advertisement. Since the Petitioners have admittedly secured more than the cut-off marks they should have been considered under the unreserved category in view of the settled position of law that merit cannot be ignored under any circumstances. As regards the notice dated 19th January, 2018, it is submitted that the same was never a part of the advertisement or ever intimated to the candidates and hence, cannot be taken into consideration. Mr. S.K.Das, while adopting the above contentions argues that even otherwise, it is the settled position of law that age relaxation cannot be a bar for consideration of the candidature of an applicant on merits. Since all the candidates including the Petitioners had appeared in the same written test without lowering of any standard of such examination for the Petitioners, it cannot be said that they having availed age relaxation would not be eligible to be considered. Mr. M.Das also adopts the above contentions and argues that if a candidate secures a position in the select list on the basis of his own merit, he cannot be treated to have been selected as a reserved candidate.

9. Mr. N.K.Praharaj, learned Government Advocate, has contended that the Government had submitted requisition to fill up 1950 posts, out of which only 938 were selected. 107 candidates did not join, for which the Government requested the OPSC to provide a list of 107 selected candidates for consideration of their appointment, but the OPSC having refused nothing further could have been done by the Government. It is further stated that in W.P.(C) No.15435/2019,

out of 6 Petitioners, 4 have already been appointed as Medical Officers vide Notification No.6834 dated 4th June, 2020 and therefore, the Writ Petition has become infructuous in respect of them. It is further stated that the validity of the select list has already expired in view of the fresh round of recruitment conducted by OPSC.

10. Mr. Sanjib Swain, learned counsel appearing for the OPSC referring to the application forms submitted by the Petitioners, contends that they had consciously applied under SEBC category despite the fact that there was no vacancy under the said category and hence, they cannot be treated as UR candidates. Further, they being admittedly over aged, sought age relaxation as SEBC candidate, which was not available to them. Since all the candidates were called to attend the written examination and verification of particulars takes place only after publication of the result of the written test, the Petitioners being found to be ineligible, their candidature was rightly rejected. Shri P.K.Mohanty, learned Senior counsel, contends that even otherwise, the prayer in some of the Writ Petitions being to quash the requisition of Government asking for 107 names, the same has become infructuous in view of refusal of OPSC to act upon it. It is further contended that though interim order was passed by this Court directing to keep certain posts vacant yet the same was on the notion that the Petitioners had applied as UR candidates. In any case, after submitting recommendation to the Government, the OPSC becomes functus officio and the unfilled vacancies have merged in the fresh recruitment process.

11. The facts of the case as laid in the Writ Petitions are not disputed inasmuch as 1950 posts were required to be filled up out of which, 938 candidates were selected, out of whom, 107 candidates did not join. It is stated that the said 107 vacancies have since been included in the subsequent recruitment process. However, as per order dated 28th August, 2019 passed by this Court in W.P.(C) No.15435/2019, 6 posts have been kept vacant till date. Similar orders have been passed in the other Writ Petitions. Therefore, at the outset, it must be clarified that the assertion of the State Governmentthat 107 posts have been included in the fresh recruitment and therefore, the Writ Petition has become infructuous is untenable.

12. On merits, it would be worthwhile to refer to the relevant statutory provision governing the field at the outset. In this regard, reference to Rule 7 of the 2017 Rules would be apposite, which is quoted herein below:-

> *"7. Eligibility criteria for direct recruitment:- In order to be eligible for direct recruitment to the service, a candidate must;*

(a) be a citizen of India

(b) have attained the age of 21 years and must not be above the age of 32 years on the first date of January of the year in which applications are invited by the Commission.

Provided that the upper age limit in respect of reserve categories of candidates refer to in Rule-5 shall be relaxed in accordance with the provisions of the Act, Rules, Orders or Instructions, for the time being in force, for the respective categories.

Provided further that the upper age limit up to 5 years shall be given to the doctors serving of ad hoc or contractual basis under the State Government/State Government undertaking."

Thus, the Rule provides for relaxation of upper age limit up to 5 years to the doctors serving on ad hoc or contractual basis under the State Government. This is reflected under Clause-3 of the advertisement, which reads as follows:-

"3. Age- A candidate must have attained the age of 21 (twenty one) years and must not be above 32 years (Thirty two) years as on 1st day of January, 20198 i.e. he/she must have been born not earlier than 2nd January, 1987 and not later than 1st January, 1998.

The upper age limit prescribed above shall be relax able by 5 (five) years for candidates belonging to the categories of Scheduled Castes (SC), Scheduled Tribes(ST), Women, Ex-Servicemen and by cumulative 10 years for candidates belonging to Physically Handicapped category, whose permanent disability is 40% and more.

Provided that, a candidate who comes under more than one category mentioned above, he/she will be eligible for only one age relaxation benefit, which shall be considered most beneficial to him/her.

Provided further that person with past service as Medical Officers under the State Government to their credit, shall be given preference and in their case, the period of service so rendered by the last date of submission of applications shall be added to the age limit for entry into the service and it is up to a maximum period of five years."

13. There is no dispute that the Petitioners have been working on ad hoc basis as Asst. Surgeons in different PHCs. A reference to the Online application of Petitioner No.1 shows that he had completed 4 years 6 months and 5 days of service as a Medical Officer under the State Government. Similarly, Petitioner No.2 had completed three years one month and 29 days of service. Same is the case of other Petitioners also. This has not been refuted in any manner by the State or OPSC. As per the Rules quoted above and the relevant provisions thereof in the advertisement the Petitioners are undoubtedly entitled to relaxation of age on the basis of the period of service rendered by them as Medical Officers under the State Government as on the last date of submission of application. In the counter filed by Opposite Party No.2, it is stated under Paragraph-6 as follows:-

> *"6. That the petitioners pursuant to the aforesaid advertisement had submitted their Online Application (Annexure-2) within the stipulated period for the post of Medical Officer (Asst. Surgeons) clearly indicating therein that their candidatures are to be considered under SEBC category. They had also indicated with regard to their past service as Medical Officers under the State Government to their credit. In order to get the preference with regard to relaxation of age.*

14. There is nothing on record to show that the Petitioners had claimed age relaxation as SEBC category. It is however, a fact that they had mentioned SEBC under the column 'category' in the application form. The question is, can mere mentioning of the category as SEBC deprive the Petitioners from being considered on their own merit. Law, in this regard, is fairly well settled. In the case of ***Pradeep Singh Dehal v. State of Himachal Pradesh and others; reported in (2019) 9 SCC 276***, the Apex Court held that every person is first a general category candidate. If a reserved category candidate qualifies on merit, he will occupy general category seat. In the case of ***Jitendra Kumar Singh and another v. State of Uttar Pradesh and others; reported in (2010) 3 SCC 119***, the question of concession given to reserved category candidates and the same being a bar for their consideration for selection on merit was considered. The following observations of the Apex Court in the said case are relevant:-

> *"In view of the aforesaid facts, we are of the considered opinion that the submissions of the appellants that relaxation in fee or age would deprive the candidates belonging to the reserved category of an opportunity to compete against the general category candidates is without any foundation. It is to be noticed that the reserved category candidates have not been given any advantage in the selection process. All the candidates had to appear in the same written test and face the same interview. It is therefore quite apparent that the concession in fee and age relaxation only enabled certain candidates belonging to the reserved category to fall within the zone of consideration. The concession in age did not in any manner tilt the balance in favour of the reserved category candidates, in the preparation of final merit/select list."*

15. In view of the law as has been laid down by the Apex Court, it is clear that notwithstanding the fact that the Petitioners belong to the SEBC category their candidature cannot be ignored if they are found eligible on their own merit.

16. Another aspect needs to be considered. Since there were no vacancies under the SEBC category and the Petitioners were otherwise eligible in view of Rule 7 of the 2017 Rules read with Clause-3 of the advertisement, they can only be treated as belonging to the unreserved category. Merely because they had mentioned SEBC under the heading, 'category' cannot act as an irrevocable bar for consideration of their candidature under the UR category. It is reiterated that UR is not a category in itself and it is open to all the so-called reserved categories. Even an SC/ST candidate can beconsidered under the unreserved category on his own merit. Such being the position of law there is no way by

which the candidature of the Petitioners could have been ignored merely because they belong to the SEBC category.

17. It has been admitted under Paragraph-9 of the counter filed by the OPSC that the Petitioner no.1 secured 103 marks, Petitioner No.2, 94 marks, Petitioner No.3, 106 marks, Petitioner No.4, 119 marks, Petitioner No.5, 108 marks and Petitioner No.6, 100 marks, all of which are above the cut-off mark, 89. In the other Writ Petitions also, the Petitioners are found to have secured equal to or more than the cut-off mark of 89. It implies, the Petitioners were entitled to be selected on their own merit, but were not selected only because of absence of vacancies under the SEBC category. This Court, therefore, finds that the methodology adopted by the OPSC in finalizing the select list in so far as the same relates to non-inclusion of the Petitioners therein, is entirely wrong and untenable. As regards the notice dated 19th January, 2018 issued by the OPSC, this Court is of the view that the same cannot override the law of the land as laid down by the Apex Court referred to hereinbefore.

18. Now the question is, what relief can be granted to the Petitioners. As already stated, the prayer in W.P.(C) No.15435/2019 is for quashment of Annexure-7. Though it is contended that the same has become infructuous in view of refusal of the OPSC to recommend 107 names from the select list yet, it is to be noted that six posts have been directed to be kept vacant out of the 107 posts as per order passed by this Court. Undoubtedly, issuance of Annexure-7 was the cause of action for the Petitioners to file the present Writ Petitions, but in view of the facts brought on record by the answering Opposite Parties, it is clear that the relief claimed in the Writ Petitions needs to be moulded appropriately to secure the ends of justice. To reiterate, this Court having found that the Petitioners were wrongly left out from the final select list, the natural corollary would be to direct the OPSC to re-visit the final select list appropriately. It has already been stated that in the mean time, four Petitioners (Petitioner Nos.2,3,5& 6) out of six have been appointed as Medical Officers pursuant to a fresh recruitment process undertaken. Obviously, they would not be entitled to any relief whatsoever in the present Writ Petitions as despite the interim order operating in their favour, they chose to appear in the subsequent recruitment process without obtaining leave of this Court or without prejudice to their contentions in the present Writ Petition. Though it is argued that apart from being included in the select list, the Petitioners should also be given seniority, this Court is unable to accept the same for the reason that the persons who are already selected securing less marks than they have not been impleaded as parties in the present Writ Petitions. For the same reason also, the select list already published in respect of 938 candidates does not warrant any interference.

Therefore, the Petitioners can only claim to be considered for inclusion in the select list in respect of the posts kept vacant as per order of this Court and nothing more.

19. In view of the findings of this Court as indicated hereinbefore, the Writ Petitions are disposed of with direction to OPSC to recommend to the State Government within a period of two months the names of only those Petitioners as have secured more than the cut-off marks of the UR category for their appointment as Medical Officers if they are otherwise found not ineligible. Further, upon receipt of such recommendation by the OPSC, if any, the State Government shall take steps to appoint the concerned candidates within a period of four weeks if there is no other legal impediment. It is made clear that such Petitioners as are found to have already been appointed during pendency of these Writ Petitions shall not be covered by this order.

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2022 (III) ILR - CUT- 939

A.K. MOHAPATRA,J.

BLAPL NO. 6971 OF 2022

BISWAJEET BARIK ....Petitioner

.V.

STATE OF ODISHA ....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Application for Bail – Commission of offences punishable under Sections 406/468/467/471/120-B of IPC – Whether the accused has indefeasible right to be released on bail under Section 437(6) of Cr.P.C. in case trial is not completed within the period of sixty days as stated therein – Held, the right conferred on the accused under section 437(6) Cr.PC., is not an absolute one and the same is subject to the condition stated in the said provision – Bail application allowed with terms and condition.

(Para-12,13)

For Petitioner : Mr. D. Nayak, Sr. Adv. Mr. Pratik Nayak.
For Opp. Party : Mr. P.C. Das, A.S.C.

ORDER Date of Hearing: 07.09.2022 : Date of Order :14.10.2022

A.K. MOHAPATRA,J.

1. This matter is taken up through Hybrid Arrangement (Virtual /Physical Mode).

2. Heard Mr. D. Nayak, learned senior counsel appearing for the Petitioner and Mr. P.C. Das, learned counsel appearing for the State. Perused the F.I.R., case diary as well as other relevant documents placed before this Court for consideration.

3. This is an application for bail under Section 439 of the Cr.P.C. filed by the petitioner in connection with Bhadrak Town P.S. Case No.93 of 2021 corresponding to G.R. Case No.587 of 2021 pending in the court of learned J.M.F.C., Bhadrak for the alleged commission of offences punishable under Sections 406/468/467/471/120-B, I.P.C.

4. The prosecution case, in brief, is that one Biswojit Acharya lodged a written report before the Inspector-in-Charge, Bhadrak Town Police Station on 25.02.2021 addressing himself to be the authorized representative of Bharti Axa Lie Insurance Company Ltd. (hereinafter referred to as the company). In the complaint lodged by the complainant it has been alleged that the accused petitioner was an ex-employee, (Employee Code No.61135) and his designation in the company was Branch Support Executive and he was posted at Bhadrak Branch since 2018. It is also alleged that since the company which is dealing in Insurance Business is required to collect premium amount in cash from various customers, which is deposited at different branches. The company in question has an agreement with one Cash Pick-up Agency, namely, C.M.S. and as per the said agreement, the said C.M.S. was providing the service of collecting cash from different branches and depositing the same with a designated Bank nominated by the company in question.

While the matter stood thus, the Finance Operation Team at the Head Office of the company conducted an audit in respect of the cash receipts from the customers and the deposit of such amount in the designated Bank account. In course of such audit, the Finance Operation Team of the Head Office found certain irregularities in depositing the cash with the designated Bank. It is further alleged that since the accused petitioner had been given the duty of coordinating with the Cash Pick-up Agency, the Finance OperationTeam found the petitioner prima facie guilty of irregularities committed in the Bank transactions. Further in the complaint, it has been clearly stated that total amount of financial irregularities as has been uncertified by the audit team is Rs.33,30,918/-. Accordingly, the F.I.R. was lodged.

5. Although in the complaint it is alleged that the accused-petitioner was absconding, however, he was arrested by the police after lodging of the F.I.R. on 21.07.2021 and since then he is in custody. Mr. D.Nayak, learned senior counsel appearing on behalf of the petitioner submitted that the petitioner is languishing

in jail custody since 21.07.2021 i.e. for more than one year. It is further submitted by Mr. Nayak, learned senior counsel on behalf of the petitioner that the foundation of the entire allegation made in the complaint is the report of the Finance Operation Team of the Head Office of the company. He further submitted that there is no direct allegation of any amount transferred to the account of the petitioner or any direct evidence to the effect that any money has been paid to the accused-petitioner. He further submits that it is only on the basis of finding of the Finance Operation Team, the petitioner has been implicated in the present case. Broadly the sum and substance of the contentions raised by Mr. Nayak are as follows:-

I. The petitioner has been falsely implicated in this case.

II. There is no allegation of falsification of record, forgery of documents or cheating in the complainant.

III. Despite earlier direction, the trial has not been concluded within the time stipulated by this Court.

IV. Since all the offences are triable by the Magistrate, in view of mandate of Section 437(6) of the Code of Criminal Procedure (in short 'Cr.P.C.') i.e. if the trial of the case is not completed within the period of 60 days from the first day of recording of evidence, the accused-petitioner is entitled to be released on bail.

V. The court has not taken any effective steps to ensure that the trial is concluded within the stipulated period of time and that such delay is not attributable to the defence or to the present petitioner.

VI. The right conferred on the accused under Section 437(6), Cr.P.C. is akin to the provisions contained in Article 21 of the Constitution of India, therefore, the court below should have released the petitioner by applying the law contained in Section 437(6), Cr.P.C.

VII. The petitioner is in custody for more than one year and his custodial interrogation is no more required. Further the entire case is based on documentary evidence.

VIII. The petitioner is a law abiding citizen and he does not have any similar nature of criminal antecedents and further in the event the petitioner is released on bail, he shall abide any terms and conditions as would be imposed by this Court.

On the above grounds, learned senior counsel appearing for the petitioner urges that the petitioner be enlarged on bail on such terms and conditions as would be deemed just and proper by this Court.

6. Learned Additional Standing Counsel representation for the State, vehemently, opposes the release of the petitioner on bail. It is submitted by learned Additional Standing Counsel for the State that the offences alleged are in the nature of Economic Offence, therefore, no leniency should be shown to the accused while considering his bail application. He further contended that

occurrence of such offences are rampant now-a-days and therefore, this Court needs to deal with such cases with a iron hand, so that such crimes cure not repeated in future. Referring to the complaint, learned Additional Standing Counsel also submits that the complaint was lodged after Finance Operation Team of the company found irregularities in the transaction and that the petitioner was held responsible by such Finance Operation Team at Head Office of the company. He also submits that at this stage, this Court need not conduct a minitrial to find out as to whether the available materials are sufficient to implicate the petitioner in the alleged crime. In reply to the contention under Section 437(6), Cr.P.C., learned counsel for the State submits that the said provision confers a discretion upon the Court and that while exercising such discretion, the Court is also required to consider the gravity and seriousness of the allegation and the difficulties likely to be faced during investigation only the Investigating Agency. In gist, learned counsel for the State contends that the petitioner is not entitled to get such benefits under Section 437(6) and as such, the bail application of the petitioner is liable to be rejected.

7. Mr. D. Nayak, learned senior counsel appearing on behalf of the petitioner submits that earlier the petitioner had approached this Court by filing an application in BLAPL No.8753 of 2021, which was disposed of by this Court vide order dated 06.04.2022 by granting liberty to the petitioner to move a fresh bail application in the event the trial is not concluded within a period of six months from the date of production of certified copy of the order dated 06.04.2022. Further, it is stated that since the trial was not concluded within the time stipulated by this Court in its order dated 06.04.2022. The petitioner has moved the present bail application seeking release on regular bail.

8. With regard to applicability of Section 437(6), Cr.P.C., Mr. Nayak, learned senior counsel appearing on behalf of the petitioner relied upon a judgment of this Court rendered in BLAPL No.5486 of 2020 disposed of on 07.01.2021 (***Brahmananda @ Ankit Kumar Barikvrs. State of Odisha***). He further contends that in the above noted judgment, the petitioner was CEO of the company, namely, Vatsalya Empire and the allegations against him was that he has cheated innocent villagers to the tune of lakhs of rupees and as such, he was charged under Sections 468/471/420/34, I.P.C. In the above noted case, the petitioner took a stand that he is entitled to be release under Section 437(6), Cr.P.C. Further, it appears from the judgment dated 07.01.2021, this Court in paragraph-5 of the said judgment formulated a question of law to the effect as to “whether the accused has indefeasible right to be released on bail under Section 437(6), Cr.P.C., in case trial is not completed within the period of sixty days as stated therein?” This court while considering the provision of Section 437(6),

Cr.P.C. has categorically observed that the said provision is link with the right of the accused to have a speedy trial as has been guaranteed under Article 21 of the Constitution of India. However, this Court has categorically held that the provision as a whole is not mandatory rather the same is directory in nature.

9. For better appreciation of the point of law involved in the present case, the provision contained in Section 437(6), Cr.P.C. is quoted herein below:-

Section 437(6) in The Code Of Criminal Procedure, 1973

> "(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs."

10. On a careful consideration of Sub-section(6) of Section 437, Cr.P.C., this Court is of the considered view that the right conferred under Sub-section(6) of Section 437, Cr.P.C. is subject to the rider i.e. "unless for reasons to be recorded in writing, the Magistrate otherwise directs", therefore, the above quoted sentence which is also a part of Sub-section(6) of Section 437, Cr.P.C. takes away the absolute right of an accused to be released on bail, in the event the trial is not concluded within the stipulated period of sixty days, from the first date fixed for taking evidence in the case. Further the above quoted sentence also confers power on the Magistrate to pass any other order/issue any other direction for reasons to be recorded in writing. On a conspectus of the provision contained in Section 437(6), Cr.P.C., this Court is of the considered view that the right conferred on the accused under Section 437(6), Cr.P.C. is not an absolute one and the same is subject to the condition stated in the said provision.

11. Now reverting back to the fact of the present case and considering the submissions made by learned counsel for the respective parties as well as considering the materials available on record and further taking into consideration the nature and gravity of the allegations made in the complaint and the fact that the offences are all triable by Magistrate and maximum sentence that can be imposed is up to seven years, this Court is inclined to exercise the discretion in favour of the accused-petitioner considering further fact that the petitioner does not have any similar criminal antecedents.

12. Accordingly, it is directed that let the petitioner be leased on bail subject to the petitioner furnishing a bail bond of Rs.30,000/-(rupees thirty

thousand) with two solvent sureties each for the like amount to the satisfaction of the learned court in seisin over the matter subject to such other terms and conditions as would be deemed fit and proper be imposed by the learned court in seisin over the matter. The release of the petitioner shall also be subject to verification of petitioner's criminal antecedents, in the event it is found that the petitioner is involved in similar nature of criminal offences then this order shall not be given effect to.

13. The release of the petitioner shall also be subject to following additional terms and conditions:-

> I. The petitioner shall furnish property security free from all encumbrances worth of Rs.5,00,000/-
>
> II. while on bail, he shall not indulge in similar criminal offences;
>
> III. he shall not tamper with the prosecution evidence and shall not make any attempt to threaten or terrorize to the prosecution witnesses in any manner whatsoever;
>
> IV. he shall appear before the court on each and every date without fail;
>
> V. he shall not leave the jurisdiction of the trial court without specific permission of the trial court;
>
> VI. he shall surrender his travel documents like passport before the court below and in the event the petitioner does not have any passport, he shall file an affidavit indicating such fact before the trial court.

14. With the aforesaid observation/direction, the bail application stands allowed.

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2022 (III) ILR - CUT- 944

V. NARASINGH,J.

W.P.(C) NO.12059 OF 2006

PANU CHARAN RATH ……..Petitioner

.V.

THE COLLECTOR & DISTRICT MAGISTRATE-CUM-MANAGEMENT INCHARGE OF NAYAGARH DISTRICT CENTRAL COOPERATIVE BANK LTD. & ANR. ………Opp. Parties

(A) CENTRAL CO-OPERATIVE STAFF SERVICE RULE, 1984 – Disciplinary Proceeding – The Collector and District Magistrate-Cum-Management in charge of Nayagarh, being the disciplinary authority passed impugned order of punishment – The Petitioner preferred Appeal before the appellate authority Collector and District Magistrate who acted as an Appellate authority and rejected the appeal – Effect of – Held, such action is contrary to the time tested principle as enunciated in maxim nemo Judex in causa sua "No one should be a judge of his own cause" which is a facet of principle of Natural Justice. (Para -9)

(B) NON-SPEAKING ORDER – Effect of – Held, it is trite law that reasons are heart and soul of an order and a non-speaking order is a manifestation of gross non-application of mind. (Para-11,12)

Case Laws Relied on and Referred to :-

1. 2010 (9) SCC 496 : Kanti Associates Vs. Masood Ahmed Khan.
2. (1969) 2 SCC 262 : A.K. Kraipak Vs. Union of India.

For Petitioner : Mr. R. Roy
For Opp. Parties : Mr. P.S. Samantra

JUDGMENT Date of Hearing & Judgment : 29.08.2022

V. NARASINGH, J.

1. The petitioner joined as peon in the Nayagarh District Central Cooperative Bank (Group-VII) in the year 1994. During his incumbency as such he was placed under suspension vide office order No.275 dtd 30.07.2005 pending drawal of proceeding due to negligence in duty for disobedience of orders or showing improper behavior. As per order dated 30.07.2005 at Annexure-1, charges were communicated to the petitioner and in response thereto the petitioner submitted his explanation denying the same.

2. It is on record that the petitioner submitted a show cause within the stipulated period against the proposed penalty. On consideration of the same by order dated 16.01.2006 at Annexure-6, order of punishment was passed treating the period of suspension as such and dismissal from service with immediate effect, which was published in the newspaper. Such order was affirmed by the Appellant Authority vide Annexure-9 dated 12.05.2006.

3. Assailing the order passed by the Disciplinary Authority and Appellate Authority at Annexure-6 & 9 respectively, the present writ petition has filed inter alia on the ground of violation of principles of nature justice.

4. There is non appearance on behalf of the Opposite Parties-the Collector & District Magistrate-cum-Management Incharge of Nayagarh District Central Cooperative Bank Ltd.(O.P. No.1) and the Secretary (O.P. No.2).

5. Mr. Pattnaik learned additional Government Advocate for the State, has produced the file of the Departmental proceeding in terms of the earlier order of this Court.

6. It is submitted by the learned counsel for the petitioner that the petitioner received a show cause notice vide Annexure-4 dated 10.12.2005 calling upon him to show cause as to why the period of suspension shall not be treated as such and as to why he shall not be dismissed from service. Copy of the enquiry report was enclosed to such show cause vide Annexure-4/1 dtd. 10.12.2005.

7. It is urged by the learned counsel that the petitioner came to know about the imposition of such penalty only from the Newspaper publication and preferred an appeal before the Collector & District Magistrate-cum-Management Incharge of Nayagarh on 15.02.2006 in terms of the Rule 39 of the Central Cooperative Staff Service Rules 1984.

The memorandum of appeal so filed is at Annexure-7. It is on record that the appellate authority rejected the appeal and the petitioner after obtaining copy of such Appellate order under the Right to Information Act has annexed the same vide Annexure-9.

8. For convenience of ready reference the order of the Disciplinary Authority at Annexure-6 is quoted hereunder;

"NAYAGARH DIST. CENTRAL CO-OP. BANK LTD.

x x x x x x x x x x

Order

> In pursuance of resolution No.1(vi) dt.06.01.2006 of the Collector and District Magistrate Nayagarh-cum-Management-in charge, Nayagarh District Central Co-operative Bank Ltd, the following punishments are hereby awarded to Sri Panu Charan Rath, Peon of the Bank (under suspension) in the matter of disciplinary proceedings No.3274 dt.15.09.2005 drawn up against him.
>
> 1. The period of suspension from 30.07.2005 is treated as such.
> 2. He is dismissed from service with immediate effect.
>
> ***Sd/-"***

9. On a bare perusal of the same and on verification of the record of proceeding submitted by the learned Additional Government Advocate, it can be seen that the same was passed by the Collector & District Magistrate-cum-Management Incharge of Nayagarh District Central Cooperative Bank Ltd.

Curiously enough, it is borne out from the record that the selfsame Collector & District Magistrate-cum-Management Incharge of Nayagarh District Central Cooperative Bank Ltd has acted as an Appellate Authority.

As rightly submitted by the learned counsel for the petitioner that it is a case of glaring irregularity in the matter of exercise of power by the Appellate Authority in as much as the appellate authority is one as same as the Disciplinary Authority and such action is contrary to the time tested principle as enunciated in the maxim ***Nemo Judex In causa Sua (77 ER 1390): "No one should be a Judge of his own cause***" which is a facet of principles of natural justice.

10. The order passed by the Appellate Authority the Collector & District Magistrate-cum-Management Incharge of Nayagarh, is quoted hereunder;

x x x x x

"No action will be taken on his representation."

Sd/-

Illegilble12.05.2006
Collector & District Magistrate
Nayagarh
-Cum-
Management in-charge
Nayagarh DCC Bank Ltd."

11. On a bare perusal of the order passed by the Appellate Authority this Court has no hesitation to hold that the same suffers from the vice of a nonspeaking order and is a manifestation of gross non-application of mind.

12. It is trite law that reasons are heart and the soul of an order and the impugned order passed by the Appellate Authority is like "inscrutable face of sphinx". In this context this Court respectfully refers to the judgment of the Apex Court in the Case of ***Kanti Associates vs. Masood Ahmed Khan*** *reported in 2010 (9) SCC 496*. In fact in the said case several judgments reiterating the principle of furnishing reasons have been succinctly stated in as much as the vanishing distinction between administrative and quasi judicial orders relating to giving reasons was also noticed referring to the celebrated judgment of the Apex Court in the case of ***A.K. Kraipak V. Union of India*** *(1969) 2 SCC 262.*

13. Hence considering the order on the touchstone of the law cited above since there is patent infraction of the principles of natural justice and the impugned appellate order being a non-speaking one, this Court is left with no alternative but to quash the order passed by the Appellate Authority at Annexure-9 and remand the matter back to **the appellate stage** for objective consideration of the grievance of the petitioner.

14. Since the petitioner is out of service from 2006, in the interest of justice and equity, it is directed that within a period of three months from the date of receipt/production of copy of the order along with Writ Petition the Appellate Authority shall consider the appeal and pass appropriate orders giving due opportunity of hearing to the petitioner /his representative and communicate the same.

15. The Writ petition thus stands disposed of.

16. No Costs.

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2022 (III) ILR - CUT- 948

V. NARASINGH,J.

CRA NO. 53 OF 1991

DEBRAJ PUTEL ....Appellant

.V.

STATE OF ODISHA ....Respondent

INDIAN PENAL CODE, 1860 – Section 304 Part-II – The Appellant/Petitioner was convicted U/s 304-II – The age of appellant was 16 years at the time of occurrence and in the meanwhile 33 years have passed and his conduct does not indicate any innate Criminal Proclivity – Effect of – Held, law is no longer *res integra* that while sentencing an accused his conduct during and after the occurrence has to be taken into account since this Country does not follow the retributive jurisprudence – This Court directs the sentence of the Appellant for the offence under section 304-II of IPC to be reduced to the period of incarceration already undergone. (Paras-30,32)

Case Laws Relied on and Referred to :-

1. (2002) 22 OCR 244 : Purna Badnaik Vs. State of Orissa.
2. AIR 1979 SC 577 : Mohinder Pal Jolly Vs. State of Punjab.
3. (2009) 16 SCC 479 : Sarup Singh Vs. State of Haryana.

4. (2022) 87 OCR (SC) 487 : Gobindan Vs. State represented by the Deputy Superintendent of Police.

For Petitioner : Mr. Sk. Zafarulla, Adv. (Amicus Curiae)

For Respondent : Mr. P.K. Maharaj, ASC.

JUDGMENT Date of Hearing : 09.09.2022 : Date of Judgment : 12.10.2022

V. NARASINGH,J.

1. Heard Mr. Sk. Zafarulla, learned Amicus Curiae for the Appellant and Mr. P.K. Maharaj, learned Public Prosecutor appearing for the State.

2. The Appellant-Debraj Putel along with three other accused persons faced trial for the charge under Sections 302/34 IPC in S.C Case No.29/8 of 1990 arising out of Kantabanji P.S. Case No.121 of 1989 for committing the murder of one Sashidhar Putel.

3. On conclusion of trial, learned Addl. Sessions Judge, Titlagarh by judgment dated 28.11.1990 while acquitting three other accused persons, namely, Nepal @ Bhagaban Putel, Asabati @ Ashmati Putel and Sundermati Putel for the charge under Section 302/34 IPC, convicted the Appellant-Debraj Putel under Section 304-II IPC and sentenced him to undergo R.I for seven years.

4. Assailing the same, the present CRA has been filed.

5. Accused-Nepal @ Bhagaban Putel was convicted under Section 342 IPC and was directed to undergo R.I for six months. Accused-Asabati @ Ashmati Putel and Sudermati Putel were convicted under Section 323 IPC and sentenced to undergo R.I. for six months each.

6. In a separate appeal vide CRA No.341 of 1990 while the appeal stood abated in respect of the accused persons, namely, Asabati @ Ashmati Putel and Sundermati Putel, this Court confirmed the order of conviction of accused-Nepal @ Bhagaban Putel under Section 342 IPC.

7. To drive home the charge, the prosecution examined 17 witnesses and 23 documents were marked as exhibits. Weapons of offence were marked as M.O. I (one wooden handle of RAPHA) and M.O-II (one Thenga).

8. The prosecution case in brief is that on 24.11.1989 at about 2.00 P.M one herd of cow damaged Gobi crops raised in the Bari of one Bhaji Putel and he drove out the cow as a result of which there was a hot exchange of words between said Bhaji Putel and one Sashidhar Putel.

9. It is the assertion of the prosecution that during the quarrel, which ensued on driving out the herd of cow, the present Appellant along with others came to the spot and started assaulting the said Sashidhar Putel for which he sustained bleeding injuries on his head and under his left ear and fell down on the ground.

10. P.W.5-Ratnabati Putel, who is stated to be an eye witness and related to both accused as well as said Sashidhar Putel shouted for help and then P.W.4 and others came to the spot and tried to rescue Sashidhar Putel.

11. It is stated that injured Sashidhar Putel was shifted to hospital but unfortunately during the course of treatment, he passed away after three days of occurrence and thus Kantabanji P.S. Case No.121 of 1989, which was initially registered under Section 307/34 IPC was turned to one under Section 302/34 IPC.

12. As already noted, out of 17 witnesses examined P.Ws.5, 6, 8 and 10 have been cited as ocular witnesses. Mainly relying on the evidence adduced by them, coupled with the statement of P.W.16, the doctor, who initially treated the injured and P.W.15, the doctor, who conducted the post-mortem of the deceased at Burla Medical College and Hospital and submitted his report vide Ext.16 and P.W. 17 the I.O., learned trial court found the present Appellant to be guilty of having committed an offence under Section 304-II IPC while acquitting him under Section 302 IPC and as already noted, the present Appellant was directed to undergo R.I for 7 years under Section 304-II IPC.

13. At this stage, it is apt to be noted, as borne out from the record, that the present Appellant was taken into custody on 25.11.1989 and he continued in incarceration till he was granted bail by this Court in 1991.

14. Mr. Sk. Zafarulla, learned Amicus Curiae, submitted with vehemence that the approach of the learned trial court is ex facie erroneous in as much as admittedly the Appellant was charged under Section 302/34 IPC. Hence, in the event of acquittal of other accused persons under Section 302 IPC, the conviction of the Appellant under Section 304-II IPC independently cannot be sustained and in this context, he relied on the judgment of this Court in the case of ***Purna Badnaik vrs. State of Orissa****, reported in (2002) 22 OCR 244*.

15. Mr. P.K. Maharaj, learned Addl. Standing Counsel for the State, while supporting the impugned judgment passed by the learned trial court submitted that the Appellant was rightly convicted by the trial court and this Court should not interfere with the same in the absence of any mitigating circumstances.

16. On a bare perusal of the judgment cited above by the learned Amicus Curiae, it can be seen that initially the conviction of the Appellant along with other co-accused therein was under Section 302/34 IPC and this Court taking note of the acquittal of the co-accused arrived at the finding that the Appellant therein (Purna Badnaik) could not have been convicted under Section 302/34 IPC.

17. But, in the present case the Appellant has been found guilty under Section 304-II IPC as such the reliance on the said judgment is of no assistance to the Appellant.

18. Referring to the evidence on record of P.W.5, it is urged with vehemence by the learned Amicus Curiae that there is discrepancy in the evidence of P.W.5 as stated in the FIR and in her deposition in court. In as much as it is submitted that P.W.5 has not attributed any specific overt act to the Appellant in the FIR yet, while deposing in court has improved upon the said version attributing specific assault by the present Appellant. But the learned trial court failing to take note of such exaggeration, on a mechanical appreciation has found the Appellant guilty.

19. It is trite law that FIR is not an encyclopedia but it is an information given at the first instance. No doubt, the contradictions in the FIR and the subsequent version have to be borne in mind while evaluating the complicity of the accused. But, that cannot be the sole basis to discard the testimony of a witness who has otherwise withstood the scrutiny of cross-examination and whose version is found to be cogent.

20. The other witness on which the learned trial court has relied upon is P.W.6 who is the wife of the deceased Sashidhar Putel. She in her examination in chief has clearly stated thus:

> "… Debraj Putel gave a blow with handle of a RAPHA on the left side head of my husband Sashidhar Putel causing profuse bleeding on the left side and right side head of myhusband due to the blows…"

21. In her cross-examination she has stated thus:

> …Accused Debraj Putel gave 10 to 12 blows with the handle of a RAPHA on the head of my husband Sashidhar Putel…. It is not a fact that I did not state before the police that accused Debraj Putel gave Thenga blows on the left side head of my husband Sashidhar Putel. I found only two bleeding injuries on the head of my husband on its front side. Accused Debraj Putel did not give any other blow to my husband excepting giving blows on the left side of his head…"

22. The other two witnesses relied on by the learned trial court are P.Ws.8 and 10 who claimed to be eye witnesses.

23. But it is apposite to note that P.W.17 the I.O in paragraphs6 and 7 of his deposition has admitted that P.Ws.8 and 10 have exaggerated their evidence before the court regarding the specific role of the accused persons.

24. Hence, this Court has to examine as to whether on the basis of the evidence of P.Ws.5 and 6, the conviction of the accused-Appellant Debraj Putel can be sustained, coupled with the evidence of I.O (P.W.17) and the doctors P.Ws.15 and 16.

25. The evidence as adduced by P.W.6 the wife of the deceased-Sashidhar Putel has been extracted herein above. P.W.5 who has withstood the scrutiny of the cross-examination as has clearly stated about the role attributed to the Appellant that he dealt a blow with the handle of a RAPHA on the left side of the head of the deceased Sashidhar Putel.

26. Taking into account the genesis of the offence, the evidence of P.Ws. 5 and 6 the approach of the learned trial court in convicting the Appellant-Debraj Putel under Section 304-II IPC cannot be faulted in as much as each person is supposed to have the knowledge of his overt act. Hence, this Court is persuaded to sustain the conviction of the Appellant under Section 304-II IPC.

27. On the question of sentence, it is noted that at the time of occurrence, which took place more than three decades back, the present convict Appellant was of impressionable age of 16 years and there is nothing on record to show that he had any criminal proclivity and on being released, he has misused the trust reposed in him.

28. If the entire prosecution case is accepted at its face value and as rightly held, the Appellant is guilty of committing an offence under Section 304-II IPC.

29. The legislature in its wisdom while enacting Section 304-II IPC has prescribed punishment which may extend to 10 years or with fine or with both.

30. Law is no longer res integra that while sentencing an accused his conduct during and after the occurrence has to be taken into account since this Country does not follow the retributive jurisprudence.

31. As already noted, the age of the Appellant was 16 years at the time of occurrence and in the meanwhile 33 years have passed and his conduct does not indicate any innate criminal proclivity.

32. Hence, this Court relying on the judgments of the apex Court in the matter of sentencing in the case of ***Mohinder Pal Jolly vrs. State of Punjab****, reported in AIR 1979 SC 577,* ***Sarup Singh vrs. State of Haryana****, reported in (2009) 16 SCC 479 and* ***Gobindanvrs. State represented by the Deputy Superintendent of Police****, reported in (2022) 87 OCR (SC) 487*, directs the sentence of the Appellant-Debraj Putel for the offence under Section 304-II IPC to be reduced to the period of incarceration already undergone.

33. The bail bond stands cancelled and the surety be discharged.

34. The appeal, accordingly, stands disposed of.

35. Before parting with the matter, this Court places on record its appreciation for the assistance rendered by Mr. Sk. Zafarulla, learned Amicus Curiae and the fairness of Mr. P.K. Maharaj, learned Addl. Standing Counsel appearing for the State, who made submissions keeping in view the onerous responsibility, discharged by a Public Prosecutor.

36. The fees of Mr. Sk. Zafarulla, learned Amicus Curiae is assessed at Rs.10,000/- (rupees ten thousand) and the Orissa High Court Legal Services Authority is called upon to disburse the same forthwith as per the procedure prescribed.

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2022 (III) ILR - CUT- 953

BIRAJA PRASANNA SATAPATHY,J.

W.P.(C) (OAC) NO. 3055 OF 2016

PARTHA SARATHI DAS ………Petitioner

.V.

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

SERVICE LAW – Disciplinary proceeding – Inordinate delay in concluding the proceeding – Effect of – Held, liable to be quashed.

(Para-6 & 9)

Case Law Relied on and Referred to :-

1. AIR 1998 SC 1833: State of Andhra Pradesh Vs. N. Radhakishan.

For Petitioner : M/s. P.K.Sahoo & A.Sahoo.
For Opp. Parties : Mr. M.K.Balabantaray, Standing Counsel.

ORDER Date of Hearing:24.08.2022 : Date of Order:26.09.2022

BIRAJA PRASANNA SATAPATHY,J.

1. This matter is taken up through Hybrid Mode.

2. Heard Mr. P.K. Sahoo, learned counsel for the Petitioner and Mr. M.K. Balabantaray, learned Standing Counsel for the State-Opposite Parties.

3. The Petitioner has filed the Writ Petition with the following prayer:-

> *"a) Admit the Original Application, call for the records, quash the Disciplinary Proceeding No.E-III-1/2002 and Memorandum of Charges initiated by Respondent No.2 vide Office Order No.1930 dt.18.02.2002 which is still pending as against the applicant under Annexure-3,*
>
> *b) And/ or pass such other order(s) or direction(s) as this Hon'ble Tribunal may deem just and proper".*

4. It is submitted that even though the proceeding against the Petitioner was initiated vide Memorandum dated 18.02.2002 and the Enquiry Officer was appointed vide Office Order No.10381 dtd. 1.10.2003, but the said enquiry never proceeded with till he was issued with the notice on 04.05.2016 under Annexure-8 basing on the direction issued by the Commissioner of Endowments, Odisha on 23.04.2016 under Annexure-7.

5. It is also submitted that the Petitioner in the meantime attained the age of superannuation on 31.01.2017 and retired from his service.

6. It is submitted that in view of the admitted delay in concluding the proceeding and in view of the fact that no counter affidavit has been filed even though notice has been issued since 20.10.2016 on the ground of inordinate delay in concluding the proceeding the same is liable to be quashed, in view of the decision of the Hon'ble Apex Court reported in the case of ***State of Andhra Pradesh vrs. N. Radhakishan,*** reported in AIR 1998 SC 1833, Hon'ble Apex Court in Para-19 & 20 has held as follows:-

> *"19. It is not possible to lay down any pre-determined principles applicable to all cases and in all situations where there is delay in concluding the disciplinary proceedings. Whether on that ground the disciplinary proceedings are to be terminated each case has to be examined on the facts and circumstances in that case. The essence of the matter is that the court has to take into consideration all relevant factors and to balance and weight them to determine if it is in the interest of clean and honest administration that the disciplinary proceedings should be allowed to terminate after delay particularly when delay is abnormal and there is no explanation for the delay. The delinquent employee has a right that disciplinary*

> *proceedings against him are concluded expeditiously and he is not made to undergo mental agony and also monetary loss when these are unnecessarily prolonged without any fault on his part in delaying the proceedings. In considering whether delay has vitiated the disciplinary proceedings the Court has to consider the nature of charge, its complexity and on what account the delay has occurred. if the delay is unexplained prejudice to the delinquent employee is writ large on the face of it. It could also be seen as to how much disciplinary authority is serious in pursuing the charges against its employee. It is the basic principle of administrative justice that an officer entrusted with a particular job has to perform his duties honestly, efficiently and in accordance with the rules. If he deviates from this path he is to suffer a penalty prescribed. Normally, disciplinary proceedings should be allowed to take its course as per relevant rules but then delay defeats justice. Delay causes prejudice to the charged officer unless it can be shown that he is to or when there is proper explanation for the delay in conducting the disciplinary proceedings. Ultimately, the court is to balance these two diverse consideration".*
>
> *20. In the present case we find that without any reference to records merely on the report of the Director General, Anti-Corruption Bureau, charges were framed against the respondent and ten others, all in verbatim and without particularizing the role played by each of the officers charged. There were four charges against the respondent. With three of them he was not concerned. He offered explanation regarding the fourth charge but the disciplinary authority did not examine the same nor did it choose to appoint any inquiry officer even assuming that action was validly being initiated under 1991 Rules. There is no explanation whatsoever for delay in concluding the inquiry proceedings all these years. The case depended on records of the Department only and Director General, Anti Corruption bureau had pointed out that no witnesses had been examined before he gave his report. The Inquiry Officers, who had been appointed on after the other, had just to examine the records to see if the alleged deviations and constructions were illegal and unauthorised and then as to who was responsible for condoning or approving the same against the bye-laws. It is nobody's case that respondent at any stage tried to obstruct or delay the inquiry proceedings. The Tribunal rightly did not accept the explanations of the state as to why delay occurred. In fact there was hardly any explanation worth consideration. In the circumstances the Tribunal was justified in quashing the charge memo dated July 31, 1995 and directing the state to promote the respondent as per recommendation of the DPC ignoring memos dated October 27, 1995 and June 1, 1996. The Tribunal rightly did not quash these two later memos".*

7. Even though notice of the writ petition was issued on 20.10.2016 with passing of an interim order, but no counter affidavit has been filed. However, it is submitted by the learned State Counsel that because of the interim order passed on 4.5.2016, the proceeding could not be disposed of.

8. This Court after going through the materials available on record finds that even though the proceeding was initiated in the year 2002 and the Enquiry

Officer was appointed in the year 2003, but no further progress was made to the said proceeding till issuance of the notice on 04.05.2016 under Annexure-8. This Court further finds that Annexure-8 was issued only when Commissioner of Endowments, Odisha vide letter on 23.04.2016 under Annexure-7calling for explanation from the enquiry officer in not completing the enquiry for such a long period.

9. In view of the discussions made hereinabove and the decision of the Hon'ble Apex Court as cited (supra), this Court is inclined to quash the proceeding initiated against the Petitioner vide Memorandum dated 18.02.2002. While quashing the same and in view of the fact that the Petitioner has retired in the meantime and his retiral dues have been held up due to pendency of the proceedings, the Opposite Parties are directed to sanction all the retirement benefits as due and admissible in favour of the Petitioner within a period of three (3) months from the date of receipt of this order.

10. With the aforesaid observations and directions, the WPC(OAC) stands disposed of. There shall be no order as to costs.

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2022 (III) ILR - CUT- 956

SANJAY KUMAR MISHRA, J.

W.P.(C) NO.19122 OF 2018

MANAGING DIRECTOR, ODISHA FOREST DEVELOPMENT CORPORATION LTD., BHUBANESWAR ....Petitioner

.V.

HADUBANDHU NAYAK & ORS. ....Opp. Parties

PAYMENT OF GRATUITY ACT, 1972 – Section 7(3-A), 8 r/w Rule 19 of Payment of Gratuity Rule, 1972 – The employee filed an appeal challenging the Order of Controlling Authority wherein claim of interest for delay payment of gratuity had been rejected – The Appellate Authority relied upon the Apex Court judgment allow the appeal with a direction to Petitioner/Corporation to deposit balance interest amount – Whether the employee is entitled to balance interest amount? – Held, Yes. – In view of such clear and unambiguous provision enshrined under Section 7 & Section 8 of the Act, this Court is of the view that there is no infirmity or illegality in the order passed by the appellate authority. (Para-22)

Case Law Relied on and Referred to :-

1. AIR 2003 SC 1526 : M. Gangahanume Gowda Vs. Karnataka Agro Industries Corporation Ltd.

For Petitioner : Mr. S.K. Pattnaik, Sr. Adv.

For Opp. Parties : Mr. M.K. Nayak.

JUDGMENT Date of Hearing & Judgment: 11.10.2022

SANJAY KUMAR MISHRA, J.

In this Writ Petition, the Petitioner-Corporation assails the judgment dated 30.07.2018 passed by the Appellate Authority under P.G. Act-Cum-Deputy Labour Commissioner, Cuttack, in P.G. Appeal No.2 of 2016, whereby the Order dated 24.02.2016 passed by the Controlling Authority under P.G. Act Cum-Assistant Labour Commissioner, Cuttack, in P.G. Case No.8 of 2005 was set aside and direction was given to pay to the Opposite Party No.1 the differential interest exceeding the total amount of Gratuity.

2. The factual matrix leading to filing of the present Writ Petition, in brief, is that the Opposite Party No.1 was working as a Divisional Manager in the Petitioner-Corporation. While working as such, Vigilance G.R. Case No.18 of 1994 was initiated against the Opposite Party No.1 under Section 13(1) read with Section 13(2) of the Prevention of Corruption Act, 1988 in the court of Special Judge, Vigilance, Berhampur, and he was placed under Suspension w.e.f. 28.05.1994 by Order dated 25.05.1994. However, during pendency of the said vigilance case, the Opposite Party No.1 was reinstated in service on 05.01.1996 and was superannuated from service w.e.f 01.07.1999 and in view of the pendency of the vigilance case, the period of suspension of the Opposite Party No.1 could not be regularized.

After about six years of his retirement, while the vigilance case was still pending, the Opposite Party No.1 filed an application on 16.05.2005 before the Petitioner-Corporation for payment of his Gratuity. Due to non-payment of Gratuity, the Opposite Party No.1 filed P.G. Case No.8 of 2005 before the Controlling Authority under P.G. Act-Cum-Assistant Labour Commissioner, Cuttack, claiming an amount of Rs.2,92,145/- towards his Gratuity.

3. On being noticed, the Petitioner-Corporation appeared before the Controlling Authority and filed its objection in P.G. Case No.8 of 2005. Ultimately, the Controlling Authority, vide Order dated 30.07.2008, held that the Opposite Party No.1 is entitled to Rs.2,92,145/- towards Gratuity with interest @ 10% per annum from 01.07.1999 till the actual payment is made. The operative portion of the said Order reads as follows:

> " Whereas Sri Hadibandhu Nayak, Ex-Divisional Manager, of your Organisation has filed an application U/s.7 of the Payment of Gratuity Act before this Court and the same was heard in your presence. After hearing, I have come to the findings that the said employee is entitled to get the balance gratuity amount of Rs.2,92,145/- (Rupees Two Lakhs Ninety Two thousand and One hundred Forty Five) only in this Court within a period of 30 days from receipt of this order along with a simple interest @ 10% per annum w.e.f.1.7.99 till the final payment."
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> (emphasis supplied)

4. Pursuant to the Order dated 30.07.2008, the Petitioner-Corporation sanctioned an amount of Rs.2,75,810/- vide Order dated 03.11.2008 and the same was deposited with the Controlling Authority vide Cheque dated 12.11.2008.The Petitioner-Corporation also deposited Cheque dated 15.12.2008 for Rs.1,37,098/- before the Controlling Authority towards interest. After depositing the said amount, the Petitioner-Corporation preferred P.G. (A) Case No.10 of 2009 before the Appellate Authority-Cum-Deputy Labour Commissioner, Cuttack, challenging the Order dated 30.07.2008 in P.G. Case No.8 of 2005. During pendency of the P.G. (A) Case No.10 of 2009, the Opposite Party No.1 was acquitted from the charges in G.R. Case No.18 of 1994 by judgment dated 16.05.2011, where after his period of suspension from 28.05.1994 to 05.01.1996 was regularized by the concerned Authority vide Order dated 27.11.2012. Ultimately, P.G. (A) Case No.10 of 2009 preferred by the Petitioner-Corporation was dismissed, vide Order dated 30.09.2014, with the following observations:

> "That advocate on behalf of the appellant and respondent are present. This is an appeal against the impugned order dtd.30-07-2008 passed by the Controlling Authority-Assistant Labour Commissioner under the Payment of Gratuity Act, Cuttack in P.G. Case No.14 of 2009. The advocate on behalf of appellant Orissa Forest Development Corporation submitted that the respondent is not entitled to the benefit of Gratuity under the Provision of Payment of Gratuity Act as claimed. The respondent strongly opposed to the said submission of the appellant andsubmitted the relevant facts along with certain documents in relation to his entitlement. The advocate for the respondent further submits that as the ld ALCcum-Authority Payment of Gratuity Act has answered issues the affirmatively and passed a reason order to pay the gratuity amount and determined the amount to be tune of Rs.2,92,145/- with simple interest @ 10% per annum w.e.f 01-07-1999. After accepting the said impugned judgment the appellant management has paid the gratuity amount of Rs.2,92,145/-along with interest but some residual amount of Rs.1,54,339/- has not been paid to the respondent with a view that the vigilance case which was instituted U/s.13(2) r.w 13(1) of P.C. Act bearing vigilance P.S. Case No.18/1995 is pending and the period of Suspension w.e.f 28-05-1994 to 05-01-1996 was not decided due to pending of the vigilance case. It is further clarified by the advocate to the respondent that the vigilance case bearing G.R. Case No.18 of 1994 U/s. 13(1) and13(2) has been decided by the Spl. Judge Vigilance Berhampur vide its judgment dtd.16-05-2011 where from it is seen that the respondent is acquitted from all the charges as alleged. Besides that the General Manager of the OFDC also issued office order on 27-11-2012 about the regularization of the suspension period keeping in view the acquittal of the respondent and he is entitled to get all the service benefit.

> In view of the aforesaid submission and perused of the LCR as well as the documents submitted by the respondent in my considered opinion the respondent is entitled to the residual amount of gratuity of Rs.1,54,330/- with interest thereon till the date of actual payment.
>
> In view of the above I do not find any merit in appeal which is accordingly dismissed without cost."

5. In pursuance of the Order dated 30.09.2014 passed by the Appellate Authority, in addition to the Gratuity amount of Rs.2,75,810/-, apart from differential Gratuity amount of Rs.16,335/-, since Rs.1,37,098/- had already been deposited on 06.12.2008 with the Controlling Authority towards interest, further interest of Rs.5,227/- was paid vide voucher dated 30.05.2015, totaling to Rs.1,42,820/- and the rest amount of Rs.1,49,820/- was paid to the Opposite Party No.1 vide voucher dated 14.08.2015. Thus, in all, the Opposite Party No.1 was paid Rs.2,92,145/- towards Gratuity, so also the same amount towards interest in a phased manner on the ground of limitation prescribed in the Proviso under Section 8 of the Payment of Gratuity Act, 1972 (for short 'the Act') with regard to maximum quantum of interest. Being dissatisfied with the payment made by the Petitioner-Corporation, Opposite Party No.1 filed an application before the Controlling Authority in terms of Rule-19 of the Payment of Gratuity (Central) Rules, 1972 claiming therein further amount of Rs.2,48,531/-. Being noticed, the Petitioner-Corporation appeared and filed its objection solely on the ground that in view of Section 8 of the Act, no further amount would be payable to Opposite Party No.1 beyond Rs.2,92,145/-, which was the principal Gratuity amount, so also equal amount towards interest, already paid to the Opposite Party No.1.

6. After hearing the Opposite Party No.1 and the Petitioner Corporation, the Controlling Authority rejected the application of the Opposite Party No.1, vide Order dated 24.02.2016, the operative portion of which reads as follows:

> "As per Sec-8 of P.G. Act amount of interest payable in no case shall exceed the amount of gratuity payable under the said Act. It is clear that the applicant has already received Rs.2,92,145/- towards interest in addition to awarded amount of gratuity of equal amount of Rs.2,92,145/-. Though the applicant has claimed additional amount of Rs.2,48,531/- towards interest on account of delayed payment of gratuity amount, the same is not sustainable in view of restriction provided under Sec-8 of the said Act. On that ground the petition of the applicant is heard and rejected."

7. Being aggrieved by such rejection Order dated 24.02.2016, the Opposite Party No.1 filed P.G. Appeal No.2 of 2016 before the Appellate Authority under P.G. Act-Cum Deputy Labour Commissioner, Cuttack, praying therein to set

aside the said Order dated 24.02.2016 passed by the Controlling Authority and pass appropriate Order for payment of balance amount of Rs.1,77,722/- as on 10.08.2015.

8. Being noticed, the Petitioner-Corporation appeared in P.G. Appeal Case No.02 of 2016 and filed its Counter/objection. Apart from delineating therein about various payments made to Opposite Party No.1, the sole ground of objection to the said Appeal was that the additional amount of interest, as claimed by the Opposite Party No.1, is not sustainable in view of the restriction imposed under Section 8 of the Act, which provides that the amount of interest payable, in no case, shall exceed the amount of Gratuity payable under the Act.

9. Finally, the Appellate Authority, referring to the judgment of the apex Court in the case of ***M. Gangahanume Gowda vs. Karnataka Agro Industries Corporation Ltd***., *reported in AIR 2003 SC 1526*, vide Order dated 30.07.2018, allowed the Appeal, with the following observations:

ORDER

> "In light of the provisions of law and observationsstated above I find that the Appeal filed by the Appellant has merit and hence is allowed on contest. The Respondent No.1 i.e. Chairman-Cum-Managing Director, Odisha Forest Development Corporation Ltd., Plot No.A/84, Kharavella Nagar, Unit-Ill, Bhubaneswar, Dist. Khurdha is directed to deposit the balance interest amount of Rs.1,77,722/- (Rupees One Lakh Seventy Seven Thousand Seven Hundred Twenty-two) only within 30 days from the date of pronouncement of this judgment."

10. Aggrieved by the judgment dated 30.07.2018 passed in P.G. Appeal No.2 of 2016, the present Writ Petition has been filed by the Petitioner-Corporation on the plea that the impugned Order suffers from irregularity, illegality and is arbitrary, so also contrary to the statutory provision.

11. Being noticed, the contesting Opposite Party No.1 has filed a Counter Affidavit and the sum and substance of the said Counter Affidavit is that the Controlling Authority was unjustified to limit the interest amount to Rs.2,92,145/- in terms of Section 8 of the Act as the said Provision is applicable to execution proceeding, where the amount of Gratuity payable under the Act is not paid by the Employer, within the prescribed time, to the person entitled thereto and the Controlling Authority, on an application made to it, in the said regard by the aggrieved person, issues a certificate for the amount to the Collector, who has to recover the same, together with compound interest thereon from the date of expiry of the prescribed time, as arrear of land revenue and pay the same to the person entitled thereto and in the said event, the Collector cannot recover interest more than the amount of Gratuity payable under the Act.

12. Heard learned Counsel for the Parties. Since pleadings have been exchanged between the Parties, with the consent of the learned Counsel for the Parties, the Writ Petition is being heard and decided finally at the stage of admission.

13. Mr. S.K. Pattnaik, learned Senior Counsel for the Petitioner-Corporation, submits that in view of the Proviso under Section 8 of the Act with regard to award of interest, Opposite Party No.3 was not justified to pass the impugned Order dated 30.07.2018 directing to deposit the balance interest amount of Rs.1,77,722/- and the said Order dated 30.07.2018 deserves to be set aside.

Learned Senior Counsel for the Petitioner-Corporation further submits that though the Appellate Authority, relying on the judgment of the apex Court reported in AIR 2003 SC 1526, has passed the impugned Order, in the said judgment, no where it has been held that Section 8 of the Act would not be applicable with regard to calculation and awarding interest by the Controlling Authority as provided under Section 7(3-A) of the Act.

14. Per contra, the learned Counsel for the Opposite Party No.1 submits that though admittedly his application dated 09.07.2015 before the Controlling Authority was in terms of Rule 19 of the Payment of Gratuity (Central) Rules, 1972 in Form 'T' for recovery thereof under Section 8 of the Act, but vide said application, Opposite Party No.1 prayed for recovery of the unpaid differential Gratuity, so also interest thereon based on the Orders passed by the Controlling Authority in P.G. Case No.8 of 2005.

15. Learned Counsel for the Opposite Party No.1 further submits that Section 8 of the Act permits the Controlling Authority to issue a certificate of the amount payable to the applicant, which is recoverable with compound interest thereon at such rate as the Central Government may, by notification specify, from the date of expiry of the prescribed time, as arrear of land revenue and pay the same to the person entitled thereto. He further submits that, without application of mind, misinterpreting Section 8 of the Act, the Controlling Authority illegally rejected the application of the Opposite Party No.1 instead of issuing a certificate for that amount to the Collector, which is rightly set aside by the Appellate Authority directing the Petitioner-Corporation to deposit the balance interest amount of Rs.1,77,722/- though the amount should have been more than as ordered by the Appellate Authority, in view of the provision enshrined under Section 8 of the Act.

16. Learned Counsel for the Opposite Party No.1 submits that in pursuance of Order dated 25.09.2014 passed by the Appellate Authority in P.G. (A) Case

No.10 of 2009, the Petitioner-Corporation issued an Office Order dated 10.08.2015, as at Annexure-F, to the Counter Affidavit filed by the Opposite Party No.1, wherein it was clearly indicated that though the payable amount of interest on the Gratuity amount is Rs.4,69,867/- but the same was limited to Rs.2,92,145/- as per Section 8 of the Act and since the differential amount on interest in terms of the said calculation made by the Corporation comes to Rs.1,77,722/-, there is no infirmity in the said impugned Order dated 30.07.2018 passed in P.G. Appeal No.2 of 2016.

17. For better appreciation, it is apposite to take note of Sections 7 and 8 of the Act. Section 7 of the Act provides for determination of the amount of Gratuity where as Section 8 of the Act deals with the procedure for recovery of Gratuity amount determined under Section 7 of the Act, which read as follows: (Excerpt).

> *7. Determination of the amount of gratuity.—(1) A person who is eligible for payment of gratuity under this Act or any person authorised, in writing, to act on his behalf shall send a written application to the employer, within such time and in such form, as may be prescribed, for payment of such gratuity.*
>
> *(2) As soon as gratuity becomes payable, the employer shall, whether an application referred to in sub-section (1) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined.*
>
> *(3) The employer shall arrange to pay the amount of gratuity, within thirty days from the date it becomes payable to the person to whom the gratuity is payable.*
>
> *(3-A) If the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in sub-section (3), the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify:*
>
> *[Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on this ground.]*
>
> *(4) (a) If there is any dispute to the amount of gratuity payable to an employee under this Act or as to the admissibility of any claim of, or in relation to, an employee for payment of gratuity, or as to the person entitled to receive the gratuity, the employer shall deposit with the controlling authority such amount as he admits to be payable by him as gratuity.*
>
> *(b) Where there is a dispute with regard to any matter or matters specified in clause (a), the employer or employee or any other person raising the dispute may make an application to the controlling authority for deciding the dispute.]*
>
> *(c) The controlling authority shall, after due inquiry and after giving the parties to the dispute a reasonable opportunity of being heard, determine the matter or matters in dispute and if, as a result of such inquiry any amount is found to be payable to the employee, the*

controlling authority shall direct the employer to pay such amount or, as the case may be, such amount as reduced by the amount already deposited by the employer.]

(d) The controlling authority shall pay the amount deposited, including the excess amount, if any, deposited by the employer, to the person entitled thereto.

*8. **Recovery of gratuity**.- If the amount of gratuity payable under this Act is not paid by the employer, within the prescribed time, to the person entitled thereto, the controlling authority shall, on an application made to it in this behalf by the aggrieved person, issue a certificate for that amount to the Collector, who shall recover the same, together with compound interest thereon [at such rate as the Central Government may, by notification, specify], from the date of expiry of the prescribed time, as arrears of land revenue and pay the same to the person entitled thereto:*

[Provided that the controlling authority shall, before issuing a certificate under this section, give the employer a reasonable opportunity of showing cause against the issue of such certificate:

Provided further that the amount of interest payable under this section shall, in no case exceed the amount of gratuity payable under this Act.]"

(emphasis supplied)

18. A reading of Section 7 of the Act discloses that the same determines the manner in which the Gratuity payable to an employee is to be calculated. Sub-Section 3 of Section 7 of the Act mandates an employer to arrange to pay the amount of Gratuity within thirty days from the date it becomes payable to the person to whom the Gratuity is payable. Sub-Section 3-A of Section 7 of the Act postulates that if the amount of Gratuity payable under Sub-Section 3 of the Act is not paid, then the employer is obligated to pay simple interest at such rate, not exceeding the rate notified by the Central Government from time to time from the date, on which the Gratuity becomes payable to the date on which it is paid, simple interest at such rate. By Standing Order 874(E) dated 1st October, 1987, the rate of interest notified by the Central Government is 10% per annum. The Proviso to Sub-Section 3-A of Section 7 of the Act directs that interest shall not be payable if the delay in payment is due to the fault of employee and the employer has obtained permission in writing from the Controlling Authority for the delay payment on this ground.

19. Further, there is no such restriction under Sub-Section (3-A) of Section 7 of the Act with regard to awarding interest on the Gratuity payable beyond the principal amount. Rather, as per the said Provision, it has been clearly stipulated that "the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of longterm deposits, as that Government may, by notification specify."

20. Now coming to Section 8 of the Act, the same provides the manner in which the recovery of Gratuity can be effected. It postulates that the Controlling Authority shall, on an application made to it in this behalf by the aggrieved person, issue a certificate for that amount to the Collector, who shall recover the same together with compound interest thereon from the date of expiry of the prescribed time, as arrears of land revenue and pay the same to the person entitled thereto. The second Proviso to Section 8 of the Act carves out an exception as a result of which the amount of interest payable under the said Section, in no case can exceed the amount of Gratuity payable under the Act. Hence, Section 7 of the Act determines the manner in which the amount of Gratuity payable to the workmen is to be calculated and Sub-Section 3-A of Section 7 of the Act contemplates that if the payment is not made then simple interest at the rate of 10% per annum is payable by the employer. Hence, the first stage ends with the determination of the Gratuity under Section 7 of the Act. If the Gratuity determined under Section 7 of the Act is not paid by the employer then an aggrieved person has to take recourse to Section 8 of the Act, which can be stated to be the recovery provision. Hence, Section 8 of the Act is attracted only when the aggrieved person applies to the Controlling Authority that the Gratuity determined or payable has not been paid to the employee upon which the certificate is issued by the Controlling Authority for that amount to the Collector which is to recover the same with interest and which as per Second Proviso of Section 8 of the Act cannot exceed the principal amount.

21. From the provision enshrined under Section 8 of the Act, it is crystal clear that the said provision is applicable to execution proceeding after determination of the said amount by the Controlling Authority in terms of the provision enshrined under Section 7(4)(b) of the Act and in case of non-payment of the determined amount by the Controlling Authority, the consequence is to be followed in terms of Section 8 of the Act, wherein there is a bar as to grant of interest payable under the said Section and in view of the said bar, in no case the recovery to be made by the Collector by imposing compound interest thereon should exceed the amount of Gratuity payable under the Act.

22. In view of such clear and unambiguous provision enshrined under Section 7 vis-à-vis Section 8 of the Act, this Court is of the view that there is no infirmity or illegality in the Order passed by the Appellate Authority dated 30.07.2018 in P.G. Appeal No.2 of 2016.

23. Having regard to the said statutory scheme, this Court is unable to accept the contention of the learned Senior Counsel for the Petitioner that at highest the interest payable would be an amount equal to the principle amount as contemplated by Section 8 of the Act.

24. Accordingly, the Writ Petition stands dismissed. No Order as to cost.

25. In view of the dismissal of the Writ Petition, the Petitioner-Corporation is directed to make such payment in terms of the Order dated 30.07.2018 passed in P.G. Appeal No.2 of 2016, to the Opposite Party No.1 within a period of four weeks from the date of communication/production of the certified copy of this Order.

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2022 (III) ILR - CUT- 965

G. SATAPATHY, J.

CRLMC NO.1309 OF 2015

SABITA PARIDA @ SAMAL ……..Petitioner

.V.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Petitioner challenges the order passed by Learned SDJM taking cognizance of offences U/s. 500(II) of the IPC – The complainant/Opp-Party 2 could not make out a case against the petitioner for commission of offence U/s. 500 of IPC – Effect of – Held, in the above premises, exposing the petitioner to the rigmarole and ordeal of a criminal trial would be an onslaught to her right to seek Justice – Hence on the circumstance, the impugned order is unsustainable and proceeding there on would be an abuse of process of the Court – The CRLMC is allowed. (Para -11)

Case Laws Relied on and Referred to :-

1. 1992 Supp (1) SCC 335 : State of Haryana Vs. Bhajan Lal.
2. (1896) ILR 23 Cal 867 (Manu/WB/0132/1896) : Auguda Ram Shaha & Ors. Vs. Nemaichand Shaha.
3. (1888) ILR 11 Mad 477 : Manjaya Vs. Sesha Shetti.
4. 1899 ILR 27 Cal 262 : Woolfun Bibi Vs. Jesarat Sheikh & Ors.
5. 11 B.L.R. 321 : Baboo Gunnesh Dutt Singh Vs. Mungneeram Chowdhry & Ors.

For Petitioner : Mr. R.N. Rout
For Opp. Parties : Mr. S.R. Roul, ASC.
Mr. A.K. Panda

JUDGMENT Date of Hearing: 13.10.2022: Date of Judgment: 14.11.2022

G. SATAPATHY, J.

Assailing the order passed on 12.12.2014 by learned S.D.J.M., Balasore in I.C.C. case No. 1252 of 2014 taking cognizance of offence U/S.500(II) of the I.P.C. and issuing of process against her, the petitioner has invoked the jurisdiction of this Court U/S. 482 of Cr.P.C. to quash the aforesaid order.

2. Facts giving rise to the present application may be adumbrated as, the petitioner is the accused and the opposite party no.2 is the complainant in 1.C.C. Case No.1252 of 2014 of the Court of learned S.D.J.M., Balasore. According to the complainant, on 05.09.2012 the accused made false, baseless and motivated allegations against the complainant and O.I.C & A.S.I. of Chandipur Police Station before the Orissa Human Rights Commission, Bhubaneswar (hereinafter referred to as 'O.H.R.C.') by stating in her complaint that on 29.08.2012 at 9 P.M. the complainant along with these two police officers came to her rented house situated at village Bhoisahi P.S. Town Dist-Balasore in inebriated condition and asked for her husband but when they did not find her husband, they molested and attempted to commit rape upon her and at that time, her sister-in-law together with her husband(husband of sister-in-law) arrived at the spot and they saw the aforesaid persons including the complainant fleeing away from the spot. On receipt of her aforesaid complaint, the O.H.R.C. got the matter enquired into by Superintendent of Police, Balasore and the D.S.P., D.I.B., Balasore submitted his enquiry report after due enquiry stating the allegation to be untrue. However, the Acting Chairperson of O.H.R.C. entrusted the D.S.P. attached to the Commission namely, Smt. Tapaswini Arukh to investigate into the allegation and she submitted her report to the Acting Chairperson of O.H.R.C., Bhubaneswar on 24.03.2014. On receipt of the investigation report, the Acting Chairperson, O.H.R.C., Bhubaneswar ordered for closure of the proceeding on the ground that the allegation are false, imaginary and concocted. According to the complainant, he was examined in his own village Badakia on 09.01.2014 by the D.S.P., O.H.R.C., Bhubaneswar in front of 500 families of his village who mocked at him by obscene remarks by which he considers himself to have been defamed on false, frivolous and concocted allegations made by the accused (petitioner) and as such the accused is liable to the punished U/S.500 of the I.P.C.

On receipt of the complaint with the above allegations, the learned S.D.J.M., Balasore recorded the initial statement of the complainant (O.P. No.2) and conducted enquiry U/S.202 of the Cr.P.C. by examining the witness and on finding sufficient materials, the learned S.D.J.M. Balasore by the order impugned in this case took cognizance of offence U/S.500 of the I.P.C. Hence, the present CRLMC U/S.482 of Cr.P.C.

3. In course of hearing of the CRLMC, Mr. R.N. Rout, learned counsel for the petitioner submits that the impugned order has been passed mechanically without appreciating the fact and there is hardly any prima facie case to connect the petitioner with the offence of alleged defamation. It is further submitted by him that the allegations referred to in the complaint are squarely covered under the 5th , 8th and 9th exception to Section 499 of I.P.C. and thereby, the impugned order giving rise to the present criminal proceeding is liable to be quashed being unsustainable in the eye of law. Learned counsel for the petitioner by placing the statement of complainant-opposite party no.2 recorded U/S.200 of Cr.P.C. by learned S.D.J.M., Balasore submits that the petitioner is the aunt-in-law of the opposite party no.2 and no where such statement of the complainant refers that his reputation has been lowered in the estimation of general public and the statement of his father recorded U/S.202 of Cr.P.C. would hardly go to reflect commission of any offence of defamation by the petitioner. It is also submitted by him that neither the petitioner had spoken to nor had made any visible representation of any imputation concerning the complainant and whatever is available on record is relating to the allegation made by the accused in good faith about the incident done to her by the complainant with the assistance of two police officers. Learned counsel for the petitioner under aforesaid grounds submits that the continuance of criminal proceeding against the petitioner for defamation is an abuse of process of law as the entire averments on complaint together with the initial statement of the complainant and statement of witness in enquiry would hardly reflect any of the ingredients of Section 499 of I.P.C. so far as to attract the offence of defamation against the petitioner. It is accordingly prayed on behalf of the petitioner to quash the proceeding in exercise of power U/S.482 of Cr.P.C.

3.1. Mr. A.K. Panda, learned counsel appearing for the opposite party no.2 by taking through the paragraph-9 of the complaint submits that due to the false allegation lodged by accused against the complainant, the D.S.P., O.H.R.C. conducted investigation and examined the complainant before his villagers on the false allegation of molesting and attempting to commit rape upon a woman who is none other than his aunt-in-law and thereby, the reputation of the complainant was lowered on the estimation of the villagers and the petitioner-accused being instrumental in foisting the false allegation lowering the reputation of the complainant has committed the offence of defamation and she is, therefore, liable to be punished there under. It is further submitted that the learned S.DJ.M., Balasore has not committed any illegality by passing the impugned order which was done in the interest of justice and the present CRLMC being unmerited may kindly be dismissed.

4. In order to appreciate the rival submissions, this Court straight away reverts back to Section 499 of I.P.C. which defines defamation as under:-

> *"Defamation.- Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.*
>
> *Explanation 1.- It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.*
>
> *Explanation 2.- It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.*
>
> *Explanation 3.- An imputation in the form of an alternative or expressed ironically, may amount to defamation.*
>
> *Explanation 4.- No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful."*

5. What are the most significant factors which are referable to the offence of defamation is the "intention" or "knowledge" with certain exceptions. In this case, the petitioner takes the umbrage of exceptions 5th, 8th and 9th appended to Section 499 of the I.P.C. which defines defamation as an offence except for the exceptions. In the present case, there is no dispute about the petitioner making certain allegations against the opposite party but the complainant-opposite party had not been able to ascribe any unlawful motive or intention of the petitioner behind raising such allegation nor is it the case of the complainant opposite party that the petitioner by use of any words either spoken or intended to read or by sign or visible representation made or published any imputation concerning the complainant intending to harm his reputation. The complainant-opposite party No.2 in this case has lodged the complaint on the ground that the accusation preferred by the petitioner-accused before O.H.R.C. was untrue, false, baseless and motivated. Further, it is undoubtedly true that the opposite party No.2 as complainant has stated in his initial statement that the petitioner had brought allegations against him and two police officials molesting her and attempting to commit rape upon her which allegations were duly investigated into by one D.S.P. attached to O.H.R.C. office but the initial statement of the complainant never discloses about the allegations raised by the petitioner in the case was a written one or a oral one nor the enquiry report of D.S.P. was produced in the complaint although the complainant stated in his complaint to

have applied for certified copy of relevant documents from the O.H.R.C. Bhubaneswar and after perusing those documents, he was satisfied that the conclusion arrived at by O.H.R.C. was genuine and correct. Neither any document of the O.H.R.C. was produced before the learned S.D.J.M., Balasore in the complaint nor was the initial statement of the complainant reveals in whose presence the D.S.P., O.H.R.C. had interrogated him in the matter and what she asked to the complainant. Similarly, the statement of the witness No.1 of the complainant recorded U/S. 202 of Cr.P.C. does not disclose about the names of persons before whom the D.S.P. interrogated the complainant in the course of investigation into the allegation raised by the petitioner. Moreover, the witness No.1 is none other than the father of the complainant and he has never stated in the enquiry U/S. 202 of the Cr.P.C. about the exact allegations raised by the petitioner-accused against the complainant.

6. In reverting back to the contention advanced for the petitioner, it appears that although the petitioner has taken the refuge of 5th , 8th and 9th exception to Section 499 of IPC, but 5th and 9th exceptions are not applicable to the case at hand, whereas 8th exception appears to be squarely applicable to the case of the petitioner since it states that accusation preferred in good faith to authorized persons who have lawful authority in respect of subject matter of accusation. In this case, if the averments taken in the complaint discloses about petitioner preferring certain accusation against the complainant-O.P. No.2 and two others which was investigated into but closed on account of the same being found untrue. Neither the impugned order nor the record in complaint discloses about production of any document with regard to closure of the proceeding before the O.H.R.C. on account of the same to be untrue. In absence of any document with regard to closure of the proceeding before the O.H.R.C., it would not be proper to say that the proceeding before O.H.R.C. was closed on account of allegation to be found untrue.

7. Be that as it may, taking cognizance of offence in a criminal complaint is not an empty formality, but a sacrosanct duty cast by law upon a Magistrate who must ensure that criminal prosecution should not be used as a instrument of harassment or a tool for seeking private vendetta or to pressurize the accused with an ulterior motive. It is reminded that Section 190 of Cr.P.C. provides for taking cognizance of offence by Magistrate who upon receiving a complaint of facts constituting any offence may take cognizance of offence. The aforesaid provision of law makes it ample clear, unless the complaint discloses/constitutes the ingredients of offence, Magistrate authorized by law should not take cognizance of offence. What are the circumstances in which this Court can exercise its inherent jurisdiction U/S.482 or Cr.P.C. has been laid down by the

apex Court by way of illustration in the most significant decision of our Apex Court in ***State of Haryana v. Bhajan Lal****; 1992 Supp (1) SCC 335* wherein at paragraph 102(3) the Apex Court has laid down one of the grounds for exercising power U/S.482 of Cr.P.C. as under:-

> ***"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."***

When the case at hand is scrutinized on the above legal principle laid down by the Apex Court, one thing emerges that the complainant-opposite party no.2 herein could not make out a case against the petitioner for commission of offence U/S.500 of IPC and a close scrutiny of materials in entirety do not disclose all the basic ingredients of offence U/S.500 of IPC against the petitioner.

8. In ***Auguda Ram Shaha and others Vrs. Nemaichand Shaha;*** *(1896) ILR 23 Cal 867* (Manu/WB/0132/1896) decided on 29.06.1896, it is observed by a two Judge Bench of High Court of Calcutta then as under:-

> *"We do not think it possible that a statement may be subject of criminal prosecution for defamation, and at the same time, may be absolutely privileged, as far as the Civil Courts are concerned."*

8.1 In ***Manjaya Vrs. Sesha Shetti***; *(1888) ILR 11 Mad 477*, it was held:-

> *"the conviction was bad. The statements of witnesses are privileged; if false, the remedy is by indictment for perjury and not for defamation."*

8.2. ***In Baboo Gunnesh Dutt Singh Vrs. Mungneeram Chowdhry and others;*** *11 B.L.R. 321*, it was held:-

> *"witnesses cannot be sued for damages in respect of evidence given by them in a judicial proceeding. If their evidence be false, they should be proceeded against by an indictment for perjury."*

8.3. In ***Woolfun Bibi Vrs. Jesarat Sheikh and others***; *1899 ILR 27 Cal 262* it was held as under:-

> *"It is clear that the statements alleged to be defamatory were made by the accused in the course of their evidence in a Court of justice, for these statements were relevant to the issue in the case under enquiry. Under these circumstances, upon the authorities cited by the officiating Sessions Judge, we think that the accused cannot be prosecuted for defamation in respect of these statements, and that the conviction and sentence must be set aside, the fine, if paid, to be refunded."*

9. Law is very clear, if false or untrue information is given to a public servant, the remedy is available U/S. 182 of the IPC, but it was to be established that the information so given by a person who knows or believes such statement to be false and it was not the case here as the D.S.P., O.H.R.C. has resorted to Section 182 of the IPC. In absence of any complaint in writing by such public servant, no proceeding U/S. 182 of IPC and in this case, neither the D.S.P. nor any body from O.H.R.C. has resorted to Section 182 of IPC, which in the circumstance gives rise to a presumption in favour of the petitioner who had raised certain allegation against the O.P. No.2 and two police officials. Nor was it disclosed by O.P. No.2 with some reliable materials/documents why the proceeding before was closed.

10. In view of the discussions made hereinabove, together with the analysis of law and facts as well as the principle laid down in the decisions referred to above and keeping in view the 8th exception to Section 499 of IPC which appears to be quite applicable to the case of the petitioner, this Court does not find any justification for proceeding against the petitioner for criminal defamation, but the learned S.D.J.M., Balasore has misread the law and took cognizance of offence of defamation and issued process against the petitioner without adverting to the facts and evidence of the case in proper perspective as the same do not make out a case against the petitioner for defamation.

11. In the aforesaid situation, especially when on careful conspectus of materials placed on record hardly disclose/constitute the basic ingredients of the offence of criminal defamation and the criminal proceeding against the petitioner, therefore, is nothing but an abuse of process of Court. In the above premises, exposing the petitioner to the rigmarole and ordeal of a criminal trial would be an onslaught to her right to seek justice. Hence, in the circumstance, the impugned order is unsustainable in the eye of law and further continuance of the criminal proceeding thereon would be an abuse of process of Court. Thus, to secure ends of justice, the impugned order and further continuation criminal proceeding thereon deserve to be quashed and, therefore, the impugned order taking cognizance of offence U/S. 500 of the IPC together with issuance of process against the petitioner is hereby quashed. As a necessary corollary, the criminal prosecution against the petitioner arising out of the impugned order is dropped.

12. Resultantly, the CRLMC is allowed on contest but in the circumstance without any order as to costs.

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2022 (III) ILR - CUT- 972

CHITTARANJAN DASH, J.

CRLMC NO. 891 OF 2016

JAYANTA BEHERA & ORS. ……..Petitioners

.V.

STATE OF ORISSA ……..Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 311 – When can be exercised? – Enumerated with case laws. (Para -3)

For Petitioners : Mr. S. Mohanty

For Opp. Party : Mr. J. Katikia, AGA

ORDER Date Order :14.10.2022

CHITTARANJAN DASH,J.

1. Learned counsel for the Petitioners is present.

2. By means of this application, the Petitioners seeks to challenge the order dated 9th March, 2016 passed by the learned Additional Sessions Judge, Athagarh in S.T. Case No.223 of 2013 whereby the learned court below allowed the prosecution to examine the brother of the deceased who appeared to be a material witness in connection with the case where the accused Petitioners are alleged to have been committed the offences under Sections 498- A/304-B/306/34 IPC and Section 4 of the D.P. Act.

3. Having regard to the fact that their appears several circumstances within the knowledge of the witness in question who is none but the brother of the deceased, allowing the examination of such witness in the opinion of the learned court appear relevant that apparently does not call for an interference., Allahabad High Court in ***Bheem Singh Vrs. State of U.P through Secretary Home, Govt. of U.P. Lucknow*** summarized the Law in respect to Section 311 Cr.P.C referring to the principles enunciated by the Apex Court as under:

> "Section 311 is manifestly in two parts, the first part of the Section has given discretion to the Court and enables it any stage of an inquiry, trial, or other proceedings under the Code, (a) to summon anyone as a witness, or (b) to examine any person in the Court, or (c) to recall and re-examine any person whose evidence has already been recorded; on the other hand, the second part of the Section is mandatory and imposes an obligation on the Court, to do one of aforesaid three things if the new evidence appears to it essential to the just decision of the case. In order to appreciate the submission of the applicant it will be worthwhile to refer to Section 311 of the Code, which reads as under:

"311. Power to summon material witness, or examine person present.- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

In this backdrop, it would be useful to make a reference to certain decisions rendered by the Supreme Court on the interpretation of Section 311of the Code, wherein the Apex Court highlighted the basic principles which are to be borne in mind while dealing with an application under Section 311 of the Code. In ***Natasa Singh v. C.B.I***., (2013) 5 SCC 741, the Apex Court, after referring the various decisions of the Supreme Court, has observed and held as under:

(SCC, p. 748-49, para 15,16) "15. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 of Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as 'any Court', 'at any stage', or 'or any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interest of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardised. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court

must be zealous in ensuring that there is no breach of the same." (***Vide: Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr.1, Zahira Habibulla H. Sheikh & Anr. V. State of Gujarat & Ors. 2. Zahira Habibullah & Anr. State of Gujarat & Ors. 3. Kalyani Baskar (Mrs.) v. M.S. Sampooram (Mrs.), 4. Vijay Kumar v. State of U.P. & Anr. 5. and Sudevanand v. State through C.B.I.6***)

21. In ***Rajaram Prasad Yadav v. State of Bihar***, (2013) 14 SCC 461, the Supreme Court held as under: (SCC, p. 473-74, para 17) "17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

17.1. Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

17.2. The exercise of the widest discretionary power under Section 311 Cr. PC. should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

17.4. The exercise of power under Section 311 Cr.PC. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 Cr. PC. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

17.9. The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

17.11. The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14. The power under Section 311 Cr.PC. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

22. In ***Swapan Kumar Chattarjee v CBI***, (2019) 14 SCC 328, the Supreme Court observed as under: (SCC p. 331, para 11 & 12) "11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has wide power under this section to even recall witnesses for re examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.

12. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier are not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed. Similarly, the court should not encourage the filing of successive applications for recall of a witness under this provision.

" 23.Section 311 of the Code gives a wide power to the court to summon a material witness or to examine a person present in court or to recall a witness already examined. It confers a wide discretion on the court to act as the exigencies of justice require. The word "just" cautions the court against taking any action which may result injustice either to the accused or to the prosecution. Where the court exercises the power under the second part, the inquiry cannot be as to whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot

be regarded as exceeding the jurisdiction. [Vide: ***Jamatraj Kewalji Govani v. The State of Maharashtra,*** AIR 1978 SC 178 (3 Judge Bench)].

24. The discretion given by the first part is very wide and its very width requires a corresponding caution on the part of the court. But the second part does not allow any discretion; it binds the court to examine fresh evidence and the only condition prescribed is that this evidence must be essential to the just decision of the case. Whether the new evidence is essential or not must of course depend on the facts of each case and has to be determined by the presiding Judge. (Vide: ***Ram Jeet and 8 others v. State of U.P***., AIR 1958 All 439)

25. In the case of The State represented by the ***Deputy Superintendent of Police v. Tr. N. Seenivasagan***, in this case, the prosecution had sought to produce a copy of the Approval order granted the authority on record and had it marked as an exhibit in the evidence, for which purpose witnesses were sought to be recalled. In its applications, the prosecution noted that the witnesses were required to mark the relevant document, which was crucial for the decision of the case. It was submitted that Exhibit. P-1 the order of sanction itself shows that the order was issued by the Board and at the time of filing the charge sheet the Investigation Officer had obtained the Approval Order of the Board but not submitted it before the court. With great respect to the judgment of the Apex Court, which does not help the applicant in the present case, because the documentary evidence had been obtained at the time of filing of charge sheet which had not been filed before the court."

4. As discussed in the preceding paragraph, from the impugned order it seems the witness sought to be examined is the brother of the deceased who might throw light on the circumstances in order to bring clarity as regards the allegations against the deceased touching her chastity and integrity as complained of by the in-laws. Consequently, keeping in view the facts and circumstances and the position of law in mind there appears substantial material necessitating examination of the witness. It is, however, made clear that the examination of the witness concerned shall under no circumstances be stretched on facts beyond his direct knowledge on the issue in specific and the court would be free to deal with the same according to law while appreciating the testimony of the witness in the given fact and circumstances after hearing the parties on the point. The impugned order, therefore, requires no interference in the present. The CRLMC accordingly stands dismissed.

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