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M/s. PLR Projects Pvt. Ltd. -V- Mahanadi Coal Fields Ltd. & Ors.
2022 (III) ILR-Cut…… 977

APPOINTMENT – There were two guidelines issued by the S&ME Department regarding engagement of Sikshya Sahayak – The first guideline was dated 6th August 2013 and the revised guideline was issued on 11th September 2014 – In terms of the corrigendum dated 9th February 2016, the last date for submission of application was 28th February, 2016 – The appellants possessed the requisite qualification in March 2015 – The candidature of the appellants have been rejected on the ground of lack of requisite qualification considering the cut-off date as 30th September 2014 – Determination of cut-off date – Held, as far as the three appellants are concerned, it has to be the revised i.e 28th Feb. 2016 in terms of the corrigendum.

Biswaranjan Biswal & Ors. -V- State of Odisha & Ors.
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M/s. M.G. Mohanty & Anr. -V- State of Odisha & Ors.
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AVOIDABLE MATERNAL DEATH – Negligence of doctors, health workers, medics and staff – Effect of – Held, direction issued to the state Govt. to take necessary steps against the erring stake holders immediately.

Sambara Sabar -V- State of Odisha & Ors.
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CENTRAL GOODS AND SERVICES TAX ACT, 2017 r/w ODISHA GOODS AND SERVICES TAX ACT, 2017 – Section 73 – Petitioner challenge show cause notice issued by competent authority – Whether writ petition under Articles 226 & 227 of the Constitution is maintainable against show cause notice, when the petitioner has ample opportunity to agitate issues before the Assessing Officer – Held, not maintainable – Writ petition at stage of show cause notice would be premature.

Muna Pani -V- State of Odisha & Ors.
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CIVIL PROCEDURE CODE 1908 – Section 24 – Power of transfer – Relevant factors to be considered – Discussed with case laws

Sonalija Jena -V- Abinash Mohapatra.
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CIVIL PROCEDURE CODE 1908 – **Order X Rule** 1 and Order XIV – Learned trial Court without adhering to the procedure laid down under Order X CPC posted the matter for hearing on the settlement of issues –Whether such procedure is admissible? – Held, No. – The procedure provided under Order X Rule 1 CPC is mandatory in nature – The learned trial Court should have adhered the procedure under Order X Rule 1 CPC before resorting to hearing on settlement of issue.

Urbasi Sethi -V- Natha Barik & Ors.
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CLAIM OF COMPENSATION – Avoidable maternal death – Prayer acceded – Direction issued to make payment to the tune of Rs. 10 lakhs.

Sambara Sabar -V- State of Odisha & Ors.
2022 (III) ILR-Cut…… 1015

COMPASSIONATE APPOINTMENT – Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 – Rule-2(b)(iii) and OCS (R&A) Rules 2020, Rule-2 (1)(d)(iii) – Whether prohibition of the 'married' daughter from seeking compassionate appointment is sustainable in the eyes of law? – Held, No. – Impugned policy of the State Government barring and prohibiting the consideration of the 'married' daughter from seeking compassionate appointment merely on the ground of marriage is arbitrary and violative of constitutional guarantees, as envisaged in Articles 14, 15, and 16(2) of the

Constitution of India – Accordingly, the word 'unmarried', as prescribed in Rules, 1990 and Rules, 2020 is hereby struck down being unconstitutional and declared as ultra vires being violative of Articles 14,15 and 16 of the Constitution of India.

Kshirabadi Bala Behera -V- Orissa Administrative Tribunal,Cuttack & Ors.
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CONSTITUTION OF INDIA, 1950 – Article 21 – Right to Health – The petitioner approached the court for justice being aggrieved by the avoidable 'maternal death' of his daughter-in-law – Held, direction issued to the state Govt. to come up with a scheme, Policy, Comprehensive Action Plan which will contain both preventive and remedial action points in the short and medium term to address the issue of maternal deaths.

Sambara Sabar -V- State of Odisha & Ors.
2022 (III) ILR-Cut…… 1015

CONSTITUTION OF INDIA, 1950 – Article 226 – Interference of the Court in policy decision – Prayer for enhancement of superannuation age – Held, whether the age of superannuation should be increased and if so, the date from which this should be effected is a matter of policy into which the High Court ought not to have interfered."

Raghunath Tripathy -V- The Commissioner-Cum-Secretary, Department of Cooperative & Ors.
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CONSTITUTION OF INDIA, 1950 – Article 226 – Scope and ambit – Interference in the administrative decision – Held, law is well settled that in exercising jurisdiction under Article 226 of the Constitution of India, this Court has the power to issue writ of certiorari only when there is failure of justice, it can also issue writ of mandamus or to pass orders and give necessary directions where the government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by statute.

Dr. Manoj Kumar Ghosal -V- O.U.A.T, Bhubaneswar & Ors.
2022 (III) ILR-Cut…… 1143

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Prayer to direct Opp.Party to settle the claim regarding damage caused at the petitioner's mill on account of fire accident – Whether writ petition is maintainable? – Held, No. – Since this case raises a disputed question of fact, the same cannot be decided in this writ application – The petitioner if so advised may approach the appropriate authority in the matter for redressal of its grievances relating to milling of salvaged paddy of 14000 quintal.

M/s. Radharani Food Industries -V- State of Odisha & Ors.
2022 (III) ILR-Cut…… 1067

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Prayer to quash the criminal proceeding – Power of High Court – Held, though the discretionary and supervisory powers of the High Court under articles 226 and 227 of the Constitution of India are very wide in amplitude, but they are not unlimited.

An F.I.R or complaint can be quashed at the initial stage where the allegation made, if taken at their face value and accepted in it's entirely, do not form a prima-facie case.

Smt. Geeta Devi Agarwal & Ors. -V- State of Odisha.
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CONSTITUTION OF INDIA, 1950 – Articles 226 & 227 –When extraordinary jurisdiction should be exercised – Explained with case laws.

Muna Pani -V- State of Odisha & Ors.
2022 (III) ILR-Cut…… 1039

CRIMINAL PROCEDURE CODE, 1973 – Sections 256, 378(4) – The Petitioner was acquitted under Section 256 Cr.P.C in a complaint Case and the case was closed by the learned J.M.F.C – The opposite party preferred revision before Additional Sessions Judge – The revision was allowed – Whether revision is maintainable against the order of acquittal under Section 256 Cr.P.C ? – Held, No – The correct approach should be appeal under Section 378(4) of Cr.P.C. before the Hon'ble High Court.

P. Ananda Rao @ Ananda Rao -V- R. Krishore Patanaik.
2022 (III) ILR-Cut…… 1208

CRIMINAL PROCEDURE CODE, 1973 – Section 378(1)(3) – Appeal against acquittal – Scope of interference against the order of acquittal – Cardinal rules which are required to be kept in mind while dealing with the appeal against acquittal – Discussed with case laws.

State of Orissa -V- Sukalyani Mishra & Anr.
2022 (III) ILR-Cut…… 1120

CRIMINAL PROCEDURE CODE, 1973 – Section 438 – Anticipatory bail – Law on anticipatory bail – Held, there exists no Act or Rules or any straight jacket formula to regulate grant of bail to an accused or a person who is apprehending arrest by police – The law on anticipatory bail has developed in

a non-linear course, through a plethora of judgments passed by the Hon'ble Supreme Court – Guiding principles on the concept of anticipatory bail discussed with case laws.

Deepak Gupta -V- Enforcement Directorate of India.
2022 (III) ILR-Cut…… 1234

CRIMINAL PROCEDURE CODE, 1973 – Section 482 – Inherent power of the court – Prayer to quash the criminal proceeding for the offence under section 409 of the Indian Penal Code – The petitioner has been exonerated in the disciplinary proceeding on the self-same set of facts and circumstances – Continuance of the criminal proceeding questioned – Held, in view of the ratio laid down in the cases of *Radhey Shyam Kejriwal Vs. State of West Bengal reported in (2011) 3 Supreme Court Cases 581*, *Deputy Superintendent of Police, EOW, CBI reported in (2020) 9 Supreme Court Cases 636 and Minaketan Pani Vs. State of Orissa reported in 2022 (II) Orissa Law Reviews 104* the continuance of the criminal proceeding against the petitioner would be an abuse of the process of law and accordingly the entire criminal proceeding stands quashed.

Satyashri @ Satyashree Mohapatra -V- State of Odisha.
2022 (III) ILR-Cut…… 1138

CRIMINAL PROCEDURE CODE, 1973 – Section 482 – Petitioner is a Chartered Accountant challenges the order of cognizance of offence under Sections 420/467/468/471/120-B of IPC – The Petitioner performed his professional duty as per the instruction, document supplied by the client – Whether cognizance of the offence against the Petitioner is sustainable? – Held, No – Neither the Petitioner is part of allegedly business transaction nor the document in question allegedly to have been forged and fabricated or is attributed to the present Petitioner in absence of material showing his personal interest in any gain/loss of the parties conducting business except that he retains his professional interest – The learned court below having not specifically recorded any reason travelled in taking cognizance against the Petitioner and as such liable for being interfered by way of exercising the jurisdiction under Section 482 of Cr.P.C.

Kulamani Parida-V- State of Orissa.
2022 (III) ILR-Cut…… 1303

CRIMINAL PROCEDURE CODE, 1973 – Section 482 – Prayer to quash the order of cognizance taken against offences punishable under sections 498(A)/323/506/34 of IPC r/w 4 of D.P. Act – Plea of petitioner that as the opposite party is not the wife of Petitioner, she cannot maintain a criminal proceeding for offence under Section 498(A) of IPC – Whether such plea is

sustainable under law? – Held, No – In view of the analysis of facts and discussions of law laid down by the Apex Court in *Reema Aggrawal Vrs. Anupam and another; (2004) 3 SCC 199* the proceeding under 498 (A) is maintainable – The impugned order cannot be interfered by this Court in exercise of inherent jurisdiction.

Jaga Sarabu -V- State of Orissa & Anr.
2022 (III) ILR-Cut…… 1297

CRIMINAL PROCEDURE CODE, 1973 – Section 482 – Whether an application under Section 482 Cr.P.C is maintainable to quash proceedings which are ex-facie bad for want of sanction as required under Section 197 Cr.P.C ? – Held, Yes.

Ajaya Kumar Barik -V- State of Odisha & Anr.
2022 (III) ILR-Cut…… 1213

DEMAND OF ESTABLISHMENT OF SEPARATE BENCH OF ORISSA HIGH COURT – Whether establishment of separate Bench of Orissa High Court is permissible with in the distance of 300 km? – Held, No. – The use of technology has been quite widespread now in the Courts and the same is monitored by the High Court – Thus the very justification for having any Bench of the High Court no more exists.

M/s. PLR Projects Pvt. Ltd. -V- Mahanadi Coal Fields Ltd. & Ors.
2022 (III) ILR-Cut…… 977

ELECTROCUTION DEATH – Claim of Compensation – No provision for compensation under the Electricity Act – Determination of – Held, when Electricity Act does not provide any relief for electrocution death this Court drawing analogy from the Motor Vehicles Act, 1988 in Schedule II therein, as per prescribe manner of determination of compensation, direct to calculate notional income taking into account the decision of Hon'ble Apex Court.

Bhagaban Rout & Anr. -V- Executive Engineer, CESCO, Salipur
2022 (III) ILR-Cut…… 1131

INCOME TAX ACT, 1961 – Whether the learned Income Tax Appellate Tribunal is correct in law while directing to allow deduction for compensation made by the assessee company to its subsidiaries which is not in relation to its own business of the assessee company and also not incidental to the business of the assessee? – Held, Yes.

Principal Commissioner of Income Tax, Bhubaneswar -V- Industrial Development Corporation of Odisha Ltd.
2022 (III) ILR-Cut…… 1029

INDUSTRIAL DISPUTES ACT, 1947 – Section 33C (2) – Whether the Labour Court while computing or determining the entitlement of workmen U/s. 33 (2) can direct any interest and future interest? – Held, Yes.

M/s. Paradeep Phosphates Ltd. -V-Presiding Officer, Labour Court, Bhubaneswar & Anr.
2022 (III) ILR-Cut…… 1109

INTERPRETATION OF STATUE – The petitioner retired from service on 30.09.2014 at the age of 58 years as per the relevant Rules governing the field – The enhanced retirement age came into effect on 31.10.2014, after the amendment in the Service Rules – Whether the amended rule applicable to the petitioner retrospectively? – Held, No, cannot be made applicable retrospectively.

Raghunath Tripathy -V- The Commissioner-Cum-Secretary, Department of Cooperative & Ors.
2022 (III) ILR-Cut…… 1262

INTERPRETATION OF STATUTES – Whether Section 10(3) and 15(2) of the Commercial Court Act, 2015 r/w amendment Act 28 of 2018, override Section 42 of the A&C Act – Held, the A&C Act must yield to the CC Act and not vice versa when the objective of both enactments is the speedy disposal of the cases and the CC Act was a later enactment – There is no apparent conflict between the A&C Act and the CC Act for being resolved.

M/s. M.G. Mohanty & Anr. -V- State of Odisha & Ors.
2022 (III) ILR-Cut…… 992

LAWYERS ABSTAIN FROM COURT PROCEEDING – Effect of – Held, Access to justice is the very foundation of a legal system – The legal fraternity is the instrument of access to justice to the people at large – When the very instruments abstain from Court proceedings, the casualty is the access to justice to common people and it is the common people and litigants who suffer – Direction issued for appropriate police assistance at all the District Courts – This Court further expects Judicial Officers at the State level to perform their functions without fear or favour.

M/s. PLR Projects Pvt. Ltd. -V- Mahanadi Coal Fields Ltd. & Ors.
2022 (III) ILR-Cut…… 977

LAWYER STRIKE – Disrupting Court proceedings in the District Courts by misbehaving the District Judge, Judicial Officers and threw the chairs, damaged the computers – Effect of – Held, lawyers, have lost their privilege by this behaviour and the police is expected to take strictest action.

The list of all the members of the Bar Associations will be furnished by learned counsel and contempt notices will be issued to all the members as to why they should not be proceeded against and punished in accordance with law for contempt of orders of this Court.

M/s. PLR Projects Pvt. Ltd. -V- Mahanadi Coal Fields Ltd. & Ors.
2022 (III) ILR-Cut…… 977

LEGAL MAXIM – "*Expressio Uniusest exclusion alterius*" means – 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 – Explained with case laws.

Narayan Swain -V- State of Orissa & Ors.
2022 (III) ILR-Cut…… 1286

MINES AND MINERALS (DEVELOPMENT AND REGULATION) ACT, 1957 – Sections 4(1), 4(1a), 21 and 23 – Principles of vicarious liability – Applicability – The liability of the managerial personal/ partner cannot be imputed automatically, the prosecution would have to make averments with regard to the specific role played by the accused personals and demonstrate that such person was directly & intrinsically connected to the crime alleged.

In the present case the petitioners are the partners in M/s. GNG exports – They were not involved in illegal transportation of iron ore fines – Accordingly the principles of vicarious liability cannot be attached to the petitioners – Hence the proceedings in case no.2(c) no 7 of 2011 is quashed to the extent of charges attaching liability against the unauthorised transportation of iron ore fines against the petitioners.

Smt.Geeta Devi Agarwal & Ors. -V- State of Odisha.
2022 (III) ILR-Cut…… 1183

MOTOR VEHICLE ACT, 1988 – Section 2(30) r/w Rule 61 of the Central Motor Vehicle Rules, 1989 – Appellant/Bank is the financer of the offending vehicle – Due to non-payment of installments, the Bank repossessed the offending vehicle and it was sold through the auction to another person – Whether Appellant/Bank is liable to pay the compensation amount, in case of

accident caused by the offending vehicle? – Held, Yes – In view of the definition enumerated in Section 2(30) of the M.V. Act and the law propounded by the Apex Court, the person, who was in possession of the vehicle on the date of accident and if a hypothecation agreement exits, is treated as the owner of the vehicle and liable to pay the compensation.

Manager Legal, ICICI Bank, Bhubaneswar Branch -V- Smt.Geetarani Mahapatra & Anr.

2022 (III) ILR-Cut…… 1178

NARCOTIC DRUGS AND PSYCHOTOPIC SUBSTANCES ACT, 1985 – Section 37 r/w Section 439 of Cr.P.C. – Offence under Section 20 (b) (ii) (C) of NDPS Act- Duty of this Court while considering the application for bail – Held, the Court must be satisfied that there are reasonable grounds for believing that the person accused is not guilty of such an offence – Additionally, the Court must be satisfied that the accused person is unlikely to commit any offence while on bail.

Rahul Pratap Singh -V- State of Odisha.

2022 (III) ILR-Cut…… 1270

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 37(1)(b)(ii) – The expression "reasonable grounds" – Indicated with case laws.

Rahul Pratap Singh -V- State of Odisha.

2022 (III) ILR-Cut…… 1270

NOTIONAL INCOME – Principle for determination – Discussed with case laws.

Bhagaban Rout & Anr. -V- Executive Engineer, CESCO, Salipur .

2022 (III) ILR-Cut…… 1131

ODISHA ELECTRICITY AMENDMENT ACT, 2016 – Section 8(1) – Implication – Whether the proviso as introduced by virtue of amendment is an exception or qualification to the principal provision? – Held, the proviso does not in any manner curtail the power of the authorities rather adds a qualification to the principal provision empowering the authorities.

Vedanta Ltd. -V- State of Odisha & Ors.

2022 (III) ILR-Cut…… 1171

ODISHA ELECTRICITY (DUTY) ACT, 1961 r/w AMENDMENT ACT, 2016 – Section 8(1) – Whether the Electrical Inspector is competent to take a decision with regard to exemption of electricity duty or ought to have

referred to the Secretary of Energy Department, as per the proviso to Section-8 (1) of the 2016 Act? – Held, plain reading of Section-8 (1) of the 2016 Act makes it amply clear that the Electrical Inspector being authorised by the State Government within the local limit as may be specified are conferred with the powers to decide all disputes of liability & payment of the electricity duty or exemption there from.

Vedanta Ltd. -V- State of Odisha & Ors.
2022 (III) ILR-Cut…… 1171

ODISHA SCHEDULED CASTES, SCHEDULED TRIBES AND BACKWARD CLASSES (REGULATION OF ISSUANCE AND VERIFICATION OF CASTE CERTIFICATES) ACT, 2011 – The Investigating Officer appointed to verify the genuineness of caste certificate of Petitioner – The document like ROR verified by the IO where father of petitioner had asserted his identity as belongs to Scheduled Tribe 'Gondo'– This vital document was overlooked by the scrutiny committee for which impugned order was passed in FCC No.21 of 2011 – Effect of – The impugned order is set aside and quashed.

Asit Kumar Nayak -V- State of Odisha & Ors.
2022 (III) ILR-Cut…… 1115

ODISHA UNIVERSITY OF AGRICULTURE & TECHNOLOGY ACT, 1965 r/w OUAT STATUTES, 1966 – Statute 8A – Appointment of the post of "Dean Students Welfare" – The petitioner was selected by the Standing Selection Committee – The opposite party no.1/Chancellor cancelled the selection process without any reason and asked to conduct fresh selection – Whether the appointing authority is empowered to interfere with the decision/recommendation of Standing Selection Committee? – Held, No. – Whenever a duly constituted selection committee utilizing the services of experts makes a recommendation for a post, it shall not be disturbed by the appointing authority unless there is any procedural irregularity or illegality prescribed under the relevant rules or illegality in making such selection.

Dr. Manoj Kumar Ghosal -V- O.U.A.T, Bhubaneswar & Ors.
2022 (III) ILR-Cut…… 1143

ORISSA CIVIL SERVICE (CCA) RULES, 1962 – Rule 29 – Consideration of Appeal – Duty cast upon the Appellate Authority – Held, since Rule 29 caste a positive obligation on the appellate authority to consider and dispose of the appeal filed by the delinquent in a particular manner, it has to be done in that manner – The provision under Rule 29 is intended to act as a safeguard against any arbitrary, unreasonable or illegal exercise of power by the disciplinary authority.

Suvendu Kumar Routray -V- State of Odisha & Ors.
2022 (III) ILR-Cut…… 1230

ORAL WILL – Legality questioned – Held, oral will bequeathing the immovable property is not recognized by law.

Abhayati Kumbhar -V- Satyabhama Kumbhar & Anr.
2022 (III) ILR-Cut…… 1127

PROPERTY LAW – The common ancestor of the parties had two wives – Plaintiff No.1 and 2 are children of one wife and Defendant is the child of another wife – Whether the properties left by the common ancestor should divided into 1/3rd share or successors of each wife would be entitled to get their share through their respective mother along with their independent share? – Held, admittedly both the wives were not living at the time of death of the common ancestor – It is not the law that in case of a person having two wives even upon the death of one wife, her death would remain suspended till the death of that male and it would be deemed that as if she died soon after the death of male after the succession opened and the properties would still notionally devolve upon her on the death of the male owner so as to be succeeded by the children born to the male owner through her – The Courts below thus are right in preliminarily decreeing the suit laid by the Plaintiffs by allotting 1/3rd share each.

Abhayati Kumbhar -V- Satyabhama Kumbhar & Anr.
2022 (III) ILR-Cut…… 1127

SERVICE LAW – Differential wages – Petitioner was communicated with an order of suspension on allegation of initiation of proceeding in the Court of law for commission of offences under sections 498(A)/ 304(B)/302/34 of the IPC r/w section 4 of D.P Act – After acquittal from all charges, suspension order revoked and petitioner was allowed to resume his duty immediately – Whether the petitioner is entitled to the differential wages for the period of suspension? – Held, Yes.

Rajesh Behera -V- Deputy Registrar, CAT, Cuttack Bench,& Ors.
2022 (III) ILR-Cut…… 1082

SERVICE LAW – Disciplinary Proceeding – Competent Authority –The Petitioner while working as Grama Panchayat Technical Assistant was removed from service by the Order of the Collector – Where as the Director, PR & DW Department, is the Appointing and Disciplinary Authority to take disciplinary action, including removal – Whether the order of removal passed by the Collector is sustainable under law? – Held, No – Law is well settled

that if the power has been vested with the particular Authority, same can only be exercised by the prescribed manner.

Narayan Swain -V- State of Orissa & Ors.
2022 (III) ILR-Cut…… 1286

SERVICE LAW – Promotion – Petitioner's case was not considered by the Authority for promotion to the post of Asst. General Manager (Electrical) because of the rating "Average" in the EPAR pertaining to the year 2014-15 as per Clause 9.1 of the OPTCL Officers' Promotion Policy – The rating "Average" was never communicated to the Petitioner – Whether the Authority were justified in utilising such rating without communicating same to the Petitioner? – Held, No. – Every entry relating to an employee under the State or an instrumentality of the State should be communicated to the employee within a reasonable period – The decision of Opp. Parties in not giving promotion to the Petitioner basing on the recommendation of the DPC is not just and proper.

Prasanta Kumar Patel-V-Orissa Power Transmission Corporation Ltd. & Ors.
2022 (III) ILR-Cut…… 1277

SERVICE LAW – Regularisation – Petitioners were engaged as High Skilled worker in between 24.09.1980 to 01.06.1992. – The Opposite Party department instead of regularizing their services issued order to work under the work-charged establishment by order dated 27.10.2008 – Whether such order is sustainable? – Held, No – It is apparent that though the petitioners render three decades of continuous service to the State but have been left in the lurch – Matter remitted back to the authority to take decision on regularization of services of the petitioner with due regards to all relevant factors like availability of post, seniority etc.

Ramesh Chandra Biswal & Ors. -V- State of Odisha & Ors.
2022 (III) ILR-Cut…… 1218

SUSPENSION OF LICENCE OF ADVOCATE – Whether Bar Council of India is competent to suspend the licence of a lawyer – Held, Yes. – We hold that the power of the bar council to revoke the licence to practice permanently or suspend it for a fixed term would also include the incidental power of interim suspension pending disposal of disciplinary proceedings for professional misconduct.

M/s. PLR Projects Pvt. Ltd. -V- Mahanadi Coal Fields Ltd. & Ors.
2022 (III) ILR-Cut…… 977

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2022 (III) ILR - CUT- 977

SUPREME COURT OF INDIA

SANJAY KISHAN KAUL,J & ABHAY S. OKA,J.

MISCELLANEOUS APPLICATION DIARY NO(s). 33859/2022
With
IA NO. 159953/2022
(ARISING OUT OF T.P.(C) NO. 2419/2019)

M/s. PLR PROJECTS PVT. LTD. …….Petitioner(s)

.V.

MAHANADI COAL FIELDS LTD. & ORS. …….Respondent(s)

(A) LAWYERS ABSTAIN FROM COURT PROCEEDING – Effect of – Held, Access to justice is the very foundation of a legal system – The legal fraternity is the instrument of access to justice to the people at large – When the very instruments abstain from Court proceedings, the casualty is the access to justice to common people and it is the common people and litigants who suffer – Direction issued for appropriate police assistance at all the District Courts – This Court further expects Judicial Officers at the State level to perform their functions without fear or favour. (Order dated 14.11.2022)

(B) ADVOCACY – When the Advocate/Lawyers fail to conduct themselves as the members of the noble profession – Effect of – Held, they loose any protection – This Court would expect the Bar Council of India to take appropriate action against all the executive members of different Bar Associations on strike contrary to directions of this Court and logically we would expect their licences to be suspended at least till the work is resumed and further action against the members of the Action Committee – We would expect the police to provide fool proof arrangements for ingress and egress of not only the judicial officers but all willing members of the Bar and the litigants who would be entitled to contest their own proceedings.

(Order dated 28.11.2022)

(C) LAWYER STRIKE – Disrupting Court proceedings in the District Courts by misbehaving the District Judge, Judicial Officers and threw the chairs, damaged the computers – Effect of – Held, lawyers, have lost their privilege by this behaviour and the police is expected to take strictest action. (Order dated 12.12.2022)

The list of all the members of the Bar Associations will be furnished by learned counsel and contempt notices will be issued to all the members as to why they should not be proceeded against and punished in accordance with law for contempt of orders of this Court.

(Order dated 14.12.2022)

(D) SUSPENSION OF LICENCE OF ADVOCATE – Whether Bar Council of India is competent to suspend the licence of a lawyer – Held, Yes. – We hold that the power of the bar council to revoke the licence to practice permanently or suspend it for a fixed term would also include the incidental power of interim suspension pending disposal of disciplinary proceedings for professional misconduct.

(Order dated 14.12.2022)

(E) DEMAND OF ESTABLISHMENT OF SEPARATE BENCH OF ORISSA HIGH COURT – Whether establishment of separate Bench of Orissa High Court is permissible with in the distance of 300 km? – Held, No. – The use of technology has been quite widespread now in the Courts and the same is monitored by the High Court – Thus the very justification for having any Bench of the High Court no more exists. (Order dated 14.12.2022)

Case Laws Relied on and Referred to :-

For Petitioner(s) : Mr. Arvind P. Datar, Sr.Adv., Mr. Sibo Sankar Mishra,AOR,
Mr. Niranjan Sahu,Mr. Debabrata Dash,
Mr. Ashok K.Parija, AG, Mr. Shibashish Misra,
Ms. Apoorva Sharma,Mr. Umakanta Mishra &
Mr. Kaushik Poddar, AOR.

For Respondent(s): Mr. Arjun Garg, AOR Mr. Gopal Jha, AOR ,
Ms. Renuka Sahu, AOR, Mr. Jagannath Nanda,
Mr. Abhimanyu Tewari, AOR, Ms. Sneha Kalita, AOR,
Mr. Ashok Kumar Parija, Sr. Adv., Mr. Sibo Sankar Mishra, AOR,
Mr. Rajesh Kumar Nayak, Mr. Kunal Chatterji, AOR,
Ms. Maitrayee Banerjee, Ms. Rohit Bansal,
Ms. Kshitij Singh, Mr. Kedar Nath Tripathy, AOR,
Ms. Preetika Dwivedi, AOR, Mr. Dhananjai Jain, AOR,
Mr. V. N. Raghupathy, AOR, Mr. Shantanu Sagar, AOR,
Mr. Gautam Narayan, AOR, Ms. Asmita Singh,
Ms. Arushi Gupta, Adv., Mr. Himanshu Shekhar, AOR,
Mr. Karunish Kumar Shukla, Mr. Amit Kumar Singh,
Mrs. K. Enatoli Sema, AOR, Ms. Chubalemla Chang,
Mr. Prang Newmai, Mr. Vikas Singh, Sr. Adv. Ms. Deepika Kalia,
Mr. Aditya Kaul, Mr. Sunil Kumar, Sr. Adv., Mr. Parth Shekhar,
Mr. Shubham Singh, Mr. Manoranjan Paikaray,
Mr. Shashwat Panda, Mr. Aniruddha Purushotham,
Mr. Tejaswi Kumar Pradhan, AOR. Ms. Eliza Bar,
Mr. Debabrata Dash, Mr. Niranjan Sahu, Mr. Apoorva Sharma,

Mr. Joydip Roy, Mr. Shashank Shukla,
Mr. Anil Kumar, Mr.Sidharth Sarthi, Mr. Shashwat Anand,
Mr. Gunjesh Ranjan, Mr. Vikas Singh, Sr.Adv.
Mr. Shibashish Misra, AOR, Mr. Parth Shekhar,
Mr. Shubham Singh, Mr. Akhilesh Kuamr Pandey,
Mr. Kedar Nath Tripathy, AOR,Mr. Ashok Kumar Panda, Sr. Adv.
Mr. Manoranjan Paikaray, Mr. Shashwat Panda,
Mr. Aniruddha Purushotham, Mr. Tejaswi Kumar Pradhan, AOR.
Mr. Manan Kumar Mishra, Sr. Adv., Mr.S.Prabhakaran,Sr. Adv.
Mr. Ardhendumauli Kumar Prasad,
Mr. Nirmal Kumar Ambastha, Ms. Anjul Dwivedi,
Mr. Ram Shankar, Ms. Shreya Srivastava,
Mr. Ashish Madaan, Ms. Ananya Sahu,
Mr. Ashok K Parija, Adv. Gen.,Mr. Baij Nath Patel,
Ms. Sagun Srivastava, Ms.Eliza Bar, Mr. Joydip Roy,
Mr. Gaurav Khanna, Mr. Shibashish Misra, AOR,
Mr. Ashok Kumar Panda, Sr. Adv., Mr. M.C. Nanda,
Mr. Manoranjan Paikaray, Mr. Shashwat Panda,
Mr. Anirudddha Purushotham,Mr. Tejaswi Kumar Pradhan, AOR.

ORDER Date of Order:14.11.2022

BY THE BENCH

Access to justice is the very foundation of a legal system. The legal fraternity is the instrument of access to justice to the people at large. When the very instruments abstain from court proceedings, the casuality is the access to justice to common people and it is the common people and litigants who suffer. We will not countenance this.

The conduct of many associations and of lawyers has been far from satisfactory in the State of Orissa. This has compelled us to pass orders earlier and undertakings were given before us that there would not be repeat of the issue of lawyers abstaining from work. This absentation naturally includes any part time absentation in a day or for whole day.

A reading of the application shows that the Members of Bar Association not only of western Orissa but also Members of Bar Association of other districts of State of Orissa have on different occasions not participated in regular court proceedings. The reasons stated in the application are being reproduced hereunder:-

- Establishment of permanent Bench of the High Court of Orissa
- Demise of Advocates
- Demanding establishment of Court
- Bharat Bandh
- Flood
- Scorching heat

- Demanding crop insurance
- Registration of case against Advocates
- Heavy rainfall
- Demise of judicial officers
- Transfer of judicial officers
- Enhancement of welfare funds, etc.

In paragraph 5 it has been set out how some of the district associations have behaved:

> "5. In addition to the above, it may be appropriate to mention here that the Members of Bar Association of the districts of Sambalapur have attended only urgent work on 26.9.2022, 27.9.2022 and 30.9.2022, observed 28.9.2022 as protest day, and complete cease work on 30.9.2022. The members of Ganjam Bar Associations are observing "Satyagrah/Dharna" during the last four days of the every month, the Members of the District Bar Association, Jeypore of the Koraput district are not participating in the last two working days of every month and the members of Bhubaneswar Bar Association are observing one day cease work on the last Friday of every month."

The aforesaid is supported by the report of learned district Judges. It is pointed out that even selective working has been considered as breach of duties of an advocate as opined by this Court in Order dated 10.1.2020.

It is averred in paragraph 7 that the Chief Justice and Administrative Judges of the High Court convened back to back meetings with all members of the Bar Associations of the State as have the district Judges but members of the Bar Association do not even participate.

The statistics for the period of 01.01.2022 to 30.9.2022 show that during this period the loss of cumulative judicial working hours in the subordinate Courts is 2,14,176 hours. The effect practically is to bring the working of the judicial system to a stand still jeopardizing the litigating public.

Another illustration given is that on 11.10.2022 the Bhubaneswar Bar Association resolved to boycott the Court of the District and Sessions Judge, Khurda at Bhubaneswar from 12.10.2022 till the issues that have been raised with the District Judge is resolved with a request not to pass any adverse orders in any civil/criminal cases in the absences of the advocates.

In view of the aforesaid facts set out in the prayer has been sought seeking directions of the concerned District Bar Association to furnish an explanation for not adhering to the assurances give to this Court.

We had asked on mentioning that the Bar Council of India should also be represented before us and the learned counsel for the Bar Council of India has placed before us an Order dated 13.11.2022 passed by the Hon'ble Chairman, Bar Council of India.

In terms of the order, the Presidents/Vice Presidents and Secretaries along with all the Members of the Executive Committee of five associations have been placed under suspension from their respective offices and are required not to discharge any function of their respective officers and remain out of offices till further from the Council.

However, this is confined to five district Bar associations as under:-

"1. Sambhalpur District Bar Association, Orissa
2. Baramba Bar Association, District Cuttack
3. Bar Association Tangi, District Khurda
4. Taleher Bar Association, District Angul
5. Pallhara Bar Association, District Angul"

The order also states that if the strike/boycott is not recalled by tomorrow, the license of practice of individual lawyers participating in this boycott/abstention shall be put under suspension with immediate effect. Certain other actions have also been taken against some members.

The Chairman of the Bar Council of Orissa is present before us who supports the factual scenario of not only these 5 district Bars being at strike but practically 20 district Bars being at strike.

While we appreciate the steps taken by the Chairman of the Bar Council of India in pursuance to the duties he has, further steps would be required qua all the other associations also if they do not fall in line.

We expect full working by all the Bar associations by day after tomorrow failing which the Bar Council of India will proceed further in similar actions as brought before us by the Chairman's order dated 13.11.2022 against all office bearers of the remaining Bar associations.

We have put all these Bar Officers and their office bearers to notice that a non-compliance would invite proceedings from this Court for contempt, the Bar Council of India would be expected to take action for suspension and cancellation of licences of the lawyers and any other further step in this behalf.

A list of the Bar Association members has been handed over to learned counsel for the Bar Council of India and submitted before us also.

We may also notice that insofar as setting up of Benches is concerned, there is a change of ground reality with technology being introduced in functioning of the Court.

We expect the High Court of Orissa to place before us status report qua the computerization which has been effected to facilitate functioning of the District Courts.

Learned counsel seeks to appears for the Central Action Committee, All Bar Associations of Western Odisha and will be handed over a copy of the application today itself and may respond within a week.

Learned counsel for the Bhubaneswar Bar Association present in Court submits that the Bhubaneswar Bar Association has not been on strike after 10th November, 2022 and undertakes that there will be no future strikes by the Bhubaneswar Bar Association.

The Chairperson of the Bar Association of Orissa/Advocate General for the State makes a submission that the State of Orissa is willing to give all police assistance as may be required for the functioning of the District Courts.

In view of the assurance we expect "appropriate police assistant at all the District Courts. We expect Judicial Officers at the State level to perform their functions without fear or favour" whether lawyers are present or not present and the consequences of adverse orders will have to be borne by the lawyers who in turn are accountable to the litigants.

The given scenario is further reflected in a report by the Office of the Nayayadhikari-cum-J.M.F.C. Grama Nayalaya, Tangi as contained in a letter dated 21.10.2022 filed as additional affidavit of the Registrar General of the State of Orissa wherein it is stated that when the Tangi Bar Association called for seizure of work, they were staying at the Court premises very late hours and the Bar President being fully drunk was hitting the main door of the Court building and on inquiry by the staff abused them. Such a conduct itself would dis-entitle somebody like this person to ever practice at the Bar.

The additional affidavit of the High Court be also handed over to the counsel for the Committee.

The President and Secretary, Central Action Committee, All Bar Association of Western Odisha to remain personally present in the Court on the next date.

ORDER:Dated: 28.11.2022

Upon hearing the counsel the Court made the following order. Two affidavits have been filed before us. The first affidavit is filed by the Registrar General of the High Court of Odisha in respect of the steps taken for providing virtual access which would obviate the need for any Benches. There are 30 district Courts functioning in the State of Odisha and the status report *qua* computerization to facilitate the functioning in the District Courts and Taluka Courts has been enclosed. The details of equipments which have been purchased have been set out. The e-Filing Version 3.0 stands implemented from 02.04.2022 and a total of 4382 Advocates have registered on the e-Filing Portal of this Version and 11290 cases have been filed through e-Filing Portal in the District Courts. Virtual court rooms have been established in the various districts and proceedings are being conducted as per Odisha High Court Video Conferencing For Court's Rules, 2020 which would facilitate a witness to appear in any Court including the High Court of Odisha from any district of the State or from any remote area in accordance with the Standard Operating Procedure (SOP). Technical persons have been appointed. The High Court of Odisha is functioning on hybrid mode and links are published. Hands on training for judicial officers, Advocates and Advocates' clerks are being conducted. That should have taken care of the needs of access to justice.

There is, however, something more to it!

The conduct of the Advocates as reflected in the supplementary affidavit filed by the High Court leaves us with little doubt that there are many socalled Advocates enrolled at the Bar whose bread and butter is obviously not this profession. After the order was passed by us on 14.11.2022, the same was circulated to all the Bar Associations through their respective District Judges. Despite our observations, agitation and picketing etc. continued.

The matter deteriorated to a stage where the District Judge, Khurda at Bhubaneswar received reports about violent obstruction to the judicial officers, staff and litigants by members of the Bhubaneswar Bar Association restraining them in entering court building on 25.11.2022. In fact, after receiving reliable information, the District Judge had sought for police protection for judicial officers, staff and litigants. 300/400 Advocates

obstructed them when staff and officers reached there and police personnel reached at about 11 a.m. But even under police protection, the Bar members prevented access by violently obstructing them. The District Judge also reported that no prior information was given to him by the Bar Association regarding such picketing on 25.11.2022.

It is, however, averred that the District Judge, Koraput, Jeypore enclosed the extract of the resolution District Bar Association, Jeypore dated 24/25.11.2022 indicating the decision to withdraw their earlier resolution for strike dated 23.06.2022.

There is then an additional affidavit of the Registrar stating that several Bar Associations of State of Odisha continue to abstain from work and have indulged in boycott, picketing etc. during the month of October, 2022 and also in November, 2022. The judicial work in least 20 districts continued to be hampered in the month of October, 2022 and 3216 cumulative judicial working hours have been lost.

The District Judge, Sambalpur intimated that members of the District Bar Association, Sambalpur staged a picketing on demand of establishment of the permanent Bench of Odisha in Western Odisha and even refused to attend a meeting called by the District Judge.

A similar approach has been adopted by the Baramba Bar Association as per the District Judge, Cuttack. Position is no different of others.

We had already cautioned the Bar Associations on many occasions in the earlier main order as well as on the last date that if they fail to conduct themselves as members of the noble profession, they loose any protection. They have done everything to invite what we are required to now direct to uphold the majesty of law and direct the working of the Courts functional.

We may also notice that the Central Action Committee has filed an affidavit. We notice from Annexure R-1 to it that the President of the Sambalpur Bar Association is actually the President of the Central Action Committee.

If the leaders of the Bar Associations in Odisha seek to invite harsh action, we will have to oblige them.

The Bar Council of India is represented before us. We would expect the Bar Council of India to take appropriate action against all the executive

members of different Bar Associations on strike contrary to directions of this Court and logically we would expect their licences to be suspended at least till the work is resumed and further action against the members of the Action Committee.

We would expect the police to provide foolproof arrangements for ingress and egress of not only the judicial officers but all willing members of the Bar and the litigants who would be entitled to contest their own proceedings. Necessary prohibitory orders be issued around the areas of the courts and appropriate steps including any preventive arrest or other arrest as required in the wisdom of the administration as required to be taken. We can only emphasize that it is the administration's duty and obligation as also the methodology by which they have to ensure [no advice is necessary by us] to see to it that the Courts are made functional and the agitating lawyers are not able to obstruct the working of the Court nor any ingress and egress of the lawyers willing to work or the public who seeks to practice directly since these lawyers are not assisting them.

The judicial officers will pass necessary orders in each of the proceedings and if adverse orders become necessary, let the same be passed as we have given the option to the litigants to come to court and defend or prosecute their proceedings freely. Further status report be filed by the Registrar.

ORDER: Dated:12.12.2022

Upon hearing the counsel the Court made the following order. A disturbing picture has been presented before us on the basis of the affidavit filed by the Registrar General of the High Court disrupting court proceedings in the District Courts.The concerned videos have also been shown to us. The position as on date at 12.30 p.m. is also placed before us which reads as under :

> "Sambalpur Incident dated 12.12.2022 Sequences
>
> 1. The Bhubaneswar Bar Associations call for support to observe Satyagraha on 12.12.2022
>
> 2. District Judge, Sambalpur anticipating untoward situation discussed with the S.P. and collector on 11.12.2022.
>
> 3. After a detail discussion today morning the District Judge and other Judicial Officers of the Sambalpur headquarters entered inside the Court premises before 10 am.

4. Lawyers and public gather in front of the Court gate and pelted stone to the Court building thereby damaging the Court property and forcibly entered inside the Court premises.

5. Police personnel present there did not take proper action.

6. Anticipating danger to the lives and property of the Judicial Officers and Court, the door was bolted from inside in the chamber of the District Judge. However, lawyers and other public forcibly entered inside the Court premises and the chamber of the district judge in presence of police and threw the chairs, damaged the computers and misbehaved the District Judge and also the other Judicial Officers present in the chamber.

7. The District Judge and other Judicial Officers could able to escorted out with lot of difficulties, however, they are scared of the incidents due to ransacking of the properties of the Court building including threat to the lives of the Judicial Officers and staff.

8. The Judicial Officers present in other chambers were also similarly threatened and forced to come out of their chambers.

9. Registrar General immediately after ascertaining the status informed the Director General of Police, Odisha over phone and also sent Whatsapp messages informing law and order situation.

10. The incidents were covered live by the Local electronic News channels viz. OTV, Argus News and others.

11. The Director General of Police, Odisha, the Principal Secretary, Home Department were also asked to take appropriate action against the persons involved with immediate effect.

12. The video footages of the incidents have been shared with the Director General of Police for immediate action."

We will not countenance the position. We have said so. We consider this a failure of the police also not to have taken action and taken the concerned disruptive lawyers into custody who must be prosecuted in accordance with law. The peace must be restored at all costs.

The State of Odisha to state before us as to what steps are they going to take so that no disruption of any Court process takes place, nor is agitation permissible within a certain specified periphery of each Court building.

Since the Advocate General is stated to be travelling, request is made to take up the matter day after.

We ask the Director General of Police and Inspector General, Sambalpur to appear before this Court personally through video conferencing to set out what steps they have taken.

We would also like to be informed by the Registrar as to what are the Courts which are functioning as all matters, in Districts which are disrupting the work, would stand transferred to the Districts adjacent where work is going on.

"Lawyers, as stated before, have lost their privilege by this behaviour and the police is expected to take strictest of action."

We expect the Bar Council of India also to be represented before us to explain as to what extent the licences have been suspended of the concerned lawyers leading the agitation.

ORDER: Dated:14.12.2022

1. Upon hearing the counsel the Court made the following order. The Central Action Committee of all Bar Associations of Western Odisha indulged in agitation and writing to advance their case for setting up Benches of the Orissa High Court. Undoubtedly, the agitation went out of hand. It has been like the ride of a tiger where the tiger has mauled, if not eaten them up. But then that is the consequence which must flow to them when they indulge in such activities.

2. Mr. Arvind Dattar, learned senior counsel for the High Court of Orissa has placed before us some suggestions which we want to deal with at the inception before we proceed further on different aspects.

The first submission is that there is no information of arrest of non-lawyers/outsiders who are visible in the vidoes and photographs and FIRs. must be registered under the relevant provisions against both lawyers and non-lawyers. We have little doubt that it has been an abject failure of the police and we did put to the police authorities whether they are capable or not of controlling the situation or would they require us to get some para military force deputed if they find themselves incompetent to handle the situation. The IG, Police, Sambalpur and the DGP, Odisha have assured that what has happened will not happen again and they take personal responsibility to ensure that complete peace is maintained and no interruption is caused in the

working of Court in any manner, whatsoever. We clarify that whatever extent of force is to be deputed must be deputed. Whatever element of force is necessary to enforce the discipline must be used and there shall be no mollycoddling because somebody is a lawyer or not and the FIR thus must be registered under the relevant provisions of the IPC and not a whitewash. We have indicated to the police authorities that their ability to control the position will be closely monitored by us in these on going proceedings.

Secondly, there is suggestion that all the office bearers of all the Bar Associations who participated in the boycott of the Courts on 12.12.2022 and indulged in violence should be issued contempt notices.

We agree with the suggestion. The list of all the members of the Bar Associations will be furnished by Mr. Sibo Sankar Mishra, learned counsel and contempt notices will be issued to all the members as to why they should not be proceeded against and punished in accordance with law for contempt of orders of this Court.

Thirdly, it has been stated that the demand for setting up of the Benches of the High Court is not only from Sambalpur but also from Bolangir, Koraput, Berhampur, Balasore, Sonepur, Rourkela. This seems to have become prestige issue rather than a functional issue. In fact Mr. Dattar says that only Koraput and Bolangir fall within the parameters of the Jaswant Singh Committee report of 1985 which prescribed at least a distance of 300 km. Thus in terms of that Committee report, there is no question of setting up Benches elsewhere.

We may also note that with the passage of time when "the use of technology has made the parameters in a sense obsolete. The use of technology has been quite widespread now in the Courts and monitored by the High Court of Orissa. Thus the very justification for having any Bench of the High Court no more exists."

In fact there are now counter demands of the Bhubaneswar Bar Association that the entire High Court should shift from Cuttack to Bhubaneswar. Naturally the Cuttack Bar Association opposes the same. The shifting of the High Court or creation of Benches is a matter of serious administration and cannot be done by such whimsical demands. We are putting this in the order to foreclose these issues which continue to be raised repeatedly and had produced this violence. In fact the Resolution passed by

the Central Action Committee is only of suspension of on going movement of strike with a high hope for formation of permanent Bench of Orissa High Court in Western Odisha at Sambalpur. We reject the Resolution. The Central Action Committee would have to call off the strike unconditionally and inform the other non-lawyers actors whom they have tried to rope in for purposes of enhancing their cause. There is no high hope for formation of a Bench much less a hope now. Even if there was some remote possibility, that is lost now with their conduct.

Fourthly, we are informed that from any District Court in Odisha, one can file a case in the High Court and also appear virtually. This has been possible with the technological progress. It is proposed that one dedicated room in every district Court premises in Odisha for the purposes of virtually appearing before the High Court every day will be functional soon and there can be adjacent back office to such room which will facilitate efiling of cases in the High Court. The time period for operationalization of the same is stated to be in three months. We accept the same.

This is insofar as the report of the High Court of Orissa is concerned.

3. There is a report of the Director General of Police, Odisha on the events which took place on 12.12.2022 at Sambalpur and the action taken in pursuance thereto. Let us say that it is the police's job to control law and order. They don't need any directions from us what to do. Suffice to say, what we have stated above, that complete peace and functionality of the Courts has to be maintained not only for the protection of the judicial officers but to ensure that whichever lawyers want to attend the Court are able to do so. We strongly condemn the endeavour of the striking lawyers to browbeat the Advocate General or members of Bar Council of India or the State Bar Council, including burning of the effigy. In fact what the report says is that these people did not hear the request of the police and converged on the entire road and disrupted free flow of traffic. In our view, if this is what was happening, the police should have affected preventive arrests and such people should remain in custody for some time at least and do not deserve any indulgence much less as the lawyers since they have lost their privilege of being an advocate. We have put the burden on the police authorities, which is their function, to treat the criminals like criminals and must be brought to book under the relevant provisions of the IPC.

4. The Bar Council of India has also submitted a report to us in a sealed cover. Orders have been passed on 12.12.2022 and 13.12.2022 specially after perusing the videos and photographs by the striking lawyers who failed to heed any caution tendered by the Bar Council of India earlier. 43 lawyers have been suspended and it is an ongoing process as on the basis of material the Bar Council of India identifies more lawyers.

5. The concern for securing the offices of the Bar Council must be met by the police authorities. It has also been pointed out that some of the senior officers of the Bar Council of India are facing threats including, Mr. Manan Kumar Mishra, Senior Advocate of this Court who is the Chairman of the Bar Council of India. It shall be the State police's responsibility to give adequate protection to him. Mr. Prabhakaran, Vice Chairperson already has security and would be provided security whenever the Members of the Bar Council visit there to make appropriate direction in pursuance to the duties as the Bar Council members. Since the family of Mr. Mishra also faces threat as he is from Bihar, the State of Bihar is directed to make adequate security arrangements for them and to provide him security personally. This order be informed to the Director General of Police, Bihar.

6. Since the meetings are held by the Bar council of India at their office at No. 21 Rouse Avenue, ITO, Commissioner of Police Delhi, will issue necessary instructions to make relevant security arrangements as and when meetings are held and the Bar Council will inform the local police authorities about the same.

7. Mr. Prabhakaran, has brought to our notice order passed in Suo Motu Contempt Petition No. 1834/2015. This is the judgment of the Division Bench of the Madras High Court dealing with somewhata similar scenario at the relevant time where the power of the Bar Council of India to suspend the lawyers pending inquiry was sought to be assailed. After the discussion of the aforesaid issue, it was observed in the concluding paras 24 and 25 as under:

> "24. In view of the reasons aforesaid, we reject the argument that the Bar Council has no right to suspend practice pending disposal of disciplinary proceedings.
>
> 25. Our answer to the question :
>
> We hold that the power of the Bar Council to revoke the licence to practice permanently or suspend it for a fixed term would also include the incidental power of interim suspension pending disposal of disciplinary proceedings for professional misconduct."

8. We have examined the judgment and would like to give our imprimatur to the legal view expressed in the judgment.

9. We must impress upon the legal fraternity that the privilege of having the licence as a lawyer has to be used responsibly. It is the legal fraternity which provides redressal to affected parties representing their case. The disruption of normal functioning affects the litigants. We are saying so in the general context and not in respect of the incident which has been an exercise in lumpenness.

10. It has been pointed out by Mr. Dattar that some kind of an additional holiday arise when there is unfortunate demise of a lawyer, the work is called off suddenly in the morning itself disrupting the working. While we respect the sentiments of the legal fraternity to pay their respects to any member of the Bar, the methodology which is adopted by the Supreme Court and by the most High Courts is to have reference or a gathering for the said purpose on specified days which the local Bar Associations can determine. It should not be more than once a month and that too in the afternoon session after 3.00 p.m. so that the normal working is not disrupted and yet the sentiments which are sought to be expressed are conveyed.

11. We may note that local Bar Associations are the association of the practicing lawyers with the object of taking up issues in the interest of improving the working of the courts. The objective cannot be to hold a meeting to disrupt the working of the Courts. If such meetings are held to hold disruptions naturally the Bar Council of India is well within its rights to take a call on the conduct of the lawyers in question.

12. We express our appreciation for the assistance provided by the Bar Council of India and its office bearers in regulating the conduct of the members of the bar which should be of the highest order and the counsels for the High court who appear to assist us and also the Advocate General for the State of Odisha.

13. We hope that the police does not give us an opportunity now to recognize a failure of theirs which would call for outside force to be brought in.

14. In the end Mr. Panda, made an impassioned plea on behalf of Bar members of Sambalpur by saying that they should not feel that they are being

victimized. In our view, they are getting what they deserve. If they had not participated in the events, we leave it to the Bar Council of India to see which are the lawyers to be exempted but such an extreme action was called for because of the behavior of the lawyers at large in Sambalpur.

15. A request is made also that the bail applications of the lawyers who have been arrested should be considered as per law. In our view, every Court acts as per law and certainly there is no requirement of showing any indulgence to these lawyers.

16. We would close by saying that this has been a most painful exercise for us because the persons on this side of the Bar have also been members of the Bar but then the larger cause of the institution requires us, as well as the Bar Council of India, to take action as done as the very edifice of the judicial system is sought to be shaken by such disruption and criminal activities carried on by a section of the Bar.

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2022 (III) ILR - CUT-992

Dr. S. MURLIDHAR ,C.J & R.K. PATTNAIK ,J.

W.P.(C) NOS. 3523, 5491 & 5494 OF 2022
&
W.P.(C) NOS. 28644 & 30554 OF 2021

M/s. M.G. MOHANTY & ANR. .....Petitioners
.V.
STATE OF ODISHA & ORS. .....Opp. Parties

W.P.(C) No. 28644 of 2021
M/s. BUDHRAJA MINING & CONSTRUCTION LTD. .....Petitioner
.V.
DISTRICT JUDGE, KHURDA & ORS. .....Opp. Parties

W.P.(C) No. 30554 of 2021
OHPC, BHUBANESWAR .....Petitioner
.V
M/s. TRAFLGAR HOUSE CONSTRUCTION (T) SATYAM SANKARNARAYAN JOINT VENTURE (TSSJV) AND ORS. .....Opp. Parties

(A) ARBITRATION AND CONCILIATION ACT, 1996 – Sections 9, 14, 34 – Whether for the purpose of dealing with applications under sections 9, 14, 34 of the A&C Act, jurisdiction can be conferred on a judicial officer subordinate to the rank of a District Judge, i.e., the Principal Civil Judge in the district ? – Held, Yes – If indeed commercial cases involving arbitral disputes arises then as a natural corollary the Commercial Court alone will have to decide those disputes and not of the Court in terms of the A&C Act.

(B) INTERPRETATION OF STATUTES – Whether Section 10(3) and 15(2) of the Commercial Court Act, 2015 r/w amendment Act 28 of 2018, override Section 42 of the A&C Act – Held, the A&C Act must yield to the CC Act and not vice versa when the objective of both enactments is the speedy disposal of the cases and the CC Act was a later enactment – There is no apparent conflict between the A&C Act and the CC Act for being resolved. (Para 50)

Case Laws Relied on and Referred to :-

1. (2018) 14 SCC 715 : Kandla Export Corporation Vs. OCI Corporation.
2. (2011) 8 SCC 333 : Fuerst Day Lawson Ltd Vs.Jindal Exports Ltd.
3. (2018) 1 SCC 407 : Innoventive Industries Ltd. Vs. ICICI Bank & Ors.
4. (1975) 2 SCC 840 : New India Assurance Company Limited Vs. Shanti Misra.
5. 2021 SCC On Line MP 457 : Yashwardhan Raghuwanshi Vs. District & Sessions Judge.
6. (2014) 11 SCC 619 : State of Maharashtra, through Executive Engineer Vs. Atlanta Limited.
7. 2019 SCC OnLine MP 2570 : Apollo Real Estate LLP Vs. Dr. Arun Waghmare.
8. (1975) 2 SCC 840 : New India Assurance Company Limited Vs. Shanti Misra.

For Petitioners : Mr. Gautam Mukherjee, Sr. Adv.
Mr. Durga Prasad Nanda, Sr. Adv.
Mr. Prabhu Prasanna Behera,
(In W.P. (C). 3523, 5491 & 5494 of 2022)
Mr. Avijit Pal, (In W.P.(C) No.28644 of 2021)
Mr. Durga Prasad Nanda, Sr. Adv.
(In W.P.(C). No.30554 of 2021)

For Opp. Parties: Mr. P.K. Parhi, Asst. Solicitor General
Mr. P.K. Muduli, Addl. Govt. Adv., Mr. Gautam Misra, Sr. Adv.,
Mr. YogeshJagia, Sr. Adv., Mr. Tanmay Mishra
& Mr. S.S. Parida

JUDGMENT Date of Judgment: 08.04.2022

Dr. S. MURLIDHAR ,C.J.

1. These five writ petitions raise interesting questions of law concerning the interpretation as well as interplay of the provisions of the Commercial Courts Act, 2015 (CC Act) with the provisions of the Arbitration and Conciliation Act, 1996 (A&C Act). These petitions also question a Notification dated 13th November 2020, issued by the State of Odisha through its Principal Secretary, Law Department in establishing the Court of the Civil Judge (Senior Division) for the purposes of exercising jurisdiction and powers under the CC Act.

2. The question posed for consideration by this Court is whether for the purposes of the dealing with applications under Sections 9,14, 34 and so on of the A&C Act jurisdiction can be conferred on a judicial officer subordinate to the rank of a District Judge, i.e., the Principal Civil Judge in the district notwithstanding Section 2 (1) (e) of the A&C Act? An incidental question is whether the power exercised by the State Government under Section 3(3) read with Section 10(3) and 15(2) of the CC Act can override Section 42 of the A&C Act?

Facts in W.P. (C) Nos. 3523, 5491 and 5493 of 2022

3. Three of the five writ petitions are by M/s. M.G. Mohanty, a registered partnership firm (Petitioner No.1) and its managing partner Mr. Rajiv Lochan Mohanty (Petitioner No.2). The background facts in these three petitions are that due to the disputes between the partners of the firm i.e. Petitioner No.2 and proforma Opposite Party Nos.4 to 8, applications under Section 9 were filed before the District & Sessions Judge (D&SJ), Bhubaneswar. These were the Arbitration Petition Nos.56, 57 and 58 of 2020. The learned D&SJ admitted Arbitration Petition No.56 of 2020 by an order dated 12th November, 2020 and on 17th November, 2020 passed an interim order in favour of the Petitioners. He issued notice in the remaining two petitions on 2nd December, 2020.

4. Meanwhile, on 13th November 2020, the impugned notification was issued by the Law Department of the State Government in consultation with the High Court establishing the Court of the Civil Judge (Senior Division) and conferring the powers and jurisdiction of the Commercial Courts under the CC Act on such Court. Following this, on 7th July 2021, the learned D&SJ transferred Arbitration Petitions Nos.56, 57 and 58 of 2020 to the Court of the Senior Civil Judge (Commercial Court), Bhubaneswar.

5. It is further stated that an application was filed before the learned D&SJ, challenging the jurisdiction of the Commercial Court in adjudicating the matter

under the A&C Act particularly, since the Presiding Officer of the Commercial Court is subordinate to the rank of a District Judge and that hearing of the application under Section 9 of the A&C Act by the Senior Civil Judge (Commercial Court) would be against the spirit of the A&C Act in terms of the recent definition of the expression, "Principal Civil Court", in the A&C Act. By an order dated 25th October 2021, the learned D&SJ rejected that application inter alia on the ground that the order dated 7th July 2021, passed by the D&SJ transferring the matter to the Senior Civil Judge (Commercial Court) was an order under Section 15 of the A&C Act, and that order had not been challenged before a higher forum.

6. In the present petitions, a challenge has been raised not only to the notification dated 13th November, 2020 but also the order dated 7th July, 2021 passed by the learned D&SJ transferring the cases pending before him to the Court of the Senior Civil Judge (Commercial Court) as well as the above order dated 25th October, 2021. A direction is sought for the establishment of the Commercial Court by conferring the power on the Presiding Officer in the cadre of the District Judge, not subordinate to the rank of the District Judge.

7. In the aforementioned three petitions by M/s. M.G. Mohanty, the interim order passed by this Court was to the effect that proceedings may continue before the Senior Civil Judge (Commercial Court), Bhubaneswar, but no final order would be passed in the applications pending before that Court.

Facts in W.P. (C) No.28644 of 2021

8. The fourth petition, W.P.(C). No. 28644 of 2021, has been filed by M/s. Budhraja Mining and Construction Limited (BMCL). The background facts as far as in this petition is concerned are that BMCL and National Aluminium Company Limited (NALCO) (Opposite Party No.3) and the General Manager, Captive Power Plant (CPP) (Opposite Party No.4) had a contractual relationship. The disputes between the parties were referred to the arbitration of a former Judge of this Court as sole Arbitrator.

9. On 28th January 2021, the learned Arbitrator passed an Award which was challenged by the Opposite Party Nos. 3 and 4 i.e., NALCO and the CPP in Arbitration Petition No.24 of 2021 under Section 34 of the A&C Act before the D&SJ, Khurda at Bhubaneswar. By an order dated 23rd June 2021, the learned D&SJ transferred the said petition to the Court of the Senior Civil Judge (Commercial Court) at Bhubaneswar which then issued notice to BMCL to appear on 16th September, 2021 and file an objection.

10. BMCL has, in the present petition, challenged the said order dated 23rd June 2021 of the D&SJ and has sought for a declaration that it is only the D&SJ, being the Principal Civil Court having territorial jurisdiction within the meaning of Section 2(1)(e) of the A&C Act who is competent to decide arbitration matters/disputes filed under Sections 9, 14, 34, 36 and 37 of A&C Act. A further prayer is to declare Section 10 and 15 of the CC Act in so far as related to arbitration applications, as being ultra vires the A&C Act. In W.P.(C) No.28644, this Court on 29th September 2021, directed that Arbitration Petition No.24 of 2021 filed by NALCO and CPP against BMCL pending in the Court of the Senior Civil Judge (Commercial Court) would continue but no final order would be passed. That interim order has continued.

Facts in W.P. (C) No.30554 of 2021

11. In W.P.(C) No.30554 of 2021, the Petitioner is Odisha Hydro Power Corporation Limited (OHPC), whereas the contesting party is M/s. TRAFLGAR House Construction (T) Satyam Sankarnarayan Joint Venture (TSSJV). The background facts as far as this petition is concerned are that an agreement was entered into between these parties whereby TSSJV was to complete the work under the agreement. The disputes that arose between the parties were referred to arbitration.

12. Arbitration Petition No.50 of 2020 was filed by OHPC before the D&SJ, Bhubaneswar under Section 14 of the A&C Act for termination of mandate of the Arbitrator. While the petition was pending, on 15th July 2021, the D&SJ transferred Arbitration Petition No.50 of 2020 to the Court of the Senior Civil Judge (Commercial Court), Bhubaneswar. The said order of transfer dated 15th July, 2021 has been challenged by OHPC before this Court in the present petition. On 19th July 2021, the Senior Civil Judge (Commercial Court) passed a consequential order receiving the case on transfer. The present petition, therefore, challenges the orders dated 15th July 2021 transferring the case record to the Senior Civil Judge (Commercial Court), Bhubaneswar and the corresponding order dated 19th July, 2021 of the Senior Civil Judge (Commercial Court) receiving the case on transfer.

13. This Court has heard the submissions of Mr. Gautam Mukherjee, learned Senior Advocate and Mr. Durga Prasad Nanda, learned Senior Advocate, instructed by Mr. Prabhu Prasanna Behera, learned counsel on behalf of the Petitioners in W.P.(C) No.3523, 5491 and 5494 of 2022. Mr. Avijit Pal, learned counsel appeared for BMCL, the Petitioner in W.P.(C) No.28644 of 2021 and

Mr. D.P. Nanda, learned Senior Advocate appeared on behalf of OHPC in W.P.(C) No.30554 of 2021.

14. Mr. Gautam Misra, learned Senior Advocate appeared on behalf of Mr. Padma Lochan Mohanty (Opposite Party No.5), whereas Mr. Yogesh Jagia, learned Senior Advocate appeared on behalf of Mr. Pankaj Lochan Mohanty (Opposite Party No.6) in the three writ petitions of M/s. M.G. Mohanty and its managing partner. In W.P.(C) No.28644 of 2021, Mr. Tanmay Mishra and Mr. S.S. Parida, learned counsel appeared on behalf of NALCO and CPP whereas Mr. P.K. Parhi, learned Assistant Solicitor General, appeared on behalf of the Union of India, Ministry of Law and Justice. In W.P.(C) No.30554 of 2021, Mr. P.K. Muduli, learned Additional Government Advocate appeared on behalf of the State of Odisha.

Submissions of counsel for the Petitioners

15. The submissions of learned counsel for the Petitioners in all these petitions could be summarized as under:

> (i) The A&C Act is a special statute as has been held in ***Kandla Export Corporation v. OCI Corporation (2018) 14 SCC 715***. In the said Judgment, the CC Act had been declared to be a general statute by relying on the decision in ***Fuerst Day Lawson Ltd v. Jindal Exports Ltd. (2011) 8 SCC 333***. Therefore, the A&C Act being a special statute would prevail over the CC Act.
>
> (ii) The definition of 'Court' under Section 2(1)(e) of the A&C Act would prevail over the provisions of the CC Act. Thus, the Principal Civil Court of the District alone has the exclusive jurisdiction to try and decide the matters relating to the disputes in arbitration under Sections 9, 14, 29A, 34, 36, 37(1)(a) and 37(2) of the A&C Act.
>
> (iii) The maxim ***'generalia specialibus non-derogant'*** was squarely applicable in these matters. In other words, it is submitted that the provisions of the general law i.e., the CC Act had to yield to the provisions of the special Act, i.e., the A&C Act. Reliance was placed on certain passages from Maxwell on Interpretation of Statutes (11th edition) [Chapter-VII Section 3, Page 168].
>
> (iv) The mere fact that the general law i.e., the CC Act contained a non obstante provision viz., Section 21 stating that the CC Act has overriding effect, did not demolish the force of the rule of construction advanced on behalf of the Petitioners. It is submitted that Section 21 of the CC Act will not override the provisions of the A&C Act.

Submissions of counsel for the Opposite Parties

16. Mr. Yogesh Jagia, learned Senior Advocate appearing on behalf of Kamal Lochan Mohanty [Opposite Party No.4 in W.P.(C) No.3523 of 2022], submitted as under:

> (i) There is no apparent conflict between the A&C Act and the CC Act. Since both enactments could be labelled as 'special' laws, *inter se* among them, the latter enactment being the CC Act, would prevail.
>
> (ii) It is further submitted, on the strength of the decision of the Supreme Court of India in ***Innoventive Industries Ltd. v. ICICI Bank and others (2018) 1 SCC 407*** that the 'inconsistency must be clear, direct and irreconcilable and inconsistency should be of such a magnitude that the legislations appear to be in 'direct collision' with each other and it is impossible to obey both of them simultaneously'.
>
> (iii) To resolve the repugnancy, a purposive and harmonious construction was required to be applied. On a collective reading of Section 9 with Section 2(1)(e) of the A&C Act read with Section 10 (3) and 21 of the CC Act, it is clear that the legislature while providing substantive provisions in the A&C Act for speedy disposal also provided procedurally the forum under the CC Act viz., the Commercial Court, to adjudicate all disputes arising under Section 9 and other sections of the A&C Act.
>
> (iv) Reliance is placed on the decision in ***New India Assurance Company Limited v. Shanti Misra (1975) 2 SCC 840***, and it is submitted that:
>
> "5. ……the change in law was merely change of forum, i.e., a change of adjectival or procedural law not a substantive law and such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to change of forum."
>
> (v) It is submitted that both the A&C Act and the CC Act aim at speedy adjudication. Whereas the CC Act covers all commercial disputes, the A&C Act is only concerned with the disputes that involved arbitration. It is submitted that if at all there is any conflict between the two enactments substantively, it would be the A&C Act that prevails. However, since it is the procedural aspect of resolution of commercial disputes, including arbitral disputes, that has been provided under the CC Act, the latter can co-exist harmoniously with the A&C Act.

(vi) Reliance was placed on the decision of the Bombay High Court in ***Gaurang Mangesh Suctancar v. Sonia Gaurang Suctancar***, where it was held that it would be the CC Act that prevails over the A&C Act. It is submitted that the main purpose of the CC Act was for speedy disposal of commercial cases. Pursuant to the amendments of 2018 to the CC Act even the appellate jurisdiction has been conferred in the form of a Commercial Appellate Court at the district level which was not provided for prior to the 2018 amendment. The purpose of specifying the forum under Section 10 of the CC Act was further substantiated from the fact that the CC Act stipulated time bound completion of pleadings without any discretion for extension which was otherwise permitted in common law.

17. Mr. Gautam Misra, learned Senior Advocate appearing for one other partner namely, Sri Padma Lochan Mohanty, made the following submissions:

> (i) In view of Sections 3, 3A, 10(3), 13, 15(2) and 21 of the CC Act, the contention of the Petitioners is that arbitration matters must be exclusively triable by the D&SJ who happens to be the Principal Civil Court original jurisdiction in a district, is not legally tenable.
>
> (ii) As per Section 10 (3) of the CC Act, the State Government in consultation with the High Court can designate a Senior Civil Judge as a Commercial Court. Appeals from the said Court would lie to the Commercial Appellate Court which would be in the rank of the District Judge. Thus even an Additional District Judge can be designated as a Commercial Appellate Court under Section 3A of the CC Act.
>
> (iii) Reference is made to the 16th Lok Sabha Parliamentary Debates dated 1st August, 2018 to urge that the objective of setting of Commercial Courts was the expeditious disposal of the commercial cases. In terms of the scheme of the CC Act, it would not be proper for one Court to hear civil suits and another to hear arbitration matters. It is pointed out that in some other States i.e., the States other than Odisha, an Additional District Judge has been appointed as a Commercial Court. It is, however, the State Government to take call in that regard. The corresponding appeal would lie to the High Court under Section 13 (1-A) of the CC Act, hence, there was no denial of the opportunity of an appeal.

Analysis and reasoning

18. The Court would first like to examine the provisions of the A&C Act. The word 'Court' is used in many provisions of the A&C Act. In the context of the present petitions, it requires to be noticed that Section 9(1) of the A&C Act states that a party can before or during or even at any time after the making of an award and prior to its enforcement apply to a 'Court' for certain interim reliefs mentioned therein. Then we have Section 14(2) which states that if there is a controversy regarding termination of the mandate of an Arbitrator, then a party may unless, otherwise agreed to by the parties, 'apply to the Court to decide on the termination of the mandate'. Section 34 of the Act which gives the remedy of challenge to an arbitral award states that such an application may be made 'to a Court'.

19. Section 37 of the A&C Act talks of 'appealable orders' and reads as under:

> "(1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:
>
> (a) refusing to refer the parties to arbitration under section 8;
>
> (b) granting or refusing to grant any measure undersection 9;
>
> (c) setting aside or refusing to set aside an arbitral award under section 34.
>
> (2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal
>
> (a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or
>
> (b) granting or refusing to grant an interim measure under section 17.
>
> (3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

20. Section 42 of the Act which makes it clear that wherein respect to an arbitration agreement an application has been made under this part in a certain 'Court', then 'that Court alone shall have jurisdiction of the arbitral proceedings'. This provision has a non-obstante clause. It reads as under:

> "Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out

> of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."

21. Since the expression 'Court' is used extensively, its definition assumes some importance. Section 2(1)(e) of the A&C Act defines the Court and reads as under:

> "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes."

22. Section 2(1)(e)(i) is relevant for the present cases since the arbitrations in question are domestic arbitrations, i.e. other than 'international commercial arbitrations'. In that context, the expression 'Court' can be only the 'Principal Civil Court of original jurisdiction in a district' and, as the provision clarifies, it 'does not include any Civil Court of a grade inferior to such Principal Civil Court, or any Court of small causes'. In certain States other than Odisha including the State of Madhya Pradesh, the 'Principal Civil Court of original jurisdiction in a district' need not be only the District & Sessions Judge (D&SJ) but can be even an ADJ. However, the admitted position is that as far as Odisha is concerned, further purposes of 2(1)(e)(i) of the A&C Act, it is only the D&SJ who is the Principal Civil Court in a district.

23. In the present case, therefore, when the applications under Section 9 or Section 34 of the A&C Act as the case may be were filed in the Court of the D&SJ, Bhubaneswar then strictly going by Section 42 of the A&C Act, it is that Court alone which would have the jurisdiction to entertain the suit notwithstanding any other provision in any other law for the time being force.

24. However, a significant change has been brought about by the enactment of the CC Act in 2015 and which came into effect from 31st December 2015. The Statement of Objects and Reasons (SOR) of the CC Act assumes significance. One stated object was that there was a 'need to provide for an independent mechanism' for the early resolution of 'high value commercial disputes'. Such early resolution, it was expected, 'shall create a positive image to the investor world above the independent and responsive Indian legal system'. The SOR referred to the 188th Report as well as the 253rd Report of the LawCommission of India.

25. The CC Act underwent certain significant changes in 2018 by the Amendment Act 28 of 2018 with effect from 3rd May 2018, while the CC Act as

it was enacted in 2015 was meant to deal with high value commercial disputes, the 2018 amendment acknowledged that there was a need for early resolution of commercial disputes 'of even lesser value'. The specific objectives enumerated in the SOR to the 2018 Amendment Bill read as under:

> "(i) to reduce the specified value of commercial disputes from the existing one crore rupees to three lakh rupees, and to enable the parties to approach the lowest level of subordinate courts for speedy resolution of commercial disputes;
>
> (ii) to enable the State Governments, with respect to the High Courts having ordinary original civil jurisdiction, to constitute commercial courts at District Judge level and to specify such pecuniary value of commercial disputes which shall not be less than three lakh rupees and not more than the pecuniary jurisdiction of the district courts;
>
> (iii) to enable the State Governments, except the territories over which the High Courts have ordinary original civil jurisdiction, to designate such number of Commercial Appellate Courts at district judge level to exercise the appellate jurisdiction over the commercial courts below the district judge level;
>
> (iv) to enable the State Governments to specify such pecuniary value of a commercial dispute which shallnot be less than three lakh rupees or such higher value, for the whole or part of the State; and
>
> (v) to provide for compulsory mediation before institution of a suit, where no urgent interim relief is contemplated and for this purpose, to introduce thePre-Institution Mediation and Settlement Mechanism and to enable the Central Government to authorise the authorities constituted under the Legal Services Authorities Act, 1987 for this purpose."

26. Keeping in view of the above changes, the Court now proceeds to look at the definitions in the CC Act. Section 2 (1) (b) defines a 'Commercial Court' to be the Commercial Court constituted under Section 3(1) of the CC Act, which reads as under:

> "3. Constitution of Commercial Courts:-
>
> (1) The State Government may after consultation with the concerned High Court, by notification, constitute such number of Commercial Courts at District level, as it may deem necessary for the purpose of exercisingthe jurisdiction and powers conferred on those Courts under this Act: Provided that with respect to the High Courts having ordinary original civil jurisdiction, the State Government may, after consultation with the concerned High Court, by notification, constitute Commercial Courts at the District Judge level:
>
> Provided further that with respect to a territory over which the High Courts have ordinary original civil jurisdiction, the State Government may, by notification,

specify such pecuniary value which shall not be less than three lakh rupees and not more than the pecuniary jurisdiction exercisable by the District Courts, as it may consider necessary.

(1A) Notwithstanding anything contained in this Act, the State Government may, after consultation with the concerned High Court, by notification, specify such pecuniary value which shall not be less than three lakh rupees or such higher value, for whole or part of the State, as it may consider necessary.

(2) The State Government shall, after consultation with the concerned High Court specify, by notification, the local limits of the area to which the jurisdiction of a Commercial Court shall extend and may, from time totime, increase, reduce or alter such limits.

(3) The State Government may, with the concurrence of the Chief Justice of the High Court appoint one or more persons having experience in dealing with commercial disputes to be the Judge or Judges, of a Commercial Court either at the level of District Judge or a court below the level of a District Judge."

27. Section 3A of the CC Act which speaks of the constitution of Commercial Appellate Courts reads as under:

"3A. Designation of Commercial Appellate Courts:-

Except the territories over which the High Courts have ordinary original civil jurisdiction, the State Government may, after consultation with the concerned High Court, by notification, designate such number of Commercial Appellate Courts at District Judge level, as it may deem necessary, for the purposes of exercising the jurisdiction and powers conferred on those Courts under this Act."

28. Commercial Appellate Courts can, therefore, also be established at the District Judge level. Arbitration matters are also commercial disputes as per the definition of 'commercial dispute under' Section 2(1)(c) read with Section 10 of the CC Act which reads as under:

"10. Jurisdiction in respect of arbitration matters:-

Where the subject-matter of an arbitration is a commercial dispute of a Specified Value and-

(1) If such arbitration is an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed in a High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.

(2) If such arbitration is other than an international commercial arbitration, all applications or appealsarising out of such arbitration under the provisions of the

> Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed on the original side of the High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.
>
> (3) If such arbitration is other than an international commercial arbitration, all applications or appealsarising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that would ordinarily lie before any principal civil court of original jurisdiction in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted."

29. Correspondingly, as regards the pending arbitration cases, the transfer of such cases to the Commercial Courts is provided under Section 15(2) of the CC Act which reads as under:

> "15 (2) All suits and applications, including applications under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of a Specified Value pending in any civil court in any district or area in respect of which a Commercial Court has been constituted, shall be transferred to such Commercial Court: Provided that no suit or application where the final judgment has been reserved by the Court prior to the constitution of the Commercial Division or the Commercial Court shall be transferred either under sub-section (1) or sub-section (2)."

30. Section 21 of the CC Act is a provision that has been relied upon by the Opposite Parties. It reads as under:

> "21. Act to have overriding effect:-
>
> Save as otherwise provided, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law for the time being in force other than this Act."

31. There can be no doubt that in terms of chronology, CC Act is later to the A&C Act. Both are Parliamentary enactments. When the CC Act was enacted, the Parliament was conscious of the A&C Act and its provisions. There is specific reference to the A&C Act in Sections 10 and 15 of the CC Act. Wherever, the subject matter of an arbitration is a 'commercial dispute of a specified value' and it fulfils the conditions which specified in Section 10(3), the matter shall be heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Courts have been constituted. Therefore, Section 3(3) of the CC Act assumes importance.

The constitution of such Commercial Courts is to be done by the State Government with the concurrence of the Chief Justice of the High Court.

32. As far as Odisha is concerned, it is an admitted position that pursuant to the aforementioned power vested in the State Government under Section 3(3) of the CC Act, the impugned notification dated 13th November 2020 has been published. It reads as under:

"GOVERNMENT OF ODISHA

LAW DEPARTMENT
*****
NOTIFICATION

Bhubaneswar dated, the 13- NOV, 2020

No. IJ-68/2018. 10933/ L, In exercise of the powers conferred by section-3 and sub-section (1) of section 9 read with section 10 of the Odisha Civil Courts Act, 1984 (Odisha Act 18 of 1984) and section 30 of the Commercial Courts Act, 2015 (4 of 2016) and in supersession of the notification of the Government of Odisha in the Law Department No.12640/L, dated 26th October 2017, published in the Extraordinary issue No.1478 of the Odisha Gazette dated the 28th October, 2017, the State Government on the recommendation ofand after consultation with the High Court of Orissa do hereby establish the Courts of Civil Judge (Senior Division) at the places as mentioned in column (2) of the Schedule below, and number of such Courts as mentioned in column (4) thereof in addition to the existing number of such Courts in the respective Judgeship having local limits of jurisdiction coextensive with the local limits of jurisdiction mentioned in column (3) of the said Schedule for the purpose of exercising the jurisdiction and powers on those Courts under the Commercial Courts Act, 2015,with effect from the date on which the said Courts are made functional.

Schedule

Sl.No.	Place of sitting of Commercial Court	Extent of local limits of jurisdiction	No. of Courts at the place of sitting
(1)	(2)	(3)	(4)
1	Cuttack Sadar	Judgeship of Cuttack, Angul, Dhenkanal and Jajpur	1
2	Bhubaneswar	Judgeship of Khurda	1
3	Berhampur	Judgeship of Ganjam, Kandhamal, Boudh and Gajapati	1
4	Sambalpur	Judgeship of Sambalpur, Bargarh, Deogarh and Jharsuguda	1

By order of the Governor
Principal Secretary to Government"

33. This has to be read with the relevant provisions of the Orissa Civil Courts Act (OCC Act), 1984. Section 2 (1) of the OCC Act reads as under:

> "Classes of Civil Courts-
>
> (1) There shall be the following classes of Civil Courts under this Act, namely:-
>
> (a) The Court of the District Judge which shall include the Court of the Additional District Judge;
>
> (b) The Court of the Civil Judge (Senior Division) which shall include the Court of the Additional Civil Judge (Senior Division) and;
>
> (c) The Court of Civil Judge (Junior Division) which shall include the Court of Additional Civil Judge (Junior Division).
>
> (2) The Court of the District Judge shall be the principal Court of original civil jurisdiction in the district.
>
> Explanation- For the purposes of this sub-section the expression "District Judge" shall not include an Additional District Judge."

34. Then we have the memo dated 27th April, 2021 of the High Court of Orissa which notified on 3rd May, 2021 as the date of commencement of the Commercial Court of the Senior Civil Judge, Bhubaneswar. In the said memo, it was directed that case records pertaining to commercial disputes under the CC Act be transferred for smooth functioning to the Commercial Court.

35.1 In order to press home the point that it is the A&C Act that would prevail and therefore the petitions pending in the Court of Senior Civil Judge (Commercial Court) Bhubaneswar should continue to be heard only by the D&SJ and not by the Senior Civil Judge Commercial Court, extensive reliance is placed by counsel for the Petitioners on the decision of the Supreme Court in **Kandla Export Corporation v. OCI Corporation** (supra). A careful perusal of the said decision reveals that the question addressed there was whether 'an appeal, not maintainable under Section 50 of the A&C Act, is nonetheless maintainable under Section 13(1) of the CC Act?' The question, in that case arose in an international commercial arbitration and not a domestic arbitration. It was contended in that case, relying on the decision in **Fuerst Day Lawson Limited v. Jindal Export Limited** (supra) that the A&C Act is a self-contained Code on all matters pertaining to arbitration, which would exclude the applicability of the general law contained in Section 13 of the CC Act.

35.2 The Supreme Court considered the definition of the word 'specified value' in the CC Act which at the relevant point of time meant not less than Rs.1crore or higher value 'as may be notified by the Central Government'. Incidentally, that definition has undergone a change by the 2018 amendment with retrospective effect from 3rd May, 2018 and the figures '1crore rupees' has been substituted by '3 Lakh rupees'. The discussion in ***Kandla Export Corporation v. OCI Corporation*** (supra) turned on the interpretation of Section 50 of theA&C Act, which was considered in ***Fuerst Day Lawson*** (Supra). It was held as under:

> "20.Given the judgment of this Court in *Fuerst Day Lawson* (supra), which Parliament is presumed to know when it enacted the Arbitration Amendment Act,2015, and given the fact that no change was made in Section 50 of the Arbitration Act when the Commercial Courts Act was brought into force, it is clear that Section 50 is a provision contained in a self-contained code on matters pertaining to arbitration, and which is exhaustive in nature. It carries the negative import mentioned in paragraph 89 of *Fuerst Day Lawson* (supra) that appeals which are not mentioned therein, are not permissible. This being the case, it is clear that Section 13(1) of the Commercial Courts Act, being a general provision vis-à-vis arbitration relating to appeals arising out of commercial disputes, would obviously not apply to cases covered by Section 50 of the Arbitration Act.
>
> 21. However, the question still arises as to why Section 37 of the Arbitration Act was expressly included in the proviso to Section 13(1) of the Commercial Courts Act, which is equally a special provision of appeal contained in a self-contained code, which in any case would be outside Section 13(1) of the Commercial Courts Act. One answer is that this was done ex *abundant cautela*. Another answer may be that as Section 37 itself was amended by the Arbitration Amendment Act, 2015, which came into force on the same day as the Commercial Courts Act, Parliament thought, in its wisdom, that it was necessary to emphasise that the amended Section 37 would have precedence over the general provision contained in Section 13(1) of the Commercial Courts Act. Incidentally, the amendment of 2015 introduced one more category into the category of appealable orders in the Arbitration Act, namely, a category where anorder is made under Section 8 refusing to refer parties to arbitration. Parliament may have found it necessary to emphasize the fact that an order referring parties to arbitration under Section 8 is not appealable under Section 37(1)(a) and would, therefore, not beappealable under Section 13(1) of the Commercial Courts Act. Whatever may be the ultimate reason forincluding Section 37 of the Arbitration Act in the proviso to Section 13(1), the ratio decidendi of the judgment in *Fuerst Day Lawson* (supra) would apply, and this being so, appeals filed under Section 50 of the Arbitration Act would have to follow the drill of Section 50 alone.
>
> 22. This, in fact, follows from the language of Section 50 itself. In all arbitration cases of enforcement of foreign awards, it is Section 50 alone that provides an appeal. Having provided for an appeal, the forum of appeal is left "to the Court

authorized by law to hear appeals from such orders". Section 50 properly read would, therefore, mean that if an appeal lies under the said provision, then alone would Section 13(1) of the Commercial Courts Act be attracted as laying down the forum which will hear and decide such an appeal."

35.3 An argument was advanced based on Section 21 of the CC Act but was repelled by the Court in ***Kandla Export Corporation*** (Supra)as under:

"26. In this view of the case, it is unnecessary to advert to Shri Giri's arguments based on Section 21 of the Commercial Courts Act. Section 21 would only apply if Section 13(1) were to apply in the first place, which, as has been found, cannot be held to apply for the reasons given herein above. Equally, it is unnecessary to advert to the arguments of the learned counsel for the Appellants based on Section 11 of the Commercial Courts Act."

35.4 The Supreme Court in ***Kandla Export Corporation v. OCI Corporation*** (supra) then discussed another aspect as under:

"27. The matter can be looked at from a slightly different angle. Given the objects of both the statutes, it is clear that arbitration itself is meant to be a speedy resolution of disputes between parties. Equally, enforcement of foreign awards should take place as soon as possible if India is to remain as an equal partner, commercially speaking, in the international community. In point of fact, the raison d'être for the enactment of the Commercial Courts Act is that commercial disputes involving high amounts of moneyshould be speedily decided. Given the objects of both the enactments, if we were to provide an additional appeal, when Section 50 does away with an appeal soas to speedily enforce foreign awards, we would be turning the Arbitration Act and the Commercial Courts Act on their heads. Admittedly, if the amount contained in a foreign award to be enforced in India were less than Rs. one crore, and a Single Judge of a High Court were to enforce such award, no appeal would lie, in keeping with the object of speedy enforcement of foreign awards. However, if, in the same fact circumstance, a foreign award were to be for Rs.one crore or more, if the Appellants are correct, enforcement of such award would be further delayed by providing an appeal under Section 13(1) of the Commercial Courts Act. Any such interpretation would lead to absurdity, and would be directly contrary to the object sought to be achieved by the Commercial Courts Act, viz., speedy resolution of disputes of a commercial nature involving a sum of Rs.1 crore and over. For this reason also, we feel that Section 13(1) of the Commercial Courts Act must be construed in accordance with the object sought to be achieved by the Act. Any construction of Section 13 of the Commercial Courts Act, which would lead to further delay, instead of an expeditious enforcement of a foreign award must, therefore, be eschewed. Even on applying the doctrine of harmonious construction of both statutes, it is clear that they are best harmonized by giving effect to the special statute i.e. the Arbitration Act, vis-à-vis the more general statute, namely the Commercial Courts Act, being left to operate in spheres other than arbitration."

35.5 What appears to have weighed with the Supreme Court in deciding ***Kandla Export Corporation*** (Supra) in the above manner was that Section 50 of the A&C Act, in relation to international commercial arbitration, did not provide for an appeal whereas accepting the submissions of the Appellants in that case would mean that notwithstanding Section 50 of the A&C Act an appeal was still maintainable. The question was that whether Section 13(1) of the CC Act would apply in the first place? Since the answer to that question was in the negative, the Court held that it is Section 50 of the A&C Act which would prevail and not Section 13(1) of the CC Act.

36. In the present case, however, we are not concerned with an international commercial arbitration. For a domestic arbitration, there is no bar as contained in Section 50 of the A&C Act to the maintaining of an appeal under Section 13(1) of the CC Act. In fact that is not in issue as far as the present case is concerned. Here, what stands transferred to the Commercial Court are petitions under Section 9 or Section 14 or Section 34 of the A&C Act. These are covered under Section 15(2) of the CC Act. The question of applicability of either Section 13(1) of the CC Act or Section 50 of the A&C Act, therefore, does not arise.

37. The principal concern expressed in ***Kandla Export Corporation*** (Supra) was that the objective of a speedy resolution of disputes would be defeated if a right of appeal under Section 13(1) of the CC Act in an international commercial arbitration was permitted despite the specific bar in Section 50 of the A&C Act. This, it was opined, would defeat the purpose of early resolution of disputes. Such a concern does not arise as far as the present case is concerned. Consequently, the Court is not persuaded that the decision in ***Kandla Export Corporation*** (supra) helps the case of the Petitioners.

38. Learned counsel for the Petitioners also placed extensive reliance on the Judgment of the Madhya Pradesh High Court in ***Yashwardhan Raghuwanshi v. District & Sessions Judge 2021 SCC On Line MP*** 457. There the validity of an order passed by the D&SJ, Bhopal, distributing the Civil and Criminal business among various Additional District Judges (ADJs) and the subordinate Judges working under his supervision. The challenge in particular was to Entry-45 in terms of which disputes/cases filed under the provisions of Sections 9, 14, 34 & 36 of the A&C Act, involving commercial disputes under the provisions of the CC Act of specified value between Rs.3 Lac and Rs.1crore were assigned to the Court of the Civil Judge Class-I, Bhopal.

39. In ***Yashwardhan Raghuwanshi v. District & Sessions Judge*** (supra), the Madhya Pradesh High Court relied on the decision of the Supreme Court of

India in ***State of Maharashtra, through Executive Engineer v. Atlanta Limited (2014) 11 SCC 619*** to hold that the Court of superior most jurisdiction in a district is the Court of the District Judge. It concluded that:

> "14……Segregation of an arbitration matters on the basis of a pecuniary limit is not what the law provides for. All the arbitration matters, irrespective of the value of claim, are required to be adjudicated by Principal Civil Court of original jurisdiction. Therefore, it is clear that in respect of commercial disputes involving an arbitration dispute only the Commercial Court of the status of District Judge orAdditional District Judge would be the competent court to entertain the matters under Sections 9, 14, 34 & 36 of the Arbitration Act."

40. Consequently, the aforementioned order dated 20th October, 2020 was set aside by the M.P. High Court.

41. This Court's attention has been drawn to an earlier decision of the Madhya Pradesh High Court in ***Apollo Real Estate LLP v. Dr. ArunWaghmare 2019 SCC OnLine MP 2570*** which appears not to have been noted in the ***Yashwardhan Raghuwanshi*** decision. There the High Court appears to have come to an opposite conclusion viz., that Section 10(2) read with Section 15(2) of the CC Act would prevail over the provisions of the A&C Act.

42. In any event, this Court is unable to agree with the reasoning of the High Court of Madhya Pradesh in ***Yashwardhan Raghuwanshi*** (supra). In particular, the Court would like to refer to the Parliamentary intent in enacting the CC Act in 2015 much after the A&C Act of 2016 and the SOR not only of the Bill introduced in 2015 but also the SOR of the Bill introduced in 2018, amending the said statute. The debates in the Parliament in this regard are instructive. In defending its decision to expand the scope of commercial disputes beyond those which were of high value, three aspects that were mentioned on behalf of the Government defending the Bill in the Parliament, which read as under:

> "Now, what really has transpired in December 2017? As has already been mentioned by the hon. Minister, in December, 2017, the Government had established atotal of 247 commercial courts across the country. But, the non-exhausted list of 22 disputes, termed as commercial disputes, has also been brought in. To increase the efficiency of the system, there are still many enactments and many things which we need to correct and this is just one part of the correction to improve the ease of doing business. By bringing the jurisdiction to three lakhs, we will actually be bringing judicial accessibility to a wider audience and to alarger number of people. By making it available to a larger number of people, we will be resolving a larger number of disputes. It is in this context that the jurisdiction has been reduced after studying the data in detail.

> This particular amendment has been brought in with the specific value which was determined under Section 2 (1) (i), where the minimum pecuniary jurisdiction is mentioned, which was one crore earlier before the Ordinance, now it has been brought to three lakhs. This jurisdiction will initiate more such disputes to have a faster disposal.
>
> As I have mentioned earlier, under the Charter, there are Chartered High Courts and non-Chartered High Courts. So, certain original jurisdictions are vested with certain High Courts and not with every High Court. This was one impediment in establishing commercial divisions. So, there was a bar of some sort. To do away with the bar, this particular enactment has been brought in and this is another major change which has been brought in through this particular Bill.
>
> The third aspect of the commercial appellate court is that normally at the District Level, either a District Judge or a Judge below the level of District Judge, will be notified as the Commercial Court Judge. Then the appeal need not go to the High Court. The appeal can go to the District Judge. That is also a part of this particular enactment."

43. The legislature appears to have left it open to the High Court and the State government either to appoint a Civil Judge (Senior Division) or an Additional District Judge as the Commercial Court of first instance to expedite the adjudication of commercial disputes. It is interesting to note that there are several States that have constituted Commercial Courts both at the District Judge level as well as below the District Judge level. In Gujarat, the Courts of the Additional District Judges in Bhuj, Anjar, Gandhidham and Bhachau have been constituted for hearing arbitration matters whereas the Courts of the Principal Senior Civil Judge in these places are for hearing other commercial disputes. In Karnataka, in some districts, it is the Principal D&SJ and in others the AD&SJ. In Bihar, depending on the pecuniary value, it could be the District Judge or the Sub-Judge. In Uttarakhand, it is the Additional District Judge Commercial Court, Dehradun. The intent clearly was to expand the power and to bring in more Courts under the rubric of 'Commercial Courts'. Considering that the specified value was being lowered, it was but natural to allow Courts below the rank of the District Judge to be designated as such.

44. Section 10(3) of the CC Act specifically deals with arbitrations, 'other than international commercial arbitrations'. The jurisdiction in respect of such disputes would now be based with the Commercial Courts, although earlier it was with a principal Civil Court, which would ordinarily exercise jurisdiction under Section 2(1)(e) of the A&C Act. The orders passed by the D&SJ on 7th July 2021, transferring the arbitration petitions to the Court of the Senior Civil Judge Commercial Court, was only by way of implementation of these provisions.

45. During the course of hearing, the issue concerning the constitutional validity of Section 10(3) of the CC Act was not seriously canvassed. In any event, the Court considers the argument to be futile for the simple reason that commercial disputes have been identified as a special category for the purposes of the legislation. It is not possible to accept the plea on behalf of the Petitioners that while A&C is a special law, the CC Act is a general law. This cannot be a mere matter of perception of the Petitioners. Here we have two special laws one being the A&C Act which is earlier and the CC Act which is later. Therefore, the principle of *'generalia specialibus non derogant'*, has no application whatsoever, in the present context.

46. There might be an anomaly inasmuch as arbitral disputes of a commercial value of less than Rs.3 Lacs may have to be dealt with directly by the D&SJ in terms of the definition under Section 2(1)(e) of the A&C Act and appeal against which would lie to the commercial appellate division in the High Court. But none of the petitions before this Court has that fact situation. The questions is, therefore, purely academic. Nevertheless, it will be open to the State Government to revise its notification in view of the above anomaly.

47. The Court is not satisfied that there is any arbitrariness in the enactment of Section 10(3) of the CC Act or any of the notifications issued by the State Government under Section 3(3) read with Section 10 of the CC Act.

48. At this stage, it must be pointed out that this Court's attention has been drawn to the Judgment of the Bombay High Court in ***Gaurang Mangesh Suctancar v. Sonia Gaurang Suctancar*** (Supra). The Bombay High Court, on analyzing these very provisions, came to the conclusion that it is the CC Act provisions that would prevail. The Court is in respectful concurrence with the said view. As rightly noted by the Bombay High Court both Sections 42 of the A&C Act and Section 21 of the CC Act appeared to be similar provisions inasmuch as they begin with a non-obstante clause, precluding the applicability of any other law for the time being in force. The following observations of the Bombay High Court in this regards are relevant, which reads as under:

> "60. G.P. Singh, in his cerebral commentary, *Principles of Statutory Interpretation* (G.P. Singh, Interpretation of Statutes, (reprint, 14 edn., Lexis Nexis, 2018) 403), has explained that "the expression 'notwithstanding anything in any other law' occurring in a section of an Act cannot be construed to take away the effect of any provision of the Act in which that section appears. In other words, 'any other law' will refer to any law other than the Act in which that section occurs." In contrast, the expression 'notwithstanding anything contained in this Act' may be construed to take away the effect of any provision of the Act in which the section occurs but it cannot take away the effect of any other law.

> 61. Indeed, a special enactment or Rule cannot be held to be overridden by a later general enactment or simply because the latter opens up with a non obstante clause. There should be a clear inconsistency between the two before giving an overriding effect to the non obstante clause.
>
> 62. The learned author G.P. Singh has also remarked that sometimes one finds two or more enactments operating in the same field and each containing a non obstante clause. Each clause, in fact, declares that its provisions will have effect 'notwithstanding anything inconsistent therewith contained in any other law for the time being in force'. The conflict in such cases is resolved on consideration of purpose and policy underlying the enactments and the language used in them. Another test applied is that the later enactment normally prevails over the earlier one. It is also relevant to consider as to whether either of the two enactments can be described a special one; in that case the special one may prevail over the more general one notwithstanding that the general one is later in time.
>
> 63. In fact, the Arbitration Act and the Commercial Courts Act, both central enactments, have employed this 'non-obstante clause' at more than one place. Precisely for this reason, Kandla Export Corporation has harmoniously resolved this imbroglio: that the Arbitration Act prevails when it concerns the parties' substantive rights, and the Commercial Courts Act does when it concerns the parties' procedural rights."

49. The Bombay High Court then undertook an analysis of the unamended provisions of the CC Act and noted that there is a two-tier Court at the district level. One is the Commercial Court of original jurisdiction and another at the District Judge level of the Commercial Appellate Court. The approach in **Kandla Exports** (supra) about the CC Act being procedural in nature and therefore having retrospective effect, found support in the decision in ***New India Assurance Company Limited v. Shanti Misra (1975) 2 SCC 840***, where a three Judge Bench held that once there was a change not in the substantive law but in the procedural law, it would operate retrospectively and 'the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum'. The relevant passage of the decision of the Bombay High Court in ***Gaurang Mangesh Suctancar v. Sonia Gaurang Suctancar,*** reads as under:

> "92. Evidently, the Commercial Courts Act is a later enactment, but it does not work at cross purpose with the Arbitration Act. In fact, both aim at speedy adjudication. The Commercial Courts Act covers all the commercial disputes, whereas the Arbitration Act covers only those disputes that involve arbitration. As Kandla Export Corporation has held, both the enactments call for a harmonious interpretation. If at all there is any conflict, as to the substantive provisions, the Arbitration Act prevails; but it has left the procedural niceties to the Commercial Courts Act."

50. The Court finds merit in the contention on behalf of the Opposite Parties that the A&C Act must yield to the CC Act and not vice versa given that the objective of both enactments is the speedy disposal of the cases and the CC Act was a later enactment. There is no apparent conflict between the A&C Act and the CC Act for being resolved. The objective of both is the speedy resolution of the disputes. As far as challenge to the vires of Section 10 of the CC Act is concerned, indeed no ground has been made out before this Court to show how Section 10 of the CC Act is ultra vires the legislative powers of the Parliament or how it is 'manifestly arbitrary'. The identification of commercial disputes as distinct from ordinary civil disputes is based on an intelligible differentia and subjecting them to a special expedited procedure can neither be considered to be arbitrary nor ultra vires the A&C Act. That prayer, therefore, has to be rejected.

51. Incidentally, there is no challenge to either Section 15 or 21 of the CC Act. If indeed commercial cases involving arbitral disputes have necessarily to be transferred under Section 10(3) read with Section 15(2) of the CC Act, then as a natural corollary the Commercial Court alone will have to decide those disputes and not of the Court in terms of the A&C Act. In passing the impugned orders transferring the cases, the D&SJ has not committed any illegality nor has the Senior Civil Judge, Commercial Court, Bhubaneswar committed any illegality in accepting the cases on transfer and proceeding with them in accordance with law.

52. Section 37 of the A&C Act does not confine the appellate power to the High Court. The very wording of Section 37 contemplates a Court other than the High Court hearing appeals against orders under the A&C Act by Courts subordinate to the High Court. Therefore, the CC Act providing for Commercial Appellate Division at the District Judge level is not inconsistent with the Section 37 of the A&C Act.

53. A 60-day appeal period is provided under the CC Act as opposed to 90 days under the CPC. The CC Act also provides for expeditious disposal of appeals within six months of the filing. It also calls for appointment of Judges possessing special knowledge and expertise in commercial law. All these provisions provide rational nexus to the object sought to be achieved by the CC Act, viz., the expeditious resolution of commercial disputes. For the aforementioned reasons, the Court finds nothing manifestly arbitrary in the enactment of Section 10 (3) of the CC Act.

54. The Court finds no merit in any of these petitions. The interim orders are hereby vacated. The petitions are dismissed, but in the circumstances, with no order as to cost.

2022 (III) ILR - CUT- 1015

Dr. S. MURALIDHAR, C.J & M.S. RAMAN,J.

W.P. (C) NO.11860 OF 2015

SAMBARA SABAR ……...Petitioner

.V.

STATE OF ODISHA & ORS. ……Opp. Parties

(A) CONSTITUTION OF INDIA, 1950 – Article 21 – Right to Health – The petitioner approached the court for justice being aggrieved by the avoidable 'maternal death' of his daughter-in-law – Held, direction issued to the state Govt. to come up with a scheme, Policy, Comprehensive Action Plan which will contain both preventive and remedial action points in the short and medium term to address the issue of maternal deaths. (Paras 36,38)

(B) CLAIM OF COMPENSATION – Avoidable maternal death – Prayer acceded – Direction issued to make payment to the tune of Rs. 10 lakhs. (Para 33)

(C) AVOIDABLE MATERNAL DEATH – Negligence of doctors, health workers, medics and staff – Effect of – Held, direction issued to the state Govt. to take necessary steps against the erring stake holders immediately. (Para 35)

Case Law Relied on and Referred to :-

1. 2010 SCC On Line Delhi 2234 : Laxmi Mandal Vs. Harinagar Hospital.

For Petitioner : Mr. Omkar Devdas

For Opp. Parties : Mr. D.K. Mohanty, AGA

JUDGMENT Date of Judgment: 03.11.2022

Dr. S. MURALIDHAR, C.J.

1. Aggrieved by the avoidable 'maternal death' of his daughter-in law Martha Sabar, who died after delivering a dead female child, the Petitioner has approached this Court with the present petition praying *inter alia* for the appointment of a Maternal Death Review Board comprised of independent members and for this Court to thereafter direct payment of compensation by the State. The Petitioner has also prayed for disbursal to the family of the deceased, her financial entitlements under the National Maternity Benefit Scheme (NMBS). General directions are also sought for the proper implementation of the various schemes of the central and state government including the Janani

Suraksha Yojana (JSY) in the village Labanyagada, Gajapati District, where the Petitioner resides and in the whole of Odisha.

2. Enclosed with the petition is the enquiry report of Dr. P.L.N. Patro, the Additional District Medical Officer (ADMO), FW, Gajapati which concluded that there was no medical negligence at any stage in the treatment of deceased. It was opined therein that the cause of death may be "due to severe sepsis with pulmonary embolism". Enclosed with the petition is also the report of an independent fact-finding enquiry undertaken by a human rights organization, which has come to the opposite conclusion after interviewing those involved and examining the available records.

3. On 17th May, 2022 this Court passed the following order in this petition:

> "1. The present petition is by the father-in-law of an unfortunate woman, who not only lost her baby due to an intra uterine death but herself died while receiving treatment on 25th March, 2015.
>
> 2. The case of the Petitioner is that the death of the baby as well as the woman was due to medical negligence and was avoidable. The pleadings in the present petition present disputed questions of fact with the Opposite Parties claiming that there was no medical negligence.
>
> 3. The Opposite Parties appear to have conducted an enquiry into the maternal death of the woman in question. The enquiry report of the ADMO (FW), Gajapati dated 10th April, 2015 is enclosed with the petition.
>
> 4. With a view to obtaining an objective assessment of the materials on record the Court requests the State Commission for Women, Odisha (SCWO) to assist it in the task. Accordingly, the following directions are issued:
>
> (i) A complete set of papers will be made available by the Registry of this Court to the Secretary, SCWO, Toshali Plaza, Satyanagar, Bhubaneswar not later than 1st June, 2022;
>
> (ii) The SCWO will constitute an appropriate enquiry team to examine the papers and also visit and record statements of the Petitioner and his family members, the concerned treating doctors, the place of treatment, the medical case record andmake an assessment as to the veracity of the claimsof either party on the basis of the materials gathered. The SCWO can also take the assistance of a qualified medical professional for making its assessment.
>
> (iii) The report of the SCWO pursuant to the above directions be made available to this Court not later than 1st July 2022.
>
> 5. As far as the connected matters are concerned, wherever replies/counter affidavits have not yet been filed they be filed positively one week prior to the next date with

> copies to learned counsel forthe Petitioner, who is permitted to file a rejoinder thereto before the next date.
>
> 6. List on 1st August, 2022 along with the connected cases listed today. A copy of this order be delivered forthwith to the Secretary, SCWO through a Special Messenger."

4. Pursuant to the above order, the Odisha State Commission for Women (OSCW) under cover of a letter dated 8th July, 2022 has submitted the report of the Enquiry Committee (EC) in a sealed cover. The report was perused by the Court at the hearing on 1st August, 2022 and copies thereof were directed to be supplied to both learned counsel for the Petitioner as well as learned counsel for the State of Odisha to enable them to make their submissions on the report.

The report of the Enquiry Committee

5. At the outset, the Court would like to set out the factual background as can be gleaned from the report of the EC of the OSCW. The Petitioner, the father-in-law of the deceased, who appeared before the EC and was examined as ECW 16 informed the EC that he had taken the deceased to the Garabandha Primary Health Center (PHC) for her health check-up on 18th March, 2015. The Pharmacist on duty there was Mr. Kishore Chandra Panigrahi (ECW 19). Dr. Sunil Kumar Shukla was the Medical Officer (MO). ECW 16 informed the EC that the deceased was complaining of chest and abdominal pain during pregnancy as was noted in the entry made in the OPD register. Dr. Shukla was not present. ECW 16 called Anjali Bala Swain, who was the Auxiliary Nursing Midwife (ANM) but since her arrival was delayed, ECW 16 referred the deceased to the District Health Hospital (DHH), Paralakhemundi.

6. The EC concluded that since no MO and ANM were available at Garabandha PHC (New), no treatment was given to the deceased on 18th March, 2015 although she was nine months pregnant. The EC concluded that this failure to provide treatment to the deceased on 18th March, 2015 had a direct nexus with her death one week later at the DHH on 25th March, 2015.

7. On 18th March, 2015 the deceased returned to her house. On 24th March 2015, she again developed labour pain at 11.45 am and came to the DHH for an ANC check-up. She complained the foetus was not moving. Dr. V. Sarojini Devi (ECW 2), who was the MO of DHH, Paralakhemundi, found some swelling on the face and legs of the deceased. After examining the abdomen of the deceased, ECW 2 could not detect any foetal movement. She opined that if a dead child remains in the uterus, it would cause complications.

8. The finding of the EC in regard to the conduct of ECW 2 was: "strangely she did not prescribe any medicine even after knowing that the patient was suffering from sepsis. She also did not refer the patient to the O & G Specialist forthwith." Save and except the bed head ticket, there was no other document in support of the nature of diagnosis, treatment and medicine prescribed to deceased. In the bed head ticket (Ext. 4) dated 24th March, 2015 there was an endorsement to the effect of "loss of foetus movement since five days."

9. It appeared from the evidence of Pramod Chandra Sahoo (ECW 1), who was the laboratory technician at the DHH, that on 24th March, 2015 he collected the blood samples of the deceased for testing, blood grouping, Hepatitis B, Haemoglobin, BT CT etc. on payment of money.

10. The EC examined Dr. Suchitra Kumari Sahoo (ECW 4), who was the O&G Specialist at DHH, Paralakhemundi. She examined the deceased on 24th March, 2015 at her residence. On perusing the Ultrasound report brought to her by the deceased, ECW 4 found Intra Uterine Death (IUD) with severe Oligohydramnios and with high BP. She advised admission of the deceased in the DHH. She stated before the EC that "she was also in a mood to refer the patient to MKCG for better treatment as her BP was high with IUD." These facts were mentioned by ECW 4 in the bed head ticket at 9.20 pm on 24th March, 2015. Despite the above reports being available by 4 pm, the EC found that "there was none in the hospital to take care of her to admit in Female O & G Ward. She was loitering in the hospital of DHH with pain having IUD." Due to the non-cooperation of the hospital authorities, "she took ultrasound test after making necessary payment to a private radiologist."

11. The EC found that the evidence of Dr. Sarojini Devi (ECW 2) was "shrouded with suspicion". The Medicine Specialist at DHH, Dr. Anil Kumar Acharya (ECW 3) was on duty at the Casualty Department of the DHH on 24th March, 2015 from 5 to 9 pm. At 8 pm he examined the deceased. He suspected IUD and toxemica. He found non-movement of foetus associated with foetal heart sound. ECW 3 then called ECW 4 who was the O & G Specialist. After giving the deceased some primary treatment, they admitted her to the O & G Department. ECW 4 informed the EC that on 25th March, 2015 at 2.30 pm a macerated female child was delivered by the deceased followed by placenta and membranes with no tear and haemorrhage. Around 5.30 pm on 25th March, 2015 on receiving calls from the nurses of the O & G, ECW 4 arrived at 6 pm and found the deceased with severe pain in the abdomen. ECW 4 then called ECW 3.

12. According to Baby Radharani Jena (ECW 7), who was on duty at the DHH as a health worker on 24th and 25th March, 2015, between 2 and 9 pm on 25th

March, 2015 she, other nurses and the ward attendant R. Anusuya, were present. She failed to recollect if any O & G Specialist had visited the ward and labour room during that period.

13. Tikili Panigrahi (ECW 8), the Counsellor at DHH stated that on 25th March, 2015 at 11 am she was present in the labour room with a staff nurse and at that time "no doctor was present in the labour room." She recalled ECW 4 informing her on 24th March, 2015 itself about the presence of a dead child in the uterus of the deceased. However, neither was the deceased admitted to the ICU nor was oxygen provided to her on that date.

14. Although Dr. Uma Kanta Baskey (ECW 10) claimed before the EC that on 25th March, 2015 he received an emergency call at 6.35 pm from the attending sister of IPD as to the deterioration of the health condition of the deceased and that he immediately rushed to the deceased and found her "gasping with low condition".

15. Further, although he claimed that he had prescribed oxygen inhalation with injection, the EC found that "there was no endorsement in the bed head ticket about providing oxygen etc." ECW 10 further stated before the EC that at 7.15 pm he declared the deceased dead.

16. B. Shakuntala (ECW 15) was the Accredited Social Health Activist (ASHA) of village Deopur. Her evidence revealed that although the deceased informed her when she was one month and fifteen days pregnant, ECW 15 did not verify or check the health condition of the deceased on any occasion or even visited the house of the deceased. ECW 15 also never took the deceased to Garabandha PHC or Labanyagada PHC, Ayush or Sub-Centre. She did not take the deceased to any hospital for a health checkup. Although ECW 15 claimed that she had taken the deceased on 24th March, 2015 to the DHH, Paralakhemundi for scanning, this claim was negative by the evidence of ECW 4 and Punya Chintal (ECW 12), ASHA, Labanyagada PHC. ECW 12 stated that ECW 15 requested ECW 12 to take the deceased to the DHH. In turn, ECW 15 claimed that she was busy in her daughter's marriage and she could not accompany the deceased.

17. The EC found the presence of ECW 3 Medicine Specialist and his admitting the deceased in the OPD to be doubtful. In the same registration number i.e. 16362 two patients were shown admitted i.e. the deceased and one A. Trinath, who was a male. The EC queried: "it is not known how a male person was admitted in a female ward".

18. Sometime during the counseling on 25th March, 2015 the deceased disclosed that this was her second pregnancy and that she had lost the first child in an institutional delivery for which she was paid money under the Mamata Scheme. The EC concluded that "the medical authorities right from ASHA to DHH, Paralakhemundi had made no effort to ascertain the reason of loss of the first child and no treatment was also afforded to the mother on that score." The EC noted that with the deceased having lost her first child, the second pregnancy was to be treated as a "high risk pregnancy." She was not given any treatment as such for that vulnerable condition. The EC then made the following observations:

> "16…The doctors of DHH did not direct their diagnosis to know the reason of abdominal pain, non-movement of the baby in the womb since 18.03.2015. Consequences of presence of a dead child in mother's uterus, reasons for the loss of the first pregnancy and as stated by ECW2 whether due to presence of dead foetus sepsis had generated resulting infection in the uterus while Martha was under high risk pregnancy due to dead child and why her baby was not removed by cesarian. On 24.03.2015 if she died due to severe sepsis with pulmonary embolism why she was not provided with oxygen and inhalation and she being a BPL category lady why she was not shifted to MKCG for better treatment."

19. The report of the EC also quotes the following comment of the enquiry team member Dr. Mamata Oram, Asst. Professor, O & G, MKCG, Berhampur:

> "as patient was suffering from severe pre-eclampsia. She needed to be treated at higher centre with ICU setup as this kind of patient have high mortality rate".

20. The other specific findings of the EC as regards ECW 4 Dr. Suchitra Sahoo were as under:

> "ECW-4 Dr. Suchitra Sahoo has proved Ext.-6 entries in the Bed head ticket made at 9.00 pm on 24.03.2015 where there is a endorsement regarding referral of Martha on MKCG. She stated that she was in mood to refer the patient to MKCG for better treatment. When the O&G specialist felt to refer the patient to MKCG for better treatment as the BP of the patient was high with a dead baby inside the uterus why she did not refer the patient to MKCG by 108 or 102 Ambulance with supporting staff and ASHA as free medical service was available to BPL patient as per the guidelines. It was her bounden duty to refer the BPL patient to save her life Guaranted under Article 21 of the Constitution of India. Consent was necessary in case of major operation not for referral to higher hospital for better treatment."

21. The EC found the "functionality and responsibility of DHH" to be questionable. The specific findings of the EC were as under:

> "20. In the instant case lapses, laches, disinterestedness to treat a poor tribal BPL woman efficiently and negligence on part of District Head Quarter doctors are

> apparent on the face of record. When the state authorities in order to safeguard the life of a richest or influential person are providing green-corridor for transportation of patients to airport to fetch flight, the poor are deprived of. The hazardous dealing with deceased was of such a degree was most likely eminent. It is not a case of individual negligence but omission of entire team of doctors to provide adequate essential and timely treatment to Martha Sabar who even spent money in the hospital for blood test and for Ultrasound test through Private Radiological Centre. Delegation of responsibility to Emergency MBBS Doctors, Staff Nurses, Counsellors and medicine specialist in case of a critical pregnant woman with IUD abdominal pain is condemnable. In bed-head ticket, the cause of death is shown to be due to severe sepsis with pulmonary embolism but no oxygen was provided. The maternal Audit report marked as Ext. 16 for the period January 2015 to May 2015 shows that deceased Martha Sabar died due to "Cardio respiratory failure".
>
> 21. On an in-depth consideration of oral, documentary evidence and surrounding circumstances, the Enquiry Team is of considered view that the deceased MarthaSabar died due to combined negligence of doctors unduty of DHH, Paralakhemundi in the district of Gajapati and Garabandha PHC (New), ASHA, ANM and AWW. Adequate financial assistance to the victim for untimely death of deceased due to medical negligence is not the solution specifically when the husband of deceased is an irresponsible person and habitual drunkard having no care and affection towards old father and ailing mother. Efforts should be made by Highest Hon'ble Court to penalize erring doctors/DHH who have betrayed the faith of a tribal illiterate poor woman and to issue instructions to ensure timely availability of all schemes to poor persons in true sense of the action and not by paperwork.
>
> 22. In the instant case, on the basis of statement of AWW, ANM, ASHA, PHC record and on the basis of medical record it is evident that the patient was not kept under care and standard protocol was not monitored."

22. The next issue that the EC took up for consideration was whether various schemes for reducing infant and maternal mortality were implemented in Gajapati District. The EC discussed the evidence of Dr. Pramod Kumar Panda, District Medical Officer-cum-Medical Superintendent, DHH, Paralakhemundi (ECW 20) and Miss Soumya Rani Gouda (ECW 11) who happened to be the District Programme Officer, Gajapati since August, 2018. The earlier JSY was currently known as the National Family Benefits Scheme (NFBS). According to ECW 11, the programmes under the National Health Mission (NHM), the Reproductive, Maternal, Newborn Child and Adolescent Health (RMNCAH) + A Programme and the quality certification of health institution were managed by her in the Gajapati District. It was claimed by her that in Gajapati District they were implementing the JSY Scheme, the Sishuabong Matru Mrityuhara Purna Nirakarana Abhiyaan (SAMMPURNA); Surakshit Matritava Aashwasan (Suman); Social Awareness and Action to Neutralize Pneumonia Successfully

(SAANS); Labour Room & Maternity OT Quality Improvement Initiative. She also spoke of the functional first referring unit (FRU) which was functioning at the level of the sub-divisional hospital since 1994 and at the DHH since 2000. It was stated that the FR wing was not available at the CHC and PHC of the district. Since 2018, they were operating the Dakshata Model to improve the standard of labour room services.

23. However, the EC found that "the district authorities are also doing more paper work and less field work" on the schemes. The EC has made recommendations in this regard as under:

> "An Impartial Committee should be formed in the district under the Chairmanship of District Collector/ Chairman, D.L.S.A. to monitor implementation of allschemes aimed to reduce infant and material mortality and care. Massive awareness camps should be organized in every Gram Panchayat to highlight all the schemes of Central Government and State Government. Life-saving procedure i.e. emergency obstetric hysterectomy (EOH) should be implemented in each DHH and SHH to prevent postpartum haemorrhage, rapture uterus, morbed-adhesions of placenta and uterine sepsis. It is pertinent to note that, regular antenatal care, identification of high-risk factors, close monitoring of labour, and to avoid difficult vaginal delivery the timely decision to do cesarean can reduce the incidence of EOH."

24. The findings of the EC in the above report have not been challenged by the counsel for the State. This Court, therefore, proceeds on the basis of the conclusion reached by the EC that the death of Martha Sabar was due to the collective negligence of the treating doctors both at the Garabandha PHC (New) and the DHH, Parlakhemundi. The extent of negligence is palpable in the finding: "In bed-head ticket, the cause of death is shown to be due to severe sepsis with pulmonary embolism but no oxygen was provided." This Court also notes that not only did the deceased not receive the benefits under the various schemes, but she even "spent money in the hospital for blood test and for Ultrasound test through Private Radiological Centre."

25. The victim was a poor tribal woman whom the State health care system failed. Despite so many schemes on paper, meant to deliver benefits to her, she died due to the sheer callousness of the State authorities, doctors, para-medical workers and staff. Even the basic first-level care and treatment at the level of the ASHA and ANM under the NHM were not provided to the deceased in the present case. She was never given advice although hers was a high-risk pregnancy. She was carrying a dead foetus for a week and received no treatment. This was despite the revised guidelines, drawn up separately for the sub-centers, the CHCs and DHHs, being operational since 2012. It is indeed extremely unfortunate that the benefit of the multifarious schemes which are meant to cater

to the needs of the poor and vulnerable like the deceased in the present case do not reach them in time.

The governing legal regime

26. At this stage, the Court would like to refer to the existing legal regime. The implementation of the NMBS and JSY was considered by the Supreme Court in W.P.(C) No.196 of 2001 ***(People's Union for Civil Liberties v. Union of India***) [hereafter 'the **PUCL Case'**] in which an order was passed way back on 20th November, 2007 directing all the State Governments and the Union Territories to continue to implement the NMBS and ensure that "all BPL pregnant women get cash assistance eight-twelve weeks prior to delivery." It was specifically directed that "the amount shall be Rs. 500/- per birth irrespective of number of children and the age of the woman." It was further directed by the Supreme Court in the ***PUCL Case*** that:

> "It shall be the duty of all the concerned to ensure that the benefits of the scheme reach the intended beneficiaries. In case it is noticed that there is any diversion of the funds allocated for the scheme, such stringent action as is called for shall be taken against the erring officials responsible for diversion of the funds".

27. In its various orders in the ***PUCL Case***, the Supreme Court issued specific directions on the implementation of the Integrated Child Development Services Scheme (ICDS) as well as the Antodaya Anna Yojana (AAY) which was meant for the "poorest of the poor".

28. The Delhi High Court in ***Laxmi Mandal v. Harinagar Hospital 2010 SCC On Line Delhi 2234*** dealt with the issue of maternal deaths and discussed the above orders of the Supreme Court of India. The Delhi High Court noted in the above judgment as under:

> "20. A conspectus of the above orders would show that the Supreme Court has time and again emphasized the importance of the effective implementation of the above schemes meant for the poor. They underscore the interrelatedness of the "right to food" which is what the main PUCL Case was about, and the right to reproductive health of the mother and the right to health of the infant child. There could not be a better illustration of the indivisibility of basic human rights as enshrined in the Constitution of India. Particularly in the context of a welfare State, where the central focus of these centrally sponsored schemes is the economically and socially disadvantaged sections of society, the above orders of the Supreme Court have to be understood as preserving, protecting and enforcing the different facets of the right to life under Article 21 of the Constitution. As already noted, these petitions focus on two inalienable survival rights that form part of the right to life. One is the right to health, which would include the right to access government (public) health facilities

> and receive a minimum standard of treatment and care. In particular this would include the enforcement of the reproductive rights of the mother and the right to nutrition and medical care of the newly born child and continuously thereafter till the age of about six years. The other facet is the right to food which is seen as integral to the right to life and right to health.
>
> 21. The right to health forming an inalienable component of the right to life under Article 21 of the Constitution has been settled in two important decisions of the Supreme Court: Pt. *Parmanand Katara v. Union of India (1989) 4 SCC 286 and Paschim Banga Khet Majoor Samiti v. State of West Bengal (1996) 4 SCC37.* The orders in the PUCL Case are a continuation of the efforts of the Supreme Court at protecting and enforcing the right to health of the mother and the child and underscoring the interrelatedness of those rights with the right to food. This is consistent with the international human rights law which is briefly discussed hereafter."

29. The Delhi High Court in ***Laxmi Mandal*** (supra) went on to discuss Article 25(1) of the Universal Declaration of Human Rights, Articles 10 and 12 of the International Covenants on Economic Social and Cultural Rights (ICESCR) and the following observations of the Committee on Economical and Social and Cultural Rights in its General Comment No.14 of 2000 on the Right to Health:

> "8. The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right tocontrol one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health. ...
>
> 11. The Committee interprets the right to health, as defined in Article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels. ...
>
> 14. "The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child" (art. 12.2 (a)) may be understood as requiring measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre-and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information."

30. The Delhi High Court in ***Laxmi Mandal*** (supra) thereafter noted the provisions of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) which is an international convention ratified by India. Specific to the rights of women in rural areas Article 14 of CEDAW reads as under:

> "14 (1). States Parties shall take into account theparticular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.
>
> 2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:
>
> (a) To participate in the elaboration and implementation of development planning at all levels;
>
> (b) To have access to adequate health care facilities, including information, counselling and services in family planning;
>
> (c) To benefit directly from social security programmes;
>
> (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;
>
> (e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;
>
> (f) To participate in all community activities;
>
> (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as wellas in land resettlement schemes;
>
> (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications."

31. The Delhi High Court in ***Laxmi Mandal*** (supra) also discussed the provisions of the Child Rights Convention (CRC) ratified by India which delineated the rights of the newly born and young child. The Delhi High Court, thereafter, observed as under:

> "27. International human rights norms as contained in the Conventions which have been ratified by India are binding on India to the extent they are not inconsistent

> with the domestic law norms. The Protection of Human Rights Act, 1993 (PHRA) recognises that the above Conventions are now part of the Indian human rightslaw. Section 2(d) PHRA defines "human rights" to mean "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India" and under Section 2(f) PHRA "International Covenants" means "the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966.
>
> 28. The orders in the PUCL Case implicitly recognize and enforce the fundamental right to life under Article 21 of the Constitution of the child and the mother. This includes the right to health, reproductive health and the right to food. In effect, the Supreme Court has spelt out what the "minimum core" of the right to health and food is, and also spelt out, consistent with international human rights law, the "obligations of conduct" and the "obligations of result" of the Union of India, the States and the UTs. While recognizing the indivisibility of civil rights and social and economic rights, the Supreme Court has made them enforceable in courts of law byusing the device of a "continuing mandamus." On their part, the High Courts in this country would be obligated to carry forth the mandate of the orders of the Supreme Court to ensure the implementation of those orders within the States and UTs."

32. In the present case, there has been an acute failure of the entire teams of doctors at each level of the health care system in Odisha to provide timely and adequate care and treatment to the deceased as pointed out by the EC. It shocks the judicial conscience that a poor tribal woman had been carrying a dead foetus for a week prior to her death with not one person in the health care system being able to provide her the needed care and treatment and which neglect resulted in her inevitable death. There has been a clear violation of the fundamental right to health of the deceased which constitutes an integral part of the right to life guaranteed in Article 21 of the Constitution of India.

Directions as to payment of Compensation

33. This Court, therefore, has no hesitation in directing that for the avoidable death of the deceased, the Government of Odisha should pay the family members the sum of Rs.10 lakhs within a period of six weeks from today. The compensation amount will be kept in fixed deposits (FDs) as directed hereafter. FDs for Rs.3,50,000/- each will be made in favour of the mother-in-law and the father-in-law of the deceased Martha Sabar and an FD for Rs.3,00,000/- in favour of her husband Ganpati Sabar. The FDs will be initially for a period of one year each and will not be permitted to be encashed during that period. The interest therefrom will be credited on a quarterly basis to the respective savings bank accounts of the aforementioned three persons. The Collector, Gajapati will

ensure that if they do not already have them, bank accounts will be opened in a nationalized bank in favour of each of the aforementioned three persons. After the first year, it will be open to the aforementioned three persons to encash part or whole of their respective FDs as per their choice. Although the EC has commented adversely on the habits of the husband of the deceased, this Court is of the view that such conduct by itself cannot be a ground to completely deprive him of any compensation.

34. The State Government will file a compliance affidavit in this Court as regards the above directions within a period of eight weeks from today, failing which the Registry will place the matter before the Court for directions. Action against the errant doctors, health workers and staff

35. As far as the negligence of the doctors and the health workers medics and staff is concerned, in view of the factual findings by the EC, the following directions are issued:

> (i) The State Government will immediately issue show cause notices (SCNs) to each of the doctors, health workers and staff whose conduct has been adversely commented upon by the EC of the OSCW in its report;
>
> (ii) A copy of the report will be enclosed to the SCN so issued;
>
> (iii) After receiving their replies to the notices, and following the due process of law, if so warranted, disciplinary action will be taken against each of the said persons in accordance with law. The Court clarifies that nothing stated in this order or the report of the EC will be construed as the final opinion as regards the individual conduct of such persons. The entire exercise as above will be endeavoured to be completed within a period of six months from today;
>
> (iv) The State Government will file a compliance affidavit as regards the above directions along with the reports of the inquiry and/or the action taken thereon within a period of seven months from today. If there is a failure by the State Government to do so, the Registry will list the matter before the Court for directions.

Directions as to a Comprehensive Action Plan and Policy

36. This Court is constrained to note that Martha Sabar's death is not an isolated instance as far as Odisha is concerned. The number of women in the tribal belts, in the rural and semi-urban areas, who have lost lives during pregnancy and as a result of unsafe deliveries is a matter for deep concern. Today in 27 separate writ petitions this Court is issuing orders for a detailed

enquiry by the OSCW into the maternal deaths of the wives or close relatives of the respective Petitioners and for remedial measures to be taken. Again, it would be safe to assume that only a small fraction of those whose wives have died on account of denial of proper health care during pregnancy have been able to seek redress in Courts and elsewhere. The increasing numbers of maternal deaths in Odisha point to a systemic failure of the health care system which appears to have failed the poorest and the weakest at a time when they need it the most.

37. As the present case shows, the extant instructions on conduct of maternal death audits by in-service medical professionals is unlikely to unearth the correct facts for remedial action and fixing of responsibility on errant doctors, para medics and staff. This exercise must be performed by an independent set of medical professionals. Further, there is an urgent need for proper orientation, training and sensitisation of support workers including the ASHAs, ANMs and Anganwadi Workers whose role is crucial for the proper delivery of the range of health measures in the various schemes floated by the state and central governments. If unfortunate maternal deaths like Martha Sabar's must be avoided, then the State must move from a post-event reaction mode to a preventive mode. Therefore, the need for a Comprehensive Action Plan.

38. This Court while endorsing the suggestions made by the OSCW in its enquiry report on strengthening the system for better delivery of the large number of welfare-oriented health related schemes for women and children in general and pregnant women in particular, directs the State Government through its Additional Chief Secretary (Health) Government of Odisha to immediately constitute an Advisory body of health care experts to draw up a Comprehensive Action Plan which will contain both preventive and remedial action points in the short and medium term to address the issue of maternal deaths. The State Government must separately come up with a Scheme or Policy to address the need for providing redress including award of compensation for every needless maternal death, the fixing of responsibility on errant doctors, para medics and staff in a time-bound manner, which will obviate the need for every individual case to be taken to either the OSCW or the Odisha Human Rights Commission (OHRC) or even this Court for remedial measures. The State Government in drawing up such Scheme/Policy will consult both the OSCW as well as the OHRC. The exercise of drawing up a Comprehensive Action Plan and formulating a Scheme/Policy for providing compensation as directed above be completed within a period of four months from today. A compliance affidavit in that regard shall be filed in this Court by the Additional Chief Secretary (Health), Government of Odisha within five months from today, failing which the Registry will place the matter before this Court for directions.

39. Before concluding, the Court would like to place on record its appreciation of the effort made by the OSCW in undertaking an enquiry and submitting a comprehensive report which has been of great assistance to this Court in preparing this judgment.

40. The writ petition is disposed of in the above terms. A copy of this judgment be delivered through a Special Messenger forthwith to the OSCW, the OHRC, the Additional Chief Secretary (Health), Government of Odisha and the Collector, Gajapati.

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2022 (III) ILR - CUT- 1029

Dr. S. MURALIDHAR, C.J & M.S. RAMAN,J.

ITA NOS. 31,33,34,35,37 AND 38 OF 2017

PRINCIPAL COMMISSIONER OF INCOME TAX, BHUBANESWAR .....Appellant

.V.

INDUSTRIAL DEVELOPMENT CORPORATION OF ODISHA LTD. .....Respondent

INCOME TAX ACT, 1961 – Whether the learned Income Tax Appellate Tribunal is correct in law while directing to allow deduction for compensation made by the assessee company to its subsidiaries which is not in relation to its own business of the assessee company and also not incidental to the business of the assessee? – Held, Yes.

(Para 14)

Case Laws Relied on and Referred to :-

1. (1966) 60 ITR 277 : Travancore Titanium Products Ltd. Vs. Commissioner of Income Tax, Kerala.
2. [1997] 226 ITR 188 (SC) : CIT Vs. Amalgamation Pvt. Ltd.
3. [1967] 65 ITR 625 (SC) : Essen Pvt. Ltd. Vs. CIT
4. [1982] 138 ITR 763 (Cal) : CIT Vs. Gillanders Arbuthnot & Co. Ltd.

For Appellant(s) : Mr.Tushar Kanti Satapathy, Sr. Standing Counsel
For Respondent(s): Mr. Sidhartha Ray, Mrs. Pami Rath

JUDGMENT Date of Judgment: 14.11.2022

Dr. S. MURALIDHAR, C.J.

1. The present appeals by the Revenue are directed against a common order dated 26th April, 2017 of the Income Tax Appellate Tribunal, Cuttack Bench,

Cuttack (ITAT) in ITA No.449/CTK/2010 for the Assessment Year (AY) 2007-08; ITA No.493/CTK/2011 for the AY 2008-09; ITA No.585/CTK/2012 for the AY 2009-10; ITA No.558/CTK/2013 for the AY 2006-07 and ITA No.98/CTK/2010 for the AY 2006-07.

2. While admitting these appeals on 18th December, 2019 the following two questions were framed for consideration by this Court:

> "(1) Whether on the facts and in the circumstances of the case and when the compensation made by the assesse company to the subsidiaries which are by themselves are independent legal entities and does not amount to assisting promotional activities of industrial undertaking in the case of the assesse company and hence it is not a business expenditure attributable to the assessee company?
>
> (2) Whether on the facts and in the circumstances of the case, the learned ITAT is correct in law in directing to allow deduction for compensation made by the assesse company to its subsidiaries which is not in relation to its own business of the assessee company and also not incidental to the business of the assessee?"

3. Whereas in ITA No.38 of 2017, the following question was framed by this Court on 18th December, 2019:

> "Whether on the facts and in the circumstances of the case and when the assesse company has not been able to explain regarding the circumstances under which the interest-free loan was given to the subsidiaries by the assessee company and further has not been able to furnish about the details of utilization of such loan by the subsidiaries, the Tribunal is correct in law in directing to allow deduction for interest claimed on the loan taken by it?

4. This Court has heard the submissions of Mr. T.K. Satapathy, learned Senior Standing Counsel for the Appellant-Department and Mr. Sidhartha Ray, learned counsel along with Mrs. Pami Rath, learned counsel appearing for the Respondent-Assessee.

5. The background facts are that the Assessee during the AYs in question debited a certain sum to its profit and loss account towards compensation paid to its two subsidiaries i.e. M/s. IDCOL Kalinga Iron Works Ltd. (IKIWL) and M/s. IDCOL Ferro Chrome and Alloys Ltd. (IFCAL) towards difference in the price of ores purchased by the said subsidiary companies from the Assessee and others.

6. During the course of assessment, the Respondent-Assessee was asked to explain the above payment of 'compensation'to the two subsidiary companies.The explanation offered was that two mines operated by the Assessee

were taken for captive use and this was to assure cheap raw material supply to ensure the longterm viability of the subsidiary companies. However,on finding that the ores available in the said mines were not suitable for use in production of high carbon Ferro Chrome, the ores were sold in the open market and the ores of desired grade and specification were purchased from outside parties, which resulted in substantial financial loss to the subsidiaries. It was this loss which was sought to be compensated by the Assessee.

7. The Assessing Officer (AO) did not accept the above explanation and disallowed the claim of expenditure on the ground that it was not incurred "wholly and exclusively for the purposes of the business" of the Assessee. In arriving at this conclusion, the AO relied on the decision of the Supreme Court in ***Travancore Titanium Products Ltd. v. Commissioner of Income Tax, Kerala (1966) 60 ITR 277*** where it was held as under:

> "The position may therefore be summarised thus: the nature of the expenditure or outgoing must be adjudged in the light of accepted commercial practice and trading principles. The expenditure must be incidental to the business and must be necessitated or justified by commercial expediency. It must be directly and intimately connected with the business and be laid out by the taxpayer in his character as a trader. To be a permissible deduction, there must be a direct and intimate connection between the expenditure and the business i.e. between the expenditure and the character of the assessee as a trader, and not as owner of assets, even if they are assets of the business."

8. After the Commissioner of Income Tax (Appeals) only partly granted relief in the appeals filed by the Assessee, it approached the ITAT which has by the impugned common order allowed the Assessee's appeals. Inter alia in the impugned order, it was noticed by the ITAT in para 22 as under:

> "22. Identical issue was raised in assessee's own case before the Tribunal vide ITA Nos.69 & 70/CTK/94 for assessment year 1989-90 & 1990-91 and has been decided in favour of the assessee by holding, by the Co-ordinate Bench that "financing or aiding or assisting any promotional activities of industrial undertaking is part of the business of the assessee company" for overall promotion of industrial development in Orissa."

9. On 20th April, 2022 when these appeals were heard, a querywas posed to Mr. Satapathy, learned Senior Standing Counsel for the Revenue, by the Court whether any appeal had been filed by the Department against the orders of the ITAT in the appeals in ITA Nos.69 and 70/CTK of 1994 filed by the Assessee for AYs 1989-90 and 1990-91.

10. An affidavit has been filed by the Department today in which it sought to be contended that the aforementioned order of the ITAT for AYs 1989-90 and 1990-91 is distinguishable on facts. It is sought to be submitted that in the said order of the ITAT the issue concerned making of loans and advances by the Assessee to its subsidiaries, which were then subsequently written off whereas in the present cases what was paid to the subsidiaries was 'compensation' for supposedly business losses of the subsidiaries.

11. Mr. Satapathy, learned Senior Standing Counsel for the Appellant draws attention of this Court to para 5 of the memorandum of appeal where again it is pleaded that the facts concerning ITA Nos.69 and 70/CTK/1994 are distinguishable and therefore, the said order can have no application to the facts of the cases on hand. Mr. Satapathy further informed the Court that he had no information about any appeal having been filed in this Court against the order of the ITAT in ITA Nos.69 and 70/CTK/1994.

12. This Court has perused the order of the ITAT dated 25th September, 1997 in ITA No.69 and 70/CTK/1994. The said appeals were filed indeed by the very same Assessee and the issue concerned expenditure incurred by the Assessee in the form of loans and advances to its subsidiaries which were subsequently written off. There again the issue was whether such amount could be legitimately claimed as business expenditure within the purview of Section 37 of the Act? After the AO and the CIT(A) had disallowed the said amount as deduction, the Assessee approached the ITAT. Among the reasons that weighed with the ITAT for allowing the claim of the Assessee was that:-

> "Loans and advances, promotional activities, etc., in our opinion, are not outside the objects of the assessee company as per its Memorandum of Association and hence the loss arising in writing off the loans andadvances is liable to be treated as loss incurred in the course of carrying on its business and allowable as deduction in the years under consideration. Similarly, the expenditure incurred on the aborted projects in the wake of the decisions mentioned herein above, is allowable as revenue expenditure. As far as the year of allowability is concerned, neither the assessing officer nor the first appellate authority disputed the bona fides of the assessee in writing off the amounts in the year under consideration."

13. In arriving at the above conclusion, the ITAT relied on the decisions of the Supreme Court in ***CIT v. Amalgamation Pvt. Ltd. [1997] 226 ITR 188 (SC) and Essen Pvt. Ltd. v. CIT [1967] 65 ITR 625 (SC)*** and of the ***Calcutta High Court in CIT v. Gillanders Arbuthnot & Co. Ltd. [1982] 138 ITR 763 (Cal).***

14. In the present case, while the nomenclature used for the expenditure incurred may have been different during AYs 1989-90 and 1990-91 where it was

'loans and advances' which were subsequently written off, the fact remains that it was an irrecoverable expenditure as far as the Assessee was concerned. In the present AYs as well, what was paid as 'compensation' by the Assessee to the very same subsidiaries was to recoup the business losses of the subsidiaries, and was again irrecoverable as far as the Assessee is concerned. Considering that the expenditure was in the nature of moneys advanced to the subsidiaries, it cannot be said that there is no intimate connection between the Assessee and the two subsidiaries as far as the business activities are concerned. In that sense the decision of the ITAT to allow the expenditure cannot be said to be inconsistent with the dictum of the Supreme Court in ***Travancore Titanium Products Ltd***.(supra).It must therefore be concluded that the expenditure incurred by the Assessee in the present cases is not only incidental to the business of the Assessee but also necessitated or justified by commercial expediency.

15. Consequently, the Court is not persuaded that the ITAT has in the present cases committed any legal error in answering the questions framed in favour of the Assessee and against the Department.

16. As far as the present appeals are concerned, for the reasons aforementioned questions Nos.1 and 2 as noted in para 2 above and the solitary question noted in para 3 above are again answered in favour of the Assessee and against the Department. The appeals are, accordingly, dismissed, but in the circumstances, with no order as to costs.

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2022 (III) ILR - CUT- 1033

Dr. S. MURALIDHAR, C.J & M.S. RAMAN,J.

W.A.NO.102 OF 2016

BISWARANJAN BISWAL & ORS. .....Appellants

.V.

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

APPOINTMENT – There were two guidelines issued by the S&ME Department regarding engagement of Sikshya Sahayak – The first guideline was dated 6th August 2013 and the revised guideline was issued on 11th September 2014 – In terms of the corrigendum dated 9th February 2016, the last date for submission of application was 28th February, 2016 – The appellants possessed the requisite qualification

in March 2015 – The candidature of the appellants have been rejected on the ground of lack of requisite qualification considering the cut-off date as 30th September 2014 – Determination of cut-off date – Held, as far as the three appellants are concerned, it has to be the revised i.e 28th Feb. 2016 in terms of the corrigendum. (Paras 15,16)

Case Laws Relied on and Referred to :-

1. 1993 Supp (3) SCC 168 : Rekha Chaturvedi Vs. University of Rajasthan.
2. AIR 2007 SC 1746 : Rajasthan Public Service Commission Vs. Kaila Kumar Paliwal.

For Appellants : Mr. J. Biswal.

For Respondents: Mr. D.R. Mohapatra, Sr. Standing Counsel

ORDER Date of Order: 29.11.2022

Dr. S. MURALIDHAR, C.J.

1. The challenge in the present writ appeal is to an order dated 24th February 2016 passed by the learned Single Judge dismissing W.P.(C) No.3138 of 2016 filed by the present three Appellants praying for a direction to Opposite Parties i.e., Odisha Primary Education Programme Authority and the School and Mass Education Department (S & ME Department), Government of Odisha, to permit the Appellants to participate in the selection process for the post of Sikshya Sahayak (SS) pursuant to an advertisement dated 12th September 2014, and the subsequent corrigendum dated 9th February 2016, and if selected, to engage them as such.

2. The background facts are that each of the Appellants acquired the B.Ed. degree and thereafter, appeared in the Odisha Teachers' Eligibility Test (OTET) Paper-II conducted by the Board of Secondary Education, Odisha in December 2014. The results were published in the month of March, 2015.

3. There were two guidelines issued by the S&ME Department regarding engagement of SSs. The first guideline was dated 6th August 2013, where *inter alia* Clause-6 Category-2 prescribed that the candidate should have passed in OTET Category-II among other qualifications. As far as the age was concerned, the candidates had to be not below 18 years and above 35 years and in case of SC/ST, Women, Ex-Serviceman and SEBC, the upper age limit could be relaxed for 5 years and in case of PH candidates, by 10 years.

4. On 11th September 2014, a revised guideline was issued regarding engagement of SSs during 2014-15. This inter alia stipulated that "passing of required training and the score in OTET is mandatory for all the candidates". As regards the age limit, it was to be determined as on 12th September 2014 "i.e., the date of publication of the advertisement".

5. It transpires that as regards the non-relaxation of the age limit for specified categories of persons, W.P.(C) No.6670 of 2015 was filed in this Court. In pursuance of the order of this Court passed therein, "the last date for submission of on-line application for the post of SS" was extended "for the candidates within the age group of 35-42 as on 30th September 2014 with relaxation of 5 years for SC/ST/SEBC/Women and 10 years for PH candidates". It is only by virtue of this corrigendum which provided for the relaxation of the upper age limit that the three writ Petitioners (the Appellant herein) became eligible to apply for the post of SS. Under the earlier advertisement dated 12th September 2014, they would not be eligible. In terms of the corrigendum dated 9th February 2016, the last date for submission of application was 28th February, 2016.

6. The Appellants contended that they had possessed the requisite qualification of OTET-II in March 2015, which was before the last date for submission of applications in terms of the corrigendum, and, therefore, their candidature could not have been rejected on the ground of lack of requisite qualification. The stand of the S & ME Department on the other hand was that since for the purposes of determination of age, as per the enhanced age criterion, the relevant date was fixed as 30th September, 2014 the qualification also had to be obtained as of that date.

7. The learned Single Judge accepted the plea of the Department that the corrigendum related back to the original advertisement itself and therefore, the cutoff date for determining whether the candidate has possessed the necessary qualification had to be the same date fixed for determining the age which was 11th September,2014.

8. Learned counsel for the Appellants has drawn the attention of the Court to the judgment of the Supreme Court in ***Rekha Chaturvedi v. University of Rajasthan 1993 Supp (3) SCC 168*** where, inter alia, in para 10, it was observed as under:

> "10.The contention that the required qualifications of the candidates should be examined with reference to the date of selection and not with reference to the last

> date for making applications has only to be stated to be rejected. The date of selection is invariably uncertain. In the absence of knowledge of such date the candidates who apply for the posts would be unable to state whether they are qualified for the posts in question or not, if they are yet to acquire the qualifications. Unless the advertisement mentions a fixed date with reference to which the qualifications are to be judged, whether the said date is of selection or otherwise, it would not be possible for the candidates who do not possess the requisite qualifications in praesenti even to make applications for the posts. The uncertainty of the date may also lead to a contrary consequence, viz., even those candidates who do not have the qualifications in praesenti and are likely to acquire them at an uncertain future date, may apply for the posts thus swelling the number of applications. But a still worse consequence may follow, in that it may leave open a scope for malpractices. The date of selection may be so fixed or manipulated as to entertain some applicants and reject others, arbitrarily. Hence, in the absence of a fixed date indicated in the advertisement/notification inviting applications with reference to which the requisite qualifications should be judged, the only certain date for the scrutiny of the qualifications will be the last date for making the applications."

9. In the present case too, there is no specific rule which governs the situation where by virtue of a corrigendum, the upper age limit for applying for a post may have been enhanced. Indeed, the revised guideline issued by the S & ME Department was also silent on this aspect.

10. The above dictum of the Supreme Court was reiterated by the Supreme Court subsequently in ***Rajasthan Public Service Commission v. Kaila Kumar Paliwal AIR 2007 SC 1746*** where it was observed as under:

> "21. Recruitment to a post must be made strictly in terms of the Rules operating in the field. Essential qualification must be possessed by a person as on the date of issuance of the notification or as specified in the rules and only in absence thereof, the qualification acquired till the last date of filing of the application would be the relevant date. *See Ashok Kumar Sharma and Others v Chander Shekhar and Another [(1997) 4 SCC 18], U.P. Public Service Commission U.P., Allahabad and Another v Alpana [(1994) 2 SCC 723] and Harpal Kaur Chahal (Smt.) v Director, Punjab Instructions, Punjab and Another [1995 Supp (4) SCC 706]."*

11. The situation in the present case is that there are no specified rules as regards the relevant date for considering whether the candidate has the requisite qualification. Admittedly, by the last date of filing of the applications in terms of the corrigendum i.e., 28th February 2016, all the three Appellant here had already acquired the OTET-II qualification and were therefore eligible to be considered for engagement as SSs.

12. It must be mentioned here that on 8th April 2016, in the present writ appeal, the following interim order was passed:

> "Issue notice as above.
>
> The submission of the learned counsel for the appellants is that since there was no cut off date specified either in the advertisement or in the Rules or any office memorandum, the cut off date for acquiring the essential qualification would be the date of application, as has been held by the Apex Court in case of Rajasthan Public Service Commission vs. Kaila Kumar Paliwal and Anr., AIR 2007 SC 1746. It is contended that as on the date of application filed by the appellants which was in terms of the corrigendum no.1297/Estt/16 dated 9.2.2016, the appellants had already acquired the essential qualification and as such, non- acceptance of the application of the appellants on such ground is wholly unjustified.
>
> Considering the aforesaid facts, we are of the opinion that appellants have made out a prima facie case for grant of interim protection. Accordingly, it is directed that respondents shall accept the hard copies of the application of the appellants for the post of Sikhya Sahayaks with reference to Corrigendum no. 1297/Estt/16 dated 9.2.2016 issued under Annexure-5 and to allow them to participate in the selection process. However, their result should be kept in sealed cover and should not be declared without the leave of this Court.
>
> A free copy of this order be given to the learned Standing Counsel, School and Mass Education Department.
>
> Urgent certified copy of this order be granted in course of the day.

13. Subsequently, on 29th September 2022, the following order was passed:

> "1. Learned counsel appearing for the School and Mass Education Department shall produce on the next date the sealed cover containing the results in respect of the present Appellants in terms of the order passed by this Court on 8th April 2016,.
>
> 2. List on 29th November, 2022."

14. Pursuant to the above order, today in Court, Mr. Mohapatra, learned Senior Standing Counsel appearing for the S & ME Department tendered a sealed cover containing the results of the participation of the three Appellants in the selection process. Those results were perused by the Court and also shared with the learned counsel for the Appellants as well as the learned Senior Standing Counsel for the S & ME Department. The results show that all three Appellants have qualified in the selection test, but have not been offered employment since according to the S& ME Department, they should have obtained the requisite OTET-II qualification as of the original date in the advertisement i.e., 30th September 2014, and not subsequent thereto.

15. In view of the settled legal position explained in the above decisions of the Supreme Court, this Court is not able to accept the plea of the S & ME Department that the requisite qualification of OTET-II was not possessed by these Appellants as of the last date for filing of the applications in terms of the advertisement read with corrigendum.

16. Even the plea that the corrigendum relates back to the original advertisement overlooks the fact that as far as the present Appellants are concerned, they became qualified to apply only because of the relaxation of the upper age limit pursuant to the orders of this Court as explained hereinbefore. In other words, it is only by virtue of corrigendum that the Appellants came to apply for the post. If the corrigendum were to relate back to the original date, they would not even be qualified to apply. Therefore, as far as the three Appellants are concerned, it cannot be said that the relevant date for determining whether the Appellants possess the requisite qualification has to be the original date of 30th September 2014. It has to be the revised date in terms of the corrigendum.

17. The settled legal position being that in the absence of Rules, the last date of submission of the application would be the relevant date as far as obtaining the qualification concerned, in the present case, that date would be 28th February, 2016. Clearly, by that date, each of the three Appellants had acquired the requisite OTET-II qualification.

18. For all of the aforementioned reasons, this Court is unable to agree with the conclusion reached by the learned Single Judge in the impugned order. The impugned order is accordingly hereby set aside. The writ appeal is disposed of with a direction to the S & ME Department to issue appointment letters to the three Appellants as Junior Teacher (Contractual) [which is what the post of SS has been renamed as], within a period of eight weeks. It is made clear that the Appellants would not be entitled to any arrears of pay.

19. Issue urgent certified copy of this order as per rules.

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2022 (III) ILR - CUT- 1039

JASWANT SINGH, J & MURAHARI SRI RAMAN, J.

W.P.(C) NO. 20996 OF 2022

MUNA PANI .....Petitioner

.V.

STATE OF ODISHA (W.R.DEPT.) & ORS. .....Opp. Parties

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 & 227 – When extraordinary jurisdiction should be exercised – Explained with case laws. (Para 5.16)

(B) CENTRAL GOODS AND SERVICES TAX ACT, 2017 r/w ODISHA GOODS AND SERVICES TAX ACT, 2017 – Section 73 – Petitioner challenge show cause notice issued by competent authority – Whether writ petition under Articles 226 & 227 of the Constitution is maintainable against show cause notice, when the petitioner has ample opportunity to agitate issues before the Assessing Officer – Held, not maintainable – Writ petition at stage of show cause notice would be premature. (Para 5.17)

Case Laws Relied on and Referred to :-

1. (2013) 63 VST 67 (Bom) : Jindal Poly Films Ltd. Vs. State of Maharashtra.
2. (1973) 31 STC 178 (SC) = (1973) 1 SCC 216 : Hira Lal Rattan Lal Vs. Sales Tax Officer.
3. (1961) 12 STC 392 (SC) : M.A. Rahman Vs. State of Andhra Pradesh.
4. (1961) 12 STC 476 (SC) : George Oaks Pvt. Ltd. Vs. State of Madras.
5. AIR 1958 SC 452 : Tata Iron & Steel Co. Ltd. Vs. State of Bihar.
6. (1971) 28 STC 331 (SC) : Delhi Cloth & General Mills Co. Ltd. Vs. CST.
7. (2006) 10 SCC 201 = 2006SCC OnLine SC 979 : Star Paper Mills Ltd. Vs. State of U.P.
8. (2014) 1 SCC 603 = 2013 SCC On LineSC 717 = (2013) 357 ITR 357 (SC) : Commissioner of Income Tax Vs. Chhabil Dass Agarwal.
9. 2012 SCC On Line Ori 90 : National Aluminium Company Ltd. Vs. Employees State Insurance Corporation.
10. (2019) 20 SCC 446 : Union of India Vs.Coastal Container Transporters Association.
11. (2008) 23 VST 8 (SC) : South India Tanners & Dealers Association Vs. Deputy Commissioner of Commercial Taxes.
12. (2008) 23 VST 8 (SC) : South India Tanners & Dealers Association Vs. Deputy Commissioner of Commercial Taxes.
13. 2015 SCC OnLine Ori 53 : Bhubaneswar Development Authority Vs. Commissioner of Central Excise.
14. (2010) 11 SCC 593 = (2010) 31 VST 1 (SC) : Paper Mills Limited Vs. Assistant Commissioner of Commercial Taxes.

15. (1973) 3 SCC 171 = 1973 SCC (Tax) 123 = AIR 1972 SC 2617 = (1972) 30 STC 567 (SC) = (1973) 89 ITR 6 (SC) : Sales Tax Officer, Ganjam Vs. Uttareswari Rice Mills.
16. (2020) 12 SCC 572 = 2019SCC OnLine SC 1470 :CCE Vs. Krishna Wax (P) Ltd.
17. (1998) 9 SCC 281 = 1997 (94) ELT 285 SC = JT 1998 (9) SC 138 : Union of India Vs. Bajaj Tempo Ltd.
18. (2012) 11 SCC 651 : Union of India Vs. Guwahati Carbon Ltd.
19. (2003) 1 SCC 72 = 2002 SCC OnLine SC 1116 : GKN Driveshafts (India) Ltd. Vs. ITO.
20. 2022 SCC OnLine SC 1262 : State of Maharashtra and Others Vs. Greatship (India) Limited.

For Petitioner : Mr. Siddhartha Sinha,(Proxy Counsel), Mr. Anirudh Sanganeria

For Opp. Parties: Mr. Lalatendu Samantaray, AGA
Mr. Sunil Mishra, ASC (Commercial Tax & Goods & Service Tax)

JUDGMENT Date of Judgment: 18.11.2022

MURAHARI SRI RAMAN, J.

1. The petitioner, indulged in execution of works contract, beseeches following relief(s) against the Notices dated 06.08.2022 issued by CT&GST Officer, Angul Circle, Angul (hereinafter be referred to as "proper officer"), for initiation of proceeding under Section 73 of the Central Goods and Services Tax Act, 2017 and the Odisha Goods and Services Tax Act, 2017 (collectively be read as, "GST Act") pertaining to the periods 2017-18 and 2018-19 vide Annexures-9 and 10:

> *"It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to admit this writ petition and issue rule nisi, calling upon the respondents to show cause as to why this writ petition shall not be allowed.*
>
> *If the opposite parties fail to show cause or show insufficient cause, the said rule may be made absolute and upon hearing the parties this Hon'ble Court may further be pleased to:*
>
> *a. To declare the Demand-cum-Show Cause Notices as ultra vires, illegal, unconstitutional and violative of the Fundamental Rights of the petitioner and thereby quash the Show Cause Notices with Reference Nos. ZD2108220041633 and ZD210822004217Y for the tax periods July, 2017 - March, 2018 and April, 2018 – May, 2018; and*
>
> *b. Pass any other order(s) and direction(s) as would be deemed just and proper by this Hon'ble Court;*
>
> *c. And for this act of kindness, the petitioner shall as in duty bound ever pray."*

2. Fact leading the petitioner to approach this Court to beseech invocation of extraordinary jurisdiction under the provisions of Article 226/227 of the Constitution of India, 1950, is that the proper officer has issued Show Cause Notices (for short, "SCN") on 06.08.2022 for determination of tax liability pertaining to the periods 2017-18 [July, 2017 to March, 2018] and 2018-19 [April, 2018 to May, 2018] under Section 73 of the GST Act on the basis of discrepancy observed between the figures furnished by the petitioner-taxpayer in the returns furnished in Form GSTR-3B under Rule 61 of the GST Rules and the data made available in the web portal-WORKS AND ACCOUNTS MANAGEMENT INFORMATION SYSTEM (WAMIS)[1]

2.1. It is contended by counsel for the petitioner that the petitioner seeking quashment of Circular vide Memo No. 36116—FIN-CT1-TAX-0045-2017/F., dated 07.12.2017 issued by the Finance Department which provided for modality to ascertain tax effect for reimbursement qua works executed after 01.07.2017, i.e., introduction of the GST Act, in connection with contract awarded prior to 01.07.2017, i.e., during the VAT (value added tax) regime, approached this Court in W.P.(C) No.3452 of 2021 which came to be disposed of on 01.02.2021 with the following observation:

> *"5. By way of this writ petition, Petitioner has challenged the action of the Opposite Parties in not reimbursing the differential tax amount arising out of change in tax regime from Value Added Tax (VAT) to Goods and Service Tax(GST) with effect from 01.07.2017.*
>
> *6. Batch of writ petitions are being filed on this issue. The main issue involved in such matters is that the difficulty faced by the contractors due to change in the regime regarding works contract under GST. The grievance of the Petitioner is that in view of the introduction of the GST, Petitioner is required to pay tax which was not envisaged while entering into the agreement.*
>
> *7. In that view of the matter, Petitioner shall make acomprehensive representation before the appropriateauthority within two weeks from today ventilating the grievance. If such a representation is filed, the authority will consider and dispose of the same, in the light of the aforesaid revised guidelines dated 10.12.2018 issued by the Finance Department, Government of Odisha, as expeditiously as possible, preferably by 15.03.2021.*

[1]*This System covers the entire life cycle of typical construction project work right from its inspection to its final completion. WAMIS has been developed with the view that all financial transactions pertaining to the State/Central Plan Schemes/Projects are accessed by the Executive, Legislature, Internal Audit, External audit and the citizen at large and the same be assessed against the physical progress and thedesired outcome. The System is work flow enabled and comprises of various building blocks in the form of module.*

8. If the Petitioner(s) will be aggrieved by the decision of the authority, it will be open for the Petitioner(s) to challenge the same.

9. No coercive action shall be taken against the Petitioner till 15.03.2021.

10. The writ petition is disposed of accordingly."

2.2. Said order has further been modified with the following order dated 12.11.2021 in consideration of I.A. No.4735 of 2021 filed in the disposed of W.P.(C) No.3452 of 2021:

"1. Last opportunity is granted to the Applicant (Petitioner) to file a representation to the Executive Engineer, Manjore Irrigation Division, Athamallik (Opposite Party No.3) and not to the tax authority. It is made clear that if such representation is not made on or before 1st December, 2021 the interim protection granted by this Court by the order dated 1st February, 2021 will stand vacated.

2. The time for disposal of such representation stands correspondingly be extended up to 1st March, 2022.

3. The application is disposed of."

2.3. It is submitted that the petitioner, in respect of other works executed, also filed writ petitions being W.P.(C) Nos.3456 of 2021, 3457 of 2021, 3458 of 2021, 3460 of 2021, 3461 of 2021, 3464 of 2021 and 3465 of 2021 on identical grounds as that were urged in W.P.(C) No.3452 of 2021. Said writ petitions also suffered similar orders of this Court on the very same date as is passed in W.P.(C) No.3452 of 2021.

2.4. It is alleged that while the representation dated 24.11.2021 (Annexure-7 series) filed before the Executive Engineer, Manjore Irrigation Division, Athamallik; Executive Engineer, Rural Works Division, Angul; and Executive Engineer, Angul Irrigation Division, Angul; in the district of Angul is still pending consideration, the CT & GST Officer of Angul Circle-opposite party No.5 has taken steps for recovery of tax with interest and penalty pertaining to July, 2017-May, 2018 by issue of SCNs dated 06.08.2022 bearing Reference Nos. ZD2108220041633 and ZD210822004217Y in exercise of power conferred under Section 73 of the GST Act.

2.5. The counsel for the petitioner would submit that in view of Clause 30 of the Agreement executed prior to introduction of the GST Act with effect from 01.07.2017 between the petitioner-contractor and the Executive Engineer-contractee stipulated that "the contractor shall bear all taxes,

including sales tax, income tax, royalty, fair-weather charges and tollage where necessary" and therefore, the change of law enhancing the rate of tax during subsistence of agreement would entail reimbursement of differential tax by the contractee. It is amplified by submitting that at the time of participating in the bid in response to the notice inviting tender of the Executive Engineer the estimated cost quoted was inclusive of value added tax as was levied under erstwhile VAT regime and therefore, it is pleaded at paragraph 5 of the writ petition as follows:

> *"*** The Odisha Value Added Tax (VAT) has been included in the estimated value of the present works contract and formed a part of the Bid Price as well as the Contract Price. Accordingly, the Tax Deducted at Source from gross amount of each running bill of the petitioner/contractor shall be made as per the then prevailing statutory provisions of law at the time of floating of tender/ submission of the tender for the contract work. The Value Added Tax is applicable to the instant contract work as the Value Added Tax Act was prevailing at the time of floating/submission of tender for the respective contract work. ***"*

2.6. The petitioner by referring to the following text from Guidelines issued by the Government of Odisha in Finance Department vide Memo No. 36116—FIN-CT1-TAX-0045-2017/F.,dated 07.12.2017 urged that the authority ought not to have insisted on submission of bills for the work already executed showing goods and service tax element as inclusive of the contract price:

> *"Works Contracts executed before 01.07.2017 and payments made in pre-GST and GST period.—*
>
> *(i) In the pre-GST regime, taxes like Central excise Duty, Entry Tax, OVAT and Service Tax have been included in the estimated value of the Works Contract and form a part of the bid price as well as of the contract price. Accordingly, value of the contract was inclusive of all taxes.*
>
> *(ii) In case of Running bills submitted before 1st July, 2017 for the works executed in the GST regime, the tax invoice is to be issued by the contractor showing CGST and SGST as applicable separately within the contract value of the works.*
>
> *(iii) In case, TDS has been deducted before 01.07.2017, but not yet deposited in the State Government exchequer under the Head of Account— 0040 through challan, the same may be deposited immediately."*

3. *Per contra*, Mr. Sunil Mishra, Additional Standing Counsel (CT & GST Organisation) would urge that the prayer to declare Demand-*cum*-Show Cause Notices[Reference Nos. ZD2108220041633 and ZD210822004217Y], dated 06.08.2022 *ultra vires*, unconstitutional and violative of fundamental rights does not warrant consideration inasmuch as there being no prejudice caused to the petitioner in getting his liability determined by competent authority vested with power under the provisions of the GST Act. The machinery provisions contained in Section 73 for adjudication of correct liability *qua* petitioner-registered supplier of service by executing works contact in terms of Schedule II appended to the GST Act pursuant to provisions envisaged in Section 7 cannot in any manner be held to be either unconstitutional or *ultra vires* or impinges any of the fundamental rights enshrined under the Constitution of India much less Article 19(1)(g).

3.1. Vehemently arguing that the SCNs issued by the opposite party No.5 is unambiguous, Mr. Sunil Mishra submitted that since the opposite party No.5-CT&GST Officer of Angul Circle, assigned with power to function as "proper officer" in exercise of powers under Section 5(1) read with Section 2(91), is competent to initiate proceeding under Section 73 on the basis of "tax liability disclosed in GSTR-3B is less than liability as per WAMIS data", which is clearly enumerated under the heading "SUMMARY OF SHOW CAUSE NOTICE" in Form GST DRC-01 prescribed under Rule 142(1)(a) issued on 06.08.2022.

4. This Court, while examining the issue whether the petitioner, works contractor, is eligible to get reimbursement of tax effect on introduction of the GST Act with effect from 01.07.2017 from the Executive Engineers has disposed of W.P.(C) No.3452 of 2021 and other cases filed by the petitioner vide order dated 01.02.2021 read with modified order dated 12.11.2021.

4.1. Consequent upon such disposal, though the petitioner claims to have made comprehensive representations vide Annexure-7 series and affirms the same to be pending before the Executive Engineers of Manjore Irrigation Division, Athamallik; Rural Works Division, Angul; and Angul Irrigation Division, Angul; in the district of Angul, nothing is stated in the instant writ petition as to why the petitioner has arrayed Executive Engineer of Rengali Right Canal Division No.II, Dhenkanal against whom possibly no relief could have been asserted. Therefore, this Court does not find any merit in the contention of the petitioner that the Executive Engineer having not yet considered such representations, the CT&GST Officer of Angul Circle has no competence to initiate action under Section 73 of the GST Act for the purpose of determining tax liability in respect of amounts received on execution of works. It is,

therefore, held that the writ petition is incompetent for non-joinder and mis-joinder of proper and necessary party and pendency of representation, if any, before such authority who is not impleaded as party in the writ petition does not deserve consideration for the purpose of adjudication as to whether the CT&GST Organisation is justified in initiating action for determination of tax liability under the GST Act.

4.2. This apart, it may also be pertinent for the authority concerned to determine as to whether the claim of the petitioner is within the period of limitation with reference to particular terms of contract specifying commencement and completion of execution of work. This Court in the case of ***Chandra Sekhar Jena Vrs. State of Odisha and Others, W.P.(C) No.23703 of 2021*** vide Order dated 30.10.2021 held as follows:

> *"1. Although learned counsel for the Petitioner seeks to have the order similar to the one passed by this Court on 13th January, 2021 in W.P.(C) No.23906 of 2020, it is seen that the agreement in question is dated 26th April, 2016 with the time for completion being 11 months. Clearly, therefore, any claim now raised arising from the said contract would be time barred. It is, therefore, not possible to accede to the prayer of the Petitioner.*
>
> *2. The writ petition is dismissed."*

4.3. Another pertinent fact which is required to be addressed to is factual dispute with regard to claim for reimbursement of differential tax in view of variation of rate of tax prior to or during the GST regime with reference to Section 64A of the Sale of Goods Act, 1930 cannot be adjudicated upon in exercise of writ jurisdiction under Article 226/227 of the Constitution of India in absence of objection as to lack jurisdiction of the CT&GST Officer to initiate action under Section 73 of the GST Act. The question whether, in fact, any amount is owed to the petitioner by opposite parties on account of GST deducted from its bills or vice versa, has become a highly disputed question of fact. The claim of the Petitioner ultimately, in simple terms, is one for money which it seeks as reimbursement from the opposite parties. It is not possible for this Court in its writ jurisdiction under Article 226 of the Constitution to calculate on a case to case basis which part of the work executed by the petitioner for reimbursement on account of introduction of GST Act and which is not. This being a disputed question of fact, the Court declines to undertake this exercise in the writ jurisdiction and leaves it to the petitioner to seek other appropriate remedies available to him in accordance with law. This is what has been precisely laid down by this Court in the case

of ***M/s. Maa Vaishno Devi Construction Vrs. The Executive Engineer, Bhubaneswar R&B Division-IV, Bhubaneswar, W.P.(C) No.7956 of 2019*** vide Order dated 22.02.2021.

4.4. It is also noteworthy here that very many works contractors laid challenge to the Guidelines issued by the Government of Odisha in Finance Department vide Memo No. 36116—FIN-CT1-TAX-0045-2017/F., dated 07.12.2017 on the advent of the GST statute with effect from 01.07.2017. During the pendency of the writ petitions, being *W.P.(C) No. 6178 of 2018 : All Orissa Contractors Association Vrs. State of Odisha, and other cases*, the Government of Odisha in Finance Department brought out Revised Guidelines for works contract vide Office Memorandum bearing No.38535-FIN-CT1-TAX-0045-2017/F., dated 10.12.2018. This Court vide Order dated 12.12.2018 disposed of said writ petition(s) by extracting the Revised Guidelines in *extenso* and held as follows:

> *"*** In that view of the matter, the Petitioner shall make a comprehensive representation before the appropriate authority within four weeks from today ventilating the grievance. If such a representation is filed, the authority will consider and dispose of the same, in the light of the aforesaid revised guidelines dated 10th December, 2018 issued by the Finance Department, Government of Odisha, as expeditiously as possible, preferably by31.03.2019.*
>
> *If the petitioner(s) will be aggrieved by the decision of the authority, it will be open for the petitioner(s) to challenge the same.*
>
> *No coercive action shall be taken against the petitioner(s) till 31.03.2019.*
>
> *The writ petition is disposed of accordingly."*

4.5. Subsequently aforesaid direction of this Court being carried out by the authority concerned, amongst many, one of such works contractors *viz. Harish Chandra Majhi, by way of petition being W.P.(C) No.14924 of 2020*, challenged the Revised Guidelines vide Office Memorandum No.38535-FIN-CT1-TAX-0045-2017/F., dated 10.12.2018. This Court disposed of said case vide Judgment dated 07.06.2021 [reported as Harish Chandra Majhi Vrs. State of Odisha and others, 2021 SCC OnLine Ori 643 = (2021) 51 GSTL 113 = (2021) 93 GSTR 354 (Ori)] wherein the following has been observed:

> *"1. The Office Memorandum dated 10 December, 2018 of the Finance Department under Annexure-3 prescribing guidelines for the implementation of GST (Goods and Services Tax) in works contract in post-GST regime with effect from 1 July, 2017, the Revised Schedule of Rates2014 (Revised SoR-2014) under Annexure-8 and the*

demand notice issued under Section 61 of the Odisha Goods and Services Act (OGST Act) has been questioned in the present writ petition and connected batch of cases. The prayers in the present petition read as under:

'i. why the action and decision of the Opp. Parties shall not be declared illegal, unconstitutional and violative of legal right of the Petitioner on account of the Taxes being shared and borne by the Petitioner on post enactment Goods and Services Tax Act, 2017?

ii. the Opp. Parties shall not be directed to restitute the benefit of GST to the Petitioner along with interest within a stipulated period in respect of work in which the estimated was prepared under VAT law.

iii. the Office Memorandum dated 10.12.2018 issued by the Opp. Party No. 4 under Annexure-3 shall not be declared illegal, arbitrary, unreasonable and same shall not be quashed.

iv. further the process adopted by the Opp. Parties in preparation of revised SoR dated 15.09.2017 under Annexure-8 shall not be declared illegal, arbitraryand same shall not be quashed.

v. why the notice issued by the Opp. Party No. 9 under Annexure-9 shall not be declared illegal, arbitrary and same shall not be quashed?

vi. why the Opp. Party shall not be directed to prepare a fresh schedule of rates considering rapidly change of rate and price and calculate the differential amount of GST on the contract in which estimate was prepared under VAT?'

***

11. The basic price of materials as per SoR-2014 was inclusive of VAT, entry tax and other tax components. Since 1 July 2017 GST is payable on the value of the contract, the value of tax components in the price of the materials in SoR-2014 was revised and reduced by excluding such tax components prevalent during pre-GST period. As such, the revised SoR2014 was issued on 16 September, 2017.

12. The Petitioner complains that the procedure adopted in the preparation of the revised SoR-2014 dated 16 September, 2017 (Annexure-8) is illegal, arbitrary and contrary to the provisions of Odisha Public Works Department Code (OPWD Code) and that the rates have not been determined on the basis of actual rates prevailing in different areas of the State.

13. The said submission of the Petitioner is not found acceptable because the rates of materials are to be maintained uniformly all over the State. Further, if there is any difference in the actual rate and scheduled rate in any particular area, the Petitioner could submit the same to the employer and this has nothing to do with the GST.

14. A further ground urged on behalf of the Petitioner is that the tender was floated prior to 1 July, 2017. The price quoted for the items and labour was as per the then prevailing market rate. Therefore, the revised SoR-2014 brought into force on 1 July, 2017 at a reduced rate is illegal and discriminatory.

15. This contention of the Petitioner is not found convincing for the reason that, first, nothing has been brought on record to show any comparison of market rate in 2014 when SoR2014 was issued and the market rate in 2017 when revised SoR was issued. Secondly, no dispute has been raised against the rates mentioned in pre-revised SoR-2014. The price difference in the revised SoR-2014 is to the extent of the changed tax amount only. Undoubtedly, the rates in revised SoR-2014 are applicable for the works all over the State.

16. Works contract is a composite supply of services and is taxable under the GST. The earlier SoR-2014 issued on 10 November, 2014 was inclusive of taxes like Central Excise Duty, Service Tax, VAT, Entry Tax etc. After the GST regime only some of the tax components needed to be included. This necessitated a revision of SoR-2014 to arrive at the GST exclusive work value. The GST component is to be added to the work value. As the revised So R is exclusive of the tax components, the estimated value of the work gets reduced to that extent. This was prepared under the recommendation of a Code Revision Committee and after verification of tax rate in the pre-GST period of each of the items including the hire charges of machineries.

***

29. In the instant case, three components of the tax, i.e., subject of tax, person liable to pay the tax and rate of tax has been clearly defined in the statute. The OM dated 10th December, 2018 only prescribes the manner/procedure of calculation to determine the amount of tax in a particular eventuality in the transitional period of migration to GST Act with effect from 1st July, 2017. Consequently, the Court finds no merit in the Petitioner's challenge to the said OM in law."

4.6. This Court on 01.02.2021 while disposing of W.P.(C) No.3452 of 2021 and other cases filed by the petitioner has taken into consideration Revised Guidelines vide Office Memorandum No.38535-FIN-CT1-TAX-0045-2017/F., dated 10.12.2018 and directed as follows:

> *"*** In that view of the matter, Petitioner shall make a comprehensive representation before the appropriate authority within two weeks from today ventilating the grievance. If such a representation is filed, the authority will consider and dispose of the same, in the light of the aforesaid revised guidelines dated 10.12.2018 issued by the Finance Department, Government of Odisha, as expeditiously as possible, preferably by 15.03.2021. ***"*

Hence, the petitioner again in the present writ petition, which is filed on 17.08.2022, without referring to Revised Guidelines dated 10.12.2018, has sought to rely on erstwhile Guidelines dated 07.12.2017 (Annexure-2, Paragraph 4 of the writ petition) which appears to be an attempt to misguide the Court.

4.7. This Court having threadbare compared the clauses contained in File No. NRRDA-GO21(17)/32017-FA, dated 06.06.2018 [Office Memorandum NRRDA

-GO21(17)/32017-FA, dated 06.06.2018] issued by the National Rural Infrastructure Development Agency, Ministry of Rural Development, Government of India vis-à-vis Revised Guidelines contained in Office Memorandum No.38535-FIN-CT1-TAX-0045-2017/F., dated 10.12.2018 issued by the Government of Odisha in Finance Department in the matters of Harish Chandra Majhi Vrs. State of Odisha and others, 2021 SCC OnLine Ori 643 = (2021) 51 GSTL 113 = (2021) 93 GSTR 354 (Ori), upheld the impugned Revised Guidelines vide Office Memorandum bearing No.38535-FIN-CT1-TAX-0045-2017/F., dated 10.12.2018.

4.8. In the said Revised Guidelines *vide* Office Memorandum dated 10.12.2018 the grievance of the petitioner is addressed to in the following manner:

> *"*** On careful consideration of the representation of the contractors visa-vis existing guidelines issued in the matter, Government have been pleased to issue following revised guidelines in supersession of the guidelines issued vide Finance Department letter dated 07.12.2017:*
>
> *1. The Goods and Services Tax (GST) has come into force w.e.f. 1st July, 2017 by subsuming various indirect taxes such as Excise Duty, VAT, CST, Entry Tax, Service Tax etc. Works contract is treated as composite supply of service under GST and are taxable @ 18%, 12% or 5% depending on the nature of works contract. In order to comply the provisions of GST relating to works contract the State Government have revised the Schedule of Rates 2014 (SoR2014) vide Works Department OM No.13827/WD dated 16.09.2017 w.e.f. 01.07.2017. While the item rates in the SoR-2014 were inclusive of all taxes i.e. Excise Duty, VAT, Entry Tax, Service Tax etc., the same has been excluded in the Revised SoR-2014. Therefore, while preparing estimates for a work after 01.07.2017, the GST exclusive work value is to be arrived at as per the revised SoR-2014 and then GST will be added at the appropriate rate.*
>
> *2. In GST regime, the works contractor is required to raise Tax Invoice clearly showing the taxable work value and GST (CGST + SGST) separately.*
>
> *3. In case of work, where the tender was invited before 01.07.2017 on the basis of SoR-2014, but payments made for balance work or full work after implementation of GST, the following procedure shall be followed to determine the amount payable to the works contractor;*
>
> *(i) Item-wise quantity of work done after 30.06.2017 (i.e. the Balance Work) and its work value as per the original agreement basing on the pre-revised SoR2014 is to be ascertained first.*
>
> *(ii) The revised estimated work value for the Balance Work is to be determined as per the Revised SoR2014.* ***(In case of rates of any goods or service used in execution of the Balance Work not covered in the Revised SoR-2014, the tax exclusive basic***

value of that goods or service shall be determined by removing the embedded tax incidences of VAT, Entry Tax, Excise Duty, Service Tax, etc. from the estimated Price/Quoted Price.)

(iii) The revised estimated work value for the Balance Work shall then be enhanced or reduced in the same proportion as that of the tender premium/discount.

(iv) Finally, the applicable GST rate (5%, 12% or 18% as the case may be) is to be added on the revised estimated work value for the Balance Work to arrive at the GST-inclusive work value for the Balance Work.

(v) A model format for calculation of the GST-inclusive work value for the Balance Work is attached as Annexure. The competent authority responsible for making payment to the works contractor will determine GST inclusive work value for the Balance Work for which agreement executed on the basis of SoR-2014.

(vi) A supplementary agreement shall be signed with the works contractor for the revised GST-inclusive work value for the Balance Work as determined above.

(vii) In case the revised GST-inclusive work value for the Balance Work is more than the original agreement work value for the Balance Work, the works contractor is to be reimbursed for the excess amount.

(viii) In case the revised GST-inclusive work value for the Balance Work is less than the original agreement work value for the Balance Work, the payment to the works contractor is to be reduced accordingly. In case excess payment has already been made to the works contractor in pursuance of the original agreement, the excess amount paid must be recovered from the works contractor.

(ix) These procedures shall be applicable to all works contract including those executed in EPC/Turnkey/Lump sum mode.

4. In case of F2 contracts, the taxable value under GST for each item of the balance work is to be determined by the competent authority applying the premium/discount offered by the works contractor on respective item.

****"* *[Emphasis supplied]*

4.9. As is admitted and conceded by the counsel for the parties that in terms of Clause 30 of the Agreement executed prior to introduction of the GST Act with effect from 01.07.2017 it is the contractor-petitioner who is required to bear all taxes, including sales tax, income tax, royalty, fair-weather charges and tollage where necessary. Therefore, the modality under the Revised Guidelines vide Office Memorandum dated 10.12.2018 in unequivocal terms specified bifurcation of work done prior and post 01.07.2017 so as to ascertain the item-wise quantity of work done after 30.06.2017 (i.e. the balance work) and its work value as per the original agreement. In other words, this will facilitate determination of tax exclusive basic value of that goods or service by removing

the embedded tax incidences of VAT, Entry Tax, Excise Duty, Service Tax, etc. from the estimated Price/Quoted Price. The applicable GST rate (5%, 12% or 18%, as the case may be) is to be added on the revised estimated work value to arrive at the GST-inclusive work value for the balance work. The Revised Guidelines dated 10.12.2018 has rationality in application of rate of tax under the GST Act on the balance work.

4.10. At this juncture the following provisions of the GST Act are relevant to be taken note of.

> ***Section 2(119):***
>
> *"'works contract' means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract;*
>
> ***Section 7(1A):***
>
> *"Where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II."*
>
> ***Schedule II:***
>
> *"Activities or transactions to be treated as supply of goods or supply of services—*
>
> ***
>
> *5. Supply of services*
>
> *The following shall be treated as supply of service, namely:—*
>
> *(a) renting of immovable property;*
>
> *(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.*
>
> *Explanation.—*
>
> *For the purposes of this clause—*
>
> *(1) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:—*

(i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972 [20 of 1972]; or

(ii) a chartered engineer registered with the Institution of Engineers (India); or

(iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(2) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure;

(c) temporary transfer or permitting the use or enjoyment of any intellectual property right;

(d) development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software;

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and

(f) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

6. Composite supply

The following composite supplies shall be treated as a supply of services, namely:—

(a) works contract as defined in clause (119) of Section 2; and

(b) supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration."

4.11. The statutory provision and the legal position as set forth by this Court lead to show that the petitioner-contractor is supplier of service which is subject to levy of GST and for that matter ascertainment of liability and correct quantification of tax liability is subject-matter of adjudication by the authorities bestowed with power under the provisions of the GST Act.

4.12. The legal position has been succinctly laid down by different Courts. Suffice it to refer to the case of *Jindal Poly Films Ltd. Vrs. State of Maharashtra, (2013) 63 VST 67 (Bom) wherein Hira Lal Rattan Lal Vrs. Sales Tax Officer, (1973) 31 STC 178 (SC) = (1973) 1 SCC 216* has been taken note of to say that the fact that the dealer upon whom the tax is imposed, is not in a position to pass on the tax on his consumers has no relevance to the competence of the Legislature. An amendment is permissible even when the principal Act fails to bring out clearly the intention of the Legislature. In *M.A. Rahman Vrs. State of Andhra Pradesh, (1961) 12 STC 392 (SC)* wherein it has been stated

that though there is no provision in the Act or the Rules specifically authorising the seller to pass on the tax to the consumer, what actually happens is that the seller includes the tax in the price and thus passes it on to the consumer. Then in his turn the seller pays the tax to the State. In effect by thus passing on the tax to the consumer through the price, the dealer has already collected the tax. The fault for failure to pay the tax or fraudulent evasion in payment thereof lies in the circumstances entirely on the dealer.

4.13. Conspectus of ***George Oaks Pvt. Ltd. Vrs. State of Madras, (1961) 12 STC 476 (SC); Tata Iron & Steel Co. Ltd. Vrs. State of Bihar, AIR 1958 SC 452; Delhi Cloth & General Mills Co. Ltd. Vrs. CST, (1971) 28 STC 331 (SC)*** leads to understand that even if statute permits the seller who is a registered dealer to collect the sales tax as a tax from the purchaser does not do away with the primary liability of the seller to pay the sales tax. The registered dealer need not, if he so pleases or chooses, collect the tax from the purchaser and sometimes by reason of competition with other registered dealers he may find it profitable to sell his goods and to retain his old customers even at the sacrifice of the sales tax. The sales tax need not be passed on to the purchasers and this fact does not alter the real nature of the tax, which by the express provisions of the law, is under no liability to pay sales tax in addition to the agreed sale price unless the contract specifically provides otherwise. When the seller passes on his tax liability to the buyer, the amount recovered by the dealer is really part of the entire consideration paid by the buyer and the distinction between the two amounts,— tax and price— loses all significance.

4.14. Going through the impugned notices dated 06.08.2022 ex facie indicates that the proper officer initiated action under Section 73 of the GST Act for adjudication of appropriate fact and determination of correct figure as there is anomaly in the data available on the WAMIS and the figures disclosed in the return furnished to the CT&GST Organisation in Form GSTR-3B. This has nothing to do with disposal of representation(s) at Annexure-7 series stated to be pending before the Executive Engineer(s) which has separate cause of action, if any, inasmuch as the Executive Engineer is not the competent authority vested with power for adjudication of tax liability under the GST Act.

4.15. Under the above premises, there is little scope to show indulgence in the present matter as the petitioner is required to justify his claim made in the returns in Form GSTR-3B prescribed under Rule 61(5) of the GST Rules read with Section 39 of the GST Act vis-à-vis data disclosed in WAMIS.

5. The petitioner in the writ petition has made a prayer to issue writ of *certiorari* by quashing Show Cause Notices dated 06.08.2022 issued by

CT&GST Officer, Angul Circle, Angul under Section 73 of the GST Act pertaining to the periods from 01.07.2017 to March, 2018 and 01.04.2018 to 31.05.2018 on the plea that the representation(s) filed before the Executive Engineer (Annexure-7 series) has not been considered in terms of Revised Guidelines dated 10.12.2018.

5.1. It may be pertinent to quote relevant portion of the representation(s) addressed to the Executive Engineer(s):

> *"That it is humbly submitted here that payments are received by me are arising out of the above contract executed prior to the commencement of the GST Act, i.e. w.e.f. 01.07.2017 wherein the Tender Notices were published prior to the commencement of the GST Act with the estimate prepared completely prior to the commencement of GST Act. Therefore, taking into consideration the works contractor required to pay the GST which was not envisaged while entering into the contract, the Finance Department vide Office Memorandum No. FIN-CT1-TAX-0045-2017/38535/F., dated 10.12.2018 has introduced a revised guidelines envisaging the circumstances where the tender was invited before 01.07.2017 but payments made for the work after implementation of GST, for which I am not liable to pay the GST amount because my work executed prior to GST came into force.*
>
> *I, therefore, pray your good office kindly consider my representation not to demand GST and reimburse the same ***."*

5.2. It is to be noted that determination of tax liability is the domain of "proper officer" defined under Section 2(91) by exercising powers conferred in Chapter XV of the GST Act. Section 73 in said Chapter deals with "determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason other than fraud or any wilful misstatement or suppression of facts". In the instant case the proper officer has invoked provisions of Section 73 for determination of tax liability of the petitioner and issued the subject Show Cause Notices. Therefore, it cannot be said that such notices are invalid or vague.

5.3. Time and again this Court is called upon to exercise power under Article 226 of the Constitution of India to interfere with the matter at the stage of Show Cause Notice. This Court on more often than not has been declining to invoke extraordinary jurisdiction showing indulgence at the stage of notice.

5.4. Therefore, meddling at this stage by this Court would be premature and entertainment of writ petition by exercise of power under Article 226 of the Constitution of India would run contrary to the settled principles.

5.5. Self-imposed restriction for entertainment of writ jurisdiction has been succinctly enunciated by the Hon'ble Supreme Court in ***Star Paper Mills Ltd.***

Vrs. State of U.P., (2006) 10 SCC 201 = 2006SCC OnLine SC 979 which is to the following effect:

> *"4. In response, learned counsel for the respondents submitted that on factual adjudication it was to be established by the appellant that its case is covered by the ratio of this Court's decision in Krishi Utpadan Mandi Samiti case [1995 Supp(3) SCC 433].*
>
> *'10. The issues relating to entertaining writ petitions when alternative remedy is available, were examined by this Court in several cases and recently in State ofH.P. Vrs. Gujarat Ambuja Cement Ltd. [(2005) 6SCC 499].*
>
> *11. Except for a period when Article 226 was amended by the Constitution (Forty-second Amendment) Act,1976, the power relating to alternative remedy has-been considered to be a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction or discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided, the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction.*
>
> *12. Constitution Benches of this Court in K.S. Rashid and Son Vrs. Income Tax Investigation Commission[1954 SCR 738 = AIR 1954 SC 207], Sangram SinghVrs. Election Tribunal, Kotah [(1955) 2 SCR 1 = AIR1955 SC 425], Union of India Vrs. T.R. Varma [1958SCR 499 = AIR 1957 SC 882], State of U.P. Vrs. Mohd. Nooh [1958 SCR 595 = AIR 1958 SC 86] and Venkataraman and Co. Vrs. State of Madras [(1966)2 SCR 229 = AIR 1966 SC 1089] held that Article226 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 issatisfied 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 abreach of principles of natural justice or procedure required for decision has not been adopted.*
>
> *13. Another Constitution Bench of this Court in State ofM.P. Vrs. Bhailal Bhai [(1964) 6 SCR 261 = AIR1964 SC 1006] held that the remedy provided in awrit jurisdiction is not intended to supersede completely the modes of obtaining relief by an actionin a civil court or to deny defence legitimately open in such actions. The power to give relief under Article 226 of the Constitution is a discretionary power. Similar view has been reiterated in N.T.Veluswami Thevar Vrs. G. Raja Nainar [1959 Supp(1) SCR 623 = AIR 1959 SC 422], Municipal Council, Khurai Vrs. Kamal Kumar [(1965) 2 SCR653 = AIR 1965 SC 1321], Siliguri Municipality Vrs. Amalendu Das [(1984) 2 SCC 436 = 1984 SCC (Tax)133 = AIR 1984 SC 653], S.T. Muthusami*

Vrs. K.Natarajan [(1988) 1 SCC 572 = AIR 1998 SC 616],Rajasthan SRTC Vrs. Krishna Kant [(1995) 5 SCC 75= 1995 SCC (L&S) 1207 = (1995) 31 ATC 110 =AIR 1995 SC 1715], Kerala SEB Vrs. Kurien E.Kalathil [(2000) 6 SCC 293 = AIR 2000 SC 2573], A.Venkatasubbiah Naidu Vrs. S. Chellappan [(2000) 7SCC 695], L.L. Sudhakar Reddy Vrs. State of A.P.[(2001) 6 SCC 634], Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha Vrs. State of Maharashtra [(2001)8 SCC 509], Pratap Singh Vrs. State of Haryana[(2002) 7 SCC 484 = 2002 SCC (L&S) 1075] and GKN Driveshafts (India) Ltd. Vrs. ITO [(2003) 1SCC 72].

14. In Harbanslal Sahnia Vrs. Indian Oil Corporation Ltd. [(2003) 2 SCC 107] this Court held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the Petitioner seeks enforcement of any of the fundamental rights; where there is failure of principles of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

15. In Veerappa Pillai Vrs. Raman & Raman Ltd. [1952SCR 583 = AIR 1952 SC 192], CCE Vrs. Dunlop India Ltd. [(1985) 1 SCC 260 = 1985 SCC (Tax) 75= AIR 1985 SC 330], Ramendra Kishore Biswas Vrs. State of Tripura [(1999) 1 SCC 472 = 1999 SCC(L&S) 295 = AIR 1999 SC 294], Shivgonda Anna Patil Vrs. State of Maharashtra [(1999) 3 SCC 5 =AIR 1999 SC 2281], C.A. Abraham Vrs. ITO [(1961)2 SCR 765 = AIR 1961 SC 609], Titaghur Paper Mills Co. Ltd. Vrs. State of Orissa [(1983) 2 SCC 433= 1983 SCC (Tax) 131 = AIR 1983 SC 603], H.B.Gandhi Vrs. Gopi Nath & Sons [1992 Supp (2) SCC312], Whirlpool Corporation Vrs. Registrar of Trade Marks [(1998) 8 SCC 1 = AIR 1999 SC 22], Tin Plate Co. of India Ltd. Vrs. State of Bihar [(1998) 8SCC 272 = AIR 1999 SC 74], Sheela Devi Vrs. Jaspal Singh [(1999) 1 SCC 209] and Punjab National Bank Vrs. O.C. Krishnan [(2001) 6 SCC569] this Court held that where hierarchy of appeals is provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction.

16. If, as was noted in Ram and Shyam Co. Vrs. State of Haryana [(1985) 3 SCC 267 = AIR 1985 SC 1147]the appeal is from 'Caesar to Caesar's wife' the existence of alternative remedy would be a mirage and an exercise in futility. … There are two well recognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles ofnatural justice. We may add that where the proceedings themselves are an abuse of process of law the High Court in an appropriate case can entertain a writ petition."

The above position was recently highlighted in U.P. State Spinning Co. Ltd. Vrs. R.S. Pandey [(2005) 8 SCC 264 =2005 SCC (L&S) 78], SCC pp. 270-72, paras 10-16."

5.6. In the context where assessment order being challenged, the High Court quashed the same invoking writ jurisdiction, the Hon'ble Supreme Court in the matter of ***Commissioner of Income Tax Vrs.Chhabil Dass Agarwal, (2014) 1 SCC 603 = 2013 SCC On Line SC 717 = (2013) 357 ITR 357 (SC)*** reiterated the scope and purport of exercise of power under Article 226 of the Constitution of India and re-stated the self-imposed restrictions quaentertainment of writ petition as follows:

"12. The Constitution Benches of this Court in K.S. Rashid andSon Vrs. Income Tax Investigation Commission [AIR 1954SC 207], Sangram Singh Vrs. Election Tribunal [AIR 1955SC 425], Union of India Vrs. T.R. Varma [AIR 1957 SC882], State of U.P. Vrs. Mohd. Nooh [AIR 1958 SC 86] and K.S. Venkataraman and Co. (P) Ltd. Vrs. State of Madras[AIR 1966 SC 1089] have held that though Article 226confers very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been abreach of the principles of natural justice or the procedure required for decision has not been adopted. [See N.T.Veluswami Thevar Vrs. G. Raja Nainar [AIR 1959 SC 422],Municipal Council, Khurai Vrs. Kamal Kumar [AIR 1965SC 1321 = (1965) 2 SCR 653], Siliguri Municipality Vrs.Amalendu Das [(1984) 2 SCC 436 = 1984 SCC (Tax) 133],S.T. Muthusami Vrs. K. Natarajan [(1988) 1 SCC 572],Rajasthan SRTC Vrs. Krishna Kant [(1995) 5 SCC 75 =1995 SCC (L&S) 1207 = (1995) 31 ATC 110], Kerala SEBVrs. Kurien E. Kalathil [(2000) 6 SCC 293], A.Venkatasubbiah Naidu Vrs. S. Chellappan [(2000) 7 SCC695], L.L. Sudhakar Reddy Vrs. State of A.P. [(2001) 6 SCC634], Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha Vrs. State of Maharashtra [(2001) 8 SCC 509], Pratap Singh Vrs. State of Haryana [(2002) 7 SCC 484 = 2002 SCC (L&S) 1075]and GKN Driveshafts (India) Ltd. Vrs. ITO [(2003) 1SCC72] .]
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15. Thus, while it can be said that this Court has recognized some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, orwhen an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case [AIR 1964 SC 1419], Titaghur Paper Mills case [Titaghur Paper Mills Co. Ltd. Vrs. State of Orissa, (1983) 2 SCC 433 = 1983 SCC (Tax) 131] and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved

person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

5.7. This Court in the case of ***National Aluminium Company Ltd. Vrs. Employees State Insurance Corporation, 2012 SCC On Line Ori 90*** has observed as follows:

"24. This Court in the case of Rohit Kumar Behera Vrs. State of Orissa, 2012 (II) ILR- CUT 395, held as under:

'21. Law is well settled that unless it is shown that the notice to show cause has been issued palpably without any authority of law, the show cause notice cannot be quashed in exercise of writ jurisdiction under Articles 226 and 227 of the Constitution.' "

5.8. Bearing in mind the above principles, the scope of alternative remedy vis-à-vis entertainment of writ petition for exercising extraordinary jurisdiction under Article 226 of the Constitution of India qua the impugned Notice(s) vide Annexures-9 and 10 issued by the CT&GST Officer, it may be apt to refer to ***Union of India Vrs. Coastal Container Transporters Association, (2019) 20 SCC 446*** wherein it has been laid down by the Hon'ble Supreme Court as follows:

"30. On the other hand, we find force in the contention of the learned senior counsel, Sri Radhakrishnan, appearing for the appellants that the High Court has committed error in entertaining the writ petition under Article 226 of Constitution of India at the stage of show cause notices. Though there is no bar as such for entertaining the writ petitions at the stage of show cause notice, but it is settled by number of decisions of this Court, where writ petitions can be entertained at the show cause notice stage. Neither itis a case of lack of jurisdiction nor any violation of principles of natural justice is alleged so as to entertain the writ petition at the stage of notice. High Court ought not to have entertained the writ petition, more so, when against the final orders appeal lies to this Court. The judgment of this Court in the case of Union of India Vrs. Guwahati Carbon Ltd., (2012) 11 SCC 651 = 2012 SCC On Line SC210 relied on by the learned senior counsel for the appellants also supports their case. In the aforesaid judgment, arising out of Central Excise Act, 1944, this Court has held that excise law is a complete code in order to seek redress in excise matters and held that entertaining writ petition is not proper where alternative remedy under statute is available. When there is a serious dispute with regard to classification of service, the respondents ought to have responded to the show cause notices by placing material in support of their stand but at the same time, there is no reason to approach the High Court questioning the very show cause notices. Further, as held by the High Court, it cannot be said that even from

the contents of show cause notices there are no factual disputes. Further, the judgment of this Court in the case of Malladi Drugs & Pharma Ltd. Vrs. Union of India, (2020) 12 SCC 808 =2004 SCC On Line SC 358, relied on by the learned senior counsel for the appellants also supports their case where this Court has upheld the judgment of the High Court which refused to interfere at show cause notice stage."

5.9. The Supreme Court of India in ***South India Tanners & Dealers Association Vrs. Deputy Commissioner of Commercial Taxes, (2008) 23 VST 8 (SC)*** expressed displeasure in entertainment ofwrit petition against the Show Cause Notice. Said Hon'ble Court in the said case laid down the modality for the Authority in the following terms:

"2. We have repeatedly stated that as far as possible the High Courts should not interfere in matters at show cause notice stage.

3. Without reply to the show cause notice the appellants herein preferred Original Petitions before the Tamil Nadu Taxation Special Tribunal which decided the matters against the assessees. The assessees filed writ petitions against the order passed by the Special Tribunal in the High Court of Madras in which impugned judgments have been delivered, against which these Civil Appeals have been filed. We find that the assessees have never replied to the show cause notices till date.

4. We are of the view that in such circumstances the Special Tribunal/High Court ought not to have interfered and they ought to have directed the assesse to reply to the show cause notice and exhaust the statutory remedy under the Act, which they have not done till date.

5. In the circumstances, to put an end to this controversy we, first of all, grant liberty to the Department to amend the show cause notices and take up additional grounds, if so advised, within a period of eight weeks from today. They will accordingly give an opportunity to the assessees to reply to the amended show cause notice as well as the original show cause notice within a period of six weeks from the date of the assesses receiving the amended show cause notice.

6. On receiving replies from the assessees the Assessing Authority shall hear and dispose of the matters as expeditiously as possible in accordance with law and in accordance with the directions given hereinabove.

7. We make it clear that the Assessing Authority will decide the matters uninfluenced by any observations made by the High Court/Tribunal in the earlier round of litigation.

8. All contentions on both sides are expressly kept open. At this stage we do not wish to express any opinion on the merits of the case."

5.10. In an identical case viz. ***Bhubaneswar Development Authority Vrs. Commissioner of Central Excise, 2015 SCC Online Ori 53***, where the Show

Cause Notice relating to service tax under Chapter-V of the Finance Act, 1994 was under challenge, this Court observed as follows:

> *"5. After hearing the learned counsel for the respective parties, it would be relevant herein to take note that the judgment of the Hon'ble Supreme Court in the case of Collector of Central Excise, Hyderabad Vrs. M/s. Chemphar Drugs and Liniments, Hyderabad, (1989) 2 SCC 127 and in particular,Para-9 thereof is quoted as hereunder:*
>
> *"9. *** In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5years in view of the proviso to sub-section (1) ofSection 11-A of the Act, it has to be established that the duty of excise has not been levied or paid orshort-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or willful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder,with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before (sic beyond) the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or willful misstatement or suppression or contravention of any provision of any Act, is aquestion of fact depending upon the facts and circumstances of a particular case."*
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> *6. Hon'ble Single Judge of Calcutta High Court in the case of Infinity Infotech Parks Ltd., (2015) 85 VST 465 (Cal) appears to have placed reliance on the judgment of Hon'ble Supreme Court as noted hereinabove in Para-66 which admittedly, is a leading judgment on the issue raised in the present case. In the said case, the Hon'ble Supreme Court came to conclude that something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months. But most importantly, the Hon'ble Supreme Court has noted thereafter that 'Whether in a particular set of facts and circumstances there was any fraud or collusion or willful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case.*
>
> *7. On perusal of the aforesaid judgment of the Hon'ble Supreme Court, it is clear there from that Hon'ble Supreme Court in the said case was dealing with an appeal filed by the Collector of Central Excise, Hyderabad against an order passed by the Tribunal. In the facts and circumstances of the said case, Hon'ble Supreme Court came to hold that this finding of fact having been ultimately held against the revenue by the Tribunal which is the final fact forum and dismissed the appeal filed by the revenue on the basis that it did not want to interfere the facts determined by the Tribunal in the said case.*
>
> *8. In the present set of circumstances of the case, any finding by the Court at this stage is likely to be prejudicial, either the Petitioner-BDA or the Service Tax Authority. ***"*

5.11. In Supreme ***Paper Mills Limited Vrs. Assistant Commissioner of Commercial Taxes, (2010) 11 SCC 593 = (2010) 31 VST 1 (SC),*** the Hon'ble Supreme Court, after taking note of earlier case being ***Sales Tax Officer, Ganjam Vrs. Uttareswari Rice Mills, (1973) 3 SCC 171 = 1973 SCC (Tax) 123 = AIR 1972 SC 2617 = (1972) 30 STC 567 (SC) = (1973) 89 ITR 6 (SC)***, wherein challenge was made to Show Cause Notice, has been pleased to make the following observation:

> *"14. In our considered opinion, the ratio of the aforesaid decision in Uttareswari Rice Mills case [(1973) 3 SCC 171 = 1973 SCC (Tax) 123] of this Court is squarely applicable to the facts of the present case. The expression used in Section 11-E of the Act is that the Commissioner must be satisfied on information or otherwise that the registered dealer has furnished incorrect statement of his turnover or furnished incorrect particulars of his sale in the return. A Show Cause Notice is issued to the dealer with the purpose of informing him that the Department proposes to reopen the assessment because the Commissioner himself is satisfied that the dealer has furnished incorrect statement of his turnover or incorrect particulars of his sales in the return submitted, so as to enable the dealer to reply to the show-cause notice as to why the said power vested in the Commissioner should not be exercised.*
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> *15. A notice was issued in order to provide an opportunity of natural justice to the dealer. There is nothing in the language of the aforesaid provision which either expressly or impliedly mandates the recording of any reasons. The provision of the Act nowhere postulates that the reasons which led to the issue of the said notice should be incorporated in the notice itself, and that in case of failure to do so, the same would invalidate the notice.*
>
> *16. The aforesaid provision is clear and explicit and there is no ambiguity in it. If the legislature had intended to give any other meaning as suggested by the counsel appearing for the appellant it would have made specific provision laying down such conditions explicitly and in clear words. It is a well-settled principle in law that the court cannot add anything into a statutory provision, which is plain and unambiguous. Language employed in a statute itself determines and indicates the legislative intent. If the language is clear and unambiguous it would not be proper for the court to add any words thereto and evolve some legislative intent not found in the statute."*

5.12. Challenge being made to the Show Cause Notice, the Hon'ble Supreme Court in the case of ***CCE Vrs. Krishna Wax (P) Ltd.,(2020) 12 SCC 572 = 2019 SCC On Line SC 1470*** at Paragraphs 7,10 and 13 discussed thus:

> *"7. Section 11-A thus deals with various facets including nonlevy and non-payment of excise duty and contemplates issuance of a show-cause notice by the Central Excise Officer requiring the "person chargeable with duty" to show cause why "he should not pay the amount specified in the notice". In terms of sub-section (10) of said Section 11A, the person concerned has to be afforded opportunity of being heard*

and after considering his representation, if any, the amount of duty of excise due from such person has to be determined by the Central Excise Officer. Without going into other details regarding the period of limitations and the circumstances under which show-cause notice can be issued, the crux of the matter is that such determination is after the issuance of show-cause notice followed by affording of opportunity and consideration of representation, if any, made by the person concerned.

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10. The issuance of show-cause notice under Section 11-A alsohas some significance in the eye of the law. The day the show-cause notice is issued, becomes the reckoning date for various issues including the issue of limitation. If we accept the submission of the respondent that a prima facie view entertained by the department whether the matter requires to be proceeded with or not is to be taken as a decision or determination, it will create an imbalance in the working of various provisions of Section 11-A of the Act including periods of limitation. It will be difficult to reckon as to from which date the limitation has to be counted.

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13. It must be noted that while issuing a show-cause notice under Section 11-A of the Act, what is entertained by the Department is only a prima facie view, on the basis of which the show-cause notice is issued. The determination comes only after a response or representation is preferred by the person to whom the show-cause notice is addressed. As a part of his response, the person concerned may present his view point on all possible issues and only thereafter the determination or decision is arrived at. In the present caseeven before the response could be made by the respondent and the determination could be arrived at, the matter was carried in appeal against the said internal order. The appellant was therefore, justified in submitting that the appeal itself was premature."

5.13. ***In Union of India Vrs. Bajaj Tempo Ltd., (1998) 9 SCC 281 = 1997 (94) ELT 285 SC = JT 1998 (9) SC 138*** it is advised that the appropriate course for the assessee was to reply to the show cause notice enabling the authorities to record their findings of fact ineach case and then, if necessary, the matter could be proceeded to the Tribunal and thereafter to the High Court.

5.14. The Hon'ble Supreme Court in ***Union of India Vrs. Guwahati Carbon Ltd., (2012) 11 SCC 651*** has held as under:

"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram vs. Municipal Committee, Chheharta, (1979) 3 SCC 83. In the said decision, this Court was pleased to observe that: (SCC p. 88, para 23).

"23. … when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular

way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking remedy are excluded."

5.15. The petitioner, in the instant case, has the fullest opportunity to refute allegations, if any, and rebut adverse finding/observations involved in the matter, as discussed above. The petitioner may also raise legal issues as well as factual disputes before the Assessing Officer during the course of proceeding. It is possible for the petitioner to seek further time, if according to him the time given by the authority for filing the reply was required to be extended in order to enable it to collect further material. It cannot, therefore, be said that the notices dated 06.08.2022 under Section 73 are vulnerable. Reference can be made to ***GKN Driveshafts (India) Ltd. Vrs. ITO, (2003) 1 SCC 72 = 2002 SCC OnLine SC 1116*** as the guiding rule for the Adjudicating Authorities as enunciated by the Hon'ble Apex Court. Paragraph 5 of said Judgment speaks as follows:

"5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee isentitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment inrespect of the above said five assessment years."

5.16. The Hon'ble Supreme Court in the case of ***State of Maharashtra and Others Vrs. Greatship (India) Limited, 2022 SCC On Line SC 1262*** reiterated the scope of interference where there is existence of statutory remedy in exercise of power under Article 226/227 of the Constitution of India. The following are the observations:

"14. At the outset, it is required to be noted that against the assessment order passed by the Assessing Officer under the provisions of the MVAT Act and CST Act, the assesse straight way preferred writ petition under Article 226 of the Constitution of India. It is not in dispute that the statutes provide for the right of appeal against the assessment order passed by the Assessing Officer and against the order passed by the first appellate authority, an appeal/revision before the Tribunal. In that view of the matter, the High Court ought not to have entertained the writ petition under Article 226 of the Constitution of India challenging the assessment order in view of the availability of statutory remedy under the Act. At this stage, the decision of this Court in the case of United Bank of India Vrs. Satyawati Tondon, (2010) 8 SCC 110 in which this Court had anoccasion to consider the entertainability of a writ petition under Article 226 of the Constitution of India by by-passing the statutory remedies,

is required to be referred to. After considering the earlier decisions of this Court, inparagraphs 49 to 52, it was observed and held as under:

"49.The views expressed in Titaghur Paper Mills Co. Ltd. Vrs. State of Orissa, (1983) 2 SCC 433 were echoed in CCE Vrs. Dunlop India Ltd., (1985) 1 SCC 260 in the following words : (SCC p. 264, para 3)

"3. …Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged."

50. In Punjab National Bank Vrs. O.C. Krishnan, (2001) 6 SCC 569 this Court considered the question whether a petition under Article 227 of the Constitution was maintainable against an order passed by the Tribunal under Section 19 of the DRT Act and observed : (SCC p. 570, paras 5-6)

"5. In our opinion, the order which was passed by the Tribunal directing sale of mortgaged property was appealable under Section 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short 'the Act'). The High Court ought not to have exercised its jurisdiction under Article 227 in view of the provision for alternative remedy contained in the Act. We do not propose to go into the correctness of the decision of the High Court and whether the order passed by the Tribunal was correct or not has to be decided before an appropriate forum.

6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the Court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

51. In CCT Vrs. Indian Explosives Ltd. [(2008) 3 SCC 688] the Court reversed an order passed by the Division Bench of the Orissa High Court quashing the show cause

notice issued to the respondent under the Orissa Sales Tax Act by observing that the High Court had completely ignored the parameters laid down by this Court in a large number of cases relating to exhaustion of alternative remedy.

52. *In City and Industrial Development Corpn. Vrs. Dosu Aardeshir Bhiwandiwala [(2009) 1 SCC 168] the Court highlighted the parameters which are required to be kept in view by the High Court while exercising jurisdiction under Article 226 of the Constitution. Paras 29 and 30 of that judgment which contain the views of this Court read as under : (SCC pp. 175-76)*

"29. In our opinion, the High Court while exercising its extraordinary jurisdiction under Article 226 of the Constitution is duty-bound to take all the relevant facts and circumstances into consideration and decide for itself even in the absence of proper affidavits from the State and its instrumentalities as to whether any case at all is made out requiring its interference on the basis of the material made available on record. There is nothing like issuing an ex parte writ of mandamus, order or direction in a public law remedy. Further, while considering the validity of impugned action or inaction the Court will not consider itself restricted to the pleadings of the State but would be free to satisfy itself whether any case as such is made out by a person invoking its extraordinary jurisdiction under Article 226 of the Constitution.

30. The Court while exercising its jurisdiction under Article 226 is duty-bound to consider whether:

(a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;

(b) the petition reveals all material facts;

(c) the petitioner has any alternative or effective remedy for the resolution of the dispute;

(d) person invoking the jurisdiction is guilty of unexplained delay and laches;

(e) ex facie barred by any laws of limitation;

(f) grant of relief is against public policy or barred by any valid law; and host of other factors.

The Court in appropriate cases in its discretion may direct the State or its instrumentalities as the case may be to file proper affidavits placing all the relevant facts truly and accurately for the consideration of the Court and particularly in cases where public revenue and public interest are involved. Such directions are always required to be complied with by the State. No relief could be granted in a public law remedy as a matter of course only on the ground that the State did not file its counter-affidavit opposing the writ petition. Further, empty and self-defeating affidavits or statements of Government spokesmen by themselves do not form basis to grant any relief to a person in a public law remedy to which he is not otherwise entitled to in law."

53. In Raj Kumar Shivhare Vrs. Directorate of Enforcement [(2010) 4 SCC 772] the Court was dealing with the issue whether the alternative statutory remedy available under the Foreign Exchange Management Act, 1999 can be bypassed and jurisdiction under Article 226 of the Constitution could be invoked. After examining the scheme of the Act, the Court observed : (SCC p. 781, paras 31-32)

"31. When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a goby by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

32. No reason could be assigned by the appellant's counsel to demonstrate why the appellate jurisdiction of the High Court under Section 35 of FEMA does not provide an efficacious remedy. In fact there could hardly be any reason since the High Court itself is the appellate forum."

15. Applying the law laid down by this Court in the aforesaid decision, the High Court has seriously erred in entertaining the writ petition under Article 226 of the Constitution of India against the assessment order, bypassing the statutory remedies."

5.17. Considering the fact that the petitioner has ample opportunity to agitate issues before the Assessing Officer, this Court holds that entertainment of the writ petition at the stage of notice would be premature. Doing so would frustrate the tax administration and interdict adjudication process. This Court is alive to the fact that the statute under consideration, viz., the GST Act and rules framed thereunder, provides sufficient safeguard for the assessee petitioner, more so, when against the final orders of adjudication, appeal lies.

5.18. Thus, the proper officer concerned is at liberty to verify the veracity of the claim(s) made in the returns furnished by the petitioner and take appropriate steps in accordance with law after affording reasonable opportunity of hearing to the petitioner.

6. For the aforesaid reasons, this Court does not warrant it necessary to invoke extraordinary jurisdiction in exercise of power under Article 226 of the Constitution at the stage of Show Cause Notice. The writ petition is, therefore, dismissed. Parties are to bear their respective costs.

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2022 (III) ILR - CUT- 1067

BISWAJIT MOHANTY, J.

W.P.(C) NO.19523 OF 2016

M/s. RADHARANI FOOD INDUSTRIES .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Prayer to direct Opp.Party to settle the claim regarding damage caused at the petitioner's mill on account of fire accident – Whether writ petition is maintainable? – Held, No. – Since this case raises a disputed question of fact, the same cannot be decided in this writ application – The petitioner if so advised may approach the appropriate authority in the matter for redressal of its grievances relating to milling of salvaged paddy of 14000 quintal.

For Petitioner : M/s. Upendra Kumar Samal, C.D. Sahoo, S.P. Patra, S. Nayak & M.R. Mohapatra.

For Opp.Parties : Mr. D.K. Mohanty, Addl. Standing Counsel. M/s.A.K. Mishra, S.Mishra & A.K. Sharma & Mr.J. R. Deo.

JUDGMENT Date of Hearing : 24.06.2022 : Date of Judgment: 28.06.2022

BISWAJIT MOHANTY, J.

This writ application has been filed with a prayer to direct opposite parties to settle the claim regarding damage caused at the petitioner's mill on account of fire accident and to pay the said amount to the petitioner's mill.

2. According to Mr. U.K. Samal, learned counsel for the petitioner, the case of the petitioner is that the petitioner mill had participated in Kharif Marketing Season 2013-2014 and had procured paddy for milling. The paddy so procured, were stored in the godown of the petitioner's mill. As per Clause 23 of the agreement under Annexure-A/2 executed between the petitioner's mill and Odisha State Civil Supplied Corporation Limited (opposite party no.2) for KMS 2013-14 it was specifically mentioned as follows:

> **"Clause-23 Insurance:-** It is the responsibility of the Custom Miller for safe and scientific storage of paddy, rice keep under joint custody and gunny bags supplied by Corporation OSCSC head office on behalf of the custom miller shall take up Standard Fire Policy of the stock with nationalized insurance company as insurance against fire and allied perils for stocks. The Corporation shall not be responsible for any damage of stock due to fire and other natural calamities kept unscientifically and in safe manner. Custom miller will be responsible for storage/damage of paddy, rice and gunny bags due to happening of theft, burglary or other reasons not covered under Standard Fire Policy. The insurance premium shall be borne by the millers."

As per the above agreement, the petitioner mill deposited the entire insurance premium with the opposite party no.2 and the said opposite party insured the entire paddy and rice stock of the petitioner's mill with the National Insurance Company Limited (opposite party no.4). Due to heavy rain and flood, some paddy, rice and gunny packets kept in the mills premises, got damaged. This was informed by the ACSO-cum Authorised Officer of opposite party no.2 to the Civil Supply Officer-cum-District Magistrate, OSCSC Ltd.,Samablpur (opposite party no.3) on 8.8.2014 under Annexure-1 requesting him to take necessary action for settlement of the insurance claim. There he indicated about the quantum of the damage suffered by the mill in respect of the paddy, rice and gunny bags. In his turn, the opposite party no.3 wrote a letter to the Deputy General Manager (Finance) on the same day,i.e, 8.8.2014 vide Annexure-2 requesting for making necessary arrangement for deputing a surveyor of opposite party no.4 for settlement of claims in respect of the mill of the petitioner. There, the opposite party no.3 clearly indicated about the quantum of damage suffered by the petitioner's mill. Accordingly, the Deputy General Manager (Finance) of opposite party no.2 vide his letter dated 11.8.2014 under Annexure-3 intimated the same to the Senior Divisional Manager of opposite party no.4.

While so on 17.9.2014, when the proprietor of the petitioner and his family members were away at Raigarh, after receiving the information that one of his family members had met with an accident, the petitioner's mill and godown got substantially damaged due to fire accident on account of electric short circuit. Staff of the petitioner's mill informed the said fact to the fire brigade and also to the ACSO and Authorized Officer the petitioner's mill. The ACSO and Authorized Officer of the petitioner's mill after receiving the telephonic message, rushed to the spot and found that fire brigade staffs busy in controlling the fire in order to save the balance portion of mill. According to him near about 45 to 50 per cent of paddy/rice at that time had already been burnt by fire. On the same date, i.e.,17.9.2014 vide Annexure-4 he intimated the matter to opposite party no.3 and requested him to pay a personal visit to the mill. On the same date, the opposite party no.3 vide Annexure-5 requested the ACSO & Authorised Officer of the mill to lodge an F.I.R. in the local police station immediately as the entire stock of opposite party no.2 in the mill had been kept under joint custody of the petitioner-miller and Authorized Officer. Accordingly, the ACSO and Authorised Officer of the petitioner's mill lodged an F.I.R. on 17.9.2014 under Annexure-18 before the O.I.C., Sasan Police Station, Sasan, a copy of which has been filed along with an affidavit dated 20.4.2022 filed on behalf of the mill of the petitioner. In the said F.I.R., it was made clear that stocks of paddy, rice of opposite party no.2 were kept in the mill premises under joint custody of miller and Authorized officer of the rice mill and as per his

assessment, nearly 40 to 50 per cent of paddy and rice had been burnt in fire. On 18.9.2014, the opposite party no.3 vide Annexure-6, intimated the Managing Director of opposite party no.2 about the fire accident caused in the mill of the petitioner on 17.9.2014 and lodging of the F.I.R. by the Authorized Officer on the same date. He also indicated therein that as per the report of the Authorized Officer about Q33,000 paddy and Q300 raw rice have been damaged due to fire accident. He also indicated therein that one mill staff has also lodged an F.I.R. Opposite party no.3 requested the Managing Director (opposite party no.2) to intimate the Insurance Company to depute a Surveyor. There, he also indicated that balance available stocks were in wet condition due pouring of water to control fire by the fire brigade staff and steps for shifting of balance available stock had not been taken only for survey by the Insurance Company. So he requested deputation of a Surveyor immediately to assess the damage caused before shifting of stock in order to avoid further damage of stock due to water. On 19.9.2014, vide Annexure-7, the General Manager (Accounts) requested the Senior Divisional Manager of opposite party no.4 to depute a surveyor to assess the damage while indicating therein that the approximate value of damaged stock was Rs.524.10 Lacs. He also requested to settle the claims at the earliest. On 25.9.2014, the opposite party no.3 requested the General Manager (Accounts) of opposite party no.2 again to take necessary steps to depute a surveyor of the Insurance Company to assess the damage. The General Manager (Accounts) in his turn vide letter dated 29.9.2014 also requested the Senior Divisional Manager of opposite party no.4 to depute a surveyor to assess the damage. Also on 29.9.2014, the Station Officer of Fire Station, Rengali certified that the mill of the petitioner was substantially damaged due to fire accident on 17.9.2014 caused on account of electric short circuit. On 13.10.2014 after a gap of 25 days from the date of accident, a team of surveyor of the Insurance Company came from Calcutta and visited the mill premises. They were accompanied by the ACSO and Authorized Officer of the mill. After recording the statement, the surveyor requested the opposite party no.3 to ask the miller to segregate and salvage the available stock. The ACSO and Authorized Officer vide his letter dated 14.10.2014 under Annexure-8 intimated this fact to opposite party no.3. On 3.3.2015, the opposite party no.3 vide Annexure-9 intimated the Managing Director of opposite party no.2 about the then status of the petitioner's mill, specifically indicating about the damage caused in the fire accident and the cause of the accident to be electric short circuit and that in the meantime, the petitioner's mill has been allowed to operate and mill the balance good quality paddy. Vide letter dated 28.1.2016 under Annexure-10, the Managing Director of opposite party no.2 intimated the opposite party no.3 that opposite party no.4 has rejected the claim of fire loss at the petitioner's mill on the ground that the

fire was not accidental and also intimated that a meeting has been convened with opposite party no.4 on 1.2.2016 to discuss all these issues and the miller should remain present in the said meeting to put forth its points along with their relevant book of accounts and documents. Vide self same letter he was also requested to intimate Santosh Das, the then ACSO to remain present in the Head office. On 16.3.2016, the Managing Director of opposite party no.2 requested the Senior Divisional Manager of opposite party no.4 for settlement of the claim as the report submitted by the surveyor was baseless and to arrange a resurvey through a pool of senior surveyor. Since no effective steps were being taken for settlement of the dispute, on 25.5.2016, the petitioner vide Annexure-11 requested the Managing Director of opposite party no.2 to give authorization to file a case against the opposite party no.4. On 16.8.2016 vide Annexure-12 the General Manager (Accounts) of opposite party no.2 requested M/s. Safe Risk Insurance Brokers Pvt. Ltd. to submit its opinion regarding the rejection of the claim of insurance company in connection with the fire accident at the petitioner's mill and representation of the miller to file a consumer case. But neither the permission was accorded nor the documents were supplied to challenge the rejection of the claim by the opposite party no.4. Instead the opposite party.no.2 started conducting audit for recovery of the amount of damage from the petitioner's mill. The petitioner also made an application before the Insurance Company (opposite party no.4) under the RTI Act to supply documents regarding insurance of the mill and claim made by the opposite party no.2. Vide letter dated 27.10.2016, under Annexure-13 the Chief Public Information Officer intimated that the information cannot be granted to a third party as the insurance policy has not been made in the name of the petitioner and has been issued in the name of the opposite party no.2. Therefore, the petitioner could take the documents from the opposite party no.2. Most importantly it was intimated that as per the survey report, the insured has not submitted the claim form. According to Mr. Samal, the case of the petitioner is that since the petitioner has paid the insurance premium to the opposite party no.2 and fire insurance has been made in the name of the opposite party no.2 for the stock of paddy and rice of opposite party no.2 lying at petitioner's mill and as the said stock got damaged due to fire accident, which was covered under the insurance policy, the opposite party no.2 should have taken appropriate steps for settlement of the claim with the opposite party no.4 including the steps to challenge rejection of claim by opposite party no.4. Instead of doing that a move is on to saddle the petitioner with said liability, which is not permissible under law.

3. Opposite party nos.2 & 3 have filed their counter affidavit. Relying on the said counter affidavit Mr. Mishra denied the allegations and submitted that the opposite party nos.2 & 3 have taken various steps for settling the claim. The

same would be clear from Annexure-7 by which opposite party no.2 intimated the opposite party no.4 about the fire accident, approximate value of damage and requested for deputing a surveyor to assess the damage/loss of the stock and for settling the claim of the petitioner. It is their further stand is that the petitioner has not deposited the entire insurance premium with opposite party no.2 rather opposite party no.2 has insured the entire stock available with the petitioner and all other custom millers of the State for KMS 2013-14 on payment of the insurance premium by opposite party no.2 itself. Subsequently, the premium paid was received from the petitioner by way of adjustment from its bills. Their further stand is that as per the terms of the agreement at Clause-23, opposite party no.2 should not be held responsible for any damage of stock kept unscientifically and in unsafe manner at the mill premises. Further relying on Clause-25(xi) of the agreement under Annexure-A/2, the opposite party nos. 2 & 3 have taken the stand that in case of shortage in paddy and rice due to happening of fire, the miller is liable to pay the economic cost. It is also their case that though the miller agreed to mill good quality paddy of Q 14000.00 as per Annexure-9 which was found after fire accident, instead of delivering Q10292.00 rice, only Q2778.00 of rice was delivered leaving balance of Q7513.94 rice. In reply to Paragraph-17 of the writ application, the above noted opposite parties submitted that opposite party no.2 represented before the insurance company for resurvey so as to confirm the first survey report. However, as the fire claim was rejected by the insurance company, in the audit, damage on account of fire claim has been included in the liability of the petitioner. In this context, Mr. Mishra relied on Clauses 23 & 25 (xi) of the Agreement under Annexure-A/2.

On 5.4.2022, Mr. Mishra learned counsel for opposite party nos.2 &3 filed certain documents which include Annexure-C/4 and letter dated 17.5.2017 written by the Managing Director of opposite party no.2 to the Senior Divisional Manager of opposite party no.3 which indicated that final report has not yet been submitted on the matter in issue and it was decided the claim should be revised by the opposite party no.4 as has been earlier requested by opposite party no.2 time and again.

On 21.4.2022 the opposite party no.2 and 3 filed further documents indicating that on fire accident involving the present petitioner two Station Diary Entries, i.e., 323 dated 17.9.2014 and 337 dated 17.9.2014 were recorded by Sasan Police Station. They filed extracts of the Station Diary Entries. A perusal of Station Diary Entry No.337 dated 17 clearly indicates that as per the then ACSO cum Authorised Officer, 45 to 50 per cent paddy/rice were burn by fire.

In the end, Mr. Mishra reiterated that once the request of opposite party no.2 with regard to settlement of claim has been rejected by opposite party no.4, in tune with the Clauses 23 & 25(xi), the petitioner has to pay the damages which occurred on account of the fire. Since the petitioner has further failed to deliver Q10292 of rice as against the available good quality paddy of Q14000 after fire accident, it should be held liable for not delivering the rest Q7513.94 of rice. Accordingly, he submitted that the writ application should be dismissed.

4. Opposite party no.4 has filed a counter affidavit. Relying on the same, Mr. J.R. Deo, learned counsel for the opposite party no.4 raised a preliminary objection relating to maintainability of the writ application vis-à-vis opposite party no.4. It is their case that since the present writ application involves intricate factual disputes, the same cannot be decided in a writ application. It is the further stand opposite party no.4 that since the claim relating to damage has been repudiated on the basis of a detailed report prepared by the surveyor and since neither surveyor's report nor the repudiation of the claim letter has been challenged, on this ground also the writ application deserves to be dismissed. Their further plea is that the writ application against opposite no.4 is not maintainable as there is no privity of contract between the petitioner and opposite party no.4. He further submitted that it is well settled that the report of the surveyor cannot be interfered with unless there is a glaring error in it. He also submitted that vide letter dated 3.6.2015 under Annexure-C/4, the opposite party no.4 with reference to the claim intimation letter dated 18.9.2014 intimated to opposite party no.2 about violation of Condition no.8 of the Policy, which reads as follows:

> "Condition No.8: If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof or if any fraudulent means or devises are used by the insured or any one acting on his behalf to obtain any benefit under the policy or if the loss or damage be occasioned by the willful act or with the convenience of the insured, all benefits under this policy shall be forfeited."

Accordingly, vide Annexure-C/4, opposite party no.4 called for comments from opposite party no.2 within a fortnight of receipt of the said letter to enable it to take further action in respect of the claim making it clear that if no comments are received, it would be presumed that opposite party no.2 had no comments to offer. Since the opposite party no.2 did not file any response to the letter dated 3.6.2015 under Annexure-C/4 their claim was repudiated and the same was intimated to the General Manager (Accounts) of opposite party no.2 vide letter dated 23.6.2015 under Annexure-D/4. Opposite Party no.4 also took a stand that opposite party no.4 has never received any letter dated 16.3.2016 as indicated at Paragraph-17 of the writ application. Accordingly, it also denied the

contents of letter dated 16.8.2016 under Annexure-12. In the above noted factual ground, Mr. Deo reiterated that since there exists no contract of insurance between the petitioner and the opposite party no.4 and since the present case involves disputed questions of facts and since the survey report and repudiation of claim order have not been challenged, the writ against opposite party no.4 is not maintainable. Accordingly, he prayed for dismissal of the same.

5. Mr. Samal has filed a rejoinder affidavit to the counter affidavits filed by opposite party nos.2, 3 and 4. While reiterating the stand taken in the writ application, Mr. Samal stated that though opposite party no.2 has objected to opinion of the Insurance Company as would be clear from their letter under Annexure-12, however, till date the opposite party no.2 has not taken any steps to challenge the repudiation of claim for realization of damage caused due to fire accident on 17.9.2014 made by opposite party no.4. In such background, the opposite party no.2 cannot saddle the petitioner with liability on account of the loss caused due to the fire accident in the petitioner's mill. Relying on the averments made in the rejoinder, Mr. Samal submitted that the stock was kept scientifically and in a safe manner in the mill premises. The ASCO and Authorized Officer of the Corporation had verified the stock kept in the premises of the petitioner's mill regularly without raising any objection. Fire Officer has certified that the fire was caused on account of electric short circuit. Further he submitted that Q.14,000 paddy, which was shown as good quality paddy under Annexure-9 were in fact damaged paddy as would be clear from report of Authorized Officer under Annexure14.

He further submitted that as per Annexure-4 the ACSO cum Authorised Officer has found that 45 to 50 per cent of Paddy/rice were burn on account of fire. Under Annexure-6 the opposite party no.3 clearly indicated to Managing Director of opposite party no.2 to the effect that as per the report of the Authorised Officer, Q33000 of paddy and Q300 of rice were damaged due to fire accident. Under Annexure-7 the General Manager (Accounts) assessed the loss at Rs.5.24 crores. As per Annexure-9 which refers to the fire accident certificate issued by the Fire Officer, Fire Station, Rengali and the report of O.I.C., Sasan Police Station, it is clear that fire accident took place on account of electric short circuit and no where anyone has indicated that such fire accident to be nonaccidental or deliberately made. In such background, according to him the opposite party no.2 should have challenged the survey report as well as the rejection of claim order issued by the opposite party no.4 in appropriate forum. Having not done that it cannot saddle the petitioner with the liability for the damage which has occurred on account of fire. Though under Annexure-12 also the opposite party no.2 makes it clear that it has objected to the opinion of

opposite party no.4 vide letter dated 16.3.2016 and though opposite party no.4 has disputed receipt of such letter but this very fact itself shows that opposite party no.2 itself was not satisfied with the opinion of opposite party no.4 that the fire was not accidental. Accordingly, the opposite party No.2 should have challenged such opinion of the opposite party no.4 before the appropriate forum which the petitioner could not have challenged because neither the survey report nor the repudiation letter was communicated to it by the opposite party no.4 at any point of time and also because as the petitioner was not a party to the contract of insurance. Lastly, he submitted that the very fact that letter dated 17.5.2017 has been issued by the opposite party no.2 to the Senior Divisional Manager of opposite party no.4 during pendency of the writ application indicating its opinion that the claim should be revisited by the opposite party no.4 itself clearly shows that opposite party no.2 was never satisfied with the survey report as well as with the repudiation of claim letter issued by the opposite party no.4. For all these reasons, he submitted that the petitioner cannot be saddled with the liability of damage that has occurred on fire accident. Accordingly, he prayed that the claim relating to the damages be accordingly be decided. Lastly, he made it clear that the petitioner has no claim against opposite party No.4 as there does not exist any privity of contract between them. It's main grievance is against the inaction of opposite party No.2 in taking appropriate steps for just resolution of settlement claim.

6. Heard Mr. U.K. Samal, learned counsel for the petitioner, Mr. D.K. Mohanty, learned Additional Standing Counsel, Mr. A. Mishra, leaned counsel for opposite party nos.3 & 3 and Mr. J.R. Deo, learned counsel for opposite party no.4.

7. The undisputed facts of the case are as follows:

The petitioner and the opposite party no.2 entered into an Agreement for Kharif Marketing Season 2013-14 on 29.11.2013 under Annexure-A/2 for milling paddy. By virtue of such Agreement, it was agreed that the opposite party no.2 shall deliver paddy to the custom miller, i.e., the petitioner at the paddy purchase centre which shall be transported and kept under joint custody of miller and corporation for storing, milling of the paddy and delivery of the custom milled rice to the opposite party no.2/F.C.I. at designated places. As per Clause-23 of the Agreement, it was the responsibility of the petitioner mill for safe and scientific storage of paddy, rice kept under joint custody and gunny bags supplied by the opposite party no.2. The opposite party No.2 on behalf of the custom miller was obliged to take up Standard Fire Policy of such stock with nationalized insurance company as insurance against fire and allied perils for

stocks. The Corporation agreed not to be responsible for any damage of stocks due to fire, kept unscientifically and in unsafe manner. The custom miller would be responsible for shortage/damage of paddy, rice and gunny bags due to happening of theft burglary or other reasons nor covered under Standard Fire Policy. The insurance premium was agreed to be borne by the millers. Clause-25(xi) makes it clear that under no circumstances, the miller would be entitled to claim shortage in paddy/rice in course of storing, milling, transporting, lifting and delivering due to happening of fire. In the event of any shortage or misappropriation, the miller was liable to pay the economic cost of paddy/rice along with interest till the date of recovery. In the event of any shortage occurring due to any accident or mishap, the reasons and circumstances of which were found by the corporation to be beyond the control of the custom miller, the custom miller would be liable to pay the cost of the shortage of stock along with all expenses by the corporation and interest at such rate and for such period as may be directed by the Corporation. Due to heavy rain from 3.8.2014 to 5.8.2014, paddy, rice and gunny bags at the mill premises got damaged and the same was duly intimated by the ACSO and Authorised Officer of the petitioner mill to opposite party no.3 on 8.8.2014 and the officers of opposite party no.2 moved to opposite party no.4 for settlement of the claim vis-àvis the above noted damage vide Annexure-3 and it has been admitted by the opposite party nos.2 & 3 in their counter affidavit at Paragraph-15 that the auditors have not included the damage of stock due to flood in the liability of the petitioner. While so on 17.9.2014, when the family of the proprietor of the petitioner was away at Raigarh after receiving the information that one of his family members had met with an accident, the petitioner's mill and godown got substantially damaged due to fire accident on account of electric short circuit. On receiving the information, the ACSO and Authorised Officer of the petitioner's mill immediately visited the spot and found that fire brigade busy in controlling the fire in order save balance portion of the mill and according to him about by then 45 to 50 per cent of paddy, rice was already burnt. In such background, on the same date, vide Annexure-4 he requested opposite party no.3 to pay a visit to the mill to assess the situation and take necessary action. On receipt of such letter vide Annexure-5 opposite party no.3 directed the ACSO and Authorised Officer of the petitioner mill authorizing him to lodge an F.I.R. in the local police station immediately without further delay as the stock of opposite party no.2 was kept under joint custody and maintenance of the petitioner as well as the Authorized Officer of opposite partyno.2. It appears that on 17.9.2014 vide Annexure-18 the ACSO and Authorised Officer of the petitioner mill lodged an F.I.R. before the O.I.C., Sasan Police Station. Therein it is clearly indicated that according to the said Authorised Officer about 40 to 45 per cent of paddy and rice have been burnt.

Upon receipt of such information, Station Diary Entry No.337 dated 17.9.2014 was made by the O.I.C., Sasan Police Station clearly indicating therein percentage of burnt paddy and rice as submitted under Annexure-18. On the very same date, one D.R. Sharma also lodged a written report with regard to fire in the mill and the same was registered vide Station Diary Entry No.332 dated 17.9.2014 to the effect that on account of such fire, some paddy and rice have been burnt and damaged. On 18.9.2014 vide Annexure-6 opposite party no.3 intimated the Managing Director of opposite party no.2 about the fire in the mill on 17.9.2014 and lodging of the complaint with the local police station by the Authorised Officer. He also indicated therein that the Authorised Officer has reported that about damage of Q33000 paddy and Q300 rice due to fire accident and balance available stock were in wet condition due to water pouring and the steps for shifting of balance available stock have not been taken awaiting survey by the insurance company. Accordingly, he requested deputing of a surveyor of Insurance Company to assess the damage in order to avoid further damage. On 19.9.2014, the General Manager (Accounts) wrote a letter vide Annexure-7 to the Senior Divisional Manager of opposite party no.4 drawing his attention to the fire at the mill on 17.9.2014 and indicating the approximate value of damaged paddy and rice to be of Rs.524.10 crores. Accordingly, he requested to depute a surveyor to assess the damage and loss and settle the claim at the earliest. On 25.9.2014, the opposite party no.3 again made a request to the General Manager (Accounts) of opposite party no.2 for taking necessary steps for deputing the surveyor to assess the damage. On 28.9.2014, the O.I.C. Sasan Police Station reported on enquiry that the electric boards have been found burnt due to electric short circuit and due to electric short circuit, some rice pockets which were inside the mill have been damaged and some paddy pockets and empty paddy pockets which were inside the godown have also been damaged. This has been indicated in Annexure-9. Further the said Annexure refers to fire accident certificate dated 29.09.2014 issued by the Station Officer, Fire Station, Rengali to the effect that on 17.9.2014 in a fire accident at the mill and godown, paddy due to electric short circuit, rice and machine panel board etc were burnt. After a gap of around 25 days the surveyor visited the spot on 13.10.2014. This was informed by the ACSO cum Authorised Officer to the opposite party no.3 vide its letter dated 14.10.2014 under Annexure-8. He also indicated therein that verbally the team of surveyor asked the miller to segregate and salvage the available stock and also told him that if necessary the team may come again to assess actual damage caused due to fire accident. In such background, he requested the opposite party no.3 to kindly issue necessary direction to the miller to segregate and salvage the available stock and also requested the surveyor to send a computerized copy of their report dated 13.10.2014. On 10.12.2014, the

Authorised Officer submitted the physical verification report as indicated in Annexure-9 making it clear that Q14,000 of good quantity paddy has been salvaged. However, in the rejoinder, the petitioner has taken a stand that the entire Q14,000 of paddy was in reality damaged paddy. Thereafter, it appears that the Collector, Sambalpur directed the petitioner to mill the available good quality paddy and minor affected paddy and deliver rice immediately to minimize the loss of Corporation i.e. opposite party no.2. The head office of opposite party no.2 was directed to be intimated about the present status in details with a request to take immediate steps for settlement of insurance claim on fire accident. It was further observed that after final acceptance of damage quantity by the insurance company, the miller should be issued notice for deposit of differential amount towards value of differential quantity within limited time. All these have been reflected in Annexure-9 dated 03.03.2015 which is a letter written by the opposite party no.3 to the Managing Director of opposite party no.2. It was also indicated therein that at present the miller had started delivery of C.M.R. In the meantime, vide letter dated 11.2.2015 under Annexure-14, the M.I. Rengali Block had intimated the opposite party no.2 that he has taken charge over the mill along with its damaged paddy and rice on 23.12.2014 from the then ASCO and since then or prior to that date the mill was lying closed by orders of the higher authority. He had also intimated that neither balance paddy was being processed nor balance rice was being delivered. But vide Annexure-9 dated 03.03.2015 the opposite party no.3 has admitted that the petitioner has started delivery of C.M.R. Sometimes thereafter vide Annexure-B/4 dated 12.3.2015, survey report was prepared clearly indicating therein that it was the opposite party no.2, who was the insured and not the petitioner. On 3.6.2015 vide Annexure-C/4, the opposite party no.4 asked for response of opposite party no.2 making their observation vis-à-vis condition no.8 of the policy as quoted earlier as it was felt that the said condition has been violated. The opposite party no.4 made it clear that it would like to have the comments of opposite party no.2 within a fortnight of receipt of this letter in order to enable them to take further action in respect of the claim failing which it would be presumed that the opposite party no.2 had no comments to offer. On such a query the opposite party no.2 remained silent. Accordingly, vide letter dated 23.6.2015 the opposite party no.4 repudiated the claim of opposite party no.2 with regard to the damage suffered at the mill on account of fire which took place on 17.9.2014. In this background, about 6 months thereafter, the Managing Director of opposite party no.2 intimated the opposite party no.3 vide letter dated 28.01.2016 vide Annexure-10 that a meeting has been convened on 1.2.2016 with the opposite party no.4 to discuss the issue relating to loss of stock in the mill premises of the petitioner on account of f ire as in the meantime, the opposite party no.4 has

rejected the claim on the ground that the fire was not accidental. In the said letter it was made it clear that the petitioner should be asked to remain present to putforth its points before them on 1.2.2016 with all relevant documents and books of accounts. Neither the petitioner nor the opposite party nos.2 & 3 have indicated as to what happened on 1.2.2016. On 16.3.2016 as would be clear from the contents of Annexure-12 the opposite party no.2 objected to the opinion of opposite party No.3 that fire was not accidental vide its letter dated 16.3.2016. Though the opposite party no.4 in its counter affidavit has made it clear that such a letter was not received by it, however, one thing is clear that the opposite party no.2 has objected to the opinion of the opposite party no.4 that the fire was not accidental. On 25.10.2016 vide Annexure-11 the petitioner made a request to the Managing Director of opposite party no.2 for authorizing them to file insurance claim before the Consumer court. Further it appears that the deponent in the writ application also requested the opposite party no.4 for claim related opinion from opposite party no.4 and the opposite party no.4 vide letter dated 3.10.2016 under Annexure-E/4 Series wrote to the General Manager of opposite party no.2 seeking their advice regarding submission of documents as requested. On 19.10.2016 under Annexure-E/4 Series in response to the above noted letter dated 3.10.2016, the General Manager requested the Senior Divisional Manager of opposite party no.4 to furnish those documents to him. Accordingly, Xerox copy of the survey report and copy of the policy were forwarded to the General Manager of opposite party no.2 vide letter dated 2.10.2016 issued by opposite party no.4 under Annexure-E/4 Series. On 27.10.2016 vide Annexure-13 the CPIO of opposite party no.4 intimated the deponent in the writ application that the information sought for by him relates to third party and they have sought permission from the policy holder as the policy was not in the name of the petitioner and as per their request, the insurance policy and survey report have been furnished to the opposite party no.2. It is in such background, when the petitioner thought that the opposite party no.2 is not taking enough steps in the matter and the liability of damage relating to stock on account of fire accident might be saddled on it, the petitioner filed the present writ application on 7.11.2016. Such an apprehension of the petitioner has been found to be correct from the averments made in Paragraph-15 of the counter affidavit filed by the opposite party no.2. During pendency of the writ application the Managing Director of opposite party no.2 intimated the Senior Divisional Manager of opposite party no.4 vide letter dated 17.5.2017 that it has been decided that claim on fire damage should be revisited by opposite party no.4 as has been requested by opposite party no.2 time and again. As to what happened pursuant to such letter,nothing is there.

The above narration broadly contains the background facts. Keeping in mind the factual background, submissions of the parties and prayer made by the petitioner it is clear that the present case clearly revolves around the damage caused by the fire accident and as to whether the petitioner should bear the liability with regard to the damage caused on account of such accident.

An analysis of the facts as indicated above clearly shows that the Authorised Officer of opposite party no.2 under Annexure-4 has indicated that when he went to the spot, he felt that about 45 to 50 per cent of paddy and rice have been burnt on account of fire. The same was also indicated by the ACSO and Authorised Officer in his report dated 17.9.2014 under Annexure-18 before the O.I.C., Sasan Police Station. Further a perusal of Annexure-6 indicates that the Authorised Officer has also indicated that about Q33000 of paddy and Q300 of rice have been damaged due to fire accident and the balance available were in wet condition due to pouring of water to control fire by the fire brigade. Vide Annexure-7 the General Manager (Accounts) of opposite party no.2 also intimated the Senior Divisional Manager of opposite party no.4 that the approximate value of damaged stock was about Rs. 5.24 crores and requested for settlement of the claim. Neither in Annexure-4 nor in Annexures-18,6 & 7 any officer of opposite party no.2 has complained that the petitioner has kept the stock in an unscientific and unsafe manner. On 28.9.2014, the O.I.C. Sasan Police Station on enquiry found that the electric boards have been burnt due to electric short circuit and due to electric short circuit, some rice pockets which were inside the mill and some paddy pockets and empty paddy pockets which were inside the godown have been damaged. On 29.9.2014 the Station Officer, Fire Station, Rengali in his certificate has also indicated about the fire accident in the mill occurring due to electric short circuit. Despite request for survey at the earliest, strangely, after expiry of more than 25 days, the surveyor visited the spot on 13.10.2014 as noted under Annexure-9 and as per the direction, the miller started milling available paddy and made delivery of the C.M.R. On 12.3.2015 the survey report was prepared under Annexure-B/4 clearly indicating that the opposite party no.2 is the insurerd. The opposite party no.2 was asked by the officer of opposite party no.4 to give its comments vide letter dated 3.6.2015 under Annexure-C/4 making it clear that in case comments are not received within a fortnight it should be presumed that the opposite party no.2 has no comments to offer. It is not disputed that opposite party no.2 did not offer any comments and accordingly, letter dated 23.6.2015 under Annexure-D/4 was issued by the opposite party no.4 to the General Manager (Accounts) of opposite party no.2 repudiating the claim. Strangely, the opposite party no.2 neither challenged the survey report nor the repudiation letter under Annexure-D/4

before the appropriate forum though it objected to opinion of the Insurance company that fire is not accidental as appears from Annexure-12.

Thus it is not disputed that the damage was caused on account of fire and also not disputed that the stock which has been damaged on account of fire was insured by the opposite party no.2 with opposite party no.4 and the survey was undertaken after a gap of about 25 days. Only on account of coming to a conclusion that fire was not accidental, the opposite party no.4 has repudiated the claim and though the opposite party no.2 has objected to the same, however, it has not challenged the same in an appropriate forum. Most strangely though opposite party no.2 was granted opportunity to respond to the views of the opposite party no.4 vide Annexure-C/4, however, it chose not to give its comments which resulted in issuance of repudiation letter under Annexure-D/4. Thus despite raising objection to the opinion of opposite party no.4, again strangely opposite party no.2 has not challenged the survey report and repudiation letter. Since the petitioner is not a privy to the contract of the insurance it has no locus standi to either challenge the survey report or the final repudiation of claim. Moreover during pendency of the writ application, on 17.5.2017, the Managing Director of opposite party no.2 in his letter to opposite party no.4 has clearly indicated that their claim on the accident should be revisited by opposite party no.4 In such background, this Court is of the opinion that the petitioner cannot be saddled with liability on account of damage of stocks due to fire accident.

To the contention of Mr. Mishra that the petitioner is bound to be saddled with the liability on account of Clauses 23 & 25(xi) of the agreement under Annexure-A/2, this Court is of the view that such a submission is without any merit and reflects contradictory stand of opposite party no.2. When opposite party no.2 itself vide Annexure-12 and letter No.8103 dated 17.5.2017 issued by the Managing Director to the Senior Divisional Manager of opposite party no.4 has raised objection to the opinion of the insurance company and is of the opinion that the matter should be revisited by the opposite party no.4, it cannot be permitted to take contradictory stand that the petitioner be saddled with liability under Clauses 23 and 25(xi) of the Agreement. Moreover, no document /evidence has been brought on record to show that the stock was kept by the petitioner in an unscientific and unsafe manner. As indicated earlier the documents under Annexures-4,6,7,9,18, etc. nowhere indicate that stock was kept in an unscientific and unsafe manner.

With regard to Clauses 23 & 25(xi) of the agreement under Annexure-A/2 it can only be said that both Clauses 23 and 25(xi) should be read together

and harmoniously. As per Clause-25(xi) the millers are required to pay the economic cost in case of shortage on account of fire along with interest. Where the shortage occurs on account of accident, the millers are required to pay the cost of shortage along with the interest and expenses incurred by the corporation. But when the subject matter of shortage is covered by insurance or when insurance agreement/contract of insurance exists giving coverage, then certainly the petitioner can take help of Clause 23 so that its liability can be indemnified. Here it is undisputed that contract of insurance exists and the opposite party no.2 is not satisfied with the reasons on the basis of which its claim vis-à-vis the fire accident has been repudiated. Further for some unknown reasons it had failed to file its response to the letter under Annexure-C/4 despite being of the opinion of the opposite party no.4 is not correct in rejecting the claim. Despite such opinion, since it has chosen not to challenge the survey report and the repudiation letter, it certainly cannot take help of Clauses 23 & 25(xi) to saddle the liability on the petitioner. There cannot be a better illustration of arbitrary use of power than this. It may also be noted here that while entertaining this writ application this Court has also nowhere prohibited the opposite party nos.2 & 3 from taking appropriate action vis-à-vis the survey report and repudiation letter before the appropriate forum. It appears that for its inaction, the petitioner is going to suffer. In such background, this Court is of the view that on account of their laches, the petitioner cannot be allowed to suffer and therefore, with regard to damage suffered on account of fire accident on 17.9.2014, the petitioner cannot be saddled with liability.

With regard to milling of salvaged paddy to the tune of Q14000 which was salvaged after the fire accident and requiring the petitioner mill to deliver Q10292 of rice and the petitioner only delivering Q2778.06 of rice leaving behind a balance of Q7513.94 of rice, while the stand of opposite party nos.2 & 3 is that Q14000 was good quality salvaged paddy, the petitioner in its rejoinder has taken a stand disputing quality of such paddy and according to it such rice was also completely damaged relying on Annexure-14. However, Annexure-14 nowhere refers to Q14,000 paddy. In any case since this raises a disputed question of fact, the same cannot be decided in this writ application. The petitioner, if so advised may approach the appropriate authority in the matter for redressal of its grievances relating to milling of salvaged paddy of Q14000 as indicated in Annexure-9.

With the above finding and observations, the writ petition is disposed of. No costs.

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2022 (III) ILR - CUT- 1082

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

W.P.(C) NO. 9904 OF 2018

RAJESH BEHERA .....Petitioner

.V.

DEPUTY REGISTRAR, CAT, CUTTACK BENCH & ORS. .....Opp. Parties

SERVICE LAW – Differential wages – Petitioner was communicated with an order of suspension on allegation of initiation of proceeding in the Court of law for commission of offences under sections 498(A)/ 304(B)/302/34 of the IPC r/w section 4 of D.P Act – After acquittal from all charges, suspension order revoked and petitioner was allowed to resume his duty immediately – Whether the petitioner is entitled to the differential wages for the period of suspension? – Held, Yes.

(Para 17)

Case Law Relied on and Referred to :-

1. AIR 1984 SC 380 : Brahma Chandra Gupta Vs. Union of India.
2. AIR 2004 SC 1005 : Union of India Vs. Jaipal Singh.
3. AIR 1997 SC 1434 : Krishnakant Raghunath Bibhavnekar Vs. State of Maharashtra.
4. AIR 2010S C 19 : Jaipur Vidyut Vitran Nigam Ltd and Ors. Vs. Nathu Ram.
5. 2015 SCC OnLine Ori 143 : Narottam PattanaikVs. Chairman-cumManaging Director, Orissa State Road Transport Corporation & Ors.

For Petitioner : M/s. P.K. Nayak, H.B. Dash, and A.C.R. Das.

For Opp. Parties : Mr. D.R. Swain, Mr. Goutam Mishra, Sr. Adv. M/s. A. Dash, J.R. Deo, A. Khandal.

JUDGMENT Date of Hearing: 21.06.2022 : Date of Judgment: 28.06.2022

Dr. B.R. SARANGI, J.

The Petitioner, who is working as Senior Technician-Cum-Operator in the Department of Shops (Structural & Fabrication), Steel Authority of India Ltd., Rourkela Steel Plant, Rourkela, has filed this writ petition seeking to quash the order dated 16.04.2018 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 260/00152 of 2015, at Annexure-4 and to issue direction to the Opposite Parties to release all benefits by treating the period of suspension as in duty, along with all consequential benefits.

2. The factual matrix of the case in brief, is that the Petitioner joined as Technician-Cum-Operator on 04.10.2001 under the Opposite Parties No. 3 to 5.

While he was working as Senior Technician-Cum-Operator, on 12.06.2010, Opposite Party No.4 issued an order of suspension of the Petitioner on the allegation of initiation of proceeding in the court of law for commission of offences under Sections 498(A)/304-B/302/34 of the Indian Penal Code (for short "IPC") read with Section 4 of the Dowry Prohibition Act (for short "D.P. Act") with an observation that the Petitioner is placed under suspension until disposal of the criminal trial pending against him in accordance with Clause 30 (ii)(h) of the Certified Standing Orders of the company. It was further directed by Opposite Party No.4 that during the period of suspension, the Petitioner shall not enter into the work premises except with the permission of the competent Authority, nor should he leave the station without his permission and shall surrender his identity card before the superior Officer immediately.

2.1 The Petitioner faced trial in Sessions Trial Case No. 106/05 of 2010-11 arising out of Sector-7 P.S. Case No. 34/2010, corresponding to G.R. Case No. 615/2010 and the learned Additional Sessions Judge, Fast Track Court, Rourkela, after conclusion of the trial, acquitted the Petitioner of all the charges under Section 235 (i) of the Cr.P.C. vide judgment and order dated 22.08.2012.

2.2 After such acquittal order was passed, the Petitioner immediately intimated the said order of acquittal to the Opposite Party No.5 with a prayer to revoke the order of suspension and allow him to resume his normal duty. On receipt of such intimation from the Petitioner, Opposite Party No.5 vide order dated 05.09.2012, revoked the order of suspension and treated the period of suspension as such and directed the Petitioner to resume his duty immediately. As per the order dated 05.09.2012, the Petitioner resumed his normal duty like others and made a representation to the Authority on 09.10.2012 with a prayer to treat his suspension as duty and to release all the dues as per his entitlement and other consequential benefits. On receipt of such representation, Opposite Parties No. 3 to 5 did not take any action and sat over the matter. Thereafter, a reminder was issued on 11.07.2014 contending that he was acquitted of all the charges and became the victim of torture mentally and financially for no fault of him and also was deprived of getting three increments and its corresponding D.A. and other statutory and consequential benefits, but no action was taken thereof. As a consequence thereof, the Petitioner approached the Central Administrative Tribunal, Cuttack Bench, Cuttack,by filing O.A. No. 606 of 2014, which was disposed of vide order dated 06.08.2014 with a direction to Opposite Parties No. 3 to 5 to consider his representation within sixty days. In compliance of the said order of the Tribunal passed on 06.08.2014 in O.A. No. 606 of 2014, Opposite Party No. 5, vide order dated 17.10.2014, rejected the representation of the Petitioner dated 09.10.2012 and the reminder dated 11.07.2014 on the ground

that it would be detrimental to the maintenance of discipline, if service/financial benefits are granted for the period of his suspension, as a matter of course.

2.3 Against such rejection of representation, the Petitioner filed O.A. No. 260/00152 of 2015 before the Central Administrative Tribunal, Cuttack Bench, Cuttack. Pursuant to notice issued by the Tribunal, Opposite Parties No. 3 to 5 filed their Counter Affidavit stating therein that the Petitioner was not available for duty, as his presence at the work spot was considered detrimental to the interest of the organization and the Opposite Party Company could not avail his service during the said period as the Petitioner remained suspended and, as such, he is not entitled to any back wages for the period of suspension.

2.4 In response to the same, the Petitioner also filed Rejoinder Affidavit contending inter alia that there is nothing on record to show that the Petitioner's behaviour and conduct has tarnished the reputation of the Company. Merely because he was involved in a criminal case, he was placed under suspension and, as such, the suspension is attributable to the Opposite Party-Company on failure to initiate any Domestic Inquiry as regards any alleged misconduct. Thereby, mere suspension throughout till reinstatement without any proceeding is unjustified and amounts to violation of principle of natural justice. It was further indicated that Opposite Parties No. 3 to 5 cannot be saddled with the liability for payment of full wages for the period of suspension, on the other hand, a direction was made to the Petitioner that during the period of suspension the Petitioner should not enter the work premises except with the permission of the competent Authority, nor should leave the station without his permission.

2.5 The Tribunal, on the basis of the pleadings available, dismissed the Original Application, vide order dated 16.04.2018, on the ground that after acquittal from the criminal case, the Petitioner is only entitled to reinstatement in service and not entitled to get the consequential benefits. Challenging such order of the Tribunal, the Petitioner has filed the present Writ Petition.

3. Mr. P.K. Nayak, learned counsel appearing for the Petitioner contended that the Tribunal has committed gross error apparent on the face of the record by dismissing the Original Application and refusing to grant full back wages, merely because the Petitioner was involved in a criminal case, though he was acquitted ultimately in the trial. It is further contended that before the Tribunal though the Petitioner had relied upon the judgment of the apex Court in ***Brahma Chandra Gupta v. Union of India, AIR 1984 SC 380***, but the same was not taken note of nor reflected in the order itself by the Tribunal. Therefore, in view of the ratio decided in the said case, the Petitioner is entitled to get the

differential back wages as he was paid subsistence allowance during the suspension period.

3.1 It is further contended that judgment of the apex Court in ***Union of India v. Jaipal Singh, AIR 2004 SC 1005,*** on which reliance was placed by Opposite Parties No. 3 to 5, has no application, as fact of the said case is not identical to the present case. In the said case, the Petitioner was dismissed on conviction in a criminal case and he was out of service. But in the present case, the Petitioner was suspended and the Authority directed not to enter into the work premises except with the permission of the competent Authority, nor should leave the station without his permission. Therefore, factually the case of the Petitioner vis-à-vis ***Jaipal Singh*** (supra) is distinguishable. The reliance placed thereon by the Tribunal cannot sustain in the eye of law.

3.2 It is further contended that the Petitioner's name has been included in a criminal case, but during trial, he was placed under suspension without initiating any disciplinary proceeding against him and during suspension period, he was paid the subsistence allowance, but acquittal being made by the Trial Court, he was immediately reinstated in service. Therefore, for the period he remained away from the work place because of the order passed by the Authority, he should not have been deprived of the benefits of differential back wages admissible to him. Thereby, the Tribunal has committed gross error apparent on the face of the record in appreciating the factual matrix of the case in hand vis-àvis the judgments relied upon by the Petitioner, the judgment in ***Jaipal Singh*** (supra) as well as the judgment in ***Krishnakant Raghunath Bibhavnekar v. State of Maharashtra, AIR 1997 SC 1434***.

3.3 It is further contended that Clause-30 of the Standing Orders deals with the procedure for dealing with cases of misconduct. As per Clause-30 (ii) (e), since the Petitioner was not found guilty of misconduct alleged or any other misconduct, he should be reinstated in his post and should be paid the difference between the subsistence allowance already paid and emoluments which he would have received if he had not been suspended, the period of suspension being treated as duty. Thereby, the Petitioner is entitled to get the differential wages, for the period, he was placed under suspension.

3.4 To substantiate his contention, reliance has been placed to the Three-Judge Bench decision of the apex Court in ***Brahma Chandra Gupta*** (supra), ***Jaipur Vidyut Vitran Nigam Ltd and Others v. Nathu Ram, AIR 2010 SC 19***, wherein the judgment of the apex Court in the case of ***Jaipal Singh*** (supra) was distinguished.

4. Per contra, Mr. Goutam Mishra, learned Senior Counsel appearing along with Mr. A. Dash, learned Counsel for Opposite Parties No. 3 to 5 vehemently contended that since the Petitioner had not discharged his duty during the suspension period and he was granted the benefit of subsistence allowance, even after acquittal from trial he is not entitled to get the differential back wages as claimed by him and thus contended that the Tribunal is well justified in passing the order impugned relying upon the judgments of the apex Court in ***Jaipal Singh*** and ***Krishnakant Raghunath Bibhavnekar*** (supra), where the direction was given that the order of the SAIL is in consonance with the judicial pronouncements and no fault is found in not extending the financial benefits during the period of suspension and though after acquittal the Petitioner is entitled to continuity in service, but cannot be paid salary for the period he was out of services arising out of his own action as per initiation of dowry death case and the department has no role to play and the Petitioner himself had invited the wrath, and accordingly dismissed the Original Application.

4.1 It is further contended that reliance placed on Clause-30 (ii)(e) of the Standing Orders for grant of financial benefits to the Petitioner is in relation to a disciplinary proceeding initiated against the person concerned and that has got nothing to do in a case of involvement in criminal case. Reliance has been placed on Clause-30 (ii)(h), which clearly indicates that subject to provisions contained in Clauses (d) and (e), the Company reserves the right to suspend an employee accused in a court of law for any criminal offence involving moral turpitude until the disposal of the trial. Since the Petitioner is allegedly involved in commission of offence under Section 304-B of the IPC, which comes under the moral turpitude, thereby the Company is well justified by passing the order of suspension being an accused in a court of law for the criminal offence alleged against him. Consequentially, he is not entitled to get any financial benefits as claimed by him.

4.2 It is further contended that so far as suspension period, during criminal allegation against the employee, is concerned, whether he will be paid full back wages or not, the Standing Orders of SAIL, Rourkela Steel Plant is silent. In absence of any such condition stipulated in the Standing Orders, the Petitioner is not entitled to get any benefits as claimed by him. Thereby,the Tribunal is well justified by dismissing the Original Application so far as grant of financial benefits pertaining to differential back wages is concerned.

4.3 To substantiate his contention, reliance is placed on a Single Bench judgment of this Court where one of us (Dr. Justice B.R. Sarangi was a member) in the case of***Narottam Pattanaik v. Chairman-cum-Managing Director, Orissa***

State Road Transport Corporation and others, 2015 SCC OnLine Ori 143, wherein a direction was given that the Petitioner is entitled to back wages for the period from 18.01.2000 to 01.10.2000 and thereby the impugned order, so far as it denied back wages from 05.05.2000 to 01.10.2000, was modified to the extent that the Petitioner is entitled to back wages from 18.01.2000, the date he was acquitted till he was reinstated in service, i.e. 01.10.2000 as if he is continuing in service. Applying the said principle to the present context, it is contended that the Petitioner having acquitted by the Trial Court on 22.08.2012, immediately thereafter the order of suspension was revoked and he was allowed to resume his duty on 05.09.2012. Therefore, if at all any benefit is to be paid, it should be for the period from 22.08.2012 to 05.09.2012, to which the Opposite Parties may not have any objection to pay the same.

5. This Court heard Mr. P.K. Nayak, learned Counsel appearing for the Petitioner, and Mr. Goutam Mishra, learned Senior Counsel along with Mr. A.Dash, learned Counsel appearing for the Opposite Parties No. 3 to 5 by hybrid mode and perused the records. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties this writ petition is being disposed of finally at the stage of admission.

6. There is no dispute with regard to the factual matrix delineated above. Only question to be considered by this Court at this point of time is that if an employee,due to his involvement in a criminal case, is placed under suspension, on being acquitted of the charges by the Trial Court, whether he is entitled to get differential back wages for the period of suspension.

7. Both Mr. Nayak, learned Counsel appearing for the Petitioner and Mr. Mishra, learned Senior Counsel appearing for the Opposite Parties No.3 to 5, have admitted that the Standing Orders certified by the Government of India, Ministry of Labour & Employment, Office of the Chief Labour Commissioner (Central) dated 31.12.1963 applies to the present Petitioner. Reliance has been placed by the parties on Clause-30 (ii) (e) and (h), which reads as follows:-

> ***"30 (ii) (e).*** If, after enquiry, an employee is adjudged guilty of the misconduct alleged against him or some other misconduct brought out in the course of the enquiry and punishment is awarded, the employee shall not be entitled to any remuneration for such period other than the subsistence allowance already paid to him. If a penalty other than dismissal or removal is imposed on him, the punishing Authority shall by order decide as to how the period of suspension shall be treated. If however, he is found not guilty of the alleged misconduct or any other misconduct, he shall be reinstated in his post and shall be paid the difference between the subsistence allowance already paid and emoluments which he would

> have received if he had not been suspended, the period of suspension being treated as duty."
>
> ***"30 (ii) (h).*** Subject to the provisions contained in clauses (d) and (e) above, the Company reserves the right to suspend an employee accused in a Court of Law for any criminal offence involving moral turpitude until the disposal of the trial."

There is no iota of doubt that Clause-30 of the Standing Orders deals with the procedure for dealing with cases of misconduct. That relates to a Departmental Proceeding initiated by the Steel Authority of India Ltd. Therefore, Clause-30 (ii)(e) relates to a situation which has been crept in a Departmental Proceeding and it is held that if the Delinquent Officer is not found guilty of the alleged misconduct or any other misconduct, he shall be reinstated in his post and shall be paid the difference between the subsistence allowance already paid and the emoluments which he would have received, if he had not been suspended, the period of suspension being treated as duty.

8. Under Clause-30 (ii) (h) of the Standing Orders,as mentioned above, the power of suspension of an employee has been reserved with the Company, when such employee is an accused in a court of law for any criminal offence involving moral turpitude until disposal of the trial. Therefore, the power is vested with the employer to place an employee under suspension, if involved in a criminal case involving moral turpitude until disposal of the trial. If the contention of Mr. G. Mishra, learned Senior Counsel appearing for the Opposite Parties No. 3 to 5 is taken into consideration, as the Petitioner was involved in an offence under Section 304-B IPC, which involves the moral turpitude, then the Employer has got the power to place him under suspension and, as such, the Employer had exercised such power and placed the Petitioner under suspension. But the consequence of acquittal in a criminal case has not been indicated in the Standing Orders itself. More so, even after involvement in criminal case, no action has been taken by the Employer by initiating a Disciplinary Proceeding. Rather direction was given that during the period of suspension, the Petitioner shall not enter the work premises except, with the permission of the competent Authority, nor should he leave the station without permission. Thereby, the order of suspension, because of involvement in criminal case being a conditional one, the Petitioner was waiting in the headquarters by availing the suspension allowance admissible to him, during the period of suspension. Ultimately, the Petitioner was acquitted in the criminal trial itself. Without initiating any Disciplinary Proceeding and ultimately, the Petitioner having been acquitted of the criminal charges in trial, mere involvement in a criminal case, placing him under suspension and denial of differential back wages, may not have any justification when he has been allowed to continue in service.

9. Taking into consideration Clause-30 (ii)(e) of the Standing Orders, which is applicable to an employee involved in a Disciplinary Proceeding and applying the aid principle to the present case, if the Petitioner was allegedly involved in a criminal case and ultimately being acquitted in trial, was reinstated immediately and paid subsistence allowance, he is entitled to get the difference between the subsistence allowance already paid and the emolument which he would have been received, had he not been suspended, the period of suspension being treated as duty. Reason being, by passing a preventive order of suspension, the Employer has deprived the Petitioner to discharge his duty putting a condition that he should not enter the work premises without the permission of the competent Authority and putting a further condition that he should not leave the station without prior permission of competent Authority. In that view of the matter, the Petitioner could not have moved anywhere, save and expect staying at headquarters, without prior permission of the Authority. Therefore, mere involvement in criminal case cannot deprive the Petitioner to get the differential salary admissible to him as he has already received the subsistence allowance for the period he was placed under suspension.

10. On a query being made by this Court, Mr. G. Mishra, learned Senior Counsel appearing for the Opposite Parties No. 3 to 5, stated that there is a gray area as the Standing Orders is silent with regard to the extension of benefits of differential salary and thus the Tribunal is well justified in passing the order impugned. But there is no rationality behind such submission made by learned Senior Counsel appearing for the Opposite Parties No. 3 to 5. Even if Standing Orders are silent about the issue and there is a gray area, but applying the principles of Standing Orders and in view of the law laid down by the apex Court, the benefit of differential salary is admissible to the Petitioner.

11. Much reliance has been placed by Mr. G. Mishra, learned Senior Counsel appearing for the Opposite Parties No. 3 to 5 on the judgment of this Court in the case of ***Narottam Pattanaik*** (supra). The factual matrix of that case is different from that of the present one, meaning thereby in the said case the Petitioner was continuing as a conductor under Orissa State Road Transport Corporation and on the allegation of misappropriation of Rs. 3859.30, the then Traffic Manager, Puri of the Corporation lodged an F.I.R., basing upon which G.R. Case was instituted and the Petitioner therein faced the trial. Consequentially, he was convicted under Sections 467/471/409, IPC. Assailing such judgment and order of conviction and sentence, the Petitioner preferred Criminal Appeal. The said Appeal was dismissed confirming the judgment and order of the court below. Against such judgment of the Appellate Court, the Petitioner preferred revision and this Court set aside the judgment of conviction

and order of sentence imposed by both the Trial Court as well as the Appellate Court. As a consequence thereof, the Petitioner made a grievance for reinstatement in service and on his reinstatement, he again claimed for continuity in service for the purpose of financial benefits and also back wages for the period he was placed under suspension and out of employment because of conviction made by the competent criminal Court. Thereby, this Court formulated a question whether the Petitioner is entitled to get full back wages for the period he was out of employment for the reasons that he has been convicted by the appropriate criminal Court and also continuity in service as claimed by him. This Court came to a conclusion that the Petitioner should be considered as if he is continuing in service, but he is entitled to the back wages for the period from 18.1.2000 to 1.10.2000. Accordingly modified the order, so far as it denies back wages from 5.5.2000 to 1.10.2000 to the extent that the Petitioner is entitled to back wages from 18.1.2000, the date he was acquitted, till he was reinstated in service i.e. 1.10.2000, as if he is continuing in service. Therefore, Mr. G.Mishra, learned Senior Counsel appearing for the Opposite Parties No.3 to 5, candidly admitted that from the date of acquittal till reinstatement, i.e. for the period from 22.08.2012 to 05.09.2012, they may not have any objection to pay the dues admissible to the Petitioner.

12. But fact remains, the case of ***Narottam Pattanaik*** (supra) is distinguishable from the present case, as the Petitioner was allegedly involved in a criminal case, for which he was placed under suspension and subsequently he was acquitted in trial. During the period of trial, he was placed under suspension and the reason for not discharging the duty is obviously because of the condition stipulated in the order of suspension itself. In that view of the matter, the ratio decided in the case of ***Narottam Pattanaik*** (supra) has no application to the present case.

13. Mr. P.K. Nayak, learned counsel for the Petitioner, contended that though the judgment of ***Brahma Chandra Gupta*** (supra) was placed before the Tribunal, the same was neither taken note of nor indicated in the order itself. As such, that itself is a Three-Judge Bench decision of the apex Court, where the apex Court at paragraph-6 held as follows:-

> "6. xxx xxx xxx. Keeping in view the facts of the case that the appellant was never hauled up for departmental enquiry; that he was prosecuted and has been ultimately acquitted, and on being acquitted he was reinstated and was paid full salary for the period commencing from his acquittal, and further that even for the period in question the concerned Authority has not held that the suspension was wholly justified because 3/4th of the salary is ordered to be paid, we are of the opinion that the approach of the trial court was correct and unassailable. The learned trial Judge

> on appreciation of facts found that this is a case in which full amount of salary should have been paid to the appellant on his reinstatement for the entire period. We accept that as the correct approach. We accordingly allow this appeal, set aside the judgment of first appellate court as well of the High Court and restore the one of trial Court with this modification that the amount decreed shall be paid with 9% interest p.a. from the date of suit till realisation with costs throughout."

14. In ***Jaipur Vidyut Vitran*** (supra), the judgment of ***Jaipal Singh*** (supra) has been distinguished. Relying on Regulation-41 (2) of Service Regulations, direction was given to the Authorities to consider that the pay and allowance to be paid to such re-instated employees and accordingly directed that the Respondents are entitled to get suspension allowance and back wages from the date of termination to date of acquittal and re-instatement.

15. The Tribunal relied on the ratio decided in the case of ***Krishnakant Raghunath Bibhavnekar*** (supra), where the apex Court observed that reinstatement with all consequential benefits should not be granted as a matter of course. There the apex Court held that when the suspension period of the employee charged for committing criminal breach of trust was treated to be a suspension pending the trial and even after acquittal, he was reinstated in service, he would not be entitled to the consequential benefits.

16. The Tribunal has committed an error apparent on the face of the record by refusing to grant the differential wages admissible to the Petitioner from the date of suspension till the date of reinstatement after acquittal, though the Petitioner was granted with the relief of continuity in service. Thereby, in view of the ratio decided by the apex Court in ***Brahma Chandra Gupta*** (supra), the Petitioner is entitled to get the differential wages for the period from the date of suspension till the date of reinstatement on acquittal in criminal trial.

17. Accordingly, the order of the Tribunal is modified to the extent that the Petitioner is entitled to get the differential wages during the period of suspension after acquittal in criminal trial, as he has been granted the benefit of continuity in service. The differential wages for the period from the date of suspension till reinstatement should be paid to the Petitioner as expeditiously as possible, preferably within a period of three months from the date of communication of this judgment.

18. In the result, the order dated 16.04.2018 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack, in O.A. No. 260/00152 of 2015 is modified to the extent as indicated above and the writ petition is accordingly allowed to that extent only. No order as to costs.

2022 (III) ILR - CUT- 1092

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

W.P(C) NO. 14945 OF 2015

KSHIRABADI BALA BEHERA .....Petitioner

.V.

ORISSA ADMINISTRATIVE TRIBUNAL,CUTTACK & ORS. .....Opp. Parties

COMPASSIONATE APPOINTMENT – Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 – Rule-2(b)(iii) and OCS (R&A) Rules 2020, Rule-2 (1)(d)(iii) – Whether prohibition of the 'married' daughter from seeking compassionate appointment is sustainable in the eyes of law? – Held, No. – Impugned policy of the State Government barring and prohibiting the consideration of the 'married' daughter from seeking compassionate appointment merely on the ground of marriage is arbitrary and violative of constitutional guarantees, as envisaged in Articles 14, 15, and 16(2) of the Constitution of India – Accordingly, the word 'unmarried', as prescribed in Rules, 1990 and Rules, 2020 is hereby struck down being unconstitutional and declared as ultra vires being violative of Articles 14,15 and 16 of the Constitution of India.

(Para 46)

Case Laws Relied on and Referred to :-

1. 2021 (2) KarLJ 126 : 2021(1) AKR 444 : Bhuvaneshwari Vs. Puranik Vs. State of Karnataka.
2. (2020) 7 SCC 469 : Secretary, Ministry of Defence Vs. Babita Puniya.
3. 2005(1) Karl.J 51 : Manjul Srivastava Vs. State of U.P.
4. (1994) 4 SCC 138 : Umesh Kumar Nagpal Vs. State of Haryana.
5. (1979) 4 SCC 260 : C.B. Muthamma Vs. Union of India.
6. (2014) 5 Mah LJ 543 : Ranjana Murlidhar Anerao Vs. State of Maharashtra.
7. (1996) 5 SCC 125 : Madhu Kishwar Vs. State of Bihar.
8. (2013) 4 SCC 1 : Voluntary Health Assn. of Punjab v. Union of India.
9. (2013) 15 SCC 755 : Indra Sarma Vs. V.K.V. Sarma.
10. (2012) 7 SCC 248 : Shreejith L. Vs. Director of Education, Kerala.
11. 2017 SCC Online Cal 13121 : State of West Bengal Vs. . Purnima Das.
12. AIR 1986 SC 872 : Express Newspapers (P) Ltd Vs. Union of India.
13. AIR 1992 Supp (2) SCC 481 : National Institute of Mental Health and Neuro Sciences Vs. Dr. K. Kalyana Raman.
14. (1991) SCC 212 : Km. Srilekha Vidyarthi Vs. State of U.P.
15. (1993) 3 SCC 259 : D.K. Yadav Vs. J.M.A. Industries Ltd.
16. AIR 2003 SC 2725 : Savitri Cairae Vs. U.P. Avas Ebam Vikas Parishad.
17. AIR 1978 SC 597 : Maneka Gandhi Vs. Union of India.

For Petitioner : M/s. B. Moharana, D.Chhotray, B.Mohanty & S.Mohanty.

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

JUDGMENT Decided On : 24.08.2022

Dr. B.R.SARANGI, J.

The petitioner, who is the daughter of the deceased employee, has filed this writ petition seeking to quash the order dated 06.05.2014 passed in O.A. No.1063 (C) of 2015, by which the Odisha Administrative Tribunal, Cuttack Bench, Cuttack has disposed of the said O.A. with a direction that one of the members of the deceased family having the eligibility criteria, excepting the petitioner, who is a married daughter of the deceased employee, shall file an application in prescribed form for appointment under the Orissa Civil Service (Rehabilitation Assistance) Rules (in short OCS (R & A) Rules), before the District Education Officer, Balasore, as per letter dated 17.11.2014, and the District Education Officer in turn will take steps for extending the benefit of appointment under the said Rules, and further to quash the order dated 29.06.2015 under Annexure-15 passed in M.P. No.637(C) of 2015, by which the Tribunal has rejected the application for modification observing that no wrong has been committed on the face of the order dated 06.05.2015 directing that one of the members of the deceased family, other than the petitioner, may apply for appointment under Rehabilitation Assistance Scheme. The petitioner has also prayed to issue direction to the opposite parties to appoint the petitioner in a suitable post under OCS (R & A) Rules, by striking down the word "unmarried" contained in Rule-2(b)(iii) of the OCS (R & A) Rules, 1990 and Rule-2 (1)(d)(iii) of the OCS (R & A) Rules, 2020, being ultra vires to the Constitution of India and violative of Articles-14, 15 and 16 of the Constitution of India.

2. The factual matrix of the case, in brief, is that the petitioner's father, who was working as Headmaster in Nilasundar Zew High School, Sundarpur, Kupari, died on 12.12.2010 in harness putting the family in distress condition. The petitioner, who is the daughter of the deceased employee, applied for compassionate appointment under the Orissa Civil Service (Rehabilitation Assistance) Amendment Rules, 2008 ("Rules, 2008" for short) through the Headmaster of the School, who, on 08.12.2011, forwarded the application of the petitioner to the Inspector of Schools, Balasore Circle, Balasore. On 16.12.2012, opposite party no.5-District Education Officer, Balasore, who is the appointing authority, forwarded the said application along with documents to the Collector, Balasore for issuance of distress certificate for consideration of the petitioner's appointment under the Rehabilitation Assistance Scheme.

2.1 The Deputy Collector, Balasore, on 19.05.2012, directed opposite party no.6-Tahasildar, Khaira to enquire and submit a detailed report regarding the

distress condition of the deceased family and furnish a certificate at an early date to the effect that "the information stated in the application has been enquired into and found correct". When no step was taken by the Tahasildar, the Deputy Collector, Balasore again issued reminder on 08.08.2012 specifically requesting to furnish the report within a week positively for perusal of the Collector, Balasore, for issuance of distress certificate in favour of the deceased family. As no enquiry report was submitted, the Deputy Collector, Balasore, again on 25.10.2012 issued another letter to the Tahasildar, Balasore, requesting to transmit/furnish the report immediately in order to issue distress certificate.

2.2 On 29.11.2012, the Tahasildar submitted enquiry report to the Deputy Collector (Est.), Balasore stating that the family members of the deceased employee were living in distress condition, but there was no mention about the marital status of the petitioner. Therefore, the Additional District Magistrate, Balasore, on 18.12.2012, directed the Tahasildar, Khaira, to submit the marital status of the petitioner with the signature of the Tahasildar by 25.12.2012 for perusal of the Collector, Balasore and consideration for issuance of distress certificate in favour of the deceased family. Despite specific direction, the Tahasildar, Khaira, did not take any step nor furnished report, for which the Deputy Collector, Balasore, again on 27.02.2013, requested the Tahasildar, Khaira to furnish the report within a week positively in order to issue distress certificate in favour of the deceased family.

2.3 Opposite party no.5-District Education Officer, Balasore, on 25.03.2013, submitted a report to the Collector, Balasore regarding marital status of the petitioner as 'unmarried' along with the affidavit sworn to by the petitioner. On 10.04.2013, the Deputy Collector, Balasore, again requested the Tahasildar, Khaira, to furnish the report within a week positively in order to issue distress certificate in favour of the deceased family for the purpose of compassionate appointment under Rehabilitation Assistance Scheme. Though several requests were made by the Collector, Additional District Magistrate and Deputy Collector, Balasore, but the same were not adhered to by the Tahasildar, Khaira, with an ulterior motive to deprive the petitioner of getting compassionate appointment. As no report was furnished by the Tahasildar, Khaira, the Deputy Collector, Balasore, again on 05.11.2013 and 19.03.2014, requested to furnish the report within a week.

2.4 The Revenue Inspector submitted a detailed report to the Tahasildar, Khaira, on 06.05.2013, as per his direction, holding that the petitioner's family are in distress condition and the marital status of the petitioner as 'unmarried', which was endorsed by the Tahasildar, Khaira, but the same was never

submitted to the Collector, Balasore, for issuance of the distress certificate. Ultimately, on 13.08.2014, the Tahasildar, Khaira, submitted the report in the prescribed proforma stating that the petitioner has married. On the basis of the said report, the Deputy Collector, Balasore, vide letter dated 17.11.2014, communicated to opposite party no.5-District Education Officer, Balasore, that the Collector, Balasore did not consider the application of the petitioner for appointment under Rehabilitation Assistance Scheme as per Rules, 2008, as she has got "married". In the said letter, it was also stated that the Collector, Balasore, has been pleased to give an opportunity to the deceased family for choosing another applicant from among the other legal heirs of the deceased for consideration of compassionate appointment.

2.5 Aggrieved by the said order/letter dated 17.11.2014 issued by the Collector, Balasore, the petitioner approached the State Administrative Tribunal by filing O.A. No.1063 of 2015, but the Tribunal, without appreciating the case of the petitioner in its proper perspective, vide order dated 06.05.2015, directed that the legal heir of the deceased, except petitioner, has to file an application under the Rehabilitation Assistance Scheme, which will be forwarded to the Government under Rule-16(2) of the OCS (RA) Rules for consideration. Thereafter, the petitioner filed M.P. No. 637(C) of 2015, for clarification/modification of the said order, which was rejected vide order dated 29.06.2015. Hence, this writ petition.

3. Mr. B. Moharana, learned counsel appearing for the petitioner vehemently contended that the Tribunal has failed to appreciate the fact that Rules, 2008, being benevolent, had been formulated with an object to tide over the sudden crisis and relieve the family of the deceased from financial destitution and get over the emergency. It is contended that by the time the petitioner submitted her application, she was 'unmarried' and because of inaction of Tahasildar, Khaira in furnishing the enquiry report, there was delay of four years. During such period, if the petitioner gets married suddenly, she cannot be denied the appointment under the Rules, 2008. It is further contended that in spite of several correspondences made by the Deputy Collector, Addl. District Magistrate and Collector, Balasore, the Tahasildar, who was in the helm of affairs of giving the information, sat over the matter, for the reason best known to him, and for his laches in due discharge of duties assigned under the law, the petitioner is deprived of getting compassionate appointment. As a consequence thereof, the purpose of the aforesaid Rule is being frustrated.

3.1 It is also contended that the petitioner is highly educated, having M.Sc. in Biotechnology with B.Ed. and Diploma in P.G.D.C.A. a nd her case should

have been considered as per Rule-16 of the OCS (Rehabilitation Assistance) Rules, as due to laches on the part of the appropriate authority, the petitioner has been deprived of getting compassionate appointment. It is also contended that after the death of her father on 12.12.2010, immediately the petitioner, being the 'unmarried' daughter, submitted her application within the time specified under the Rules for compassionate appointment, which was routed through the Headmaster of the School, who forwarded the application on 08.12.2011 to the District Education Officer, Balasore. She got married in April, 2014, but she was maintaining the family staying at her in-laws house and looking after her mother and her brother. Therefore, denial of the benefit admissible to the petitioner for compassionate appointment cannot be sustained in the eye of law.

3.2 It is also contended that Rule-2(b) of OCS (R.A.) Rules, 1990 defines 'family members' and under clause-(iii) of Rule-2(b) thereof it is prescribed that only 'unmarried' daughter is eligible to get compassionate appointment, which creates discrimination between the 'unmarried' and 'married' daughter. Therefore, the incorporation of word 'unmarried' to the Rules should be declared as ultra vires to the Constitution of India. Even Rule-16(1) authorizes the appropriate authority to relax the Rules, but such relaxation has never been utilized for the object sought to be achieved in terms of the Rules. Therefore, it is contended that the word 'unmarried' contained in Rule-2(b)(iii) of OCS (RA) Rules, 1990 be declared as ultra vires to the Constitution, being violative of Articles-14, 15 and 16 of the Constitution of India, by which the 'married' daughter has been deprived of getting the benefit of compassionate appointment because of marital status. It is further contended that in view of Article-15 of the Constitution, which prohibits discrimination on the basis of religion, race, caste and gender, Rule-2(b)(iii) of OCS (RA) Rules, 1990 suffers from vice of discrimination, which cannot be sustained in the eye of law. Therefore, it is contended that the word 'unmarried' should be struck down.

3.3 It is further contended that even now the OCS (RA) Rules, 1990 has been replaced by OCS (RA) Rules, 2020, Rule-2(1)(d)(iii) whereof also prescribes similar clause extending the benefit to the 'unmarried' daughter excluding the 'married' daughter, which is in gross violation of Articles 14 and 15 of the Constitution of India. Therefore, the use of word 'unmarried' in Rule-2(1)(d)(iii) of the Rules, 2020 should be declared as ultra vires to the Constitution.

3.4 In support of his contentions, learned counsel appearing for the petitioner has placed reliance in ***Bhuvaneshwari V. Puranik vs. State of Karnataka***, 2021 (2) KarLJ 126 : 2021(1) AKR 444; ***Smt. Sarojni Bhoi v. State***

of Chhattisgarh (W.P.(S) No.296 of 2014 disposed of on 30.11.2015); ***C.N. Apporva Shree v. State of Karnataka*** (W.P. No.5409 of 2021 (S-KSAT), disposed of on 22.03.2021 by the High Court of Karnataka) against which order, the State of Karnataka preferred SLP No.20166 of 2021, which was dismissed by the apex Court vide order dated 17.12.2021.

4. Mr. S. Jena, learned Standing Counsel appearing for the School and Mass Education Department emphatically contended that since the OCS (RA) Rules have been framed in exercise of power conferred under Article 309 of the Constitution of India, it has got statutory force. As such, when the Rules do not prescribe to extend the benefit to the 'married' daughter, meaning thereby only an 'unmarried' daughter is eligible to get the benefit, in that case when the application of the petitioner was taken into consideration for compassionate appointment, she had got married. Accordingly, she is not entitled to get such benefit. Therefore, he contended that the writ petition has to be dismissed in limine.

In support of his contentions, he has relied upon ***Secretary, Ministry of Defence v. Babita Puniya***, (2020) 7 SCC 469; ***Manjul Srivastava v. State of U.P.,*** 2005(1) Karl.J 51 (Writ-A No.10928 of 2020, disposed of on 15.12.2020); ***Udham Singh Nagar District Cooperative Bank Ltd. V. Anjula Singh*** (Special Appeal No.187 of 2017 disposed of on 25.03.2019 by the High Court of Uttarakhand); ***Meenakshi Dubey v. M.P. Poorva Kshetra Vidyut Vitran Co. Ltd.*** (W.A. No.756 of 2019, disposed of on 02.03.2020 by the High Court of Madhya Pradesh, Principal Seat at Jabalpur) and ***Rita Giri v. The Jharkhand Urja Vikash Nigam Limited through its Chief Managing Director, Ranchi*** [W.P.(S) No.1800 of 2018, disposed of on 08.08.2022 by the High Court of Jharkhand at Ranchi].

5. This Court heard Mr. B. Moharana, learned counsel appearing for the petitioner and Mr. S. Jena, learned Standing Counsel for School and Mass Education Department through hybrid mode. Pleadings have been exchanged between the parties, with the consent of learned counsel for the parties the matter is being disposed of finally at the stage of admission.

6. In exercise of power conferred by the proviso to Article 309 of the Constitution of India, the Governor of Orissa in order to regulate recruitment to the State Civil Services and posts, as a measure of rehabilitation assistance, was pleased to make the Rules called "the Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 (for short "Rules, 1990"), which had been published in the official gazette on 24.09.1990.

7. For just and proper adjudication of this case, Rule-2(b)(iii) & Rule-16 of the Rules, 1990 are extracted below:-

> *"2. In these rules, unless the context otherwise requires-*
>
> *xxx xxx xxx*
>
> *(b) 'Family Members' shall mean and include the following members in order of preference;*
>
> *xxx xxx xxx*
>
> *(iii) Unmarried daughters and unmarried step daughter;"*
>
> *xxx xxx xxx*
>
> *"16. (1) The State Government where satisfied that the operation of all or any provisions of these rules causes undue hardship in any particular case, it may dispense with or relax the provisions to such extent as it may consider necessary for dealing with the case in a just and equitable manner.*
>
> *(2) Such cases shall be examined in General Administration Department and orders of Chief Minister shall be obtained."*

8. In exercise of powers conferred by the proviso to Article 309 of the Constitution of India and in supersession of the Odisha Civil Service (Rehabilitation Assistance) Rules, 1990, the Governor of Odisha, to regulate recruitment to the Group-D Posts as a measure of rehabilitation assistance, was pleased to make the Rules called "the Odisha Civil Services (Rehabilitation Assistance) Rules, 2020" (for short "the Rules, 2020").

9. For just and proper adjudication of this case, Rule-2(d)(3) & Rule-10 of the Rules, 2020 are extracted below:-

> "*2. Definitions:- (1) In these rules, unless the context otherwise requires-*
>
> *xxx xxx xxx*
>
> *(d) 'family members' means and include the following members,-*
>
> *xxx xxx xxx*
>
> *(iii) Unmarried daughters and unmarried step daughters.*
>
> *xxx xxx xxx*
>
> *10. Interpretation:- If any question arises relating to the interpretation of any provision of these rules, it shall be referred to the Government in the General Administration and Public Grievance Department for decision."*

10. In view of the provision contained in the Rules, referred to above, the 'unmarried' daughters and 'unmarried' step daughters coming within the meaning of family members are eligible to be considered for compassionate appointment, whereas 'married' daughters are excluded from such

consideration, though married sons are eligible to get such benefit. Thereby, this creates gender discrimination between the 'son' and 'daughter' having 'married' and 'unmarried'.

11. In ***Umesh Kumar Nagpal v. State of Haryana***, (1994) 4 SCC 138, the apex Court held that the object of compassionate appointment is to help the family tied over the crisis that befalls them on the circumstance, so that the family will not be put to jeopardy by being driven to impecuniosities and condemned by penury. It is for this reason the emphasis on appointment on compassionate grounds is immediacy of appointment. This principle has been laid down in various judgments of the apex Court and, as such, the compassionate appointment is by now too well settled that it is not a matter of right and not an alternate source of recruitment.

12. Like the provisions mentioned in Rules, 1990 and Rules, 2020, as mentioned above, similar provision has also been provided in the Karnataka Civil Services (Appointment on Compassionate Grounds) Rules, 1996, Rule-2(1((b) thereof defines 'Family' in relation to a deceased Government servant means his or her spouse and their son (unmarried daughter and widowed daughter), (unmarried brother, unmarried or widowed sister) who were living with him.

Taking into such meaning attached to 'Family' and referring to the ratio decided in ***C.B. Muthamma v. Union of India***, (1979) 4 SCC 260, the apex Court in the context of Indian Foreign Service (Conduct and Discipline), Rules, 1961, which prohibits appointment of married woman to such service, held in paragraphs-6 and 7 as follows:

> *"6. At the first blush this rule is in defiance of Article 16. If a married man has a right, a married woman, other things being equal, stands on no worse footing. This misogynous posture is a hangover of the masculine culture of manacling the weaker sex forgetting how our struggle for national freedom was also a battle against woman's thralldom. Freedom is indivisible, so is justice. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis-à-vis. half of India's humanity viz. our women, is a sad reflection on the distance between Constitution in the book and law in action. And if the executive as the surrogate of Parliament, makes rules in the teeth of Part III especially when high political office, even diplomatic assignment has been filled by women, the inference of diehard allergy to gender parity is inevitable.*
>
> *7. We do not mean to universalize or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel*

selectivity. But save where the differentiation is demonstrable, the rule of equality must govern. This creed of our Constitution has at last told on our governmental mentation, perhaps partly pressured by the pendency of this very writ petition. In the counter-affidavit, it is stated that Rule 18(4) (referred to earlier) has been deleted on November 12, 1973. And, likewise, the Central Government's affidavit avers that Rule 8(2) is on its way to oblivion since its deletion is being gazette. Better late than never. At any rate, we are relieved of the need to scrutinize or strike down these rules".

Similar view has also been taken by the Bombay High Court in ***Ranjana Murlidhar Anerao v. State of Maharashtra***, (2014) 5 Mah LJ 543.

13. In ***Madhu Kishwar v. State of Bihar***, (1996) 5 SCC 125, the apex Court while taking note of discrimination being suffered in silence by Indian women observed in paragraph-28 to the following effect:

"28.....Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination."

14. Similarly, in ***Voluntary Health Assn. of Punjab v. Union of India***, (2013) 4 SCC 1, the apex Court in paragraph-20 observed as follows:

"20. It would not be an exaggeration to say that a society that does not respect its women cannot be treated to be civilised. In the first part of the last century Swami Vivekanand had said:

'Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind'."

15. In ***Indra Sarma v. V.K.V. Sarma***, (2013) 15 SCC 755, the apex Court held that marriage is one of the basic civil rights of man/women and observed in paragraphs-24 & 25 as follows:

"24. Marriage is often described as one of the basic civil rights of man/women, which is voluntarily undertaken by the parties in public in a formal way, and once concluded, recognizes the parties as husband and wife. Three elements of common law marriage are (1) agreement to be married (2) living together as husband and wife, (3) holding out to the public that they are married. Sharing a common household and duty to live together form part of the Consortium Omnis Vitae which obliges spouses to live together, afford each other reasonable marital privileges and rights and be honest and faithful to each other. One of the most important invariable consequences of marriage is the reciprocal support and the responsibility of maintenance of the common household, jointly and severally. Marriage is an institution has great legal significance and various obligations and duties flow out of marital relationship, as per law, in the matter of inheritance of property, successionship, etc. Marriage, therefore, involves legal requirements of

formality, publicity, exclusivity and all the legal consequences flow out of that relationship.

25. Marriages in India take place either following the personal Law of the Religion to which a party is belonged or following the provisions of the Special Marriage Act. Marriage, as per the Common Law, constitutes a contract between a man and a women, in which the parties undertake to live together and support each other. Marriage, as a concept, is also nationally and internationally recognized. O'Regan, J., in ***Dawood v. Minister of Home Affairs*** *(2000) 3 SA 936 (CC) noted as follows:*

"Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well. The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends...."

16. In view of propositions of law, as laid down by the apex Court, it is made clear that 'marriage' is an institution/sacred union not only legally permissible but also basic civil right of the man and woman and one of the most important inevitable consequences of marriage is the reciprocal support and the marriage is an institution has great legal significance and right to marry is necessary concomitant of right to life guaranteed under Article 21 of the Constitution of India as right to life includes right to lead a healthy life.

17. It is very often said that 'married' daughter has no obligation to maintain her parents even if they are unable to maintain themselves. In ***Dr. (Mrs.) Vijaya Manohar Arbat v. Kashi Rao Rajaram Sawai***, (1987) 2 SCC 278, the apex Court held that a daughter after her marriage does not cease to be a daughter of her father or mother, and observed in paragraphs 12 and 13 as follows:

"12. We are unable to accept the contention of the appellant that a married daughter has no obligation to maintain her parents even if they are unable to maintain themselves. It has been rightly pointed out by the High Court that a daughter after her marriage does not cease to be a daughter of the father or

mother. It has been earlier noticed that it is the moral obligation of the children to maintain their parents. In case the contention of the appellant that the daughter has no liability whatsoever to maintain her parents is accepted, in that case, parents having no son but only daughters and unable to maintain themselves, would go destitute, if the daughters even though they have sufficient means refuse to maintain their parents.

13. After giving our best consideration to the question, we are of the view that Section 125(1)(d) has imposed a liability on both the son and the daughter to maintain their father or mother who is unable to maintain himself or herself. Section 488 of the old Criminal Procedure Code did not contain a provision like clause (d) Section 125(1). The legislature in enacting Criminal Procedure Code, 1973 thought it wise to provide for the maintenance of the parents of a person when such parents are unable to maintain themselves. The purpose of such enactment is to enforce social obligation and we do not think why the daughter should be excluded from such obligation to maintain their (sic her) parents."

18. The apex Court in number of cases repeatedly emphasized the need of compassionate appointment to the dependent of the deceased Government servant without any loss of time. The whole object of granting compassionate appointment to enable the dependent(s) of deceased's family to earn bread and butter for the family and to come out from financial crisis, who suffers on account of unexpected and untimely death of deceased/Government servant therefore, the criteria to grant compassionate appointment should be 'dependency' rather than 'marriage'. In a given case, a 'married' daughter might be deserted wife, might have been abandoned wife, fully dependent upon her father, she might have been married to an indigent husband so that both the married daughter and son-in-law could have been dependent of the bread winner whose death left them to extreme financial hardship. There might be many other probability in which married daughter might be fully dependent upon the income of her father so that the death of the father to leave her and rest of the family members in extreme financial hardship, therefore, the yardstick for extending the benefit of compassionate appointment should be dependency of the dependents on the deceased Government Servant and their marital status of dependent should not be impediment for his/her consideration on compassionate ground to wipe-out leaves from the eyes of the suffering family on account of loss of earning member in the family.

19. A daughter after her marriage doesn't cease to be daughter of the father or mother and obliged to maintain their parents and daughter cannot be allowed to escape its responsibility on the ground that she is now married, therefore, such a policy of the State Government disqualifying, a 'married' daughter and excluding her from consideration apart from being arbitrary and discriminating is

retrograde step of State Government as welfare State, on which stamp of approval cannot be made by this Court.

20. Article 14 of the Constitution mandates that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Clauses (1) and (2) of Article 15 of the Constitution prohibit the State from discriminating any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 16 of the Constitution which contains the fundamental right of equality of opportunity in matters of public employment, by sub-clauses (1) and (2) thereof guarantees that:

> *"16. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.*
>
> *16. (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State."*

21. Article 16(2) of the Constitution prohibits discrimination only on sex but clause (3) of Article 15 enables the State to make "any special provision for women and children". Articles 15 and 16 of the Constitution read together prohibit direct discrimination between members of different sexes if they would have received the same treatment as comparable to members of the opposite gender. The constitutional mandate is infringed only where the females would have received same treatment with males but for their sex.

22. In ***Shreejith L. v. Director of Education, Kerala***, (2012) 7 SCC 248, the apex Court held that marriage by itself does not disqualify the person concerned from seeking employment.

23. In ***Secretary, Ministry of Defence*** (supra), the apex Court, while considering gender equality/equality of opportunity in case of claim for Permanent Commissions by women officers engaged in Short Service Commissions officers in Army, held that women officers who are granted Permanent Commission are entitled to all consequential benefits at par with SCC male officers.

24. In ***Manjul Srivastava*** (supra), learned Single Judge of Allhabad High Court, while considering the claim for compassionate appointment under the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974, directed the authority to consider the claim of compassionate appointment in accordance with law, which shall mean without reference to her marital status.

25. In ***Udham Singh Nagar District Cooperative Bank Ltd*** (supra), the Full Bench of Uttarakhand High Court, while considering the definition of "Family" in Rule-2(c) of the Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 and in the note below Regulation 104 of the U.P. Cooperative Committee Employees Service Regulations, 1975 that any of the members, referred to which includes a 'married' daughter would be entitled to compassionate appointment even if they were not dependant on the Government servant at the time of death and also struck down the non-inclusion of 'married' daughter within the definition of 'family' under Rule-2 (C) of 1975 Rules and in the note of Regulation 104 of 1975 Regulation holding that same is discriminatory and in violation of Articles-14, 15 and 16 and Part-III of the Constitution of India.

26. Reverting back to the case at hand, exclusion of "married daughters" in the Rules, as mentioned above, is based on the premise that, on her marriage, a daughter ceases to depend on her father and is, thereafter, dependent on the her husband and her in-laws. While this premise may, possibly, have been justified in the social environment prevalent half a century ago, such a premise ignores the realities of present day society where the number of destitute women abandoned by their husbands, or those who are divorced and are not even provided maintenance, are on rise. The policy, based on the marriage of a daughter proving fatal for appointment on compassionate grounds, proceeds in oblivion of husbands harassing and torturing wives in ample measure, and thereby creating a situation for the wives to withdraw from the matrimonial household, and return to her paternal home, usually the first refuge of one in distress. Such situations are not uncommon in Indian conditions. These destitute women invariably come back to their parental home, and are supported by their parents both financially and otherwise. This premise of the State Government, in making the Rule/Regulation, is completely flawed and ignores present day social realities.

27. Considering the question of dependence, it matters little whether or not the son or the daughter is married for, if a married son dependent on the deceased Government servant is eligible for compassionate appointment, there is no justifiable reason why a married daughter, merely because of her 'marriage', should be held disentitled to be considered for compassionate appointment, even if she fulfills the requirement of being dependent on the deceased Government servant at the time of his demise. Just as a son continues to be the son of the deceased Government servant, both before and after marriage, so does the daughter. The mere fact that she is married does not result in her ceasing to be the daughter of the deceased Government servant. Just as sons (married or

unmarried) or daughters (widowed or unmarried) may also have an independent means of livelihood and would therefore not be eligible to be considered for compassionate appointment as they are not dependent on the deceased Government servant, likewise a married daughter, who is not dependent on the deceased, would also be ineligible for being considered for compassionate appointment.

28. No doubt, a daughter acquires a new relationship on marriage; she does not, however, lose the old relationship; qua relationships she is a daughter before, during and after marriage; once married, the dependency factor does not altogether cease; and proceeding on such an assumption would be a misadventure. Therefore, drawing a distinction between "married sons" on the one hand and "married daughters" on the other, should satisfy the requirement of a classification based on an intelligible differentia. It should, in addition, fulfill the other test of having a reasonable relation to the object sought to be achieved thereby.

29. If "dependency" is the intelligible differentia, which distinguishes those included in the group from those excluded therefrom, then a classification, which excludes "married daughters dependent on the deceased Government servant" from within its ambit, would not satisfy the test of a valid classification, as it would then not be based on an intelligible differentia. A valid classification should also have a reasonable nexus with the object sought to be achieved by the Rules/Regulations which, in the present case, is to provide immediate succor, to the deceased Government servant's family in financial distress, by providing appointment on compassionate grounds to a dependent.

30. Violation of gender equality is in violation of the fundamental rights guaranteed under Articles 14, 15 and 21 of the Constitution. The guarantee under Article 15 of the Constitution encompasses gender discrimination, and any discrimination on grounds of gender fundamentally disregards the right to equality, which the Constitution guarantees. There cannot be any discrimination solely on the ground of gender. The sustenance of gender justice is the cultivated achievement of intrinsic human rights. Equality cannot be achieved unless there are equal opportunities and, if a woman is debarred at the threshold, it clips her capacity and affects her individual dignity. Gender identity is an integral part of sex and no citizen can be discriminated on the ground of gender identity. Discrimination, on the basis of gender identity, includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying the equal protection of laws guaranteed under our Constitution.

31. In the context of compassionate appointments, various High Courts in ***Manjul Srivastava***; ***Ranjana Murlidhar Anerao*** (supra)*;* ***State of West Bengal v. Purnima Das,*** 2017 SCC Online Cal 13121*;* ***Anjula Singh*** and ***Smt. Sarojni Bhoi*** (supra) have held that 'married' women cannot be denied entry into service by way of compassionate appointment, merely on the ground of marriage.

32. The exclusion of married daughter is based on the assumption that, while a son continues to be a member of the family, and that upon marriage he does not cease to be a part of the family of his father, a daughter upon marriage ceases to be a part of the family of her father; it is discriminatory and constitutionally impermissible for the State to make that assumption, and to use marriage as a rationale for practicing an act of hostile discrimination by denying benefits to a daughter, when equivalent benefits are granted to a son in terms of compassionate appointment; marriage does not determine the continuance of the relationship of a child, whether a son or a daughter, with the parents; the State has based its defence, and the foundation of the exclusion, on a paternalistic notion of the role and status of a woman; these patriarchal notions must answer the test of the guarantee of equality under Article 14; and it must be held answerable to the recognition of gender identity under Article 15.

33. The inclusion of "married daughter", in the definition of a "family", would enable her alone to get the benefit from two families (that of her parents and of her husband) does not merit acceptance. If the test is of dependence, a married daughter who is dependent on her husband and her in-laws would not be entitled to be extended the benefit of compassionate appointment on the death of her parent, since she would then not be dependent on them. It is exclusion of only those destitute women, who are abandoned/ignored by their husbands, who do not have any other source of livelihood, and have perforce to depend on their parent for their survival, from the ambit of a "family", which is unreasonable, irrational and arbitrary.

34. A larger Bench of Madhya Pradesh High Court in ***Meenakshi Dubey*** (supra) held that Clause-2.2 of policy of compassionate appointment of the State Government dated 29.09.2014 is violative of Articles 14, 16 and 39(a) of the Constitution of India to the extent it deprives a 'married' daughter from consideration for compassionate appointment.

35. Adverting to the prayer made to declare the provision as ultra vires, it means beyond powers, in strict sense. Therefore, the expression is used to mean any act performed in excess of powers of the authority or the person, who performs the act. Prof. Wade, H.W.R.: Administrative Law, observes as follows:

> *"The ultra vires doctrine is, therefore, not confined to cases of plain excess of power; it also governs abuse of power, as where something is done unjustifiably, for the wrong reasons or by the wrong procedure. In law the consequences are exactly the same; an improper motive or a false step in procedure makes an administrative act just as illegal as does a flagrant excess of authority. Unless the Courts are able to develop doctrines of this kind, and to apply hem energetically, they cannot impose limits on the administrative powers which Parliament confers so freely, often in almost unrestricted language".*

36. The term 'ultra vires', therefore, not only means 'beyond powers' but also "wholly unauthorized by law" and thus void. Basically, ultra vires character of an act may be two-fold, (i) simple ultra vires, and (ii) procedural ultra vires.

> (i) *Simple ultra vires*- An act may be said to acquire the character of simple ultra vires when the person does the act in excess of the power conferred on him.
>
> (ii) *Procedural ultra vires*- Procedural ultra vires may happen when there is a failure to comply with mandatory procedural requirements. All procedural requirements as laid down by statute should be complied with.

37. The development of the doctrine of ultra vires now refers to not only the lack of power to do any act but also to any situation like improper or unauthorized procedure, purpose or violation of the law of natural justice in exercising the power that is lawfully conferred on the authority concerned.

38. In ***Shri Sitaram Sugar Company Ltd. v. Union of India,*** (1990) 3 SCC 223, the apex Court observed that "a repository of power acts ultra vires either when he acts in excess of his power in the narrow sense or by acting in bad faith or for an inadmissible purpose or for irrelevant grounds or without regard to relevant considerations or with gross unreasonableness. Act any of the repository of power, whether legislative, administrative or quasi-judicial, is open to challenge if it violates the provisions of the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it".

39. In ***Express Newspapers (P) Ltd v. Union of India***, AIR 1986 SC 872, the apex Court observed that "the doctrine of ultra vires can cover virtually all situations where statutory power is exercised contrary to some legal principles. Where a public authority is held to have acted for improper motives or irrelevant considerations, its action is ultra vires and void".

40. In ***National Institute of Mental Health and Neuro Sciences v Dr. K. Kalyana Raman***, AIR 1992 Supp (2) SCC 481, the apex Court observed that

"the procedural fairness is the main requirement in administrative action. The 'fairness' or 'fair procedure' in the administrative action ought to be observed".

41. In ***Km. Srilekha Vidyarthi v. State of U.P***., (1991) SCC 212, the apex Court observed that "arbitrariness and abuse of power is the antithesis of the rule of law and hence every action involving arbitrary decision and abuse of power is ultra vires".

42. Article 14 of the Constitution guarantees to every person in India equal treatment before law and extends protection of the laws in equal measures to all.

43. In ***D.K. Yadav v. J.M.A. Industries Ltd***, (1993) 3 SCC 259, the apex Court held that Article 14 has a pervasive processual potency and versatile quality, equalitarian in its social and allergic to discriminatory dictates. Equality is the antithesis of arbitrariness.

44. In ***Savitri Cairae v. U.P. Avas Ebam Vikas Parishad***, AIR 2003 SC 2725, the apex Court observed that "equality clause in Article 14 is of wide import and it permits reasoning classification based on intelligible differentia having nexus with the object sought to be achieved. Ordinarily equality clause cannot be invoked in the enforcement of a State legislation vis-à-vis a Parliamentary legislation or the legislation of another State".

45. In ***Maneka Gandhi v. Union of India***, AIR 1978 SC 597, the apex Court observed that "Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.

46. From the factual and legal analysis, as made above, it emanates that institution of marriage is an important and basic civil right of man and woman and marriage by itself is not a disqualification and impugned policy of the State Government barring and prohibiting the consideration of the 'married' daughter from seeking compassionate appointment merely on the ground of marriage is plainly arbitrary and violative of constitutional guarantees, as envisaged in Articles 14, 15, and 16(2) of the Constitution of India. Accordingly, the word 'unmarried', as prescribed in Rules, 1990 and Rules, 2020 is hereby struck down being unconstitutional and ultra vires being violative of Articles 14, 15 and 16 of the Constitution of India.

47. As a fallout and consequence of aforesaid discussions, the orders dated 06.05.2015 and 29.06.2015 passed by the Tribunal in O.A. No.1063 (C) of 2015

and M.P. No.637(C) of 2015 respectively cannot be sustained in the eye of law and accordingly the same are liable to quashed and are hereby quashed. As a consequence thereof, refusal to grant benefit to the 'married' daughter for consideration of compassionate appointment is hereby declared void and inoperative. Hence, the order impugned passed by the authority in rejecting the petitioner's case for compassionate appointment is hereby quashed. Accordingly, the opposite parties are directed to reconsider the claim of the petitioner for being appointed on compassionate ground afresh in accordance with law keeping in mind the fact that her father was died on 12.12.2010 and her application was rejected on 17.11.2014 after four years.

48. Before parting with the case, this Court strongly condemns the attitude of the Tahasildar, Khaira, who was discharging his duty at the relevant point of time, in not providing the enquiry report to the Collector, Balasore in spite of repeated communications being made through Deputy Collector, Addl. District Magistrate and Collector, Balasore for issuance of distress certificate in favour of the petitioner in time. The Tahasildar concerned shall be communicated with regard to displeasure of this Court and compliance thereof shall be filed before this Court by the State Government within three months hence.

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

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2022 (III) ILR - CUT- 1109

ARINDAM SINHA,J & SANJAY KUMAR MISHRA,J.

WP(C) NO. 32412 OF 2021

M/s. PARADEEP PHOSPHATES LTD. .....Petitioner

.V.

PRESIDING OFFICER, LABOUR COURT, BHUBANESWAR & ANR. .....Opp. Parties

INDUSTRIAL DISPUTES ACT, 1947 – Section 33C (2) – Whether the Labour Court while computing or determining the entitlement of workmen U/s. 33 (2) can direct any interest and future interest? – Held, Yes. (Para 10,11)

Case Law Relied on and Referred to :-

1. AIR 2002 SC 6431: Z. S. B. V. Bank Ltd. Vs. Shri Ram Gopal Sharma.

For Petitioner : Mr. Narendra Kishore Mishra, Sr. Adv.
For Opp Parties : Mr. Shankar Das-O.P. no.2 (in person)

JUDGMENT Date of Judgment:17.11.2022

ARINDAM SINHA,J.

1. Impugned in the writ petition is order dated 25th August, 2021 made by the Labour Court in Industrial Dispute Misc. Case no.76 of 2014. Petitioner is the management. Mr. Mishra, learned senior advocate appears on its behalf. The workman appears in person.

2. Mr. Mishra submits, requirement of law on moving the Court under section 33C(2) in Industrial Disputes Act, 1947 is that the claim must be made in Form T-3, the format given pursuant to sub-rule (2) in rule 69 of Orissa Industrial Disputes Rules, 1959. He draws attention to the form, it providing for annexure to set out details of the money due or the benefits accrued and the case for their admissibility. He submits, function of the Court on receiving application by such form is to compute or determine the amount due. He draws attention to annexure-9 being the form T-3 application by the workman. He submits, it will appear that only, inter alia, wages calculation sheet was disclosed as annexure, without case for admissibility. This is preliminary point of objection.

3. His second submission, made without prejudice to above objection is, the workman was initially dismissed from service. It is true that the first dismissal did not result in approval and hence, there was the second proceeding pursuant to order passed by a coordinate Bench, commenced from date of vitiation of the earlier proceeding. During that period the workman was treated as on suspension and paid subsistence allowance, neither referred to nor taken into consideration in making impugned order. Also without prejudice is his third submission that the second dismissal order dated 18th December, 2009 is pending approval in the proceeding under section 33(2)(b). Impugned order could not have been made during pendency of the proceeding, as the misconduct on which the dismissal proceeding is founded, happened before the period of claim. Lastly, he submits with reference to page14 of impugned order, it cannot be said that the amount directed to be payable is either a computation or a determination as it was purported acceptance of the claim made, in toto.

4. We perused impugned order. It appears, the Court below relied on judgment of the Supreme Court in **Jaipur Z. S. B. V. Bank Ltd. v. Shri Ram**

Gopal Sharma, reported in AIR 2002 SC 643. We extract a passage from paragraph 14 and reproduce it below.

> "14. Where an application is made under Section 33(2)(b), proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. ***If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available***. This being the position there is no need of a separate or specific order for his reinstatement. xxxxxx" (emphasis supplied)

The law declared as above is clear. Hence, there came to be the second dismissal order meaning thereby, till then at least, the workman was in service. This removes hurdle of any dispute that can be raised regarding the workman deemed to have continued in service and entitled to all the benefits available.

5. Of the litigation that has gone before, there was **judgment dated 12th May, 2011** made in **W.A. no.259 of 2011** (parties' own case) by another previous coordinate Bench. In that judgment there was also reliance on **Jaipur Z**. S. B. V. Bank Ltd. (supra). Clear finding by the Division Bench was that the workman is entitled salary for period from 21st August, 2006 to 8th December, 2009. Here, we notice, 21stAugust, 2006 was date of first order of dismissal and, as aforesaid, 18th December, 2009 was second order of dismissal. We also find, the Division Bench took note that the second order of dismissal still is required to be approved by the Tribunal. Hence, the entitlement of salary is a finding that was made on noticing such fact. A passage from paragraph 12 of the judgment is extracted and reproduced below.

> *"xxxxxx Since we have affirmed the order of the learned Single Judge, salary for the period and other consequential benefits in the form of kind as claimed by the respondent, as granted by the learned Single Judge, shall be paid within a period of six weeks by the employer. Otherwise that amount shall carry interest at 12 % from*

the date of first order of dismissal till the date of payment of monetary benefits as directed in the impugned order."

6. The workman preferred review against said judgment dated **12th May, 2011** (supra). It resulted in **judgment dated 11th May, 2012**. There was modification. We extract direction for modification from the judgment and reproduce it below.

"5. xx xxxx Therefore, opp. party no.1-Management is directed to pay the wages and other consequential benefits as per the revised pay scale as applicable to petitioner-workman instead of paying the wages and other consequential benefits as directed by this Court vide judgment dated 12.5.2011 passed in W.A. No.259 of 2011. The opp. party-Management is directed to pay the revised scale of pay and other consequential benefit within a period of 8 weeks from the date of production of certified copy of this order.

6. In the result, the review petition is allowed to the extent indicated above."

7. Petitioner's contention that annexure to the Form T-3 application did not contain a case for admissibility is to be adjudicated in view of facts being that there was **judgment dated 12th May, 2011** (supra) and review **judgment dated 11th May, 2012** (supra). On query from Court Mr. Mishra submits, his client preferred Special Leave Petition against the review judgment, which was dismissed. In the circumstances, the question of admissibility of a case for computation or determination of entitlement of the workman was answered in his favour and has become final. Therefore, it is no matter that a case was not made out in the annexure, for admissibility of the claim. We may add that a party in an adversarialproceeding is required to make out a case to notice of his opponent, for the latter to be able to defend the case or resist the claim. It is clear from aforesaid judgments that the management had every opportunity to meet the case of claim on the point of admissibility of the workman's case of, inter alia, entitlement.

8. We find from impugned order, the claim has been computed on basis of the annexure. It was made at the revised scale of pay and accepted by the Court below. On this aspect we notice, the Court below relied on the annexure on justification given in, inter alia, a sentence given in impugned order, extracted and reproduced below.

"xxxxxx There is neither any pleading nor any evidence on behalf of the OP challenging the wages calculation sheet of the applicant for the period from 1.8.2008 to 18.12.2009 at any point of time in the present case. xxxxxx"

9. Mr. Mishra points out from deposition of the management witness that his client had deposed, subsistence allowance as well as entitlements, as per order of dismissal,had been paid and there is no outstanding dues to be paid. The workman is not entitled to anything, was also asserted. This witness was not cross-examined by the workman. Hence, the oral testimony being uncontroverted, became evidence. We extract from the deposition relevant passages relied upon, to reproduce it below.

> *"xxxxxx Accordingly, the applicant was paid subsistence allowance for the period in which he was under suspension. xxxxxx"*
>
> *"xxxxxx The applicant was paid all his entitlements as per his order of dismissal and there is no outstanding dues to be paid to the applicant. Besides, there is no Award/Order/Settlement in favour of the applicant for his present claim. I am aware about Misc. Case No.58 of 2008 and Misc. Case No.72 of 2014. I am also aware that the period of claim and nature of claim in those cases and the present case is distinct and different. The applicant is not entitled to anything claimed in the present case.*
>
> *Cross-examination by the applicant.*
> *Declined."*

We appreciate above extracted deposition of the management witness as submissions made in deposing before the Court. It cannot be relied upon as statements of fact, as there is no reference to particulars of payments made, backed up by documentary acknowledgement of receipt. We say this also because on perusal of the deposition we do not find that annexure to the form T-3 application was shown to the witness by his examining counsel, or any question put in regard thereto, for the witness to make out case from the box that calculation given in the annexure was misconceived or incorrect. Had that been done, the workman would have been put on notice of the case of dispute and his thereafter declining to cross-examine the witness may have assumed significance. Even affidavit evidence requires specific denial. We take this view as a corollary to the celebrated view taken by a Division Bench of the High Court, Calcutta in ***A.E.G. Carapiet v. A.Y. Derderian, reported in AIR 1961 Calcutta 359.*** In the circumstances, the annexure became documentary evidence before the Court below and, it appears, the finding that there is neither any pleading nor any evidence on behalf of the management, challenging the wages calculation sheet of the workman for period 1st August, 2008 to 18th December, 2009 is correct. It cannot be said to be perverse.

10. At this stage Mr. Mishra submits, impugned order is also bad having granted interest and interest on interest. We extract from the operative paragraph

in impugned order, the computation and determination made and reproduce it below.

> *"xx xxxx So, the* ***applicant is entitled to interest @ 12% amounting to Rs.7,49,548/-*** *(i.e. Rs.4,49,261/- towards wages + Rs.28,700/-towards leave encashment* ***X interest @ 12% per annum for 156 months and 25 days) on his wages (i.e. Rs.4,49,261/-*** *and leave encashment (i.e. Rs.28,700/-) from 01.08.2008 till today. As per the above calculation the applicant is entitled to Rs.12,27,509/- (i.e. Rs.4,49,261/- towards wages + Rs.28,700/- towards leave encashment + Rs.7,49,548/- towards interest) in toto towards his wages, leave encashment and interest thereon."* *(emphasis supplied)*

We find 12% per annum interest amounting to Rs.7,49,548/-was granted on aggregate arrear wages determined at Rs.4,49,261/-, for 156 months and 25 days. There was further direction that the aggregate was to be paid within two months,failing which applicant would be entitled interest at 12% per annum on the aggregate amount. Mr. Mishra's submission was also that the labour Court in computing or determining under section 33C(2) cannot direct any interest, let alone future interest.

11. The entitlement to interest in favour of the workman at 12% per annum on all service benefits for the period stood adjudicated by said **judgment dated 12th May, 2011** (supra). Once that is an entitlement, it was computed and determined under section 33C (2), as has been done. This computation and determination was sought by the workman on having successfully obtained modification of said judgment, to claim the revised wages. Award of future interest on the aggregate amount of principal plus interest may amount, by a part, of awarding interest on interest. On query made to the workman regarding direction to pay future interest he submits, if the money was given to him as directed then he would have earned interest on the entire amount upon having kept the same in an interest bearing account. In circumstances above and the management having invoked writ jurisdiction of this Court, of superintendence, in exercise of which, thus far, we have not found impugned order to suffer from either illegality or irregularity, we accept the workman's contention on the direction regarding payment of further interest upon failure to pay the aggregate amount, in finding said direction to also be continuation of the entitlement to interest pronounced in favour of the workman and having become final as aforesaid.

12. There is no merit in the writ petition. It is dismissed.

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2022 (III) ILR - CUT- 1115

ARINDAM SINHA,J.

WP(C) NO.11807 OF 2012

ASIT KUMAR NAYAK .....Petitioner

.V.

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

ODISHA SCHEDULED CASTES, SCHEDULED TRIBES AND BACKWARD CLASSES (REGULATION OF ISSUANCE AND VERIFICATION OF CASTE CERTIFICATES) ACT, 2011 – The Investigating Officer appointed to verify the genuineness of caste certificate of Petitioner – The document like ROR verified by the IO where father of petitioner had asserted his identity as belongs to Scheduled Tribe 'Gondo'– This vital document was overlooked by the scrutiny committee for which impugned order was passed in FCC No.21 of 2011 – Effect of – The impugned order is set aside and quashed.

Case Laws Relied on and Referred to :-

1. (2009) 10 SCC 268 : Sayanna Vs. State of Maharashtra.
2. AIR 1995 SC 94 : Madhuri Patil Vs. Addl. Commr., Tribal Development.
3. (2018) 16SCC 299 : Asian Resurfacing of Road Agency (P) Ltd. Vs. CBI.

For Petitioner : Mr. Susanta Kumar Mishra.

For Opp. Parties: Mr. Y.S.P. Babu, AGA, Mr. Prasanna Kumar Parhi, DSG
Mr. Debabrata Rath, CGC

JUDGMENT Date of Judgment : 18.11.2022

ARINDAM SINHA,J.

1. Mr. Mishra, learned advocate appears on behalf of petitioner and submits, his client belongs to scheduled tribe 'Gondo'. He has challenged final order dated 20th June, 2012, of the State Level Scrutiny Committee, passed in fake caste certificate case (FCC no.21 of 2011). He submits, the Investigating Officer (IO) did not afford his client opportunity in the purported investigation conducted. His client had earlier moved a Division Bench of this Court by W.P.(C) no. 2003 of 2012, which was disposed of on order dated 8th February, 2012. There was direction for his client to have fair and reasonable opportunity of hearing and allow him to furnish the documents, if any.

2. He draws attention to report dated 11th November, 2011 of the IO, on the investigation made without participation of his client. He points out from

findings in impugned final order that when his client produced photocopy of the admission register relating to, inter alia, his father, the committee said they had perused the original admission register and found that caste entry on admission of his father had been tampered with by overwriting and made 'Gondo'. Hence, the document could not be relied upon and was not taken into consideration. He submits, there is no mention in report of the IO that school admission record regarding his client's father had been tampered. He relies on judgment of the Supreme Court in **Sayanna vs. State of Maharashtra, reported in (2009) 10 SCC 268**, paragraph 14. He submits, impugned final order be quashed.

3. Mr. Babu, learned advocate, Additional Government Advocate appears on behalf of State and relies on paragraphs 10, 11 and 12 in the counter. He submits, it will appear therefrom that petitioner was given opportunity to appear in the investigation but, he did not. The committee complied with directions made in aforesaid order of the Division Bench, by supplying copies of documents attached to the report of the IO, to petitioner. His show-cause was perused and he was given personal hearing. Steps were duly taken in the matter as per observations of the Supreme Court in **Madhuri Patil v. Addl. Commr., Tribal Development, reported in AIR 1995 SC 94**. Impugned final order was made. It has clear findings. In the circumstances, there should not be interference by judicial review.

4. Court has perused report of the IO, made before aforesaid direction of the Division Bench, to allow, inter alia, fair opportunity to petitioner. It appears from the report that admission record of elder brother of petitioner, admitted to the school on 16th July, 1970, was verified by the IO and on requisition made, the Head Master had opined that the caste of petitioner's said brother is 'Guna' in general category. Several khatas in the RoR were also verified by the IO. Of them, except khata no.796, all were joint. Khata no.796 stands in name of father of petitioner, where the caste is written as 'Gondo'. Relevant paragraph from the report is reproduced below.

> *"On verification Khata No.796 of G. Udayagiri mouza stand in the name of Sridhar Nayak, S/o. Surendra Nayak of G. Udayagiri in which the caste is written as "Ganda"."*

The IO remarked that such was proof of the record having been managed by any means.

5. Impugned final order says that the committee gave opportunity to petitioner and he appeared before it on three days. As aforesaid, petitioner produced photocopy of the school admission register in respect of his father's

admission. Mr. Mishra hands up the photocopy, as obtained on requisition dated 2nd March, 2012 under Right to Information Act, 2005. The photocopy of the admission register page, showing some admissions made in June and July, 1944,was forwarded under cover of letter dated 3rd March, 2012 by the Head Master, Hubback High School, G. Udayagiri, Kandhamal. This was noted in impugned final order. It appears, the committee itself called for the original register and on perusal thereof found tampering, as aforesaid. Such tampering is not obvious in the photocopy. Also, there is no reference to admission of petitioner himself, as verified in the investigation or in impugned final order. Furthermore, khata no.796, referred to by the IO in his report, was neither mentioned and therefore not dealt with in impugned final order. All this was pointed out to Mr. Babu.

6. Further query was made to Mr. Babu regarding restrictions regarding transfer of land, placed on owners belonging to scheduled tribes. Section 22 in Odisha Land Reforms Act, 1960 bars transfer to a person not belonging, except when made with prior written permission of the Revenue Officer. The witnesses were examined in the investigation behind the back of petitioner, causing interference by the Division Bench, as aforesaid. Hence, where the relative of petitioner had dealt with his land, in describing himself to belong to a caste in general category, the testimony of such and the purchaser witnesses, in absence of petitioner having had opportunity to confront them, becomes unreliable.

7. Mr. Parhi, learned advocate, Deputy Solicitor General and Mr. Rath, learned advocate, Central Government Counsel appear on behalf of Union of India.

8. In **Madhuri Patil** (supra) the Supreme Court streamlined procedure for issuance of social status certificates. The guidelines aregiven in paragraph 12 of the judgment. Guideline (5) is in respect of verification and collection of all the facts of social status claimed by the candidate or the parent or guardian, as the case may be. A passage from the guideline is extracted and reproduced below.

> *"He also should examine the school records, birth registration, if any. He should also examine the parent, guardian or the candidate in relation to their caste etc.* ***or such other persons who have knowledge of the social status of the candidate*** *and then submit a report to the Directorate together with all particulars as envisaged in the pro forma, in particular, of the Scheduled Tribes relating to their peculiar anthropological and ethnological traits, deity, rituals, customs, mode of marriage, death ceremonies, method of burial of dead bodies etc. by the concerned castes or tribes or tribal communities etc."* *(emphasis supplied)*

Guideline (6) is on contingency of report from the Vigilance Officer finding the claim for social status to be 'not genuine' or 'doubtful' or spurious or falsely or wrongly claimed. Guideline (7) says, incase, inter alia, particulars given are procured or found to be false or fraudulently obtained, procedure envisaged in guideline (6), is to be followed.

9. Regarding Court's appreciation in respect of the investigation report and findings in impugned final order, as stated in paragraphs 4 to 6 above, State has no answer. Photocopy, of the document made in year 1944, was supplied in year 2012, upon requisition made under the Act of 2005. The photocopy is, therefore, accepted to be a true copy of the original. The committee felt necessity for looking at the original. It was not said in impugned final order, to have been shownto petitioner. It is not understood, why this document was missed by the IO in his investigation, when verifying the school admission register, to find only, admission particulars of petitioner's elder brother.

10. Paragraph 14 from **Sayanna** (supra) is reproduced below.

> *"It is difficult for this Court to understand as to on which basis the Scrutiny Committee came to the conclusion that the word "lu" was interpolated in the register of the schoolmore particularly when it was not so opined by the Police Inspector who had conducted the enquiry. Whether interpolation by addition has taken place can be stated by a handwriting expert or by comparison of admitted letters of a person with this disputed one. It is an admitted position that the Scrutiny Committee had never attempted to get an expert's opinion nor itself had compared the disputed letters with admitted one of the appellant."*

The committee formed opinion, by itself, on simply perusing original admission register of year 1944. There ought to have been an allegation before the committee, for it to evaluate the evidence in relation to the allegation.

11. Section 7(1) in Odisha Scheduled Castes, Scheduled Tribes and Backward Classes (Regulation of Issuance and Verification of Caste Certificates) Act, 2011 says, when it comes to notice that a person not belonging to any of the reserved category has obtained a false caste certificate, the committee may suomotu or otherwise, call for the record and enquire into the correctness of such certificate. There is no mention in impugned final report that this document was initially also produced by petitioner and erroneously relied upon, for issuance of the certificate. Where the law requires inquiry, to establish that a caste certificate obtained is fake, there should not have been pronouncement by the committee, without inquiry, that a document made in year

1944 and not part of the record, had been tampered with, to say it cannot be relied upon and disregard it.

12. Reason (5) from impugned order is reproduced below.

> *"5. It is found from the statements of the alleged before the SLSC on 28.2.12 that the alleged has no idea about theGonda caste and has no knowledge about the tribal language of the Gond people. He is also unable to speak about the profession and festival etc. of the Gond people. From the said statement of the alleged it is ascertained that the alleged does not belong to Gond caste as he is unaware of the socio cultural life styles and traits of the Gond people."*

This reason is not based on guideline (5) in **Madhuri Patil** (supra). In said guideline, as appears from passage therefrom reproduced above, there is requirement for examination of such other persons, who have knowledge of the social status of the candidate. Impugned final order does not say any such person was examined. As such, Court is unable to fathom basis for said reason that petitioner has no idea about 'Gondo' caste or has no knowledge about the tribal language of the 'Gondo' people etc.

13. Paragraph 14 from **Madhuri Patil** (supra) is reproduced below.

> *"14. The question then is whether the approach adopted by the High Court in not elaborately considering the case is vitiated by an error of law. High Court is not a court of appeal to appreciate the evidence. The Committee which is empowered to evaluate the evidence placed before it when records a finding of fact, it ought to prevail unless found vitiated by judicial review of any High Court subject to limitations of interference with findings of fact.* ***The Committee when considers all the material facts and records a finding, though another view, as a court of appeal may be possible, it is not a ground to reverse the findings. The court has to see whether the Committee considered all the relevant material placed before it or has not applied its mind to relevant facts which have led the Committee ultimately recorded the finding****. Each case must be considered in the backdrop of its own facts."* *(emphasis supplied)*

A much later document is the RoR khata no.796, verified by the IO but overlooked by the committee. Therein, father of petitioner had asserted his identity as belonging to scheduled tribe 'Gondo', in having had got the land so recorded. The bar on transfer became applicable. Position taken regarding father of petitioner, in year 1944 on him getting admission and thereafter by himself in recording his caste 'Gondo' in the RoR khata, is consistent. These were good direct evidence before the committee. The otherwise finding, therefore, is perverse.

14. Mr. Mishra submits, though his client had obtained interim order dated 18th July, 2012 but, by reason of long pendency of the writ petition and direction of the Supreme Court in **Asian Resurfacing of Road Agency (P) Ltd. v. CBI, reported in (2018) 16SCC 299**, same was deemed vacated. His client's employer proceeded and passed order dated 12th August, 2020, removing his client from railway service with immediate effect saying, service thus far rendered, was infructuous. He submits further, the writ petition was thereafter amended at his client's instance, bringing additional prayer. Mr. Babu submits, consolidated writ petition is not available in the record, nor copy was served. To prevent exactly this, the Supreme Court also in **Madhuri Patil** (supra) said in guidelines (11), (12) and (13) as reproduced below.

> *"11. The order passed by the Committee shall be final and conclusive only subject to the proceedings under Article 226 of the Constitution.*
>
> *12. No suit or other proceedings before any other authority should lie.*
>
> *13. The High Court would dispose of these cases as expeditiously as possible within a period of three months. In case, as per its procedure, the writ petition/Miscellaneous petition/matter is disposed of by a single Judge, then no further appeal would lie against that order to the Division Bench but subject to special leave under Article 136."*

15. Impugned final order is set aside and quashed. Since, the termination was solely on basis of impugned final order, herein quashed, petitioner will approach his employer with this order, for immediate reinstatement on continuity of service. Union of India (Railways) is obliged to expeditiously deal with the approach.

16. The writ petition is disposed of.

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2022 (III) ILR - CUT- 1120

D. DASH,J & Dr. S.K.PANIGRAHI,J.

GCRLA NO. 02 OF 2012

STATE OF ORISSA .....Appellant

.V.

SUKALYANI MISHRA & ANR. .....Respondents

CODE OF CRIMINAL PROCEDURE, 1973 – Section 378(1)(3) – Appeal against acquittal – Scope of interference against the order of acquittal – Cardinal rules which are required to be kept in mind while dealing with the appeal against acquittal – Discussed with case laws.

(Para 13)

Case Laws Relied on and Referred to :-

1. 2006 CRI. L. J. 2392 : State of Gujarat Vs. Jamabhai Ramabhai Chauhan Solaji Tal
2. (2011) 6 SCC 288 : Braham Swaroop & Anr. .Vs. State of Uttar Pradesh.

For Appellant : Mr. S.S.Kanungo, Addl. Govt. Adv.

For Respondents : Mr. A.B.Mohanty

JUDGMENT Date of Hearing : 16.11.2022 : Date of Judgment:18.11.2022

D.DASH,J.

The State, by filing this Appeal, with the leave of the Court, has called in question the judgment dated 7th March, 2011 passed by the learned Ad-hoc Additional Sessions Judge, FTC-II, Cuttack in Sessions Trial Case No.401 of 2008 arising out of G.R Case No. 309 of 2006 corresponding to Salipur P.S Case No.156 of 2006 of the Court of the learned J.M.F.C., Salipur.

By the same, the Trial Court has acquitted the respondents (accused persons) of the charge under section 328/302/34 of the Indian Penal Code (in short, 'IPC').

2. **Prosecution Case:-**

Deceased Sarada Mani Dibya died on 19.05.1997 night around 10 p.m. She was then 82 years old and staing in the house of accused Achutananda at village Baliapada. For last 15 to 20 years, she was staying there. She was suffering from Asthma and colic pain. On 20.05.1997, accused Achutananda lodged a report (Ext.9) at Nischintkoili Police Outpost intimating the unnatural death of Saradamani. So an U.D Case was registered there and it was numbered as U.D Case No.05 of 1997. The Assistant Sub Inspector of Police (ASI) attached to that Nischintkoili Police Outpost (P.W.6) then enquired into the matter. He held inquest over the dead body of the deceased, prepared report to that effect and sent the same for Post Mortem Examination by issuing requisition. Report being received from the Doctor holding the Post Mortem examination vide Ext.17 as no such opinion as to cause of death could be rendered; as advised by the Doctor; the viscera of the deceased was sent for chemical examination. On completion of enquiry, the ASI submitted his report to

the Officer-in-Charge of Salipur Police station (P.W.10) who in turn submitted the Final Form (Ext.17) on 10.01.2001.

3. On 20.05.1997, Bichitrananda Mishra (P.W.1)who happens to be the informant in the present case and claims of the adopted son of the deceased, received the information about the death of the deceased and had come to see her. He then had notices froth coming out of the mouth of the deceased and had also seen some injuries on her back and body which had created suspicion in his mind as to the cause of death of Saradamani (deceased) who was in a sound state of health before the death. There was land dispute between Bichitrananda (P.W.1) and accused Achutananda. Accused Achutananda managed to obtain a Will on his favour from Saradamani (deceased) on 18.07.1995 in respect of her entire landed property and in that connection, a partition suit i.e. Title Suit No.55 of 1993 as well as Probate Misc. Case No.05 of 1999 had been filed before the Court of law. For the above enmity and suspicious circumstances; Bichitrananda (P.W.1) verified the record of the U.D Case and then could know that the viscera was found to contain poison as per the report of the chemical examiner. From that, his suspicion was further confounded that the accused persons in order to grab the property of the deceased had murdered her by administering poison. He, therefore, filed a Writ Application before this Court which was numbered as W.P.(Criminal) No.37 of 2006. Said Writ Application was dismissed giving liberty to that Bichitrananda to file the report before the police (P.W.7) or complaint in the Court of law. In view of that Bichitrananda filed the written report (Ext.1) before the police on 10.05.2021. The case was registered and investigation then commenced.

4. In course of investigation, the then Officer-in-Charge of Salipur Police Station visited the spot, prepared the spot map, examined the witnesses and arrested the accused persons. The Chemical Examination Report (Ext.6) was obtained and so also the final opinion of the Doctor(Ext.18) was taken. On his transfer, the investigation was taken up by his successor in office (P.W.9) on 21.08.2007. He also visited the spot and prepared another spot map, made seizure of the papers available with that U.D Case record (Ext.10, 12 and 13) and also seized the Will dated 18.07.1995 (Ext.8). On completion of investigation, he submitted Final Form on 13.07.2008 placing the accused persons to face the trial for commission of offence under section 328/302/34 of the IPC.

5. Learned J.M.F.C., Salipur have taken cognizance of the offences,after observing formalities committed to the Court of Sessions for trial. That is how the Trial Court commenced against these accused persons after framing of the charge for the above offences.

6. In the trial, the prosecution in total has examined 11 witnesses;out of whom the informant as already stated is P.W.1. One Sachidananda Mishra has been examined as the eye witness to the occurrence and he is P.W.2 who happens to be the brother of accused Achyutananda. P.W.3 and 4 are the witnesses to have heard about the incident from that eye witness P.W.2. The inquest witness has been examined as P.W.5. The ASI of Police who had conducted inquest in U.D. Case No.05/1997 has come to the witness box as P.W.6. The two Investigating Officers have been examined as P.W.7 and 9 and the chemical examiner as P.W.8. The then O.I.C of Salipur Police Station,who had submitted the Final Form in the U.D Case, has been examined as P.W.10 and the Medical Officer who, on going through the post mortem examination report of the deceased Saradamani, had given the opinion on receipt of the chemical examiner's report has come at the end as P.W.11. Besides the above, prosecution has also proved certain documents which have been admitted in evidence and marked as Ext.1 to 19. Those are the written report (Ext.1), inquest report (Ext.3), chemical examination report (Ext.6), post mortem report (Ext.17), final form of the U.D Case (Ext.16), final opinion of the Doctor conducting post mortem examination (Ext.18), chemical examination report (Ext.6)and U.D Case F.I.R (Ext.19), seizure list and zimanamas etc.

7. The defence having been taken the plea of denial and false implication, has also examined two witnesses in support of their plea.

8. The Trial Court with the above evidence on record has proceeded to ascertain as to whether the death of the deceased was natural or homicidal in further answering the point as to whether these accused persons have not hand causing said death of the deceased.

9. On detail examination of evidence and their evaluation, the Trial Court's conclusion is that the prosecution has failed to prove that the death was homicidal. Not only that, it has held that there has been failure to connect the accused persons in causing the murder of the deceased beyond reasonable doubt. Accordingly, he has acquitted all the accused persons of the charges under section 328/302/34 IPC and has set them at liberty.

10. It be stated, at this stage, that during pendency of these appeal, Respondent No.1 and 3 having died, the appeal had abated against them and it now survives in respect of Respondent No.2 and 4.

11. Mr. S.S.Kanungo, learned Additional Government Advocate submitted that the Trial Court, on some flimsy grounds, has rejected the evidence of P.W.2

who is the eye witness to the incident. He further submitted that keeping in view the fact that deceased Saradamani was not happy with the accused Achutananda who was in a mood to grave her entire property in not parting the same with others even by an inchwhich is evident from the fact that he had obtained Will from Saradamani without her knowledge and consent which has been stated by the prosecution witnesses, the evidence of P.W,2 when is free from any such infirmity, the Trial Court has held the same to be untrustworthy simply for the reason that he disclosed the fact as to the happening of the incident and the role of the accused persons therein after long lapse of time. He further submitted that when the evidence of P.W.2 finds corroboration from the evidence of P.W.3 and 4 that he had immediately disclosed the fact before them, the Trial Court had all the reason to accept the positive version of P.W.2 and according to him, that is enough to fasten the guilt of the accused persons, which is the material irregularity committed by the Trial Court. He, therefore, submitted that, there stands compelling and substantial reason to differ with the finding of the Trial Court and hold that the order of acquittal is unreasonable as relevant convincing evidence have been unjustifiably eliminated in the process. He further submitted that keeping in view the age of the deceased at that time as she was then 82 years of old and she was leaving with the accused persons in their house and when it is not stated by the accused persons as to how the death has taken place by in take of poison, the conclusion of the Trial Court that the prosecution has failed to establish the charges against the accused persons is not at all the possible one and as such it is perverse and infirm and pulpably erroneous which warrants interference.

12. Learned counsel for the Appellant Nos.2 and 4 submitted all in support of finding of the Trial Court. He submitted that the nondiscloser of the incident by P.W.2 for such a long period and the first time disclosure after more than 8 years or so is itself to enough to hold the evidence that P.W.2 as wholly unbelievable when he is not whispering a word as to why and for what reason, he resorted to sphinx like silence. He further submitted that when P.W.2 is the brother of accused Achyutananda, he even not disclosing the incident before anybody and even before that informant (P.W.1) when he was enquiring about the cause of death has to be taken as a highly disturbing and disbelieving feature in further taking his conduct into account and the Trial Court is right in entertaining grave doubt on the version of this P.W.2. He further submitted that P.W.1 having lodged the FIR on 10.05.2006 when he has not written anything as to have been so told by this P.W.2, who claims to have seen the incident, his evidence has to be held on the standing of the base of falsehood and the same also renders the evidence of P.W.3 who is the son of P.W.2 vulnerable. He

further submitted that the Trial Court has committed no such error in the matter of appreciation of the evidence and it is not a case where the Trial Court has taken into consideration, some circumstances wholly inconsequential and has acted with material irregularity. He therefore contended that this appeal does not merit acceptance.

13. At this juncture, before addressing the rival submission and examine the evidence in order to ascertain the position as to if the order of acquittal warrants interference, it would be apt to take note of the settled principles of law as to the scope of interference with an order of acquittal passed by the Trial Court in seisin of an appeal as against the acquittal.

The Appellate Court considering the judgment of the acquittal can interfere only when there are compelling reasons for doing so in holding the judgment is clearly unreasonable, wherein the relevant and convincing materials have been unjustifiably eliminated in the process. ***(Syed Peda Aowila) versus Public Prosecutor High Court of A.P; AIR 2008 SC 2573***.

Where the findings recorded by the Trial Court are not perverse or contrary to material or record and there is no infirmity in the reasons signed by the Trial Court for acquitting the accused, no interference is warranted. ***State of Gujarat V. Jamabhai Ramabhai Chauhan Solaji Tal 2006 CRI. L. J. 2392 and Braham Swaroop & Another Vs. State of Uttar Pradesh; (2011) 6 SCC 288***.

As stated in a catena of decisions of Supreme Court that in an appeal against acquittal certain cardinal rules are required to be kept in mind namely, (a) that there is a presumption of innocence in favour of the accused which has been strengthened by the acquittal of the accused by the trial court (b) if two views are possible, a view favourable to the accused should be taken, (c) that the trial judge had the advantage of looking at the demeanour of the witnesses and (d) the accused is entitled to a reasonable benefit of doubt. Two views being reasonably possible; one favouring the accused is possibly preferred.

14. With the above settled principles in mind, let us now proceed to examine the evidence. The star witnesses for the prosecution are P.W.2, 3 and 4. P.W.2 is the younger brother of accused Achutananda and deceased is his Aunt. The death of the deceased took place on 19.05.1997. This witness says that in the night, he heard accused persons abusing the deceased and then a sound. He further states that when he came out, the door was closed and after giving a push to the door when it got opened, he could see accused Aruna catching hold of the two hands of Saradamani and her waist and accused Niranjan (Dead) catching hold her

head. He also says to have seen accused Achutananda (Dead) pressing the two side of the jaw of Saradamani (deceased) and then accused Sukalyan was administering something kept in a glass. He states to have shouted that accused persons were trying to kill the deceased and thereafter Pratap Mishra (P.W.5), and Kamalakanta Mishra (Not Examined) and some others came. Alekha Malik (Not Examined) also came there and told that as to why he was shouting when the accused persons were administering medicine to the deceased as per his evidence. Pratap and Kamalakanta and others pushed him outside the house and remained in that very house. This incident having taken place on 19.05.1997, this witness is said to have stated to P.W.3 and P.W.4. P.W.3 is his son. He states that hearing from Saradamani as "MARIGALI MARIGALI", his father went there and pushed the door and went inside the house and then his father told him that accused Aruna had caught hold of two hands and waist of Saradamani, accused Niranjan (Dead) had caught hold of the head and accused Achyutananda (Dead) had pressed her mouth and thereafter he (P.W.2) shouted that accused persons were trying to kill Saradamani. He then was told by one Alekh Malik that why he was shouting as the accused persons were administering medicine. P.W.4 says to have been told by P.W.2 about the forcible administration of poison by the accused persons. P.W.1 after filing the Writ Application before, this Court has gone to lodge the FIR on 10.05.2006 and thereafter, all these witnesses have been examined by police in the year 2006 in connection with the incident which had taken place in the year 1997. None of the witnesses have said as to why and for what reason they remained silent in not disclosing about the incident when the death of Saradamani according to them had been caused by these accused persons. On going through the evidence, it is also seen that they were knowing that information about the death of Saradamani having been given police enquiry was going on. But still then they have not stated anything before them and what was such compelling reason. More interestingly when P.W.1 has lodged the FIR on 10.05.2006 which is a typed one where he has signed in English he has nowhere indicated about these witnesses; that P.W.2 had seen this incident and P.W.3 to have been told by P.W.2 and they in turn to have told him anything about that. In the FIR he says that he had the reason to believe that his mother was administered poison by these accused persons. It is true that poison has been detected on the viscera of the deceased but no such evidence is forthcoming that the Doctor who conducted the post mortem examination had noticed any such external injuries on the body of the deceased nor had it been so found in the buccal cavity suggestive of forcible administration of substance much less the poisonous substance upon the deceased. Such belated disclosure by all these witnesses about such a startling facts when having remained silent for such a long period after finding the opportune moment, they have so

disclosed after about a decade is by itself enough to disbelieve the version of all those witnesses. Their conduct is highly suspicious, which has gone unremoved by any such explanation. It also does not stand to reason that when there was no threat from any side; they even would not tell to that P.W.1 and would wait for such a long period of a decade for the police to come after lodging of FIR by P.W.1 in the year 2007 about the incident is of the year 1997. We, therefore, are of the clear view that the Trial Court has rightly held these witnesses to be wholly untrustworthy and thus did commit no such mistake in refusing to rely upon their evidence. We accordingly find no reason at all much less, any compelling reason to interfere with the order of acquittal against these two surviving accused persons as has been returned by the Trial Court so as to hold the impugned judgment as the outcome of perverse appreciation of evidence in unjustifiably eliminating any material evidence.

15. In the result, the Appeal stands dismissed.

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2022 (III) ILR - CUT- 1127

D. DASH, J.

R.S.A NO. 145 OF 2022

ABHAYATI KUMBHAR .....Appellant

.V.

SATYABHAMA KUMBHAR & ANR. .....Respondents

(A) PROPERTY LAW – The common ancestor of the parties had two wives – Plaintiff No.1 and 2 are children of one wife and Defendant is the child of another wife – Whether the properties left by the common ancestor should divided into 1/3rd share or successors of each wife would be entitled to get their share through their respective mother along with their independent share? – Held, admittedly both the wives were not living at the time of death of the common ancestor – It is not the law that in case of a person having two wives even upon the death of one wife, her death would remain suspended till the death of that male and it would be deemed that as if she died soon after the death of male after the succession opened and the properties would still notionally devolve upon her on the death of the male owner so as to be succeeded by the children born to the male owner through her – The

Courts below thus are right in preliminarily decreeing the suit laid by the Plaintiffs by allotting 1/3rd share each. (Para 13)

(B) ORAL WILL – Legality questioned – Held, oral will bequeathing the immovable property is not recognized by law. (Para 14)

For Appellant : Mr. A.K. Sahoo
For Respondents : -

JUDGMENT Date of Hearing : 14.11.2022: Date of Judgment : 25. 11.2022

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 dated 17.03.2022 passed by the learned Additional District Judge, Sundargarh in R.F.A. No.12/30 of 2018-21.

By the same, the Appeal filed by the present Appellant being aggrieved by the judgment and preliminary decree dated 23.03.2018 and 29.03.2018 respectively passed by the learned Senior Civil Judge, Sundargarh in Civil Suit No.488 of 2015, under section 96 of the Code has been dismissed. Thereby, the suit filed by the present Respondents as the Plaintiffs having been preliminarily decreed by the Trial Court declaring that each of the Respondents (Plaintiffs) and the Appellant (Defendant) are entitled to 1/3rd share over the suit scheduled property; the same has been confirmed by the First Appellate Court.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Suit.

3. Plaintiff's case is that one Hadu is the common ancestor of the parties. He got married to Bhagabati for the first time and the Defendant is the daughter born out of the said wedlock. After the death of the first wife, Hadu married Satyabhama, the Plaintiff No.1 and the Plaintiff No.2 is the daughter of Hadu through Satyabhama.

4. It is stated that schedule 'A' and 'B' properties are the ancestral properties on the hands of Hadu and as such exclusively recorded in his name. It is further stated that schedule 'C' property is the self acquired property of Hadu which have been recorded in his name as such.

5. It is stated that the parties are Gonda by Caste and as such members of the Schedule Caste community and they being Hindus are governed by Mitakshara School of Hindu law.

6. According to the case of the Plaintiffs, there has been no partition of the suit scheduled land described in schedule 'A' to 'C' after the death of Hadu and, therefore, each of them is entitled to 1/3rd share over it. Plaintiff's claim for partition having not been accepted by the Defendant, the suit has come to be filed.

7. The Defendant, in the written statement, while traversing the plaint averment, has admitted the inter se relationship of the parties. It is also admitted that the lands in schedule 'A' to 'C' stand recorded in the name of Hadu. The specific plea of the Defendant No.1 is that her father named Hadu, being satisfied with her service as she had been looking after him, had declared that the Defendant will get the land measuring Ac.0.060 decimals appertaining to Plot No.1106 under Khata No.382/100 of Mouza Amlipali and Ac.0.740 decimals of land under Plot No.243/3199 signed of Khata No.38 of village Chitabhanga. The claim of the Plaintiff for partition was thus refuted.

8. The Trial Court, on the rival pleadings, having framed four issues, on examination of evidence in the backdrop of the rival pleadings and upon their evaluation, has concluded that the suit schedule properties are liable to be partitioned amongst the parties and each one is entitled to 1/3rd share therein being the legal heirs and successors of Hadu.

9. The Defendant, being aggrieved by the said judgment and preliminary decree passed by the Trial Court declaring 1/3rd share each of the parties over the suit land in schedule 'A' to 'C' as described in the plaint, having carried the First Appeal, has been unsuccessful. Hence, the present Second Appeal.

10. Learned Counsel for the Appellant submitted that the Courts below are not right in excluding the oral evidence let in by the Defendant as regards family arrangement arrived between the parties and separate allotment of the specific properties to the Defendant by her deceased father during his life time. He submitted that such conclusion arrived at by the Courts below, in repelling the claim of the Defendant, is the outcome of perverse appreciation of evidence. According to him, on the face of overwhelming evidence on record, the Courts below have completely erred in returning the finding on that score against the claim/case of the Defendant. He further submitted that when Hadu had two wives and both together are entitled to get one share, the Courts below ought to

have held that successors of each wife would be entitled to get their share through their respective mother along with their independent share. He, therefore, urged for admission of this appeal to answer the above as the substantial question of law.

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

12. Before proceeding to address the submission of the learned counsel for the Appellant to find out as to if there surfaces a substantial question of law meriting admission of the appeal, the admitted position as emerges from the pleadings, need be highlighted.

13. Hadu was the common ancestor of the parties. He had his first wife through whom Defendant No.1 was born. She is the daughter of Hadu through his first wife. On the death of the Defendant's mother (first wife of Hadu); he having married for the second time, the Plaintiff No.2 has been born. The mother of the Plaintiff No.2 is Plaintiff No.1. Admittedly, Hadu having died leaving behind his wife Plaintiff No.1 and two daughters, the Plaintiff No.2 and the Defendant, when the succession opened on the death of Hadu, these three persons came to succeed as his legal heirs being Class-I heirs finding place in the Schedule of Hindu Succession Act, 1956 which has its applicability to the parties. So, when Hadu died, his both wives were not living and, therefore, the question of the mother of the Defendant succeeding the property of Hadu, in any manner can not at all arise. It is not the law that in case of a person having two wives even upon the death of one wife, her death would remain suspended till the death of that male and it would be deemed that as if she died soon after the death of male after the succession opened and the properties would still notionally devolve upon her on the death of the male owner so as to be succeeded by the children born to the male owner through her.

In view of that, I am afraid to accept the submission of the learned counsel for the Appellant which is misconceived.

14. Coming to the other question with regard to the family arrangement, the Defendant's specific plea is that her father, during his life time, had been satisfied with her service as she was taking all his care and looking after him, and had given the properties measuring Ac.0.060 in Mouza Amlipali and Ac.0.740 decimals in Mouza Chitabhanga. It stands admitted that all these properties in suit which include the above noted landed properties stood recorded in the name of Hadu. Except leading the oral evidence, the Defendant has not

proved a single scrap of paper to that effect. Mere oral evidence coming from the lips of the Defendant and her witnesses that her father had given a declaration to that effect that these lands, after his death, would be held by the Defendant as its owner is not enough to conclude that Hadu, during his life time, had made a family arrangement in that way that the Plaintiffs would be excluded from said part of his properties which would be enjoyed by the Defendant alone to the exclusion of the Plaintiffs. Moreover, when it is said by the Defendant that Hadu had declared said properties to be given to her, whether he had so stated that the Plaintiffs would accordingly be excluded from enjoying those properties, with any such explanation. Such a declaration by the owner even if accepted to have been made during his life time that it would so come to the hands of one to the exclusion of others, the same has no legal force as law does not recognize an oral Will bequeathing the immovable property, The Defendant having led oral evidence on that score, the same has rightly been kept beyond the scope of consideration to answer the contentious issue in accepting the claim of the Defendant. The Courts below thus are right in preliminarily decreeing the suit laid by the Plaintiffs.

For the aforesaid discussion and reasons, the submission of the learned counsel for the Appellant that their surfaces the substantial questions of law to be answered in this Appeal meriting its admission cannot be countenanced with.

15. In the result, the Appeal stands dismissed. There shall be no order as to cost

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2022 (III) ILR - CUT- 1131

BISWANATH RATH,J.

W.P. (C) NO. 7704 OF 2007

BHAGABAN ROUT & ANR. .....Petitioners

.V.

EXECUTIVE ENGINEER,CESCO,SALIPUR .....Opp. Party

(A) ELECTROCUTION DEATH – Claim of Compensation – No provision for compensation under the Electricity Act – Determination of – Held, when Electricity Act does not provide any relief for electrocution death this Court drawing analogy from the Motor Vehicles Act, 1988 in Schedule II therein, as per prescribe manner of determination of compensation, direct to calculate notional income taking into account the decision of Hon'ble Apex Court.

(Paras 9,10)

(B) NOTIONAL INCOME – Principle for determination – Discussed with case laws. (Para-9)

Case Laws Relied on and Referred to :-

1. 2012 (Supp.-II) OLR 256 : T.Bimala Vs. Cuttack Municipal Corporation, Cuttack & Ors.
2. AIR 1999 SC 3412 : Chairman, Grid Corporation of Orissa Ltd. (GRIDCO) & Ors. Vs. Sukamani Das & Anr.
3. 2011 (II) OLR- 708 : Executive Engineer, Central Electricity Supply Utility Ltd., Cuttack Electrical Division, Jobra, Cuttack Vs. Hema Sethy.
4. (2014) 1 SCC 244 : Kishan Gopal & Anr. Vs. Lala & Ors.
5. (2001) 8 SCC 197 : Lata Wadhwavrs. State of Bihar.
6. (2009) 14 SCC 1 : R.K.Malik & Anr. Vs. Kiran Pal.
7. (2021) 2 SCC 166 : Kirti & Anr. Vs. Oriental Insurance Company Ltd.

For Petitioners : Mr. A.A.Khan, Mr.R.Pati.

For Opp. Parties : Mr. D.Ray.

JUDGMENT Date of Hearing & Judgment: 01.11.2022

BISWANATH RATH,J.

1. This Writ Petition involves the following prayer:-

> "It is therefore, humbly pray that this Hon'ble Court may graciously be pleased to admit the writ application and after hearing both the sides allow the same and direct the Opp. Party to pay a compensation of Rs.5 lakhs to the petitioners within a stipulated time by issuing appropriate writ;
>
> And any other order/orders as deem fit and proper be passed;
>
> And for this act of kindness, the petitioners shall as in duty bound, ever pray."

2. Short background involving the case is the parents of the deceased involving herein claims while their son returning to their house after cultivating their agricultural land on 13.08.2006 at about 5.00 P.M. accidentally came in contact with the electric charge wire in a hanging stage from the Electric Poll in damaged condition, as a result of which son of the Petitioners coming in contact with live wire fell down on the ground. On being shifted to S.C.B, Medical College and Hospital for treatment. S.C.B, Medical College and Hospital on examination of body declared that the son of the Petitioners was dead on the arrival of the body in the hospital itself. It is on the premises of premature death of deceased caused due to negligence of CESCO authority and the financial loss

as well as loss on mental agony at the were made to the competent authority for making necessary payment towards compensation. For the department remain silent, this Writ Petition came to be filed with prayer for direction for appropriate compensation. Pleading and submission also discloses there has been lodging of F.I.R. registered as P.S.U.D. Case No.10 of 2006 in Jagatpur P.S. appearing at Annexure-1.

3. Learned counsel for the Petitioners in the above background of matter taking this Court to the inquest report as well as post mortem report under Annexures-2 & 3 for the finding therein deceased dying due to electrical shock claims a sum of Rs.5,00,000/- as compensation for loss on account of life, love and affection and other incidental expenditures. Taking this Court to the observations in Annexures-1 to 3 learned counsel for the Petitioners contended that the Petitioners have proved the case and for the loss due to negligence by CESCO department which should be directed to pay the required compensation.

4. Mr. Ray, learned counsel for the sole Opposite Party taking this Court to the counter plea as well as disclosures through Annexure-(A) contended there has been communication by the Assistant Manager (Electrical) to the I.I.C, Jagatpur Police Station intimating therein that there is reporting by the Camp line man to the establishment informing that Rabindra Rout, the deceased was stealing energy by means of hook after cutting the AB cable on 13.08.2006 evening. In the process cutting of AB cable electrocuted the poll and there involves a fatal accident resulting death of the deceased. It appears, the department wanted an inquiry and appropriate action involving the complaint. While not disputing the observations in the inquest report for intimation of the department to the police already involved therein, Mr. Ray, learned counsel for the Department to support his case takes help of a decision in ***T.Bimalavrs. Cuttack Municipal Corporation, Cuttack and others*** reported in ***2012 (Supp.-II) OLR 256.***

Mr.Ray, learned counsel appearing for the Department in the above back ground contended for the settled position of law no inference can be done against the department merely because of existence of a final form or the inputs in the inquest report or the post mortem report. Mr.Ray, learned counsel also objected the entertainability of the Writ Petition on the premises that investigation, if any, by police authority came in form of final report and did not involve the department. Preparation of such final report cannot bind the department. Further police also did not show any interest on their attempt for lodging an F.I.R.

5. Considering the rival contentions of the Parties, this Court finds, undisputedly there is death of the son of the parents appearing as the Petitioner Nos. 1 & 2 on 13.08.2006. It is clear from the inquest report as well as the post mortem report, the death of the deceased caused due to electrocution, final form also supports the case of the Petitioners no doubt the case could not be further investigated for there is no ascertainment of involvement of any person however all the documents such as inquest report, post mortem report as well as the final form are all in one direction undisputedly suggesting there is death of the deceased on account of electrocution coming in contact of line wire undisputedly belonging to the CESCO. There should not be also any dispute that the wire or the poll came in contact with the body of the deceased. It is at this stage coming to consider the stand of the department, the Opposite Parties, this Court finds, the Opposite Parties contest herein simply on the basis of disclosures vide document at Annexure-A which reads as follows:-

> To
> The Officer-In-Charge,
> Jagatpur Police Station,
> Jagatpur
>
> Sub:- FIR regarding fatal accident at the time of energy theft by cutting AB cable at DhiaSahi under Bohugram Electrical Section on dt.13.8.06 evening.
>
> Sir,
>
> It is reported by the Camp line man that Sri Rabindra Kumar Rout, son of Sri Bhagyadhar Rout of Village-Dhia Sahi (Barabodia) was stealing energy by means of hook after cutting the AB cable on dt.13.08.06 evening at about 7 P.M. and electrocuted to fatal accident.
>
> Hence, you are requested to kindly investigate the matter and report your findings for further action at this end."
>
> Yours Faithfully,
>
> Illegible,
> Sd/- 14.08.06
> Asst. Manager (Elect),
> Electrical Section, Bahugram.
> (SEAL)
>
> Permanent Address
> Sri Bhagyarathi Samal,
> S/o. Sri Prana Krushna Samal,
> Vill.-Hatasisua,
> P.S.-Tangi, Dist- Cuttack

It appears through Annexure-A department sought for a F.I.R. on the fatal accident in an attempt of theft of energy by cutting the AB cable by the deceased. Unfortunately copy of report of complainant line man is not coming to see the light of the day. For the allegation involved that there involved a theft by cutting AB cable at DhiaSahi under Bohugram Electrical Section on dated 13.08.2006, this Court here draws the inference, in the event department has already requested the Jagatpur Police Station drawing an F.I.R. on the allegation involved therein, there should have been chasing such aspects. The counter or the additional counter affidavit did not contain any further information as to the development on the request of the department through AnnexureA. In the event the police authority on such issues remained silent since there was availability of further legal processes, such processes ought to have been followed. Pleading through the counter affidavit as well as the additional counter affidavit nowhere establishes following of any further legal recourses by the department. Further in the event the Assistant Manager (Electrical) Section Bohugram had already come to notice the incident and reported on 14.08.2006 only hardly a day after the incident taking place regarding thereto involving an attempt by cutting of AB cable, there is no material brought on record at least involving a departmental inquiry to have its findings on such action and/ or seizure of any wire and/or any material utilized for the purpose or sketch of the area of operation, if any, at least establishing there was an attempt of stealing energy by means of hooking and by cutting AB line. If there was any cutting in the AB cable there would have been also a report at least suggesting such cutting. For there is no development after such F.I.R and the materials completely absent establishing any sort of inquiry by the department, this Court finds, Annexure-A a simply creation of the department to block the claim of the parents of the deceased.

6. Coming to the argument of counsel for the department questioning the maintainability of the Petition for there involvement of disputed question of fact, this Court first of all finds, the F.I.R, inquest report, post mortem report and final form all supports the case of the Petitioner so far their claim on the death of their son on electrocution, whereas the department even though attempted to lodge an FIR on allegation of attempt for stealing energy against the deceased there is neither any following up action for undertaking a legal exercise involving their allegation involves Annexure-A nor there is even any internal report produced either in counter or additional affidavit bringing in some material to at least making out a case involving a theft attempt. This Court here finds, the case of the Petitioner rather gets support of a decision of the Hon'ble Apex Court in the case of ***Chairman, Grid Corporation of Orissa Ltd. (GRIDCO) and others vrs. Sukamani Das and another*** reported in ***AIR 1999 SC 3412***. This Court here also finds support of a decision of this Court on the entertainability of Writ Petition

through judgment of this Court in the case of ***Executive Engineer, Central Electricity Supply Utility Ltd., Cuttack Electrical Division, Jobra, Cuttack vrs. Hema Sethy*** reported in ***2011 (II) OLR- 708.***

Through ***AIR 2001 SC 485*** vide paragraph-12 therein, the Hon'ble Apex Court came to hold as follows:-

> 12. Even if there is no negligence on the part of the driver or owner of the motor vehicle, but accident happens while the vehicle was in use, should not the owner be made liable for damages to the person who suffered on account of such accident? This question depends upon how far the Rule in Rylands v. Fletcher (1861-73 All ER (Reprint)1) (supra) can apply in motor accident cases. The said Rule is summarized by Blackburn J. thus:
>
> The true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, or the act of God; but, as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient."
>
> This decision also supports the case of the Petitioner here.

7. At this stage taking into consideration the decision taken support by the opponent, this Court finds the claim of the Petitioner though based on a reporting in the inquest report as well as F.I.R. and further final form observations involving the F.I.R. at the instance of the parties in loss but however there is no material establishing the case contrary to the existence in all these records. Further in spite of involvement of such serious issue, department failed in undertaking the minimum an enquiry at least coming to a finding by its own people that there is in fact, an attempt for stealing energy by cutting AB cable.

8. It is in the above background, this Court finds, there is no disputed fact involved herein. In the circumstance this Court finds, the Petitioners for the undisputed loss of their son at the age of twenty four years observes, there is great loss to the parents not only on account of death of their son but there is also loss of mental agony as well as love and affection and Petitioners deserved appropriate compensation.

9. Since the matter involves compensation involving death on account of electrocution, Electricity Act since does not provide such relief, this Court drawing analogy from the Motor Vehicles Act, 1988 for Schedule II therein prescribing manner of determination of compensation in case one unable to

throw light on income aspect and such party is in unskilled category, schedule II meant for compensation for third party in fatal accident/ injury case at Clause-6 prescribes Rs.15,000/- per annum for non-earning persons and same schedule also prescribes seventeen multipliers in case deceased above twenty years but does not exceed 25 years.

This Court here takes into account a decision of the Hon'ble Apex Court in the case of ***Kishan Gopal and another vrs. Lala and others*** reported in (2014) ***1 SCC 244***, again in the case of ***Lata Wadhwavrs. State of Bihar*** reported in ***(2001) 8 SCC 197*** where Hon'ble Apex Court not finding any material to establish income factor has relied on Notional Income factor through second Schedule to Section 163-A of Motor Vehicle Act has come to take the Notional Income factor in the minimum to be Rs.15,000/- per annum. This principle is even also taken into account in the case of ***R.K.Malik and another vrs. Kiran Pal and others*** reported in ***(2009) 14 SCC 1***. Scope on Notional Income also has been further enlarged by the Hon'ble Apex Court through involving a case under Motor Vehicle Act in the case of ***Kirti and another vrs. Oriental Insurance Company Limited*** reported in (***2021) 2 SCC 166*** through para-17 therein observed as follows:-

> 17. There are two distinct categories of situations wherein the court usually determines notional income of a victim. The first category of cases relates to those wherein the victim was employed, but the claimants are not able to prove her actual income, before the Court. In such a situation, the court "guesses" the income of the victim on the basis of the evidence on record, like the quality of life being led by the victim and her family, the general earning of an individual employed in that field, the qualifications of the victim, and other considerations."

10. This court finds, the Petitioners deserve to get appropriate compensation. Here taking into account the loss of fifteen years in the meantime and without getting into further loss of time, this Court here finds the Petitioners claim the income of the deceased @ Rs.3,000/- per month and the age of the deceased at the time of death hardly twenty four years however while the parents claim their son is a cultivator, there is absolutely no material to establish the income of the deceased. Taking into account the decision of Hon'ble Apex Court to apply notional income further in the year @ 15,000/- per annum taking into account 1/3rd for his personal use and keeping in view the age of the deceased at twenty four years of a age below twenty-five years and also the age of the parents at the relevant point of time they are entitled to get the compensation at the above rate multiplied by at least seventeen years which comes to 10,000 * 17 years= 1,70,000/-. For there is already loss of sixteen years in the meantime and no

amount even paid as exgratia, the Petitioners should also get the interest minimum @ 5% all through on the compensation determined by this Court.

11. Payment as directed hereinabove including interest be released in favour of the Petitioner No.1 at least within a period of three weeks of the judgment. Failure of releasing of amount within three weeks, the Petitioners will be entitled to get interest @ 7% on the entitlement all through till the payment is paid.

12. The Writ Petition succeeds. No costs

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2022 (III) ILR - CUT- 1138

S.K. SAHOO,J.

CRLMC NO. 1587 OF 2022

SATYASHRI @ SATYASHREE MOHAPATRA .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power of the court – Prayer to quash the criminal proceeding for the offence under section 409 of the Indian Penal Code – The petitioner has been exonerated in the disciplinary proceeding on the self-same set of facts and circumstances – Continuance of the criminal proceeding questioned – Held, in view of the ratio laid down in the cases of *Radhey shyam Kejriwal Vs. State of West Bengal reported in (2011) 3 Supreme Court Cases 581, Deputy Superintendent of Police, EOW, CBI reported in (2020) 9 Supreme Court Cases 636 and Minaketan Pani Vs. State of Orissa reported in 2022 (II) Orissa Law Reviews 104* the continuance of the criminal proceeding against the petitioner would be an abuse of the process of law and accordingly the entire criminal proceeding stands quashed.

Case Laws Relied on and Referred to :-

1. 2022 (II) OLR 104 : Dr. Minaketan Pani Vs. State of Orissa.
2. (2011) 3 SCC 581 : Radhey Shyam Kejriwal Vs. State of West Bengal.
3. (2020) 9 SCC 636 : Ashoo Surendranath Tewari Vs. Deputy Superintendent of Police, EOW, CBI.

For Petitioner : Mr. Rudra Narayan Parija

For Opp. Party : Mrs. Susamarani Sahoo, A.S.C.

ORDER Date of Hearing & Order: 23.08.2022

S. K. SAHOO, J.

This is an application under section 482 of the Code of Criminal Procedure filed by the petitioner Satyashri @ Satyashree Mohapatra with a prayer to quash the criminal proceeding in G.R. Case No.2141 of 2020 which arises out of Hirakud P.S. Case No.145 of 2020 pending in the Court of S.D.J.M., Sambalpur so also the order of taking cognizance dated 13.04.2021 for the offence under section 409 of the Indian Penal Code.

2. On 13.06.2020 on the first information report submitted by one Birendra Kumar Nayak before the Inspector in-charge of Hirakud police station, the aforesaid Hirakud P.S. Case No.145 of 2020 was registered under section 409 of the Indian Penal Code against the petitioner and one Lalit Kumar Dandsena. It is stated in the first information report that the petitioner, who was a Graduate Engineer (Mechanical) in the office of the Superintending Engineer, Mechanical Circle (MED.I.P), Hirakud was in additional charge of the Stores Sub-Division Nos. I & II and Workshop Sub-division of the office of the Executive Engineer, Mechanical Division, Hirakud for the period from 22.08.2011 to 24.10.2014. A petition dated 01.09.2015 was filed by nine numbers of employees of Mechanical Division, Hirakud containing allegations of misappropriation of 928 meter 10mm dia copper wire from the mechanical store premises and basing on such petition, enquiry was conducted by the Superintending Engineer, Mechanical Circle (MIP), Hirakud and findings were given that the petitioner dismantled the copper wire through the co-accused Lalit Kumar Dandsena, Chowkidar of the stores and taken away the same. It is further stated in the first information report that as per the instruction of the Engineer-in-Chief, Water Resources, Odisha, another enquiry was conducted by the Chief Engineer & Basin Manager, Upper Mahanadi Basin, Burla and in his report, it was recommended for fixation of responsibility on the petitioner and to impose penalty for misappropriation of Government property with recovery of the cost for 650 kg. of copper. The Chief Engineer & Basin Manager, Upper Mahanadi Basin, Burla also ascertained the cost of copper wire, which came to Rs.2,88,600/- (rupees two lakhs eighty eight thousand six hundred).

After registration of the F.I.R., investigation was carried out and during the course of investigation, statements were recorded, documents were seized and it was found to be a true case under section 409 of the Indian Penal Code against the petitioner. As prima facie evidence under section 409 of the Indian Penal Code was found against the petitioner, charge sheet was submitted under

the said offence against him on 31.03.2021 and on the basis of such charge sheet, the learned S.D.J.M., Sambalpur took cognizance of the offence under section 409 of the Indian Penal Code against the petitioner as per the impugned order dated 13.04.2021.

3. Learned counsel for the petitioner contended that for the self-same accusation, the petitioner faced departmental proceeding and the Enquiry Officer as per his report dated 09.07.2021 opined that the very existence of copper wire turns out to be doubtful and the allegations appear to be an act of revenge to malign the image of the delinquent officer (petitioner)and concluded that the charges are not established against the petitioner and recommended that he should be exonerated of allthe charges. After careful consideration of the written statement of defence, representation of the delinquent officer(petitioner), findings of the Enquiry Officer,the views of the Engineer-in-Chief-cum-Special Secretary to the Government, Internal Vigilance, Department of Water Resources and the documents, the disciplinary authority also exonerated the petitioner from allthe charges framed against him.Itisfurther contended by the learned counsel forthe petitioner that since the finding arrived at by the Enquiry Officer is on merit and the petitioner has been exonerated in the disciplinary proceeding on the self-same set offacts and circumstances, continuance of the criminal proceeding would be an abuseof the process of the Court and therefore, the order of taking cognizance so also the entire criminal proceeding should be quashed. Reliance is placed on the decision of this Court in the case of **Dr. Minaketan Pani -Vrs.-State of Orissa reported in 2022 (II) Orissa Law Reviews 104**.

Mrs. Susamarani Sahoo, learned Addl. Standing Counsel, on the other hand,contended that the disciplinary proceeding and the criminal prosecution can be launched simultaneously and they are independent to each other and the findings given in the disciplinary proceeding are not binding on the proceeding for criminal prosecution and therefore, merely because the petitioner has been exonerated in the disciplinary proceeding, the same cannot be a ground to quash the criminal proceeding or the order taking cognizance of offence under section 409 of the Indian Penal Code.

4. Adverting to the contentions raised by the learned counsel for the respective parties and after going through the articles of charges so also the statement of allegation against the petitioner, which are annexed to the CRLMC application, it appears that the allegations are same. The views of the Enquiry Officer are quoted herein below:

> "1. The said wire was not in stock/store/surplus/site account of any Sectional Officer or any Sub-divisional officer.
>
> 2. It sounds impractical that such heavy duty copper wire was laid in layers for just illumination purpose.
>
> 3. The incident was reported after about one year of actual date of occurrence, that too after the departure of the delinquent officer from Hirakud.
>
> 4. Sri Ashok Kumar Nayak, the then S.E.(Mech.) deposes that the delinquent officer was a strict officer and hence may be a victim of false allegations to defame him.
>
> 5. As reported by Sri Ramanarayan Mohanty, C.E. (Mech.) and the then E.E. (Mech.) of the said division, that during his tenure neither his Junior Engineer, Asst. Engineer, Asst. Executive Engineer or Deputy Executive Engineer in-charge of the Store & Workshop nor any Security in-charge ever informed him about such incident.
>
> It is apparent that, the very existence of the copper wire turns out to be doubtful. The allegations appear to be an act of revenge to malign the image of the delinquent officer. So, it is concluded that the charges arenot established against the delinquent officer Sri Satyashree Mohapatra and hence may be exonerated."

It appears that the Enquiry Officer has examined the witnesses, verified the documents and after thorough analysis has arrived at the above conclusion. Thus, there is no dispute that the articles of charges against the petitioner so also the accusation against the petitioner as per the charge sheet are on the same set of facts and circumstances.

In **Radhey shyam Kejriwal -Vrs.- State of West Bengal reported in (2011) 3 Supreme Court Cases 581**, it has been held as follows:

> "38. The ratio which can be culled out from these decisions can broadly be stated as follows:
>
> (i) Adjudication proceedings and criminal prosecution can be launched simultaneously;
>
> (ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;
>
> (iii) Adjudication proceeding and criminals proceeding are independent in nature to each other;
>
> (iv) The finding against the person facing prosecution in the adjudication proceedings isnot binding on the proceeding for criminal prosecution;
>
> (v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20 (2) of the Constitution or Section 300 of the Code of Criminal Procedure;
>
> (vi) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceeding is on technical ground and not on merit, prosecution may continue; and

> (vii) In case of exoneration, however, on merits where allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases.
>
> 39. In our opinion, therefore, the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceeding is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court."

The aforesaid decision was relied upon by the three-Judge Bench of the Hon'ble Supreme Court in **Ashoo Surendranath Tewari -Vrs.- Deputy Superintendent of Police, EOW, CBI reported in (2020) 9 Supreme Court Cases 636** and the view taken in **Radheyshyam Kejriwal** (supra) was unanimously accepted.

In the case of **Dr. Minaketan Pani**(supra) the Hon'ble Chief Justice Dr. Justice S. Muralidhar discussing all the aforesaid citations has been pleased to held as follows :

> "26. For all of the aforementioned reasons, in the facts and circumstances of the present case where on the same charges on which the petitioner is facing criminal trial, he has been honourably exonerated in the departmental proceedings, the Court adopts the reasoning of the decisions in Radhey shyam Kejriwal v. State of West Bengal (supra) and Ashoo Surendranath Tewari v. Deputy Superintendent of Police, EOW, CBI (supra) andsets aside the impugned order dated 15th January 2009, passed by the Sub Divisional Judicial Magistrate (S), Cuttack in G.R. Case No.1057 of 2007."

Considering the submissions made by the learned counsel for the respective parties and the fact that the petitioner has been exonerated in the disciplinary proceeding on merit, which was on the self-same set of facts and circumstances like the criminal proceeding in G.R. Case No.2141 of 2020 pending on the file of learned S.D.J.M., Sambalpur, keeping in view the ratio laid down in the cases of **Radheyshyam Kejriwal** (supra), **Ashoo Surendranath Tewari** (supra) and **Dr. Minaketan Pani** (supra), I am of the humble view that the continuance of the criminal proceeding against the petitioner would be an abuse of the process of law and accordingly, the impugned order dated 13.04.2021 so also the entire criminal proceeding in G.R. Case No.2141 of 2020 pending on the file of S.D.J.M., Sambalpur stands quashed. Accordingly, the CRLMC application is allowed.

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2022 (III) ILR - CUT- 1143

S.K. SAHOO, J.

W.P.(C) NO. 11732 OF 2019

Dr. MANOJ KUMAR GHOSAL …….Petitioner

.V.

O.U.A.T, BHUBANESWAR & ORS. …….Opp. Parties

(A) CONSTITUTION OF INDIA,1950 – Article 226 – Scope and ambit – Interference in the administrative decision – Held, law is well settled that in exercising jurisdiction under Article 226 of the Constitution of India, this Court has the power to issue writ of certiorari only when there is failure of justice, it can also issue writ of mandamus or to pass orders and give necessary directions where the government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by statute. (Para 11)

(B) ODISHA UNIVERSITY OF AGRICULTURE & TECHNOLOGY ACT, 1965 r/w OUAT STATUTES, 1966 – Statute 8A – Appointment of the post of "Dean Students Welfare" – The petitioner was selected by the Standing Selection Committee – The opposite party no.1/Chancellor cancelled the selection process without any reason and asked to conduct fresh selection – Whether the appointing authority is empowered to interfere with the decision/recommendation of Standing Selection Committee? – Held, No. – Whenever a duly constituted selection committee utilizing the services of experts makes a recommendation for a post, it shall not be disturbed by the appointing authority unless there is any procedural irregularity or illegality prescribed under the relevant rules or illegality in making such selection. (Para 12)

Case Laws Relied on and Referred to :-

1. 1995 Supp (2) SCC 230 : R.S. Mittal Vs. Union of India.
2. (2000) 1 SCC 600 : A.P. Aggarwal Vs. Govt. of NCT of Delhi & Anr.
3. (1993) 2 SCC 573 : AshaKaul (Mrs.) & Anr. Vs. State of Jammu & Kashmir & Ors.
4. (2008) 1 SCC 448 : Director, SCTI for Medical Science & Technology & Anr. Vs. M. Pushkaran.
5. 2015 (II) ILR -Cut- 827 : Sasmita Manjari Das Vs. State of Orissa & Ors.
6. A.I.R. 1994 SC 1808 : J. & K. Public Service Commission, etc. Vs. Dr. Narinder Mohan & Ors. etc.
7. (2008) 7 SCC 648 : Lakhwinder Singh Vs. Union of India & Ors.
8. A.I.R. 1994 SC 495 : Dr. H. Mukherjee Vs. Union of India & Ors.
9. 2013 (II) OLR (SC) 31 : Sr. Divisional Retail Sales Manager & Ors.Vs. Ashok Shankarlal Gwalani.

10. A.I.R. 1986 S.C. 302 : Harbans Lal Vs. Jagmohan Saran.
11. (2006) 5 SCC 173 : Municipal Council, Sujanpur Vs. Surinder Kumar.
12. (2008) 2 SCC 417 : Sarabjit Rick Singh Vs. Union of India.
13. (2008)14 SCC 171 : Assistant Commissioner, Income Tax, Rajkot Vs. Saurashtra Kutch Stock Exchange Limited.
14. (2010) 13 SCC 336) : Sant Lal Gupta and Ors. Vs. Modern Cooperative Group Housing Society Ltd. & Ors.

For Petitioner : Mr. Jayant Rath, Sr. Adv.

For Opp. Parties : Mr. Pabitra M. Pattajoshi
Mr. Sanjeev Udgata.

JUDGMENT Date of Hearing: 31.10.2022: Date of Judgment: 28.11.2022

S. K. SAHOO, J.

The petitioner Dr. Manoj Kumar Ghosal has knocked at the portals of this Court by filing this writ petition with a prayer to quash the impugned notification dated 19.08.2019 under Annexure-9 issued by the Odisha University of Agriculture and Technology (OUAT), Bhubaneswar (hereafter 'opposite party no.1 University') with a further prayer to appoint him in the post of Dean of Students Welfare, OUAT as per his selection by the Standing Selection Committee (opposite party no.4) pursuant to the circular dated 26.04.2018 under Annexure-2.

2. It is the case of the petitioner that the opposite party no.1 University is a body corporate established under the Odisha University of Agriculture of Technology Act, 1965 (hereafter 'OUAT Act') imparting agriculture related education and research and is funded by the Government of Odisha. The opposite parties nos.2 to 4 are the Officers of the University. After completing M.Tech (Agricultural Engineering) from IIT, Kharagpur and Ph.D. from IIT, Delhi, the petitioner joined the opposite party no.1 University on 30.04.1990 as Research Assistant (Agricultural Engineering) and he was promoted to the post of Assistant Professor on 22.01.1991 and thereafter to the post of Associate Professor on 22.01.2004 and finally, he was working as Professor in the University since 22.01.2010 and now he is the Professor in the Department of Farm Machinery and Power, College of Agricultural Engineering and Technology under the opposite party no.1 University.

It is the further case of the petitioner that the post of Dean of Students Welfare in the opposite party no.1 University fell vacant sometime during April, 2018 and the said post being a very important post in the administration and management of discipline among the students, on 26.04.2018 a circular was issued for filing up of the said post and the following eligibility and qualification for appointment to the said post was specified in the advertisement:

(i) The Dean, Students Welfare shall be selected from amongst the Professors of the University or the persons of equivalent rank having experience as such for a minimum period of five years in the concerned faculty; and

(ii) The Dean, Students Welfare shall be a person trained in students' welfare activities who would be able to shoulder the duties and responsibilities prescribed in the Act and Statutes.

Similar eligibility and qualification criteria have also been prescribed under the OUAT Act and Statute 8A of the OUAT Statutes, 1966 for appointment to the post of Dean of Students Welfare.

It is the further case of the petitioner that since 2010, he was working as Professor in the opposite party no.1 University and that he had completed about nine years as such and that he was also involved in the following students' welfare activities in the University:-

(i) Working as Superintendent of Boys' Hostel of OUAT (Krupasindhu Hostel) from June 2016 till date.

(ii) Worked as Assistant Superintendent of Kharvela Hostel (Hostel No.6) from 2008-2010 and Superintendent from March, 2010 to January, 2011.

(iii) Working as NSS Programme Officer to look after the NSS activities of College of Agricultural Engineering and Technology, OUAT, Bhubaneswar from 2005 till date.

(iv) Working as the Vice President of the Athletic Society of the College of Agricultural Engineering and Technology from 2004-2008.

(v) Worked as member anti-ragging squad of the College of Agricultural Engineering and Technology from 2004 till date.

(vi) Organizing NSS Special Camp (two times).

(vii) Accompanying two study-tours with UG students.

It is the further case of the petitioner that in addition to his rich experience in the students' welfare activities, he had also good research and academic contributions in the agricultural and allied subjects. The petitioner having fulfilled all other criteria prescribed in the Statute as well as the circular, applied for the post of Dean of Students Welfare pursuant to the circular under Annexure-2 by making proper application along with other requisite documents.

It is the further case of the petitioner that the opposite party no.1 University constituted a Screening Committee under the Chairmanship of Dr. P.K. Roul, Dean, Extension Education, OUAT vide office order dated

22.06.2018 in order to scrutinize the applications received pursuant to the aforesaid circular under Annexure-2, inter alia, for filling up of the post of Dean of Students Welfare. The applications of the petitioner and others received for the said post were scrutinized by the Screening Committee in its meeting held on 23.08.2018 and upon such scrutinization, the Screening Committee observed that the petitioner along with six other candidates are eligible to be considered for the said post.

It is the further case of the petitioner that Statute 3 of the OUAT Statutes, inter alia, prescribed the manner of appointment of Officers of the University which includes the Dean of Students Welfare. As per the said Statute, there shall be a Standing Selection Committee under the Chairmanship of the Vice-Chancellor of the University, inter alia, to deal with appointment of Officers of the University including the Dean of Students Welfare. In terms of the said Statute, the opposite party no.4 Standing Selection Committee issued notice dated 01.09.2018 to the petitioner to attend the meeting of the Committee on 05.09.2018 along with the original certificates and mark sheets as well as list of research publications etc. and as per the schedule, the petitioner attended the meeting of the Standing Selection Committee on 05.09.2018 and produced all the required documents and also made power point presentation.

It is the further case of the petitioner that he came to know from reliable sources that the Standing Selection Committee after considering the qualification and criteria of all the eligible candidates and upon interview, selected him to be appointed as the Dean of Students Welfare in OUAT and accordingly, the same was placed before the opposite party no.2 Chancellor for appointment. At that time, the opposite party no.2 wanted to know from the opposite party no.3 Vice-Chancellor who is also the Chairman of the Standing Selection Committee whether a certain type of experience was considered while assessing the candidates for selection and appointment as Dean of Students Welfare which are essentially required for the post, to which the opposite party no.3 clarified that the Selection Committee had taken into account the same and reiterated selection of the petitioner and in spite of such reiteration, the result of the selection process was not published.

It is the further case of the petitioner that after having appeared before the Standing Selection Committee on 05.09.2018, the petitioner waited for the result of the selection process and since no result was published, he vide letters dated 17.12.2018 and 09.03.2019 drew the attention of the opposite party no.2 requesting him to look into the matter for declaration of the result. In the meantime, the petitioner through one of his acquaintance made an application

under the RTI Act seeking various information relating to the selection process for the post of Dean of Students Welfare pursuant to the circular under Annexure-2, but the Public Information Officer of the University vide letter dated 16.01.2019 only provided information relating to the list of eligible applicants and candidates appeared in the viva voce examination and the Public Information Officer in reply to the information relating to recommendation of the Selection Committee and the result of the selection process has stated that the same had not been declared.

It is the further case of the petitioner that under the OUAT Statute, it is the Standing Selection Committee who is to deal with the appointment of its Officers including the Dean of Students Welfare and after the said Selection Committee upon proper scrutiny, verification and interview selects a person to be appointed to the said post, the opposite party no.2 has no jurisdiction either to sit over such recommendation or reject the same. It is the further case of the petitioner that the Standing Selection Committee pursuant to the circular and interview, has recommended the name of the petitioner for being appointed as Dean of Students Welfare and notwithstanding such recommendation by statutorily constituted Standing Selection Committee following due process of law, the opposite party no.2 is sitting over the matter. According to the petitioner, the appointing authority i.e. opposite party no.2 ought not to have illegally and arbitrarily sat over the recommendation of the duly constituted Selection Committee.

It is the further case of the petitioner that while the matter stood thus and more than one and half years from the date of circular dated 26.04.2018 was passed, the opposite party no.1 vide notification dated 19.08.2019 under Annexure-9 cancelled the selection process and asked to conduct fresh selection to the post of Dean of Students Welfare, OUAT and the said notification has been issued by the Registrar, OUAT by the order of opposite party no.3. In the said notification, it is further stated that the decision to cancel the selection process has been taken pursuant to the letter of the Special Secretary to the Chancellor opposite party no.2 dated 09.07.2019.

It is the further case of the petitioner that since the petitioner has already been selected to the advertised post, he had a right to be considered for appointment and the opposite party no.1 ought not to have ignored the select panel by cancelling the selection process after one and half years from the date of advertisement and the opposite parties by virtue of the impugned notification dated 19.08.2019 has declined to make the appointment on its whims particularly when there is a vacancy which can be offered to the petitioner keeping in view

his selection and therefore, there was no justifiable reason on the part of the opposite party no.1 to cancel the selection process by declining to appoint the petitioner who had already been selected and as such, the impugned notification dated 19.08.2019 under Annexure-9 should be quashed as grossly unfair, arbitrary and not bonafide.

3. This Court issued notice to the opposite parties and observed vide order dated 21.10.2019 in I.A. No.13728 of 2019 that as an interim measure, any selection/appointment to the post of Dean of Students Welfare pursuant to the circular dated 24.09.2019 (annexed as Annexure-D/4 to the counter affidavit filed on behalf of opposite party no.2) shall abide by the result of the writ petition.

4. The opposite parties nos.1 and 3 have filed their joint counter affidavit indicating therein that the petitioner was promoted to the rank of Professor under Career Advancement Scheme since 22.01.2010 and that his involvement in students related activities is not disputed. The Standing Selection Committee after taking interview of all candidates, including the petitioner sent its recommendation in sealed cover to the office of the Chancellor and after verification of the result sheet, certain points of objection were raised by the office of the Chancellor and communicated vide letter dated 17.09.2018 and the proceedings of the Standing Selection Committee were returned back vide letter dated 03.01.2019 with instruction to reconvene the selection committee and to reassess all the candidates as per observation of the Chancellor. It is further stated that since reconvening of the same selection committee to reassess the same candidates afresh would not have been appropriate, as per observation of the Vice Chancellor, clearance was sought for from the office of the Chancellor for starting the process afresh, with fresh notification and after obtaining clearance, process went on for fresh notification after cancelling the previous selection process vide impugned notification under Annexure-9 and after cancellation, fresh applications were invited from the eligible Professors vide circular dated 24.09.2019, with last date of application as 15.10.2019 at 5.00 p.m. It is further mentioned that the Chancellor has got no jurisdiction to reject the recommendation of the Standing Selection Committee. Section 6.1 of OUAT Act prescribes that the Dean of Students Welfare is an officer of the opposite party no.1 University. Section 6.2 of the said Act prescribes that the Officers of the University specified in Clause (ii) to (xi) of subsection (1) shall be appointed by the Chancellor. The Governor shall be the Chancellor of OUAT as specified in the section 7(1) of OUAT Act and as per the provision of OUAT Act, Dean of Students Welfare is appointed by the Chancellor. Statute 3(1)(i) of OUAT Statute, 1966 states that in order to deal with appointments of officers, teachers

and other employees, there shall be a Standing Selection Committee. As per Statute 3(1)(ii) of the said Statute and notification No.35639 dated 25.11.2004, the Standing Selection Committee for appointment of teachers and officers as enumerated in clauses (iv) to (xi) of sub-section (1) of section 6 of the OUAT Act are as follows:-

> Standing Selection Committee:
>
> (a) Vice-Chancellor … Chairman
>
> (b) Two co-opted members to be nominated by the Vice-Chancellor in consultation with the State Government from among experts in the subject concerned the post for which recruitment is to be made;
>
> (c) The Secretary to Government, Agriculture Department or his nominee who should not be less than that of an Additional Secretary in the rank;
>
> (d) An Academician nominated by the Chancellor.

In view of the above provision of the OUAT Statute, selection of Dean of Student Welfare was conducted by Standing Selection Committee of OUAT and the selected candidate was to be appointed by the Chancellor of OUAT.

It is further stated in the counter affidavit that out of seven numbers of eligible candidates, six numbers of candidates appeared before the Standing Selection Committee held on 05.09.2018 which would be implied from the attendance sheet of the candidates under Annexure-6 and the name of the recommended candidates by the Standing Selection Committee for the post of Dean of Students Welfare was kept by the Standing Selection Committee in a sealed cover and the same was intimated to the office of the Chancellor vide letter dated 05.09.2018 of the Vice-Chancellor for appointment of the recommended candidate to the post of Dean of Students Welfare.

It is further stated in the counter affidavit that the Circular under Annexure-2 indicates that the University reserves right to cancel the interview or the entire process of selection if so required. Further, it is the appointing authority to decide whether appointment would be given to the selected candidate or not. As such, appearance of the petitioner before the selection committee for the post of Dean of Students Welfare did not confer him right to claim for appointment as such. In the meantime, the selection of Dean of Students Welfare held on 05.09.2018 was cancelled by the Chancellor vide letter dated 09.08.2019 and notified by OUAT vide notification dated 19.08.2019 under Annexure-9 and the selection process has started afresh.

It is further stated in the counter affidavit that the entire selection process for the post of Dean of Students Welfare held on 05.09.2018 was cancelled by the Chancellor, OUAT and the order of the Chancellor was communicated by the Special Secretary to the Chancellor vide letter No.10161/SG(HE) dated 09.08.2019 under Annexure-F/1 and as per order of the Chancellor, the selection process for the post of Dean, Students Welfare held on 05.09.2018 was cancelled through impugned notification under Annexure-9.

It is further stated in the counter affidavit that the appointing authority Chancellor has already cancelled the entire selection process and a fresh selection process has been started with an issue of circular no.15782 dated 24.09.2019, in inviting applications from the eligible candidates. It is also stated that in the Circular No.8120 dated 26.04.2018, it is mentioned that the University reserves right to cancel the interview or the entire process of selection and appointment of Dean, Students Welfare is made by the Chancellor, not by the Registrar and the entire process of selection was cancelled by the appointing authority, the Chancellor and therefore, the petitioner's claim being devoid of merit, liable to be rejected.

5. Counter affidavit has also been filed on behalf of opposite party no.2, Chancellor, OUAT wherein it is stated that the petitioner did not satisfy the eligibility condition and that the opposite party no.2 was not bound by the recommendation of the Standing Selection Committee and the petitioner did not have indefeasible right to claim appointment to the post of Dean of Students Welfare, OUAT merely because the Standing Selection Committee recommended his name to such post.

It is further stated that the post of Dean of Students Welfare is a tenure post for three years. Under the OUAT Act and the Statute, the Dean of Students Welfare shall have the following duties and power:-

OUAT Act, 1965

"13.

(1) The Dean of Student Welfare shall be responsible to the Vice-Chancellor.

(2) The Dean of Student Welfare shall have the following duties, namely:-

(i) to make arrangements for the housing of students;

(ii) to direct a programme of student counseling;

(iii) to arrange for the employment of students inaccordance with plans approved by the ViceChancellor;

(iv) to supervise the extra-curricular activities and needs of students;

(v) to assist the graduates, who leave the University in procuring employment;

(vi) to organize and maintain contact with the Alumni of the University; and

(vii) to perform such other duties as may be assigned to him by the Board or the Vice-Chancellor.

OUAT Statutes, 1966

9.(1) In addition to the duties conferred upon theDean of Student Welfare by or under the Act, he shall have the following powers and duties namely:-

Administrative Powers:

(a) He shall:-

(i) Be responsible to the Vice-Chancellor in the exercise of powers and discharge of duties contained under the Act or these Statutes;

(ii) Take steps to promote employment of the students within the various services of the University wherever such employment is beneficial to students and in the best interest of the University programmes involved;

(iii) Formulate the rules for the control of housing and hostel for students including the selection and appointment of Wardens, supervision over the masses and control of sanitary arrangements and similar facilities;

(iv) Plan and direct, in co-ordination with other University Officers, all non-curricular activities for students including clubs, recreations centers, cooperatives, etc., as may from time to time approvedby the University for the welfare of the students;

(v) Co-operate with the staff in charge of Physical Education Programmes, National Cadet Corps activities and related activities of students as required by the University;

(vi) Allot residential accommodation to students;

(vii) Make arrangements for scholarships, stipends, part-time employments and other such student assistance;

(viii) Communicate with the guardians of students concerning the welfare of the students;

(ix) Deal, in consultation with the Dean of the Faculty concerned, with the student indiscipline, excessive absenteeism and other students irregularities from point of view of maintenance of discipline and act as Ex-Officio Chairman of the Committee on Student Discipline;

(x) Supervise health programme and medical facilities for students;

(xi) Explore the possibilities of finding suitable employment for Graduates and arrange their interview with prospective employers;

(xii) Sanction all kinds of leave of the University employees working under him.

It is further stated in the counter affidavit that the opposite party no.1 by order of the opposite party no.3 issued circular dated 26.04.2018 in inviting applications for the post of Dean, Students Welfare and the essential qualification and experience prescribed for the post as on the last date of application i.e. 19th May 2018, would be considered and the University reserved the right to cancel the interview or entire process of selection or might not conduct the interview if so required. It is further stated that the opposite party no.3 by letter dated 05.09.2018 sent amongst others, the recommendation of the candidates by the Standing Selection Committee for perusal and order of appointment by the opposite party no.2. It is further stated that while perusing the recommendation of the candidates made by the Standing Selection Committee for the post of Dean of Students Welfare, OUAT, the opposite party no.2 observed that while assessing the candidates, the Standing Selection Committee had not taken into consideration their respective training and experience necessary for the post of Dean of Student Welfare, an essential condition in the statute and the circular issued inviting application for the said post and the said eligibility criteria relates to soft skill management of students outside the class room which has a reasonable, relevant and rational nexus with the duties and responsibilities to be shouldered by the appointee as prescribed in the OUAT Act and the Statute for the post of Dean of Student Welfare and therefore, the opposite party no.2 returned the recommendation of Selection Committee dated 05.09.2018 to the opposite party no.3 to look into the said aspect while selecting the candidate for the post of Dean of Students Welfare, OUAT, a matter connected with the smooth administration of the University.

It is further stated that the opposite party no.3 thereafter resubmitted the said recommendation without any fresh meeting of selection committee and without devising any parameter of soft skill for making a realistic assessment of the suitability of a candidate to become Dean of Students Welfare, OUAT as per provisions prescribed in OUAT Act, 1964 and the Statute made thereunder. The opposite party no.3 was requested to convene the same selection committee to assess the suitability of all the candidates and to resubmit the final assessment for appropriate decision of the opposite party no.2. The opposite party no.1 by letter dated 11.06.2019 intimated that when the file was placed before the opposite party no.3, the latter observed that compliance with all the observation made by the opposite party no.2 could be viable, if a fresh selection of Dean of Student Welfare is made and requested for cancellation of previous selection process and thereafter, the selection process for the post of Dean of Student Welfare held on 05.09.2018 pursuant to circular under Annexure-2 was cancelled by the opposite party no.2 on the basis of observation made by the opposite party no.3 and the same was communicated to the opposite party no.3

by letter dated 09.08.2019 and pursuant to the aforesaid cancellation, the OUAT issued fresh circular dated 24.09.2019 under Annexure-D/4 inviting application for the post of Dean of Student Welfare. It is further stated that the person whose name finds place in the select panel has no vested right to get appointment in the said post in spite of vacancy existing and in this case, the decision of the authority to cancel the selection process and to hold a fresh selection was taken in a bonafide way for appropriate reasons.

It is further stated in the counter affidavit that the petitioner was not prejudiced in any manner inasmuch as he had already applied for the post of Dean of Student Welfare, OUAT pursuant to aforesaid circular dated 24.09.2019 (Annexure-D/4) issued by the OUAT and that the petitioner has no cause of action to file the writ petition and therefore, the same should be dismissed.

6. The petitioner filed a rejoinder affidavit to the counters filed by opposite parties nos.1 and 3 and counter filed by opposite party no.2 wherein it is mentioned that the opposite parties in their counter affidavits while justifying the impugned cancellation of the notification dated 26.04.2018 for selection of Dean, Students Welfare, OUAT wherein the petitioner was selected, have alleged certain new facts and have suppressed certain material facts. It is further stated that the opposite parties while admitting about recommendation of the name of the petitioner as the selected candidate by the duly constituted Selection Committee pursuant to the Circular for appointment dated 26.04.2018, have stated that such recommendation was returned back with some observations by the opposite party no.2 to the opposite party no.3 being the Chairman of the Selection Committee and was instructed to re-convene the Selection Committee for assessing all the candidates as per the observation. However, the opposite party No.3 thought it fit to go for a fresh selection in order to comply the observations made by the Chancellor and hence the selection process pursuant to Circular dated 26.04.2018 was cancelled vide notification under Annexure-9 with the concurrence of the Chancellor and new Circular for fresh selection was issued.

It is further stated in the rejoinder affidavit that the Standing Selection Committee after conclusion of the selection process pursuant to the circular dated 26.04.2018 (Annexure-2) found the petitioner as the most suitable candidate for appointment to the post of Dean, Students Welfare, OUAT and accordingly, recommended the name of the petitioner vide letter dated 05.09.2018 along with the result sheet to the opposite party no.2 being the appointing authority for appointment. The Chancellor pursuant to such recommendation by the Selection Committee, has observed that the Selection

Committee has not taken into consideration the respective training and experience necessary for the post of Dean, Student Welfare which is an essential condition in the statute and the circular invited for the post. It is further alleged that the said eligibility criteria relates to soft skill management of students outside the classroom. Observing the same, the Chancellor returned the recommendation to the opposite party no.3 to look into the said aspect.

It is further stated in the rejoinder affidavit that the petitioner has learnt from the reliable sources that the Chancellor vide its letter dated 17.09.2018 has observed that the Selection Committee has not taken into consideration the experience as Hostel Superintendent or Student Advisor etc. while assessing the candidate. In the said letter dated 17.09.2018, the Chancellor has observed that these experiences relates to soft skill of managing students outside the classroom. The opposite party no.3 being the Chairman of the Selection Committee vide his letter dated 06.11.2018 categorically replied that the Selection Committee while assessing the candidates has taken into consideration the experience as Hostel Superintendant and the Student Advisor as observed by the Chancellor. It is further stated that the Vice-Chancellor has clarified that such assessment has been made as per the biodata submitted and presentation made by the candidates in the interview and has further elaborated the experience of the recommended candidate outside the classroom meeting to the observation of the Chancellor. By so clarifying, the Vice-Chancellor (Chairman of Selection Committee)/opposite party No.3 once again placed the recommendation before the Chancellor for necessary appointment. It is further stated that all the observations made by the Chancellor in his letter dated 17.09.2018 has been duly complied with and observed by the Vice-Chancellor.

It is further stated in the rejoinder affidavit that as observed by the Chancellor, the experience as Hostel Superintendent or Students Advisor etc. relates to soft skill management of students outside the classroom and the Vice Chancellor clarified that the selection committee considered all such experiences of the selected candidate (petitioner) as well as such experience of other candidates and upon such consideration, the recommendation was made.

It is further stated in the rejoinder affidavit that the statute 3(1)(v) of the OUAT Statute stipulates the that the Dean of Students Welfare shall be a person trained in students welfare activities, who would be able to shoulder the duties and responsibilities prescribed in the Act and Statutes. Such stipulation in the Statute has also been stated in “Eligibility and Qualification” condition of the circular for appointment apart from the other requirement of minimum five years of experience as Professor of the University. Except this, neither the Act or the

Statute nor the Circular for appointment in question stipulate any other eligibility condition or qualification criteria for appointment to the post in question. Further, nowhere the OUAT Act, 1965 or the OUAT Statute or for that matter the circular for appointment stipulate any parameter for assessing such soft skill management of the candidates. Notwithstanding the same, the observation of the opposite party no.2 regarding experience as Hostel Superintendent or Student Advisor of the candidates which relates to soft skill management of students outside classroom has been considered by the Selection Committee and upon such consideration, the petitioner has been selected and duly recommended. The observations of Chancellor with respect to the recommendation by the Selection Committee having been duly complied with, the authorities ought not to have dumped the whole selection process by merely stating that fresh selection was necessary to comply with the observations of the Chancellor.

It is further stated in the rejoinder affidavit that the reason of dumping the whole selection process by the opposite parties pursuant to the circular dated 26.04.2018 amounts to introducing a wholly new criteria of selection after the circular for the appointment was issued and the Selection Committee made its recommendation and that such course of action is impermissible under law. The so-called parameter for soft skill management as stated in the counter affidavit of the opposite parties has nowhere been prescribed in the Act or the Statute or for that matter in the circular for appointment. Considering the same, the Chancellor has observed only regarding the experience as Hostel Superintendent or Student Advisor etc. for assessing the soft skill management and this observation has been duly taken care of by the Selection Committee and as such the opposite parties for no good reason and acting mechanically and arbitrarily have thrown out the selection process pursuant to circular dated 26.04.2018 and as such the same is illegal and deserves to be set aside.

It is further stated in the rejoinder affidavit that the Chancellor in his letter dated 03.01.2019, requested the Vice-Chancellor to re-convene the same Selection Committee to assess all the candidates as per his observations. Notwithstanding the same, the Vice-Chancellor for no good reasons and going beyond the mandate of the Chancellor decided to go for fresh selection without considering the exercise already made by the Selection Committee following a rigorous process of selection and therefore, the impugned cancellation of selection process is without any rational and legal basis but merely at the whims and caprices of the authorities.

It is further stated in the rejoinder affidavit that the appointing authority has ignored the recommendation of the statutorily constituted Selection

Committee for no good reasons. The Selection Committee through its chairman has duly complied with the observations made by the Chancellor, yet the recommendation has been illegally ignored. Such action of ignoring the select panel by the appointing authority on its whims is unsustainable in the eyes of law.

It is further stated in the rejoinder affidavit that introducing a fresh criteria of appointment to a post after the selection panel has been drawn is against the basic tenets of law. After the petitioner was duly selected and his name being recommended by the Selection Committee, the authorities on the plea of assessing the candidates on a new criteria alien to the Statute as well as the Circular for appointment, cancelled the selection process and therefore, the impugned cancellation is illegal.

It is further stated in the rejoinder affidavit that the statutory provisions governing the impugned appointment would show that all the criterias and qualification as prescribed therein were duly complied with while selecting and recommending the name of the petitioner for being appointed to the post in question. Further, the Standing Selection Committee which recommended the name of the petitioner for being selected comprised of an academician nominated by the opposite party no.2 and as such all the concerns of the Chancellor has been considered by the Selection Committee.

It is further stated in the rejoinder affidavit that the right of the opposite party no.1 University to cancel the interview or the selection process or the right of the appointing authority to decide must be exercised fairly and not merely at their whims. The University as well as the appointing authority is obliged under law to assign good reasons for ignoring the recommendation of the statutorily constituted Selection Committee.

It is further stated in the rejoinder affidavit that the petitioner having been found to have fulfilled all the eligibility condition, was selected and recommended by the statutorily constituted Selection Committee in which one of the members was the nominee of the opposite party no.2 and that apart, at no point of time, the opposite party no.2 in any of his communication raised such allegation regarding non-fulfillment of eligibility condition by the petitioner.

7. Mr. Jayant Rath, learned Senior Advocate appearing for the petitioner submitted that the Standing Selection Committee was constituted strictly in accordance with the provisions of the Statute of OUAT. After the decision was taken by the Selection Committee, the name of the petitioner was recommended

to the office of the Chancellor for his appointment as Dean of Students Welfare which was made by the Vice Chancellor, the Chairman of the Selection Committee, inter alia, comprising of two expert members i.e. Chancellor's nominee and Government's nominee. After receipt of such recommendation, without due application of mind, the Principal Secretary of the Chancellor wrote a letter to the Vice-Chancellor on 17.09.2018 that the Selection Committee has not taken into consideration the experience as Hostel Superintendent or students' advisor etc. while assessing the candidates for selection and appointment to the post of Dean of Students Welfare which is an essential condition in the Statute and the circular issued and the said eligibility criteria relates to soft skill of managing students outside the class room which has got a reasonable, relevant and rational nexus with the duties and responsibilities to be shouldered by the appointee and that the Chancellor desired that these experiences of the candidates should be looked into while selecting the candidates for such post. The Vice-Chancellor immediately replied that all relevant facts regarding selection have been taken into account and recommendation of the petitioner's name was made. The experience of the petitioner outside the classroom as per his biodata, meeting the requirement was also indicated. Without whispering anything about the contents of the communication made, the Additional Secretary of the Chancellor's Office requested the ViceChancellor to reconvene the meeting of the very same Standing Selection Committee to reconsider its decision. It is urged by the learned counsel that when all the aspects were taken care of by the Selection Committee while selecting and recommending the name of the petitioner for appointment as Dean of Students Welfare, the Vice-Chancellor illegally and without assigning any valid reason, communicated to the Chancellor's Office suggesting to have a fresh selection by constituting a selection committee afresh and referring to such communication, the Special Secretary to the Chancellor communicated that the Chancellor has been pleased to cancel the selection and recommendation and passed the order to initiate fresh selection process complying all observations of the Chancellor communicated earlier to the University. Learned counsel argued that issuance of the impugned notification is the outcome of complete nonapplication of mind to the materials on record. According to him, the selection of the duly constituted Selection Committee cannot be cancelled as a matter of course, thereby reducing the selection process as farce. There was no valid reason for the same and the actions of the opposite parties are not legal but whimsical and therefore, the impugned order is not sustainable in the eyes of law and should be quashed and the opposite party no.2 should be directed to appoint the petitioner as the Dean of Student Welfare of OUAT. In support of such contention, Mr. Rath placed reliance in the cases of **R.S. Mittal -Vrs.- Union of India reported in 1995**

Supp (2) Supreme Court Cases 230, A.P. Aggarwal -Vrs.- Govt. of NCT of Delhi and another reported in (2000) 1 Supreme Court Cases 600and AshaKaul (Mrs.) and another -Vrs.- State of Jammu and Kashmir and others reported in (1993) 2 SupremeCourt Cases 573.

8. Mr. Pabitra Mohan Pattajoshi, learned counsel appearing for the opposite parties nos.1 and 3 reiterated the stand taken in the counter affidavit and submitted that when after verification of the result sheet, certain points of objection were raised by the office of the Chancellor and the proceedings of the Standing Selection Committee were returned back with instruction to reconvene the selection committee and to reassess all the candidates as per observation of the Chancellor, since reconvening of the same selection committee to reassess the same candidates afresh would not have been appropriate, therefore, clearance was sought for from the office of the Chancellor for starting the process afresh with fresh notification and after obtaining clearance, process went on for fresh notification after cancelling the previous selection process.

9. Mr. Sanjeev Udgata, learned counsel appearing for the opposite party no.2, Chancellor, OUAT contended that neither the opposite party no.2 was bound by the recommendation of the Standing Selection Committee nor the petitioner has got any indefeasible right to claim appointment to the post of Dean of Students Welfare on the basis of recommendation of his name by the Committee to such post. He argued that when the opposite party no.2 after perusing the recommendation of the name of the petitioner made by the Committee observed that while assessing the candidates, the Committee had not taken into consideration their respective training and experience necessary for the post of Dean of Students Welfare and the eligibility criteria relates to soft skill management of students outside the class room, therefore, the opposite party no.2 was quite justified in returning the recommendation of selection committee to the opposite party no.3 to look into the said aspect while selecting the candidate for such post which was a matter connected with the smooth administration of the University. The training and experience necessary for the post of Dean of Students Welfare is an essential condition in the statute and the circular issued inviting applications for the said post and it has got a reasonable, relevant and rational nexus with the duties and responsibilities to be shouldered by the appointee and therefore, it cannot be ignored or sidelined. It is argued that the decision of the authority to cancel the selection process and to hold a fresh selection having been taken in a bonafide way for the best interest of the institution, it cannot be said there is any illegality or perversity in the same or that the petitioner was prejudiced in any manner and therefore, the writ petition should be dismissed. The learned counsel for the opposite party no.2 placed

reliance in the cases of **Director, SCTI for Medical Science & Technology and another -Vrs.- M. Pushkaran reported in (2008) 1 Supreme Court Cases 448, Sasmita Manjari Das -Vrs.- State of Orissa and others reported in 2015 (II) Indian Law Reports -Cut- 827, J. & K. Public Service Commission, etc. -Vrs.- Dr. Narinder Mohan and others etc. etc. reported in A.I.R. 1994 Supreme Court 1808, Lakhwinder Singh -Vrs.- Union of India and others reported in (2008) 7 Supreme Court Cases 648, Dr. H. Mukherjee -Vrs.- Union of India and others reported in A.I.R. 1994 Supreme Court 495 and Sr. Divisional Retail Sales Manager and others -Vrs.- Ashok Shankarlal Gwalani reported in 2013 (II) Orissa Law Reviews (SC) 31**.

10. Adverting to the contentions raised by the learned Counsel for the parties and on perusal of the records, following are the main issues, which arise for consideration in the present writ petition:-

> (i) Whether this Court, in exercise of jurisdiction under Article 226 of the Constitution of India can quash impugned notification dated 19.08.2019 under Annexure-9 and direct the petitioner to be appointed to the post of Dean of Students Welfare?
>
> (ii) Whether the appointing authority is empowered to interfere with the decision/recommendation of Standing Selection Committee? If so, on what ground(s)?
>
> (iii) Whether the impugned notification under Annexure-9 cancelling selection process for the post of Dean, Students Welfare as per the circular dated26.04.2018 (Annexure-2) is valid and legal?
>
> (iv) Whether the initiation of fresh process of selection and the consequential issuance of circular dated 24.09.2019 under Annexure-D/4 issued by the opposite party no.1 are valid and legal?

Discussion on issue no.(i) :
Scope and ambit of Article 226 of the Constitution of India:

11. Law is well settled that in exercising jurisdiction under Article 226 of the Constitution of India, this Court has the power to issue a writ of certiorari only when there is a failure of justice and it cannot be issued merely because it may be legally permissible to do so. It is obligatory on the part of the petitioner to show that a jurisdictional error has been committed by the statutory authority. There must be an error apparent on the face of the record as the High Court acts merely in a supervisory capacity and not as the appellate authority. An error apparent on the face of the records means an error which strikes one on mere

looking and does not need long drawn out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matters to show its incorrectness. Such errors may include giving reasons that are bad in law or inconsistent, unintelligible or inadequate. It may also include the application of a wrong legal test to the facts found, taking irrelevant consideration into account and failing to take relevant consideration into account, and wrongful admission or exclusion of evidence as well as arriving at a conclusion without any supporting evidence. Such a writ can also be issued when there is an error in jurisdiction or authority whose order is to be reviewed has acted without jurisdiction or in excess of its jurisdiction or has failed to exercise the jurisdiction vested in him by law. (Ref:- **HarbansLal -Vrs.- Jagmohan Saran : A.I.R. 1986 S.C. 302; Municipal Council, Sujanpur -Vrs.- Surinder Kumar : (2006) 5 Supreme Court Cases 173; Sarabjit Rick Singh -Vrs.- Union of India : (2008) 2 Supreme Court Cases 417; Assistant Commissioner, Income Tax, Rajkot -Vrs.- Saurashtra Kutch Stock Exchange Limited : (2008) 14 Supreme Court Cases 171, SantLal Gupta and Ors. -Vrs.- Modern Cooperative Group Housing Society Ltd. and Ors. : (2010) 13 Supreme Court Cases 336).**

Similarly this Court is empowered under Article 226 of the Constitution of India to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case, this Court, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion. (Ref:-**CAG -Vrs.- K.S. Jagannathan : (1986) 2 Supreme Court Cases 679).**

Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The decision of the Selection Committee can be interfered with only on limited

grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the recommendations, or proved mala fides affecting the recommendations etc. Jurisdictional review is permissible only to the extent of finding whether the process in reaching the decision has been observed correctly and not the decision as such. The evaluation made by an expert committee should not be easily interfered with by the Courts which do not have the necessary expertise to undertake the exercise that is necessary for such purpose. This Court cannot sit as an appellate authority to examine the recommendations of the Selection Committee like the Court of appeal. The discretion to make recommendation has to be given to the Selection Committee alone and the Courts rarely sit in appeal to examine the selection of the candidates nor is it the business of the Court to examine each candidate and record its opinion. Moreover, it is settled that the function of the Selection Committee is neither judicial nor adjudicatory, it is purely administrative.

Discussion on issue no.(ii) :

Power of appointing authority to interfere with the decision/recommendation of selection Committee:-

12. Whenever a duly constituted selection committee utilizing the services of experts makes a recommendation of a name for a post, it shall not be disturbed by the appointing authority unless there is any procedural irregularity or violation of any norm prescribed under the relevant rules or illegality in making such selection. If the appointing authority has unfettered powers to do as it likes, there is no need for framing the rules or following a prescribed procedure in this type of matters. The entire exercise done by the Selection Committee cannot be treated as a futile exercise by giving them an impression that their opinion would not be given due weight and regard. If there are sufficient reasons for rejecting the recommendation made by the selection committee like choosing a less meritorious candidate or a candidate with any stigma or punishments and if such recommendation is not made with due diligence and care, certainly the appointing authority has every right to interfere in such matters and issue directions either to correct such mistakes or to recommend the names of suitable candidates.

Discussion on issue nos.(iii) & (iv) :

Whether the cancellation of selection process for the post of Dean, Students Welfare and initiation of fresh process of selection with consequential issuance of circular by the opposite party no.1 are valid and legal?

13. OUAT is an educational institution which is dedicated to agriculture related research, extension services and education in agricultural science and technology. The post of the Dean of Students Welfare is a respectable and responsible post of such institution. Therefore, in making selection of a candidate for such important post, every care has to be taken to maintain transparency and to identify the best among the applicants. It seems that after a rigorous process of exercise made by the Selection Committee, out of the six eligible candidates, the petitioner was found to be the most suitable candidate for appointment to the post of Dean, Students Welfare and accordingly, his name was recommended for the post. It should not be forgotten that the Standing Selection Committee for appointment of such post comprised of Vice-Chancellor (opposite party no.3) as the Chairman of the Selection Committee, two coopted members nominated by the Vice-Chancellor in consultation with the State Govt. who acted as experts who were none else than two Vice-Chancellors of two different Agriculture Universities, State Government's nominee who in this case was Commissioner-cum-Secretary, Department of Agriculture and Farmer's Empowerment and also Chancellor's nominee.

When there is recommendation by such a high level body, due weight has to be given for such recommendation, except under exceptional and compelling circumstances. In the normal circumstances, the recommendation has to be approved without interference. If there are any extraordinary circumstances compelling the appointing authority to come to a different opinion, it has to assign cogent reasons that made it not to accept the recommendation made by the Standing Selection Committee. Keeping such an important post vacant in an institution of higher learning for years together leads to the disruption in the administration and discipline of students and fall of standards. Whenever there is recommendation, the appointing authority is expected to expedite such matters by clearing such files on priority basis.

At this stage, it would be worthwhile to discuss few citations placed by the learned counsel for the respective parties.

(i) In the case of **Dr. Narinder Mohan** (supra), the Hon'ble Supreme Court has been pleased to hold that once statutory rules have been made, the appointment shall be only in accordance with the rules. In the case of **Sasmita Manjari Das** (supra), it is held that if any condition is stipulated in the advertisement, it is to be strictly followed by the authority and in no case, it would be deviated.

In the case in hand, eligibility and qualification criteria have been prescribed under the OUAT Act and the OUAT Statutes for appointment to the

post of Dean of Students Welfare. In the circular under Annexure-2, it has been laid down that the Dean of Students Welfare shall be selected from amongst the Professors of the University or the persons of equivalent rank having experience as such for a minimum period of five years. He shall be a person trained in students' welfare activities who would be able to shoulder the duties and responsibilities prescribed in the OUAT Act and the OUAT Statutes. Thus the conditions stipulated under the OUAT Act and the OUAT Statutes so also in the circular under Annexure-2 were to be strictly followed by the authority in the appointment to the post of Dean of Students Welfare. The post has to be filled up as per the statutory rules and in conformity with the constitutional mandate.

(ii) In the case of **Lakhwinder Singh** (supra), the Hon'ble Supreme Court held that the suggestions of Special Selection Board in the matter of promotion are only recommendatory in nature and it can be varied or interfered with by the appointing authority. In the case of **Dr. H. Mukherjee** (supra), the Hon'ble Supreme Court held that the function of the Public Service Commission being advisory, the Government may for valid reasons to be recorded on the file, disapprove of the advice or recommendation tendered by the Commission, which decision can, if at all, be tested on the limited ground of it being thoroughly arbitrary, mala fide or capricious.

Thus, the selection and recommendation of the nameof the petitioner for the post of Dean of Students Welfare made by the Opposite party no.4 under the chairmanship of opposite party no.3 to the opposite party no.2 can be disapproved, inter alia, on the ground of arbitrariness.

(iii) In the case of **State of Orissa -Vrs.-Rajkishore Nanda reported in (2010) 6 Supreme Court Cases 777**, it is held that a person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for the purpose of appointment and that by itself does not amount to selection or create a vested right to be appointed. Similar view has been taken in the case of **Kulwinder Pal Singh and Ors. -Vrs.- State of Punjab reported in (2016) 6 Supreme Court Cases 532.**

In the case of **R.S. Mittal** (supra), it is held as follows:-

> "10. It is no doubt correct that a person on the select panel has no vested right to be appointed to the post for which he has been selected. He has a right to be considered for appointment. But at the same time, the appointing authority cannot ignore the select panel or decline to make the appointment on its whims. When a person has been selected by the Selection Board and there is a vacancy which can be offered to him, keeping in view his merit position, then, ordinarily, there is no justification to ignore him for appointment..."

In the case of **A.P. Aggarwal** (supra), the Hon'ble Supreme Court held as follows:-

> "11...It is not therefore open to the Government to ignore the panel which was already approved and accepted by it and resort to a fresh selection process without giving any proper reason for resorting to the same. It is not the case of the Government at any stage that the appellant is not fit to occupy the post. No attempt was made before the Tribunal or before this Court to place any valid reason for ignoring the appellant and launching a fresh process of selection.
>
> 12. It is well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us (vide **Shrilekha Vidyarthi -Vrs.- State of U.P. : A.I.R. 1991 S.C. 537**)."

In the case of **Asha Kaul** (**Mrs.**) (supra), it is held that it does not confer an absolute power upon the Government to disapprove or cancel the select list sent by the public service commission. Where, however, the Government is satisfied, after due enquiry that the selection has been vitiated either on account of violation of fundamental procedural requirement or is vitiated by consideration of corruption, favouritism or nepotism, it can refuse to approve the select list. It is true that mere inclusion in the select list does not confer upon the candidates included therein an indefeasible right to appointment, but that is only one aspect of the matter. The other aspect is the obligation of the Government to act fairly. The whole exercise cannot be reduced to a farce. Having sent a requisition/request to the Commission to select a particular number of candidates for a particular category, in pursuance of which the Commission issues a notification, holds a written test, conducts interviews, prepares a select list and then communicates to the Government, the Government cannot quietly and without good and valid reasons nullify the whole exercise and tell the candidates when they complain that they have no legal right to appointment.

A vested right in the matter of appointment will not accrue if there are valid reasons. It is true that a person selected, on account of being empanelled alone, does not acquire any indefeasible right of appointment, however, there is a legitimate expectation on the State not to act unfairly or arbitrarily. If without any valid reasons, a completed selection process is cancelled and an entire new selection process is taken up, it would reflect lack of bonafide and probably of malafide against the selected candidates.

In the case of **Director, SCTI for Medical Science & Technology** (supra), it is held as follows:-

> "11….Only because the name of a person appears in the select list, the same by itself may not be a ground for offering him an appointment. A person in the select list does not have any legal right in this behalf. The selectees do not have any legal right of appointment subject, inter alia, to bona fide action on the part of the State.
>
> ** ** ** ** ** **
>
> 16. It is, therefore, evident that the selectee as such has no legal right and the superior court in exercise of its power of judicial review would not ordinarily direct issuance of any writ in absence of any pleading and proof of mala fide or arbitrariness on the part of the employer. Each case, therefore, must be considered on its own merit.

In the case of **Ashok Shankarlal Gwalani** (supra), the Hon'ble Supreme Court held as follows:-

> "17. Generally, if an irregularity is detected in the matter of selection or preparation of a panel, it is desirable to have a fresh selection instead of re-arranging the panel which is found to be vitiated. The authority empowered to appoint, is the competent authority to decide as to whether the panel should be discarded and there should be a fresh selection.."

It is true that the petitioner did not acquire any indefeasible right of appointment merely because of recommendation of his name to the post of Dean of Students welfare, but in absence of violation of fundamental procedural requirement or that he is not fit to occupy the post, refusal to approve the select list recommended by the Selection Committee constituted of such a high level body reflects lack of bonafide rather the decision dehors sufficient reasons shows nonapplication of mind and smacks of arbitrariness and therefore, it becomes vulnerable. The legitimate expectation of the petitioner on the opposite parties not to act unfairly has been frustrated.

14. Selection based on merit, tested impartially and objectively, is the essential foundation of any useful and efficient public service. The object of any process of selection for an important post is to secure the best and the most suitable person for the job. Criteria for selection cannot be changed during the course of selection arbitrarily. There is no dispute that as appointing authority, the Chancellor (opposite party no.2) has every jurisdiction to examine as to whether a Selection Committee had been properly constituted and as to whether a selection had been properly made or not. The opposite party no.3 being the Chairman of the Selection Committee replied to the desire of the opposite party no.2 to look into the experience of the candidates as Hostel Superintendent or Students Advisor, that the Selection Committee while assessing the candidates, has taken into consideration the experience as Hostel Superintendant and the Students Advisor and that such assessment has been made as per the biodata

submitted and presentation made by the candidates in the interview and has further elaborated the experience of the recommended candidate (petitioner) outside the classroom. When the opposite party No.3 once again placed the recommendation before the opposite party no.2 for review and reconsideration and making necessary appointment and all the observations made by the Chancellor in his letter dated 17.09.2018 has been duly complied with and observed by the Vice-Chancellor who clarified that the selection committee considered all such experiences of the selected candidate (petitioner) as well as such experience of other candidates and upon such consideration, the recommendation was made, in such an event, the order of the opposite party no.2 in not approving the recommendation of the Selection Committee and asking the opposite party no.3 as to whether a fresh meeting of Selection Committee was held or not to consider the fresh recommendation and whether the OUAT has devised any parameters of soft skills for assessing suitability of a teacher to become the Dean of Students Welfare and whether all the applicants were assessed against those parameters and ultimately directing the opposite party no.3 to start fresh process of selection is leading to a conclusion that it is an arbitrary action much detrimental to the interest of the institute leading to delay in reaching finality in the matter. When the opposite party no.3 replied to the desire of the opposite party no.2 as above, there could be no earthly reason to deviate from the recommendation made in favour of the petitioner. Mr. Rath, learned Senior Advocate, is right, in his submission, that nowhere the OUAT Act, 1965 or the OUAT Statutes or for that matter the circular for appointment stipulate any parameter for assessing such soft skill management of the candidates. It seems that the Selection committee, inter alia, has taken into account the vast experience of the petitioner in working as Superintendent of Boys' Hostel of OUAT, (Krupasindhu Hostel), Assistant Superintendent and Superintendent of Kharvela Hostel (Hostel No.6) for different period, working as NSS Programme Officer to look after the NSS activities of OUAT, working as the Vice President of the Athletic Society of the College of Agricultural Engineering and Technology, working as member anti-ragging squad of the College of Agricultural Engineering and Technology, organizing NSS Special Camp (two times) and accompanying two studytours with UG students. Therefore, there were sufficient materials before the Selection Committee that among all the eligible candidates, the petitioner is best trained in student welfare activities, who would be able to shoulder the duties and responsibilities prescribed in the OUAT Act, 1965 or the OUAT Statutes and accordingly the recommendation of his name was quite justified. Thus the action of the opposite parties in ignoring the recommendation of the name of the petitioner and cancelling the selection process is unfair, unreasonable, arbitrary and patently

violative of Article 14 of the Constitution of India. The consequential issuance of fresh circular inviting applications for the post of Dean, Students Welfare, OUAT is also not sustainable in the eye of law.

15. In view of the foregoing discussions and in the facts and circumstances of the case, I am of the humble view that the impugned notification dated 19.08.2019 under Annexure-9 cancelling selection process for the post of Dean, Students Welfare as per the circular dated 26.04.2018 (Annexure-2) so also initiation of fresh process of selection and the consequential issuance of circular dated 24.09.2019 by the Registrar, OUAT (opposite party no.1) under Annexure-D/4 are without any valid reason and the same is arbitrary and unconstitutional and hereby quashed. I direct the opposite parties to take immediate steps in appointing the petitioner as Dean of Students Welfare, OUAT as he was duly selected by the Standing Selection Committee (opposite party no.4) and as nothing has been brought out against him on record. Accordingly, the writ petition is allowed. No costs.

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2022 (III) ILR - CUT- 1167

K.R. MOHAPATRA, J.

CMP NO. 778 OF 2022

URBASI SETHI .....Petitioner

.V.

NATHA BARIK & ORS. .....Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order X Rule 1 and Order XIV – Learned trial Court without adhering to the procedure laid down under Order X CPC posted the matter for hearing on the settlement of issues – Whether such procedure is admissible? – Held, No. – The procedure provided under Order X Rule 1 CPC is mandatory in nature – The learned trial Court should have adhered the procedure under Order X Rule 1 CPC before resorting to hearing on settlement of issue.

Case Laws Relied on and Referred to :-

1. 2011 (I) OLR 709 : Manorama Mohanta Vs. Orissa State Financial Corporation & Ors.
2. AIR 2021 SC 2161 : Rahul S. Shah Vs. Jinendra Kumar Gandhi & Ors.

For Petitioner : Mr. Bibekananda Bhuyan

For Opp. Parties : Mr. Narayan Prasad Parija

ORDER Date of Order: 02.11.2022

K.R. MOHAPATRA,J.

1. This matter is taken up through hybrid mode.

2. This CMP has been filed assailing the order dated 23rd July, 2019 (Annexure-3) passed by learned 1st Additional Senior Civil Judge, Cuttack in CS No.341 of 2019, whereby learned trial Court without adhering to the procedure laid down under Order X CPC posted the matter for hearing on the settlement of issues.

3. Mr. Bhuyan, learned counsel for the Petitioner submits that there is delay in assailing the order impugned herein and delay has been explained at para-9 of the CMP, which reads as under:-

> *"9. That the aforesaid illegalities committed by the Ld. Civil Judge came to the knowledge of the petitioner first time on 29.07.2022 when the certified copy vide Annexure3 was obtained for pursuing the hearing of CMP No.92 of 2022 before this Hon'ble Court and as such the same was not known to the petitioner beforehand. Therefore, there was no delay in challenging the same. Due to the COVID19 pandemic the petitioner could not challenge the said order before hand though the Hon'ble Apex Court hasexcluded the period of limitation from 15.03.2020 till 28.02.2022 and the delay in preparing the present CMP is neither deliberate nor willful. Hence the delay in filing the present CMP may be condoned and the present case be considered on its own merit."*

Mr. Bhuyan, learned counsel for the Petitioner submits that the ratio in the case of ***Manorama Mohanta Vs. Orissa State Financial Corporation and others, reported in 2011 (I) OLR 709*** is relevant for adjudication of the issue involved in this CMP, wherein it is held as follows:-

> *"5.At this stage, it is undisputed that the suit was posted for filing of draft issues on 24.10.2006. A suit should not be posted for filing of draft issues, rather a suit, after the pleadings are complete, should be posted for hearing under Order X, Rule 1 of the Code for ascertaining whether the allegations made in the pleadings are admitted or denied and for settlement of issues. There is no provision in the Code for posting of case for filing of the draft issues. Such a practice is not proper. Nevertheless, if the suit is posted for filing of draft issues, it cannot be held to be posted for hearing…."*

He also relied upon the decision in the case of ***Rahul S. Shah Vs. Jinendra Kumar Gandhi and others,*** reported in ***AIR 2021 SC 2161***, in para 42.1 of which, Hon'ble Supreme Court held as under:-

> ***42***. *All courts dealing with suits and execution proceedings shall mandatorily follow the below mentioned directions:*
>
> *42.1. In suits relating to delivery of possession, the court must examine the parties to the suit under Order 10 in relation to third-party interest and further exercise the power under Order 11 Rule 14 asking parties to disclose and produce documents, upon oath, which are in possession of the parties including declaration pertaining to third-party interest in such properties.*
>
> *42.2. In appropriate cases, where the possession is not in dispute and not a question of fact for adjudication before the court, the court may appoint Commissioner to assess the accurate description and status of the property.*
>
> *42.3. After examination of parties under Order 10 or production of documents under Order 11 or receipt of Commission report, the court must add all necessary or proper parties to the suit, so as to avoid multiplicity of proceedings and also make such joinder of cause of action in the same suit."*

He, therefore, submits that without adhering to the procedure under Order X CPC learned trial Court could not have proceeded for hearing on the settlement of the issues, which is provided under Order XIV CPC. It is his submission that Petitioner/Defendant No.1 all along was under impression that the matter is posted for hearing under Order X Rule 1 CPC. When the counter-claim of the Petitioner was not accepted, she filed CMP No.92 of 2022 assailing the said order. After obtaining certified copy of the entire order sheet of the suit, which was required to assist the Court for adjudication of CMP No. 92 of 2022, learned counsel for the Petitioner came to know that on the date of appearance of the Petitioner, the matter was posted for hearing on settlement of issues as the Defendant No.1 filed her written statement on the very date of her appearance. The procedure adopted by learned trial Court is unknown to law. Code of Civil Procedure as well as case law mandates the Court to adhere to the procedure under Order X Rule 1 CPC after completion of pleadings before proceeding for settlement of issues. Although the Petitioner participated in the proceeding of the suit on 23rd July, 2019, but the same does not preclude the Petitioner from challenging the order dated 16th July, 2019, as there cannot be estoppel against the law. He, therefore, prays for setting aside the direction of learned trial Court for hearing on settlement of issues vide order dated 16th July, 2019 (Annexure3) and prays for a direction to learned trial Court to adhere to the procedure provided under Order X Rule 1 CPC before proceeding ahead for hearing on settlement of issues.

4. Mr. Parija, learned counsel for the Plaintiff/Opposite Party vehemently objected to the above submission and contends that filing of the present CMP is an afterthought and is a novel attempt to patch up the lacunae on the part of

Defendant No.1 in challenging the order dated 29th July, 2022, whereby filing of counter-claim of the Defendant No.1 was not accepted. It is his submission that Defendant No.1/Petitioner all throughout participated in the suit without raising any objection with regard to procedure adopted by learned trial Court. Explanation given at para-9 of the CMP is an after thought. Since the Petitioner has participated in the hearing on settlement of issues on 23rd July, 2019; hence she cannot raise any objection afterward with regard to non-adherence of procedure adopted under Order X Rule 1 CPC. The Petitioner at that stage could have made a submission to learned trial Court to adhere to the procedure under Order X Rule 1 CPC. No doubt, the procedure provided under Order X Rule 1 CPC is mandatory in nature as laid down by this Court as well as Hon'ble Supreme Court. But, that does not give leverage to the Petitioner/Defendant No.1 to assail the order directing hearing on settlement of issues after lapse of almost two years. Hence, he prays that the CMP merits no consideration.

5. Upon hearing learned counsel for the parties and on perusal of record, it appears that the impugned order was passed on 16th July, 2019 directing hearing on settlement of issues. Admittedly, the impugned order was assailed before this Court after the lapse of almost two years. The Petitioner at para-9 of the CMP has explained that she could came to know that the Court has directed hearing on settlement of issues when she obtained the certified copy of order dated 29th July, 2022, by which prayer for acceptance of counter-claim of the Petitioner was rejected and was challenged in CMP No.92 of 2022. While arguing the matter, the Petitioner applied for certified copy of the order sheet in CS No.341 of 2019 and came to know about non-adherence of mandatory provision under Order X Rule 1 CPC. It has also been stated that due to COVID-19 pandemic, period from 15th March, 2020 till 28th February, 2022 has been excluded from limitation. Thus, there is hardly any delay in challenging the order dated 16th July, 2019. No period of limitation is provided to file applicationunder Articles 226 and 227 of the Constitution. In that view of the matter and more particularly when the point of law is raised in the CMP, this Court feels that delay, if any, in filing the CMP should be condoned and it is so ordered.

6. The language of Order X Rule 1 CPC makes the procedure laid down therein mandatory. Further, the ratio laid down in ***Manorama Mohanta*** (supra) and ***Rahul S. Shah*** (supra) also makes it clear that the procedure provided under Order X Rule 1 CPC is mandatory in nature. In addition to the above, Order XIV provides the procedure for settlement of issues. Sub-rule 5 of Rule 1 of the said Order provides as under:

> "*At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under Rule 2 of Order X and*

afterhearing the parties or their pleaders, ascertain upon what material proposition of fact or law the parties are at variance, and shall thereupon proceed to frame and record issue on which the right decision of the case appears to depend."

Thus, it is abundantly clear that hearing on settlement of issues must be preceded by hearing under Order X Rule 1 CPC. In view of the above, learned trial Court should have adhered the procedure under Order X Rule 1 CPC before resorting to hearing on settlement of issues.

7. This Court, accordingly, sets aside the direction for hearing on settlement of issues vide order dated 16th July, 2019 and consequential orders passed pursuant thereto and direct the learned trial Court to adhere to the procedure provided under Order X Rule 1 CPC and proceed accordingly.

8. The CMP is allowed to the aforesaid extent. No cost.

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2022 (III) ILR - CUT- 1171

K.R. MOHAPATRA, J.

W.P.(C) NO.11646 OF 2022

VEDANTA LTD. .....Petitioner

.V.

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

(A) ODISHA ELECTRICITY (DUTY) ACT, 1961 r/w AMENDMENT ACT, 2016 – Section 8(1) – Whether the Electrical Inspector is competent to take a decision with regard to exemption of electricity duty or ought to have referred to the Secretary of Energy Department, as per the proviso to Section-8 (1) of the 2016 Act? – Held, plain reading of Section-8 (1) of the 2016 Act makes it amply clear that the Electrical Inspector being authorised by the State Government within the local limit as may be specified are conferred with the powers to decide all disputes of liability & payment of the electricity duty or exemption there from. (Para 10)

(B) ODISHA ELECTRICITY AMENDMENT ACT, 2016 – Section 8(1) – Implication – Whether the proviso as introduced by virtue of amendment is an exception or qualification to the principal provision? – Held, the proviso does not in any manner curtail the power of the authorities rather adds a qualification to the principal provision empowering the authorities. (Para 10)

Case Laws Relied on and Referred to :-

1. (2005) 13 SCC 477 : Competent Authority Vs. Barangore Jute Factory & Ors.
2. (2004) 6 SCC 708 : Union of India Vs. Sanjay Kumar Jain

For Petitioner : Mr. Sujit Ghosh, Sr.Adv. & Mr. P.K. Nayak
For Opp. Parties : Mr. Swayambhu Mishra, Addl. Standing Counsel.

JUDGMENT Date of Hearing : 25.08.2022 : Date of Judgment: 11.11.2022

K.R. MOHAPATRA, J.

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

2. Petitioner being a Private Limited Company calls in question the inaction of the authorities under the Electricity Act, 2003 (hereinafter referred to as 'Electricity Act') and Odisha Electricity (Duty) Act, 1961 (herein after referred to 'Electricity Duty Act') in considering its representation dated 5th August, 2021.

3. Before delving into the issue involved in this writ petition, it would be profitable to deal with certain relevant provisions of the Electricity Duty Act (pre and post-amended) for adjudication of the writ petition.

3.1 Section 8 of the Electricity Duty Act, 1961 reads as follows:-

> ***"Disputes between the licensee and the consumer***-
>
> *(1) The Chief Electrical Officer or such other officer not below the rank of an Assistant Engineer or an Assistant Electrical Inspector as may be authorized by the State Government in that behalf shall have the power to decide all disputes relating to the liability for payment of the electricity duty or exemption therefrom.*
>
> *(2) Subject to the decision in appeal before such authority as may be constituted by the State Government in that behalf by a notified order, preferred within three months from the date of the order under sub-section (1), such order shall be final"*

Subsequently, the Electricity Duty Act was amended and published in Gazette Notification dated 5th November, 2016, which received the assent of the Governor of Odisha on 3rd November, 2016. Amended provisions of the Odisha Electricity (Duty) Amendment Act, 2016 reads as under:-

> *"(1) The Chief Electrical Inspector, Electrical Inspector or Deputy Electrical Inspector as may be authorized by the State Government within the local limit as may be specified in that behalf shall have the powers to decide all disputes relating to the liability for payment of the electricity duty or exemption therefrom:*

Provided that in case of any dispute relating to exemption of electricity duty as an incentive under different Policy Resolutions of the State Government, such dispute shall be referred to the Secretary to Government, Energy Department, whose decision shall be final.

(1-a) Any person, aggrieved by the order passed by the authority referred to in sub-section (1), may prefer an appeal accompanied with such fee as may be prescribed, before,—

(a) the Principal Chief Electrical Inspector, where the order is passed by the Chief Electrical Inspector;

(b) the Chief Electrical Inspector, where the order is passed by the Electrical Inspector; and (c) the Electrical Inspector, where the order is passed by the Deputy Electrical Inspector, within one month from the date of the order passed under sub-section (1) and the decision in appeal under this subsection shall be final subject to appeal, if any, preferred under sub-section (2):

Provided that no appeal shall be admitted unless the appellant makes a deposit of fifty percentum of the amount disputed.

(c) in sub-section (2), for the words, figure and bracket "under sub-section(1)", the words, figure and bracket "under sub-section (1-a)" shall be substituted."

4. As reveals from the writ petition, the Petitioner-Company is engaged in the business of production and export of Aluminum. It has set up its processing unit, *'Aluminum Smelter'* within the Special Economic Zone (SEZ) area under the provisions of Special Economic Zone Act, 2005 (hereinafter called 'SEZ Act'). Claiming exemption from levy of electricity duty upon auxiliary consumption of 3 x 600 MW Captive Generating Plant (CGP), i.e., Units- I, III and IV and refund of money already deposited towards electricity duty along with applicable interest, the Petitioner-Company made a representation to the Chief Electrical Inspector, Sambalpur-Opposite Party No.2 stating *inter alia* that electricity generated by the Captive Generating Plant (CGP) within Domestic Tariff Area is being consumed by its Aluminum Smelter situated within SEZ area. Hence, the auxiliary energy consumption should be exempted from levy of electricity duty by virtue of Section 50 of the SEZ Act and Clause-9 of the Special Economic Zone Policy, 2015 (hereinafter referred to as 'SEZ Policy'). Such representation although filed on 5th August, 2021 and the Petitioner has already submitted documents in support of its claim pursuant to letter dated 7th August, 2021 of the Opposite Party No.2 (Annexure-6 series), but no action on its representation was taken till filing of the writ petition. Hence, this writ petition has been filed.

5. Counter affidavit has been filed stating that the Opposite Party No.2 vide its letter No.ED/CORR/JSG/30/2462 dated 29th December, 2021, letter No. 663

dated 20th May, 2022 and letter No. 892 dated 4th July, 2022 intimated the Petitioner-Company about the decision of the Principal Chief Electrical Inspector, Odisha, Engineer in Chief (Electricity)-cum-PCEI, Odisha, wherein it was indicated that the claim of the Petitioner-Company for exemption of electricity duty in respect of auxiliary consumption has been turned down and accordingly question of refund does not arise. Rejoinder affidavit has also been filed by the Petitioner Company disputing the same.

6. Mr. Ghosh, learned Senior Advocate submits that in view of the amended provisions of the Electricity Duty Act, 2016, the Chief Electrical Inspector should not have taken a decision on the representation of the Petitioner as issue involved therein was with regard to exemption of electricity duty as an incentive under the Policy resolution of the State Government. In view of the proviso to Section 8 of the amended provision of the Electricity Duty Act, the dispute ought to have been referred to the Secretary to Energy epartment, Government of Odisha to take a decision in that regard. Thus, any decision on the representation dated 5th August, 2021 is non est in the eye of law and the representation, as aforesaid, is deemed to be pending before the Chief Electrical Inspector. He, therefore, submitted that it should be referred to the Secretary of the Energy Department to take a decision on the same. Mr. Ghosh relied upon the case law in ***Competent Authority vs. Barangore Jute Factory and others,*** reported in (2005) 13 SCC 477 and submits that when the statue requires an act to be done in a particular manner the same has to be done in that manner. Hence, Opposite Party No.2 has no jurisdiction to take a decision in the dispute with regard to exemption of the electricity duty in terms of the policy of the Government. It should have referred the matter to the Secretary, Energy Department to take the decision as per the proviso to Section-8 of the Electricity Duty Act, 2016.

7. Mr. Mishra, learned ASC refuting such submission contended that in paras-11 and 13 of the counter affidavit, Opposite Party No.2 has taken a stand in clear terms that the Petitioner-Company is not entitled to the benefit claimed under SEZ Policy, 2015, as the auxiliary consumption of 3 x 600 MW is outside the processing area of the SEZ. The Electrical Inspector being authorised by the Principal Secretary of the Energy Department, has taken a stand in the counter affidavit dated 20th July, 2022 akin to the stand taken by Opposite PartyNo.1. In para-13, Opposite Party has taken the following stand:-

> *"13. That in reply to para-9 of the Writ petition, it is humbly submitted that the electricity generated by the captive generating plant is not exempted from electricity duty, but instead the energy consumed within the SEZ area is exempted from*

> *electricity duty as per the SEZ Act, 2005, the SEZ Policy, 2015, Notification No.2767 dtd. 11.04.2016 and Notification No.3379 dtd.12.03.2020 of Department of Energy. SEZ policy clearly states that all sales and transactions for carrying out Authorized Operations Developers, Co-Developers & Units* ***within the Processing*** *Area shall be exempted from taxes, cess, duties, fees, levies under any State law. SEZ Policy also clearly states that Auxiliary consumption cannot be said to be a part of the 'transaction' as per the definitions of auxiliary consumption. It is pertinent to mention here that the definitions of auxiliary consumption have been quoted in Para 16, 17 and 18 writ petition. Also 'transaction' refers to an occasion when someone buys or sells something, or when money is exchanged or the activity of buying or selling something as per Cambridge English dictionary. Hence the same does not apply here and the said idea is completely misconceived."*
>
> *(emphasis supplied)*

Counter Affidavit filed by the State Government on 3rd August,2022 also indicates at para-4 that the Petitioner-Company is not entitled to the benefit either under Industrial Policy Resolution of 2017 (hereinafter referred to as 'IPR 2017') or SEZ Policy, 2015.

8. He further submitted that Section 8 (b) of the Electricity Duty Act, 2016, as laid down makes it abundantly clear that the Chief Electrical Inspector (ECI) shall be the power to decide all the disputes relating to the liability for payment of the electricity duty or exemption therefrom. The issue with regard to exemption of liabilities has already been adjudicated by a competent authority having jurisdiction. When a decision has already been taken that the Petitioner-Company is not entitled to any exemption as claimed in its representation dated 5th August, 2021, question of referring the matter to the State Government does not arise. The Petitioner-Company, if so aggrieved, may file an appeal under Section 8 (1-a) of Electricity Duty Act. It is his submission that Hon'ble Supreme Court in the case of ***Union of India Vs. Sanjay Kumar Jain, reported in (2004) 6 SCC 708***, observed as follows:-

> *"11. The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in Mullins v. Treasurer of Survey [1880 (5) QBD 170, (referred to in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha (AIR 1961 SC 1596) and Calcutta Tramways Co. Ltd. v. Corporation of Calcutta (AIR 1965 SC 1728); when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment*

to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso." Said Lord Watson in West Derby Union v. Metropolitan Life Assurance Co. (1897 AC 647)(HL). Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. (See A.N. Sehgal and Ors. v. Raje Ram Sheoram and Ors. (AIR 1991 SC 1406), Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal and Ors. (AIR 1991 SC 1538) and Kerala State Housing Board and Ors. v.Ramapriya Hotels (P)Ltd. and Ors. (1994 (5) SCC 672).

"This word (proviso) hath divers operations. Sometime it worketh a qualification or limitation; sometime a condition; and sometime a covenant" (Coke upon Littleton 18th Edition, 146) "If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails....But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole" (Per Lord Wrenbury in Forbes v. Git [1922] 1 A.C. 256).

xx xx xx

13. A proviso to a section cannot be used to import into the enacting part something which is not there, but where the enacting part is susceptible to several possible meanings it may be controlled by the proviso (See Jennings v. Kelly [1940] A.C. 206)."

He, therefore, submits that as a general rule proviso added to the enactment either to qualify or to create exception to the enactment itself and ordinarily a proviso is not interpreted like a general rule. Further, the proviso does travel beyond the principal provision to its proviso. Thus, the submission of learned counsel for the Petitioner is not acceptable. Accordingly, he prayed for dismissal of the writ petition.

9. Heard learned counsel for the parties at length and perused the record as well as the case law placed before this Court. The only issue that falls for consideration is whether the Chief Electrical Inspector-Opposite Party No.2 is competent to take a decision on the representation dated 5th August, 2021 or the representation should have been referred to the Government to take a decision on the same.

10. No doubt, the claim of the Petitioner for exemption of levy of electricity duty and refund thereof is on the basis of IPR 2017 as well as SEZ Policy 2015. Under Section 8 of the Electricity Duty Act, 1961, the Electrical Inspector or such other Officer more fully described in the said provision was conferred with

the power to decide all disputes relating to liability for payment of the electricity duty or exemption therefrom. Sub-section (2) of Section 8 of the Electricity Duty Act, 1961 provided for an appeal against the decision taken by the Electrical Inspector or such other Officer, as the case may be authorized by the State Government in that behalf. In 2016 along with other provisions there was an amendment to Section 8 of the principal Act. By virtue of the amended provision of Section 8(1) of the Electricity Duty Act, the Chief Electrical Inspector or the Deputy Electrical Inspector, as may be authorized by the State Government within the local limit, were conferred with power to deal with dispute relating to payment of electricity duty or exemption therefrom. A proviso has been incorporated by virtue of amendment, which lays down that any dispute relating to exemption of electricity duty '*as an incentive under different policy resolutions of the State Government'* should be referred to the Secretary to Government, whose decision shall be final. Thus, the question arises for consideration is that whether the proviso as introduced by virtue of amendment is an exception or qualification to the principal provision? A plain reading of Sub-section (1) of Section 8 of the Electricity Duty Act, 2016 makes it amply clear that the Chief Electrical Inspector, Electrical Inspector or Deputy Electrical Inspector, as the case may be authorized by the State Government within the local limits, as may be specified are conferred with the power to decide all disputes of liability of payment of electricity duty or exemption therefrom. Thus, the principal provision confers power with the aforesaid authorities to deal with all disputes relating to levy of electricity duty and claim for exemption therefrom including a claim based on different policy resolutions of the State Government. A conspectus of the principal provision, i.e., Section 8(1) of the Electricity Duty Act, 2016 as well as the proviso thereof makes it abundantly clear that the proviso does not in any manner curtail the power of the authorities more fully described in Sub-section (1) of Section 8 to decide all disputes relating to levy of Electricity Duty or claim for exemption therefrom. In other words, the Authorities under Subsection (1) are well within their competence to decide all types of claim for exemption of electricity duty including one under any policy resolution of the State Government. The proviso, however, adds a qualification to the principal provision empowering the authorities under Sub-Section (1) to refer the matter to the State Government for its decision, if the claim of exemption of electricity duty is made as an incentive under any policy resolution of the State Government. In the instant case, the Chief Electrical Inspector has taken a decision refusing the claim of the Petitioner for exemption of levy of electricity duty and refund thereof. But, there is nothing in the said provision which would suggest that the authority can exercise *suo motu* power to refer the matter to Government. Thus, a move at the instance of the aggrieved party has to be made to refer the matter.

11. In view of the discussions made above, two options are open to the Petitioner-Company, viz., i) either to prefer an appeal under Sub-section (1-a) of Section 8 of the Electricity Duty Act, 2016; or ii) to make an application before the authority, who has taken a decision on the representation of the Petitioner, to refer the matter to the State Government for its decision by the Secretary of the Energy Department. It is made clear that the decision taken by the Chief Electrical Inspector will not in any way infringe the right of the Petitioner-Company to make an application to refer the matter to the State Government, on its claim for exemption of electricity duty in terms of an incentive under policy resolution of the State Government. The observations made herein above should not be construed as an opinion on the merit of the claim of the Petitioner's Company for exemption of electricity duty under IPR 2017 or SEZ Policy, 2015.

12. With the aforesaid observation, the writ petition is disposed of. Issue urgent certified copy of the judgment on proper application.

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2022 (III) ILR - CUT- 1178

B.P. ROUTRAY,J.

MACA NO. 557 OF 2019

MANAGER LEGAL, ICICI BANK, BHUBANESWAR BRANCH .....Appellant

.V.

SMT. GEETARANI MAHAPATRA & ANR. .....Respondents

MOTOR VEHICLE ACT, 1988 – Section 2(30) r/w Rule 61 of the Central Motor Vehicle Rules, 1989 – Appellant/Bank is the financer of the offending vehicle – Due to non-payment of installments, the Bank repossessed the offending vehicle and it was sold through the auction to another person – Whether Appellant/Bank is liable to pay the compensation amount, in case of accident caused by the offending vehicle? – Held, Yes – In view of the definition enumerated in Section 2(30) of the M.V. Act and the law propounded by the Apex Court, the person, who was in possession of the vehicle on the date of accident and if a hypothecation agreement exits, is treated as the owner of the vehicle and liable to pay the compensation. (Para 16)

Case Laws Relied on and Referred to :-

1. (2015) 3 SCC 679 : HDFC Bank Ltd. Vs. Reshma & Ors.
2. AIR 2019 SC 66 : Prakash Chand Daga Vs. Saveta Sharma & Ors.

For Appellant : Mr. B.B. Mishra

For Respondents : Dr. T.C. Mohanty, Sr. Adv.

JUDGMENT Date of Judgment : 25.11. 2022

B.P. ROUTRAY,J.

1. Present appeal by the insurer is directed against judgment dated 26th June, 2019 passed by the learned 6th M.A.C.T., Khurda in M.A.C.T. Case No.96/2010, wherein compensation to the tune of Rs.1,25,000/- has been granted along with interest @ 6% per annum to the claimant from the date of filing of the claim application, i.e. 08.10.2010 on account of injury sustained by her in the motor vehicular accident dated 27.05.2007.

2. According to the claimant, namely, Geetarani Mahapatra, she along with her husband and grand-son were standing on the road side and the offending vehicle being driven in a rash and negligent manner dashed against them. In the accident, she and her husband were injured and their grand-son died.

3. The Appellant-ICICI Bank is the financier of the offending vehicle, i.e. Maruti Car bearing Registration No.OR-02-T-9747.

4. Mr. Mishra submits that the Appellant is not the registered owner of the offending vehicle and therefore, it cannot be fastened with the liability to pay the compensation. According to him, one Naresh Pattanaik was the owner of the offending vehicle on the date of accident and the claim application is not maintainable in his absence. He relies on the decisions of the Supreme Court in ***HDFC Bank Ltd. vs. Reshma and others***, ***(2015) 3 SCC 679*** and ***Prakash Chand Daga vs. Saveta Sharma and others, AIR 2019 SC 66***, in support of his submission.

5. Dr. T.C. Mohanty, learned Senior Advocate submits for the claimant that the offending vehicle being under possession of the Appellant-ICICI Bank on the date of accident, the Bank is liable to pay the compensation amount.

6. Before delving in-to the rival contentions, as urged by the parties, the undisputed facts need to be mentioned here that, the accident took place on 27.5.2007. The offending vehicle was initially purchased by Raj Mohan Patra (present Respondent No.2) in the year 2004, with hypothecation agreement

executed between him and the ICICI Bank on 1.8.2004 and financed by ICICI Bank. Due to non-payment of installments, ICICI Bank repossessed the offending vehicle on 18.6.2006 under Ext.5. Initially the name of Raj Mohan Patra was registered as the owner of the offending vehicle and the same was registered again in the name of Naresh Pattanaik with effect from29.5.2007, vide Ext.6.

Admittedly, the offending vehicle did not have a valid insurance policy on the date of accident. It's involvement in the accident is not disputed. The vehicle was driven by Naresh Pattnaik at the time of accident.

7. It has been explained by the Appellant-Bank that, after taking repossession of the offending vehicle on 18.6.2006, it was sold through auction to one Choudhury Ashis Das on 2.1.2007 and thereafter Choudhury Ashis Das sold it to Naresh Pattanaik without knowledge of the Bank.

8. So the point for determination is regarding ownership of the offending vehicle on the date of accident. The question is that, who would be the owner of the offending vehicle on the date of accident, i.e. on 27.5.2007 ?

9. The definition of owner as prescribed under the M.V. Act is as follows:

> "2(30) *'owner'* means a person in whose name a motor vehicle stands registered and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase, agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement."

10. The Supreme Court in the case of **HDFC Bank Ltd**. (supra),have held as follows:

> "On a careful analysis of the principles stated in the foregoing cases, it is found that there is a common thread that the person in possession of the vehicle under the hypothecation agreement has been treated as the owner. Needless to emphasise, if the vehicle is insured, the insurer is bound to indemnify unless there is violation of the terms of the policy under which the insurer can seek exoneration.
>
> In Purnya Kala Devi (supra), a three-Judge Bench has categorically held that the person in control and possession of the vehicle under an agreement of hypothecation should be construed as the owner and not alone the registered owner and thereafter the Court has adverted to the legislative intention, and ruled that the registered owner of the vehicle should not be held liable if the vehicle is not in his possession and control. There is reference to Section 146 of the Act that no person shall use or cause or allow any other person to use a motor vehicle in a public place without insurance as that is the mandatory statutory requirement under the 1988 Act. In the

> instant case, the predecessor-in-interest of the appellant, Centurion Bank, was the registered owner among with respondent no.2. The respondent no.2 was in control and possession of the vehicle. He had taken the vehicle from the dealer without paying the full premium to the insurance company and thereby getting the vehicle insured. The High Court has erroneously opined that the financier had the responsibility to get the vehicle insured, if the borrower failed to insure it. The said term in the hypothecation agreement does not convey that the appellant financier had become the owner and was in control and possession of the vehicle. It was the absolute fault of the respondent no.2 to take the vehicle from the dealer without full payment of the insurance. Nothing has been brought on record that this fact was known to the appellant financier or it was done in collusion with the financier. When the intention of the legislature is quite clear to the effect, a registered owner of the vehicle should not be held liable if the vehicle is not in his possession and control and there is evidence on record that the respondent no.2, without the insurance plied the vehicle in violation of the statutory provision contained in Section 146 of the 1988 Act, the High Court could not have mulcted the liability on the financier. The appreciation by the learned Single Judge in appeal, both in fact and law, is wholly unsustainable.
>
> In view of the aforesaid premises, we allow the appeals and hold that the liability to satisfy the award is that of the owner, the respondent no.2 herein and not that of the financier and accordingly that part of the direction in the award is set aside. However, as has been conceded to by the learned senior counsel for the appellant, no steps shall be taken for realization of the amount. There shall be no order as to costs."

11. Further in the case of ***Prakash Chand Daga*** (supra), the Supreme Court have held as follows:

> "9. The law is thus well-settled and can be summarized:-
>
> "Even though in law there would be a transfer of ownership of the vehicle, that, by itself, would not absolve the party, in whose name the vehicle stands in RTO records, from liability to a third person …….. Merely because the vehicle was transferred does not mean that such registered owner stands absolved of his liability to a third person. So long as his name continues in RTO records, he remains liable to a third person."

In the aforesaid case the vehicle was transferred from the earlier owner to the subsequent owner on 11.9.2009 and the accident took place on 9.10.2009 and despite sell of the vehicle on 11.9.2009, no transfer of ownership was effected.

12. In the instant case, the Appellant did not purchase the vehicle on transfer. The status of the Appellant is that he is the financier Bank, who repossessed the vehicle on 18.6.2006. Therefore, the decision in ***Prakash Chand Daga's*** case (supra) is not applicable to the present facts.

13. Rule 61 of the Central Motor Vehicle Rules, 1989 postulates that:

> "61. Termination of hire-purchase agreements, etc.—(1) An application for making an entry of termination of agreement of hire purchase, lease or hypothecation referred to in sub-section (3) of Section 51 shall be made in Form 36 duly signed by the registered owner of the vehicle and the financier, and shall be accompanied by the certificate of registration and the appropriate fee as specified in rule 81.
>
> (2) The application for issue of a fresh certificate of registration under sub-section (5) of Section 51 shall be made in Form 36 and shall be accompanied by a fee as specified in rule 81.
>
> (3) Where the registered owner has refused to deliver the certificate of registration to the financier or has absconded then the registering authority shall issue a notice to the registered owner of the vehicle in Form 37."

14. The Appellant does produce the copy of the hire-purchase agreement to justify the contention that the ownerships of the vehicle still continues with Raj Mohan Patra despite repossession of the same by the Bank upon default in payment of installments. Therefore the presumption is against the Bank that after repossession of the vehicle, the ownership transferred to it for all purposes.

15. Admittedly upon taking repossession of the offending vehicle by the Appellant-Bank, it did not apply to the concerned authority for entry of cancellation of the hire-purchase or hypothecation agreement and it also did not take any step in terms of Section 50 of the M.V. Act for transfer of the ownership of the offending vehicle in its favour. What is important to see is the credibility and correctness of the averment of the Appellant. The Appellant has examined one witness, viz. OPW-1, namely, Santosh Kumar Panda, an official of the Bank. Said OPW-1 in his evidence has said that after repossession of the vehicle on 18.6.2006, it was sold through auction on 2.1.2007 to Choudhury Ashis Das and said Choudhury Ashis Das again sold the offending vehicle to Naresh Pattanaik on 18.1.2007. But the document under Ext.6 speaks that Naresh Pattanaik became the registered owner of the offending vehicle w.e.f. 29.5.2007. So, prior to 29.5.2007, the registered owner of the vehicle was Rajmohan Patra. But the undisputed fact remains that the vehicle was in actual possession of the Appellant-ICICI Bank w.e.f. 18.6.2006 and no material has been produced on record to reveal anything that the vehicle was sold and its possession was handed over to Choudhury Ashis Das w.e.f. 2.1.2007. The Appellant-Bank did not produce any sale certificate or handing over possession memo in favour of Choudhury Ashis Das. This means that the contention of the Appellant regarding re-sale of the vehicle to Choudhury Ashis Das is unsubstantiated. So, the inference is that, the Appellant-Bank was in possession

of the offending vehicle from 18.6.2006 till 28.5.2007, which means the possession of the vehicle on the date of accident, i.e. on 27.5.2007 with Appellant-ICICI Bank is established.

16. In view of the definition enumerated in Section 2 (30) of the M.V. Act and the law propounded in the case of ***HDFC Bank Ltd***.(supra), the person, who was in possession of the vehicle on the date of accident, where a hypothecation agreement exits, is treated as the owner of the vehicle and liable to pay the compensation. It is important to mention here that Rajmohan Patra is admittedly not in possession of the offending vehicle w.e.f. 18.6.2006 and the possession of the offending vehicle between 18.6.2006 to 28.5.2007 is not established in favour of any person other than the ICICI Bank. Therefore, at no circumstance, neither Rajmohan Patra nor Choudhury Ashis Das nor Naresh Pattanaik could be treated as owner of the vehicle in true sense.

17. There being no other dispute raised, either regarding negligence on the part of the driver or with regard to quantification of the compensation amount, no merit is seen in the appeal.

18. In the result, the appeal is dismissed and the Appellant is directed to deposit the entire compensation amount along with interest before learned Tribunal as per its direction within a period of three months from today; where-after the same shall be disbursed in favour of the claimant on same terms and proportion as contained in the impugned judgment.

19. On deposit of the award amount before the learned Tribunal and filing of a receipt evidencing the deposit with a refund application before this Court, the statutory deposit made by the Appellant with accrued interest thereon be refunded to him on proper application.

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2022 (III) ILR - CUT- 1183

S.K. PANIGRAHI, J.

CRLMP NO.1238 OF 2018

SMT. GEETA DEVI AGARWAL & ORS. .....Petitioners

.V.

STATE OF ODISHA .....Opp. Party

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Prayer to quash the criminal proceeding – Power of High Court – Held, though the discretionary and supervisory powers of the High Court under Articles 226 and 227 of the Constitution of India are very wide in amplitude, but they are not unlimited.

An F.I.R or complaint can be quashed at the initial stage where the allegation made, if taken at their face value and accepted in it's entirely, do not form a prima-facie case.

(B) MINES AND MINERALS (DEVELOPMENT AND REGULATION) ACT, 1957 – Sections 4(1), 4(1a), 21 and 23 – Principles of vicarious liability – Applicability – The liability of the managerial personal/ partner cannot be imputed automatically, the prosecution would have to make averments with regard to the specific role played by the accused personals and demonstrate that such person was directly & intrinsically connected to the crime alleged.

In the present case the petitioners are the partners in M/s. GNG exports – They were not involved in illegal transportation of iron ore fines – Accordingly the principles of vicarious liability cannot be attached to the petitioners – Hence the proceedings in case no.2CC no 7 of 2011 is quashed to the extent of charges attaching liability against the unauthorised transportation of iron ore fines against the petitioners.

Case Laws Relied on and Referred to :-

1. (2009) 10 SCC 184 : Neelu Chopra Vs. Bharati.
2. (2010) 10 SCC 660 : Asoke Basak Vs. Maharastra.
3. (2005) 10 SCC 228 : Anil Mahajan Vs. Bhor Industries.
4. (1995) 6 SCC 194 : Rupan Deol Bajaj Vs. Kanwar Pal Singh Gill.
5. AIR 1992 SC 604 : State of Haryana Vs. Ch. Bhajan Lal.
6. AIR 1988 SC 709 : Madhavrao Jiwajirao Scindia Vs. Sambhajirao Chandrojirao Angre.
7. AIR 1998 SC 128 : M/s Pepsi Foods Ltd Vs. Special Judicial Magistrate.
8. [1915] A.C. 705 HL : Lennard's Carrying Co. Ltd. Vs. Asiatic Petroleum Co Ltd.
9. [1957] 1 QB 159 : H.L Bolton Co. Ltd., Vs. T.J Graham and Sons.
10. (2011) 1 SCC 74 : Iridium Indian Telecom Limited Vs. Motorola Inc.
11. (2008) 5 SCC 662 : S.K. Alagh Vs. Vs. State of U.P.
12. (2015) 4 SCC 609 : Sunil Bharti Mittal Vs. CBI.
13. (1989) 4 SCC 630 : Sham Sunder Vs. State of Haryana.
14. (2008) 5 SCC 668 : Maksud Saiyed Vs. State of Gujarat.
15. (2010) 10 SCC 479 : Maharashtra State Electricity Distribution Co. Ltd. Vs. Datar Switchgear Ltd.

16. (2013) 4 SCC 505 : GHCL Employees Stock Option Trust Vs. India Infoline Ltd.
17. AIR 2012 JHAR 148: Bihar MICA Exporters Association Vs. State of Jharkhand and Ors.
18. 2009 (II) OLR 407 : Surendra Kumar Agarwal Vs. State of Orissa and Ors.
19. 2021 SC 503 : Pradeep S. Wodeyar Vs. The State of Karnatak.
20. (2010) 3 SCC 330 : National Small Industries Corpn. Ltd. Vs. Harmeet Singh Paintal.
21. (2008) 5 SCC 668 : Maksud Saiyed Vs. State of Gujarat.
22. (2012) 5 SCC 661 : Aneeta Hada Vs. Godfather Travels & Tours (P) Ltd.

For Petitioners : Mr. B.S. Tripathy

For Opp. Parties : Mr. Karunakar Gaya, ASC.

JUDGMENT Date of Hearing:09.02.2022 : Date of Judgment:18.02.2022

S.K. PANIGRAHI, J.

1. These petitions under Articles-226 and 227 of The Constitution of India have been filed with a prayer to quash the criminal proceedings emanating from Case No. 2 (C) CC No. 07 of 2011, for the alleged commission of offenses under Sections-4(1), 4(1A,)21(1) and 23 of the Mines and Minerals (Development & Regulation) Act, 1957 and Under Rules 3, 6, 12(3), 12(4) and 18 of the Orissa Minerals (Prevention of theft, Smuggling and illegal mining and Regulation of Possession, Storage, Trading and Transportation) Rules, 2007, which is pending in the Court of learned J.M.F.C, Kujanga.

2. Shorn of unnecessary details, the facts of the present matter are as follows:

i. In pursuance to the letter of The Mining Officer, Cuttack dated 2.12.2020, a truck bearing registration No. OR-05W-0779 was seized on 03.12.2010.The said truck belonged to Sri. Trupti Ranjan Das. The seizure was made on the ground of using fake transit passes for the transportation of iron ores from the stockyard at Manguli, Cuttack belonging to M/S Gananayak and Co, to M/S GNG Exports at Paradip Port.

ii. Confiscation proceedings against the seized trucks were initiated vide C.P. Case No.69/2010, for the offence enumerated under the ambit of Sec. 23(C) of M&M(DR) Act.,1957.Another, FIR No. 5 dated-02.02.2011 was lodged on the strength of a complaint filed by DDM, Jajpur road at Paradip Marine Police Station, against Sri. Trupti Ranjan Das and M/S Gananayak and Co.

iii. On verification of records by the State level Enforcement Squad and the Mining Squad of Mining office, Jajpur road and Mining office of Cuttack, it was found that the 125 fake transit passes out of Form-G books were used by M/S Gananayak and Co , for the illegal transportation of iron ore fines to the tune of 1842.640 MT valued at Rs.22,92,244/- (approx.).An F.I.R was lodged before the IIC, Tangi Police Station vide P.S. Case No.7/2011 against accused M/S Gananayak. & Co. and its Proprietor Sajan Kumar Joshi and Vivek Kumar Joshi, corresponding to G.R. Case No.60/2011, pending before learned SDJM(S), Cuttack.

iv. A complaint case, 2(c) C.C. No.7/2011 was lodged in the Learned Court of JMFC (P), Kujang by the DDM, Jajpur road against Gajanan Agrawal (Dead) along with the petitioners No.1 to 3 , making them jointly and severally liable or the acts of Sri. Trupti Ranjan Das. The petitioners are the partners in the firm of M/S GNG Exports. The learned JMFC(P), Kujanga took cognizance of the offenses against the present petitioners U/s.21(c) of MMDR Act, and under Rule-18 of OM Rules, 2007 and issued Summons. In the said complaint case, it has been prayed to confiscate the 6000 MT (approx) of iron ore fines stored at Paradip port of M/S GNG Exports.

v. A brief background study of M/S GNG Exports reveals that, it is a registered firm based in West Bengal involved in exporting iron ore fines since 1993. From the year of 2008 they started exporting iron ore fines from the ports of Paradip, Odisha. They were granted the license for storing iron ore fines at Paradip port area vide License No. 13595. The validity of the said license was bracketed in the period between 06.12.2008 and 05.12.2010. An application for renewal was filed on 02.12.2010. However, it got rejected under Rule-6 of Orissa Mineral Rules, 2007, due to the non-production of mandatory information.

3. Learned Counsel for the petitioners Shri Bhabani Shankar Tripathy vehemently submits that the learned J.M.F.C, Kujanga, has taken cognizance of the complaint case 2(c) C.C. No.7/201 without verifying the genuineness of the allegation. The petitioner had moved this court on an earlier occasion vide WPCRL No.197/2011 for quashing the said complaint case, but the court was not inclined to interfere with the proceeding of the court below at that point in time since the investigation of the case was underway. However, the court had dismissed the petition with an observation to move the court at a subsequent stage of the proceeding. Further, the investigation is now complete and the charged sheet has already been submitted. It is clearly evinced out in the charge sheet that the transit passes were issued by M/S Gananayak and Co for the

vehicle bearing Regd. No.OR-05W-0779, which belonged belonged to Sri Trupti Ranjan Das. Prima Facie evidence to bring in charges under Sections-420, 468, 471 and 34 of IPC, against the Sajjan Kumar Joshi, the proprietor of M/S Gananayak and Co. have been found. The charge sheet has been filed against Kumar Joshi, the proprietor of M/S Gananayak and Co. However, no incriminating evidence is found against the petitioners or M/S GNG Exports so as to sustain the complaint case. Furthermore, the Mining Officer, Cuttack had lodged an FIR before the lIC, Tangi Police, Cuttack in Tangi P.S. Case No.7/2011 dt.09.11.2010 corresponding to G.R. Case No.60/2011 pending before the court of learned SDJM(S), Cuttack, with specific allegations against M/s. Gananayak & Co. for forging 121 Transit Passes which were used for transporting Iron Ore Fines. The Deputy Director Mines, Jajpur Road had deliberately and willfully suppressed the aforesaid facts and filed the aforesaid case in furtherance of the motive to harass and humiliate the petitioners by arraying them in multiple criminal proceedings. Continuing with such proceedings will be nothing but the blatant abuse of the process of law. No case against M/S GNG Exports is made out since they were bona fide purchasers of iron ores from M/S Gananayak and Co., and were under the impression that the transit passes were valid and not forged. Moreover, as the exporter M/S GNG Exporters had very little means of determining the genuineness of the transit passes.

4. Learned Counsel for petitioners also submitted that the complaint case suffers from technical laches. He placed reliance on the case of ***Neelu Chopra vs. Bharati***[1], wherein the Hon'ble apex court held that :

> "5. In order to lodge a proper complaint, mere mention of the sections and the language of those sections is not be all and end of the matter. What is required to be brought to the notice of the court is the particulars of the offence committed by each and every accused and the role played by each and every accused in committing of that offence.".

Again, in the case of ***Asoke Basak V. Maharastra***[2], the Hon'ble Supreme court observed that, it would be difficult to hold that a complaint, even ex facie, discloses the commission of an offence by the accused in the absence of any specific averment demonstrating the role of the accused. Perusal of the make complaint would it crystal clear that the allegations made in the impugned complaint are absolutely vague and even if they are taken at their face value and accepted in their entirety, do not prima facie constitute

1. (2009) 10 SCC 184 , **2.** (2010) 10 SCC 660

any offence and/or the complaint does not disclose commission of any offence by the petitioners as Partners of GNG Exports u/s.21(1) of MMDR Act, 1957 and Rule-18 of OM Rules, 2007.

Additionally, the counsel contended that mere mention of words like " in connivance with me M/S Gananayak and Co.", "cheated" "fraud" in the complaint, does not establish the guilt of M.S GNG Exports. Reliance was placed on the case of ***Anil Mahajan V. Bhor Industries*** [3], wherein the Hon'ble Supreme Court has held that :

> "8. The substance of the complaint is to be seen. Mere use of the expression "cheating" in the complaint is of no consequence. Except mention of the words "deceive" and "cheat" in the complaint filed before the Magistrate and "cheating" in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MOU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay.".

5. *Per contra*, Ld. Senior Counsel for the State opposes the petitions on the grounds that the license granted to M/S GNG Export expired on 05.12.2011 and the iron ore fines were procured via fake transit passes. Thereby, the 6000 M.T (valued at Rs. 74,64,000) of iron ore fines stored over the granted port area to M/S GNG Export were illegal and unauthorized, and their seizure was rightful. Further, as verified by the State level Enforcement Squad along with Mining Squad of Mining Office. Jajpur Road and Mining Office, Cuttack, 125 illegal transit passes out of Form-G books bearing Numbers.030967, 031028, 031146 & 031147 were used by M/s. Gananayak & Company during the period from September, 2010 to November,2010 for the transportation of Iron ore fines in connivance with M/s. GNG Exports & its partners, to the tune of 1842.640 MT valued at Rs.22,92,244/- (approx.). Thus, M/S GNG Exports and Sri. Trupti Ranjan Das have committed offenses falling under the purview of Sections-4(1-A)of Mines and Minerals (Development & Regulation) Act, 1957 read with Rule- 12(3) and (4) of Orissa Minerals Rules, 2007.Moreover, the petitioner had earlier filed a writ petition (Crl.) No.197 of 2011, wherein the subject matter of challenge was almost same. This Hon'ble Court vide order dtd.5.8.2011 was pleased to dispose of the same holding that, the proceeding in 2(C) CC No.7 of 2011 can not be quashed in its entirety after taking all aspects into consideration. Hence, on the self same ground the present application is devoid of any merit and hence liable to be dismissed.

3. (2005) 10 SCC 228

6. Heard Ld. Counsels for the parties and perused the materials on record.Before adverting to the facts of the case, it is apposite to refer first to the law applicable to the facts of the present case. It is well settled that though the discretionary and supervisory powers of the High Court under Articles- 226 and 227 of The Constitution of India are very wide in amplitude, yet they are not unlimited. Nevertheless, it is trite that the powers under the said provisions have to be exercised sparingly and with caution to secure the ends of justice and to prevent the abuse of the process of law. Where the allegations in the first information report or the complaint taken at its face value and accepted in their entirety do not constitute the offence alleged, ex facie, the High Court would be justified in in invoking its powers under Articles- 226 and 227 to quash the criminal proceedings. Reference may be made to the Hon'ble Supreme Court's decision in ***Rupan Deol Bajaj v. Kanwar Pal Singh Gill*[4].**

7. In the case of ***State of Haryana v. Ch. Bhajan Lal*[5]**, the Hon'ble Apex Court has held that an FIR can be quashed at the initial stage where the allegations made, even if taken at their face value and accepted in its entirety, do not prima facie constitute any offence or make out a case against the accused. The Hon'ble court observed that :

> "105. In the exercise of the extra-ordinary power under Article 226 or the inherent powers under Section 482 of the Code of Criminal Procedure, the following categories of cases are given by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelized and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised:
>
> (a) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;
>
> (b) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;
>
> (c) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;
>
> (d) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;

4. (1995) 6 SCC 194 , **5**. AIR 1992 SC 604

(e) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(f) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(g) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

8. The aforesaid proposition of law was again reiterated by the Hon'ble Apex Court in ***Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre***[6], the Supreme Court has observed as follows:

"7. The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the Court cannot be utilized for any oblique purpose and where in the opinion of the Court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the Court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

9. In the case of ***M/s Pepsi Foods Ltd v. Special Judicial Magistrate***[7], the Hon'ble Apex court held that a Magistrate can discharge the accused at any stage of the trial if he considers the charge to be groundless, but that does not debar the accused from approaching the High Court under Section 482 of the Code or Article 227 of the Constitution to have the proceeding quashed against him when the complaint does not make out any case against him, and still he must undergo the agony of a criminal trial.

10. In the present case, the Petitioners herein have all been charged under Section-21(1) of the Mines and Minerals (Development & Regulation) Act, 1957 and Under Rule-18 of the Orissa Minerals (Prevention of theft, Smuggling and illegal mining and Regulation of Possession, Storage, Trading and

6. AIR 1988 SC 709 , **7.** AIR 1998 SC 128

Transportation) Rules, 2007.At this juncture, it would be apposite to refer to the relevant statutory provisions and examine the legal position.

11. Section-21(1) of the Mines and Minerals (Development & Regulation) Act, 1957 attaches penal liability to acts falling under he purview of Section-4(1) and section-4(1A) of MMDR Act, 1957. Sections-4(1) and 4(1A) read as follows

> (1) No person shall undertake any reconnaissance, prospecting or mining operations in any area, except under and in accordance with the terms and conditions of a reconnaissance permit or of a prospecting licence or, as the case may be, of a mining lease, granted under this Act and the rules made thereunder:

Provided that nothing in this sub-section shall affect any prospecting or mining operations undertaken in any area in accordance with terms and conditions of a prospecting licence or mining lease granted before the commencement of this Act which is in force at such commencement:

[Provided further that nothing in this sub-section shall apply to any prospecting operations undertaken by the Geological Survey of India, the Indian Bureau of Mines, 6 [the Atomic Minerals Directorate for Exploration and Research] of the Department of Atomic Energy of the Central Government, the Directorates of Mining and Geology of any State Government (by whatever name called), and the Mineral Exploration Corporation Limited., a Government company within the meaning of 7 [clause (45) of section 2 of the Companies Act, 2013 (18 of 2013), and any such entity that may be notified for this purpose by the Central Government]:]

[Provided also that nothing in this sub-section shall apply to any mining lease (whether called mining lease mining concession or by any other name) in force immediately before the commencement of this Act in the Union territory of Goa, Daman and Diu.]

(1A) No person shall transport or store or cause to be transported or stored any mineral otherwise than in accordance with the provisions of this Act and the rules made thereunder.

12. Rule-18 of the Orissa Minerals Rules,2007 reads :

> "**18. Penalties**. - (1) Whoever undertakes or causes to undertake illegal mining, transports or stores any mineral otherwise than with the provisions of Section 4 (1) and or 4 (1A) of the Act is punishable with imprisonment for a term which may extend to two years, or with fine which may extend to twenty five thousand rupees or with both and in the case of continuance of such illegal activity with an

> additional fine which may extend to five hundred rupees for each day during which such illegal activity continues after conviction for the first such contravention.
>
> (2) Whoever contravenes any of the provisions of these rules shall be punishable with imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees or with both and in the case of continuation of contravention with an additional fine which may extend to five hundred rupees for each day during which such contravention continued after conviction for the first such contravention.
>
> (3) Whenever any lease-holder transports the mineral raised in his lease without a valid permit or valid transit pass or in excess of the quantity and quality permitted or mentioned in the transit pass, it shall be treated as violation of the provisions of these rules and breach of the covenants of the lease and shall be liable for penalty as provided."

13. It is alleged that the petitioners are vicariously liable for the acts of heir agent namely Sri. Trupti Ranjan Das, who was involved in the transportation of the minerals by using fake transit passes.

14. Learned Counsel for the petitioners argued that them being a exporter firm, did not hold the means to ensure the veracity of the transit passes. Additionally, vicarious liability is not attracted in the present case.

15. The rule of criminal liability is derived from the Latin maxim *Actum non facit reum, nisi mens sit rea,* which essentially means that a forbiddenact or omission has to be done with a deliberate intent to do it. Trouble arose when the question of 'how to' make a company/ corporation/ corporate entity liable for criminal offences. It is an undenying fact that a company can, in fact, partake or commit a forbidden act or omission, but the vexed question has been as to how the intent of a juristic person can be proved. Therefore, the courts developed what is termed as the 'Doctrine of Attribution'. As per this doctrine, in the event of an act or omission leading to the violation of the law, the *mens rea* i.e. the intent of committing the act would be 'attributed' to all those who were in charge of the company at the time of the commission of the offence.

16. Directors, Managers, key Managerial Personnel were brought to court to account for the contraventions of law performed by them under the guise or the legal façade of the company. This doctrine is akin to what is otherwise termed as 'lifting the corporate veil' in order to examine the ones who are the 'alter ego' of the company.

17. Under the aforesaid principle of "doctrine of attribution" the effort of the courts has been to take legal proceedings against juristic entities to a just and

reasonable conclusion. Merely because a corporate entity cannot be imprisoned, taking a view that persons who were in charge of the management of these companies should be left scot-free would have been an unfair and irrational approach. It is with such a backdrop that these aforesaid principles have to be understood. When there is an allegation against a juristic or corporate entity the endeavour is to ascribe or attach liability to those particular persons in charge of the affairs of the company in question, who are actually pulling the strings and running the show. It is for these reasons that the principle of 'doctrine of lifting of corporate veil' was evolved and expounded by the courts of law. Under this principle based on the materials on record, the court pinpoints or identifies the particular persons who were pulling the levers of the machinery that is a juristic entity. Having identified such persons who were actually directly involved or in charge of the affairs of the company the criminal liability is fastened or is attached to such persons and such persons only. There might be situations where a number of persons constitute the management of a corporate entity however, only by virtue of them holding a position on the management of such entity would not automatically make them liable.

18. It is due to this reason that the courts are compelled to embark upon a journey to lift the veil behind which the persons in the management of the company are crouching behind in order to camouflage or insulate themselves from any liability. Thus, having 'lifted' the so-called veil, liability attaches to those individuals who are identified to be the culprits hiding behind the juristic veil. This is the sum and substance of the principle of the "doctrine of attribution". Similarly, these persons who are identified as the 'will and mind' are called the 'alter ego' of the company as they are the ones who were acting as such and had taken the company down the path of such criminality. It is thus seen that all these principles owe their origin to the principle of 'attribution' and it is this doctrine of attribution which is, the endeavour of fastening liability on certain individuals, within the management of the company in question while invoking either of the principles of "lifting of corporate veil" or while identifying the "alter ego" of the defaulting company.

19. As early as 1915 the House of Lords in the celebrated case of ***Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co Ltd.***[8], while trying an offence under the Merchant Shipping Act applied the 'doctrine of attribution' to identify Mr. Lennard, who was the owner of the ship and also responsible for the management of the ship, as the "directing mind and will" of the company. Subsequently, in ***H.L Bolton Co. Ltd., v. T.J Graham and Sons***[9], the Court

8. [1915] A.C. 705 HL, 9. [1957] 1 QB 159

likened companies to a human body andtheir brain to the directors of the company, and applied the doctrine of attribution to criminal cases. This principle though used and relied upon in India from time to time, was finally discussed extensively and applied by the Hon'ble Supreme Court in ***Iridium Indian Telecom Limited v. Motorola Inc.***[10].

20. However, with courts across the country increasingly accepting the view that the Directors, Managers, Promoters etc. were the "mind and will" of the company, an unfortunate problem arose here in allsuch designated personnel of the company started being prosecuted whether or not they were actually "in charge of the affairs of the company".

21. Coming down heavily on this worrying trend, the Hon'ble Apex Court has, time and again, sternly deprecated this practice and attempted to draw a clear distinction between personnel of a company who are "actively in charge of the affairs of the company" and those who are not. Therefore, a company might not be indictable, but those particular members in charge of it are. In this regard, it would be useful to advert to the observations made by a three-Judge Bench of the Hon'ble Supreme Court in ***S.M.S. Pharmaceuticals v. Neeta Bhalla*** (supra), wherein the Hon'ble Supreme Court held that;

> *"5. … a complaint must contain material to enable the Magistrate to make up his mind for issuing process. If this were not the requirement, consequences could be far-reaching. If a Magistrate had to issue process in every case, the burden of work before the Magistrate as well as the harassment caused to the respondents to whom process is issued would be tremendous. Even Section 204 of the Code starts with the words 'if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding'. The words 'sufficient ground for proceeding' again suggest that ground should be made out in the complaint for proceeding against the respondent. It is settled law that at the time of issuing of the process the Magistrate is required to see only the allegations in the complaint and where allegations in the complaint or the charge-sheet do not constitute an offence against a person, the complaint is liable to be dismissed.*
>
> *8. The officers responsible for conducting the affairs of companies are generally referred to as directors, managers, secretaries, managing directors, etc. What is required to be considered is: Is it sufficient to simply state in a complaint that a particular person was a director of the company at the time the offence was committed and nothing more is required to be said. For this, it may be worthwhile to notice the role of a director in a company. The word 'director' is defined in Section 2(13) of the Companies Act, 1956 as under:*
>
> *'2. (13) 'director' includes any person occupying the position of director, by whatever name called;'*

10. (2011) 1 SCC 74

There is a whole chapter in the Companies Act on directors, which is Chapter II. Sections 291 to 293 refer to the powers of the Board of Directors. A perusal of these provisions shows that what a Board of Directors is empowered to do in relation to a particular company depends upon the roles and functions assigned to directors as per the memorandum and articles of association of the company. There is nothing which suggests that simply by being a director in a company, one is supposed to discharge particular functions on behalf of a company. It happens that a person may be a director in a company but he may not know anything about the day-to-day functioning of the company. As a director he may be attending meetings of the Board of Directors of the company where usually they decide policy matters and guide the course of business of a company. It may be that a Board of Directors may appoint sub-committees consisting of of one or two directors out of the Board of the company who may be made responsible for the day-to-day functions of the company. These are matters which form part of resolutions of the Board of Directors of a company. Nothing is oral. What emerges from this is that the role of a director in a company is a question of fact depending on the peculiar facts in each case. There is no universal rule that a director of a company is in charge of its everyday affairs. We have discussed about the position of a director in a company in order to illustrate the point that there is no magic as such in a particular word, be it director, manager or secretary. It all depends upon the respective roles assigned to the officers in a company."

22. It would also worthwhile at this stage to extract the following observations made in ***S.K. Alagh v. State of U.P.***[11] by the Hon'ble Supreme Court of India;

"19. As, admittedly, drafts were drawn in the name of the company, even if the appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself."

23. Furthermore, the Hon'ble Supreme Court in ***Sunil Bharti Mittal v. CBI***[12] held;

"42. No doubt, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.

11. (2008) 5 SCC 662, **12**. (2015) 4 SCC 609

43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision."

24. The Hon'ble Supreme Court in ***Sham Sunder v. State of Haryana***[13] observed ;

"9. But we are concerned with a criminal liability under penal provision and not a civil liability. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold."

25. In ***Maksud Saiyed v. State of Gujarat*** [14], *the Apex Court held*;

"13. Where a jurisdiction is exercised on a complaint petition filed in, terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability."

26. The same principlehasbeen unambiguously reiterated in ***Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd***[15] ***and GHCL Employees Stock Option Trust v. India Infoline Ltd.***[16]**.**

27. It is now well established that if the statute implicates specific liability on the constituent members of a company, then they can be arrayed for contravention. Statutes mandatorily have to contain a provision to fix vicarious liability. Section-23 of the MMDR Act, 1957 affixes the concept of vicarious liability on companies. Section-23 reads:

"Offences by companies.—(1)If the person committing an offence under this Act or any rules made thereunder is a company, every person who at the time the offence

13. (1989) 4 SCC 630 , **14**. (2008) 5 SCC 668, **15**. (2010) 10 SCC 479, **16**. (2013) 4 SCC 505

was committed was in charge of, and was responsible to the company for the conduct of the business of the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed with the consent or connivance of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,— (a) "company" means any body corporate and includes a firm or other association of individuals; (b) "director" in relation to a firm means a partner in the firm."

28. I shall now delve into the question of whether or not these offenses the Petitioners have been charged with are prima facie made out against them hereinunder.

29. A bare perusal of the language of Section-4 and Section-4(1A) of the MMDR Act,1957, explicitly debars the storage and transportation of any mineral without a valid permit. M/S GNG Exports was granted the permit to store iron ore fines vide License No. 13595 of 06.12.2008 in its RS-6 plot at Paradip Port. However, the validity of the license had lapsed on 05.12.2010 and the renewal was underway but not complete. Clearly, it attracts the liability of unauthorized storage as enshrined under Section-4(1A) of MMDR Act, 1957.

30. In the case of ***Bihar MICA Exporters Association vs. State of Jharkhand and Ors*** [17]**,** the Hon'ble High Court of Jharkhand has succinctly held that ;

"In the background of the discussion made in the earlier part of this judgment, obviously this provision of Section 23-C has been introduced by the parliament in the year 1999 consciously with the object of preventing illegal mining, transportation and storage of mineral in order to suppress every serious mischief of illegal mining within the country, incidences of which have surfaced in different States and are of enormous proportions. The effect of such illegal mining is not only having an adverse effect on public exchequer by denying it valuable revenue but at the same time hasthe effect of degrading and denuding the environment. As such, it has also a long term effect of decline of scarce natural resources of the country such as minerals, forests reserve etc. The National Mineral Policy, 2008 also seeks to develop a sustainable frame work

17. AIR 2012 JHAR 148

for optimal utilization of the country's natural mineral resources for the Industrial growth of the country and at the same time improving the life of the people living in the mining areas, which are generally located in the backward and tribal regions of the country. These resources are not to be frittered away and exhausted by any generation. Every generation owes a duty to all the succeeding generation to develop and preserve the natural resources in the country and preventing pollution, which is in the interest of the mankind. It is recognized by the Parliament and Parliament has declared that it is expedient in the public interest that the Union take under its control regulation of mines and development of minerals. Seen in the aforesaid light, the introduction of the aforesaid provision of Section 23-C with the expression "for the purposes connected therewith" is to be read in a manner to carry out the legislative intent and object. Section 23-C therefore intends to prevent illegal mining, transportation, storage of mineral in question and for the purposes connected therewith i.e. buying and selling of illegal mined minerals. It cannot be said that the persons indulging in the activity of buying or selling or trading of such minerals can escape the rigour of law while only those who are indulging in mining, transportation and storage thereof are to be subjected to the regulatory regime. Such a construction could defeat the very aim and object of the Legislature.".

31. Additionally, in the case of ***Surendra Kumar Agarwal vs. State of Orissa and Ors***[18], the Hon'ble Orissa High Court had expounded that :

"The 2007 Rule has been enacted by the State Government in exercise of power under Section 23C of the MMDR Act for prevention of theft, smuggling and illegal mining and to regulate the possession, storage, trading and transportation of minerals in the State of Orissa. Rule 12 of the 2007 Rules provides for seizure and confiscation of minerals raised or transported, stored, sold, supplied, distributed, delivered for sale or processed, without any lawful authority.".

32. The liability of the petitioners can be arrayed for the illegal storage of iron ore mines. With regard to the same, the Hon'ble Supreme court, in the case of ***Pradeep S. Wodeyar V. The State of Karnataka***[19] has held that ;

"80. Vicarious liability and Section 23 of MMDR Act A-1 submitted that the charge-sheet does not ascribe any role to A-1 and hence the process initiated against him must be quashed. The appellants in support of their argument relied on Sunil Bharati Mittal (supra), Shiva Kumar Jatia v. NCT of Delhi 60 , Sunil Sethi v. State of Andhra Pradesh 61 and Ravindranatha Bajpe v. Mangalore Special Economic Zone Ltd. 62 In Sunil Bharati Mittal (supra), a three- judge Bench of this Court observed that the general rule is that criminal intent of a

18. 2009 (II) OLR 407, **19.** 2021 SC 503

group of people who undertake business can be imputed to the Company but not the other way around. Only two exceptions were provided to this general rule: (i) when the individual has perpetuated the commission of offence and there is sufficient evidence on the active role of the individual; and (ii) the statute expressly incorporates the principle of vicarious liability. Justice Sikri writing for a three-judge Bench observed:

43.Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision."

"82.Section 23(1) of the MMDR Act stipulates that where the offence has been committed by accompany, every person who at the time of the commission of the offence was in-charge of and responsible for the conduct of business shall be deemed to be guilty of the offence. The proviso stipulates that nothing contained in sub-section (1) shall render such a person liable to punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence of preventing the commission of the offence.".

33. In the case of ***National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal***[20], the Hon'ble Apex court has reiterated that;

"39 . (v) If the accused is a specific averment in the complaint and by virtue of their position they are liable to be proceeded with.€- 84. The test to determine if the Managing Director must be charged for the offence committed by the Company is to determine if the conditions in Section 23 of the MMDR Act have been fulfilled i.e., whether the individual was in-charge of and responsible for the affairs of the company during the commission of the offence. In view of the above decisions, the submissions which has been urged on behalf of the appellant cannot be acceded to. The determination of whether the conditions stipulated in Section 23 of the MMDR Act have been fulfilled is a matter of trial. Moreover, it is evident that the charge sheet, as a matter of fact, ascribes a role to A-1 and A-2 for the payment of transportation. Therefore, there is a prima facie case against A-1, which is sufficient to arraign him as an accused at this stage".

34. Additionally in the case of ***Maksud Saiyed v. State of Gujarat*** [21], the Hon'ble Apex court observed that :

"13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the

20. (2010) 3 SCC 330, **21.** (2008) 5 SCC 668,

Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities".

35. Hence, adducing liability for the unauthorized storage of iron ore fines on the partners of M/S GNG Exports is well within the ambit of law and its intent.

36. It is noticed that in enactments where criminal liability sought to be affixed on acompany, the provisions usually provide for "offences/contravention by companies".That being the case when an offence is attributed to a company, the same is done on the strength of a statutory prescription, there is no question of any "vicarious liability". Thus, the arguments that are made, time and again, before courts of law as regards to the vicariousness of liability of certain persons in the management of a company, is in essence a misnomer. It is for the simple reason that when the statute itself provides for a provision for the prosecution of a company, the only exercise that has to be done thereafter, is the application of the doctrine of attribution (supra) in order to pinpoint or fasten the liability upon the individuals within the larger body of persons occupying the management of the company.

37. Thus, the so called 'vicarious' liability of the Directors/ Key anagerial Personnel cannot be imputed automatically. In the absence of any statutory provision to this effect, if it is to be deemed to be included under the IPC, even then the prosecution would have to make averments with regard to the specific role played by the accused Directors/Key Managerial Personnel and demonstrate that such person was "in charge of the affairs of the company" and is directly and intrinsically connected to the crime alleged. One classic example of such an express provision fastening liability on the directors of a company is Section 141 of the Negotiable Instruments Act, 1881. In ***Aneeta Hada v. Godfather Travels & Tours (P) Ltd.***[22] also, the principle of "alter ego", was applied only in one direction, as in if a body corporate was being charged with an offence, then the principle would be applied to pin point to the group of person(s)who guide the business who had criminal intent, and not vice versa so as to lead to the fallacious conclusion that all the management personnel of the company

22. (2012) 5 SCC 661

possessed criminal intent. There has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company. Other examples wherein a specific statutory provision has been created to fasten/affix liability on a company and the directors in charge of itare liable under some specific statutes like Section 10 of the Essential Commodities Act, 1955; Section 42 of the Foreign Exchange Management Act, 1999 and Section 17 of the Prevention of Food Adulteration Act, 1954.

38. M/S Gananayak and Co was involved in supplying iron ore fines to M.S GNG Exports. The supply was facilitated by the truck bearing registration number- OR-05-W-0779. The origination of the fake transit passes was caused by M/S Gananayak and Co. The petitioners are the partners in M/S GNG Exports. They were not involved in causing the transportation of iron ore fines . They were the receivers of iron ores and not the employer of transportation. This implicates M/S Gananayak and Co can be brought in under the purview of "transport or store or cause to be transported" as enshrined under Section-4(1A) OF MMDR Act, 1957 and not the petitioners. Accordingly, the principle of vicarious liability cannot be attached to the petitioners.

39. In light of the discussions made herein above, I am not inclined to quash the proceedings in Case No. 2 (C) CC No. 07 of 2011 in its entirety. However, this court concedes to the fact that the petitioners cannot be brought under the cloak of liability for the transportation of iron ore fines vide fake transit passes. Hence, the proceedings in Case No. 2 (C) CC No. 07 of 2011, pending before the J.M.F.C, Kujang is quashed to the extent of charges attaching liability against the unauthorized transportation of iron ore fines against the petitioners. Nevertheless, the charges for the unauthorized storage of iron ore fines are sustained.

40. At the cost of repetition, it is emphasized that nothing shall be construed to come in the way or prejudicially affect the fair trial in so far as the Petitioners in Case No.2(C) CC No. 07 of 2011 are concerned. Ordered accordingly.

41. The CRLMP is accordingly disposed of.

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2022 (III) ILR - CUT- 1202

MISS. SAVITRI RATHO,J.

TRP(C) NO. 86 OF 2022

SONALIJA JENA .....Petitioner

.V.

ABINASH MOHAPATRA .....Opp. Party

CODE OF CIVIL PROCEDURE, 1908 – Section 24 – Power of transfer – Relevant factors to be considered – Discussed with case laws.

(Paras 6 & 8)

Case Laws Relied on and Referred to :-

1. AIR 2002 SC 396 : Sumita Singh Vs. Kumar Sanjay and Anr.
2. (2017) 4 SCC 150 : Krishna Veni Nagam Vs. Harish Nigam.
3. 2020 (III) ILR CUT 796 : PrabhatiPattnaik Vs.Aditya Kumar Pattnaik.
4. (2006) 9 SCC 197 : Anindita Das Vs. Srijit Das.
5. 2017 (II) CLR (SC) 981 : Santhini Vs. VijayaVenketesh.
6. 2022 SCC Online SC 1199 : N.C.V. Aishwarya Vs. A.S. Saravana Karthik Sha.
7. (TRP (CRL) No. 98 of 2021) : Biswajit Mishra Vs. Anuva Choudhury.

For Petitioner : Mr. B. Parida
For Opp. Party : Mr. R. Prusty

ORDER Date of Order : 19.10.2022

MISS. SAVITRI RATHO,J.

1. This application has been filed by the petitioner-wife under Section 24 of C.P.C. for transfer of C.P. No. 48 of 2021 filed under Section 22 of the Special Marriage Act, 1954 read with Section 7 of the Family Court Act by the opp. party-husband for restitution of conjugal rights, in the Court of learned Judge, Family Court, Rourkela, to the Court of learned Judge, Family Court, Bhubaneswar.

TRP(C) No. 235 of 2022 has been filed by the petitioner-wife under Section 24 of C.P.C. for transfer of C.P. No. 128 of 2022 filed by the opp. party-husband under Section 25 of the Guardian & Wards Act 1890, in the Court of learned Judge, Family Court, Rourkela, to the Court of learned Judge, Family Court, Bhubaneswar, which is listed today along with this TRP(C) and is also disposed of today by a separate order.

2. Vide order dated 08.09.2022, the matter was referred for mediation to the Orissa High Court Mediation Centre. The Mediator has submitted an interim report dated 27.09.2022 informing that the next date of meditation was

12.10.2022. Today, in TRP(C) No. 235 of 2022, Mr. Parida, learned counsel for the petitioner has filed the copy of the mediation report dated 12.10.2022 along with a memo. The mediator has inter alia reported that the mediation became unsuccessful. As mediation has failed, the two TRP(C) s are taken up for final disposal on the consent of the counsels.

3. Mr. B. Parida, learned counsel for the petitioner-wife submits that the parties had fallen in love and their marriage was arranged and solemnized before friends and relatives in the Rourkela Club on 10.02.2012. The parents of the petitioner had fulfilled the demands made at the time of marriage. But soon after her marriage she was tortured at Rourkela the place of her in laws as well as at her husband's workplace in Jharsuguda. They demanded Rs 5 lakhs more as dowry. Their son was born on 23.08.2014. But the opposite party continued to harass her. The parties stayed in Bhubaneswar between 2015 to 2016, but the opposite party left her and son and went back to Rourkela. She has lodged FIR against him at the Uditnagar Police Station. She has filed C.P.No. 134 of 2019 against him for divorce, permanent alimony and maintenance of their son , in the Court of the learned Judge, Family Court, Bhubaneswar, where he has appeared and filed written statement dated 06.07.2019. Thereafter in order to harass her , he has filed C.P.No, 48 of 2021 in the Court of the learned Judge , Family Court , Rourkela for restitution of conjugal rights. During pendency of the present TRP (C), the opposite party has filed C.P.No. 128 of 2022 in the Court of the learned Judge, Family Court, Rourkela claiming custody of their son and for transfer of the C.P. to Bhubaneswar, she has filed TRP (C) No. 235 of 2022 which is listed today. The petitioner and her minor son are residing in Bhubaneswar with her parents and as she has no independent source of income, they are dependent on her parents. As the distance between Rourkela and Bhubaneswar is more than 400 kms., it would be inconvenient for her to go to Rourkela to attend the case. That apart, C.P. No. 134 of 2019 filed by her for divorce is pending in the Court of learned Judge, Family Court, Bhubaneswar in which the opposite party-husband has appeared, so no inconvenience will be caused to him if C.P. No. 128 of 2022 is also transferred to the Court of learned Judge, Family Court, Bhubaneswar. Both cases should also be heard together by the same judge, to prevent contradictory decisions as the parties and the subject matter in the two proceedings are the same. In support of his prayer for transfer, Mr. B. Parida, learned counsel for the petitioner submits that it is the settled position of law that in matrimonial cases, the convenience of the wife is to be given paramount importance and in case one case is pending in a particular Court involving the same parties and subject matter, to prevent conflicting decisions, both the cases should be heard by the same Judge. He has relied on the following decisons :-

(i) Sumita Singh vrs. Kumar Sanjay and another reported in AIR 2002 SC 396.

(ii) Krishna Veni Nagamvrs. Harish Nigam reported in (2017) 4 SCC 150.

(iii) Prabhati Pattnaik vrs.Aditya Kumar Pattnaik reported in 2020 (III) ILR CUT 796.

4. Mr. R. Prusty, learned counsel for the opposite party opposes the prayer for transfer stating that the petitioner will face inconvenience and expenditure in coming from Rourkela to Bhubaneswar to contest this case as well as other cases pending between the parties as he will have to cover 800 miles to come to Bhubaneswar to attend to all his cases pending there and return to Rourkela. He also apprehends danger to his life if he has to come to Bhubaneswar. This Court should also consider the difficulties which will be faced by him if the case is transferred to Bhubaneswar.

5. Sections 22 to 25 of the C.P.C deal with power of transfer of different Courts. Section – 24 of the C.P.C deals with the power of the High Court and District Court to transfer cases pending in any court subordinate to it and is extracted below :

Section 24.General power of transfer and withdrawal.

(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage-

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and-

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which isthereafter to try or dispose of such suit or proceeding] may, subject to any special directions in the case of any order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section,-

(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court;

(b) "proceeding" includes a proceeding for the execution of a decree or order.]

(4) the Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it.

6. In the case of ***Sumita Singh*** (supra), the Supreme Court observed that the wife's convenience must be looked into as it was the husband's suit against the wife and considering her difficulties allowed her prayer for transfer .

In the case of ***Anindita Das vs. Srijit Das*** reported in ***(2006) 9 SCC 197***, the Supreme Court observed that as the Court was showing leniency shown to the ladies was being misused as a number of petitions for transfer were being filed for which each petition was required to be considered on its merit. As the husband was willing to pay all the travelling and accommodations expenses of the wife and a companion , the wife's prayer for transfer was rejected by the Supreme Court .

In the case of ***Krishna Veni Nagam*** (supra), the Supreme Court has considered the problems faced by the wife as well as the husband and to take care of their difficulties , the help of technology like video conferencing can be taken

The decision of the Supreme Court in ***Krishna Veni*** (suspra), had been referred to a larger Bench. In its decision in ***Santhini vs. VijayaVenketesh*** reported in 2017 (II) CLR (SC) 981. Chief Justice Mishra speaking for the majority answered the reference as follows :

…"56. In view of the aforesaid analysis, we sum up our conclusion as follows :-

(i) In view of the scheme of the 1984 Act and in particular Section 11, the hearing of matrimonial disputes may have to be conducted in camera.

(ii) After the settlement fails and when a joint application is filed or both the parties file their respective consent memorandum for hearing of the case through videoconferencing before the concerned Family Court, it may exercise the discretion to allow the said prayer.

(iii) After the settlement fails, if the Family Court feels it appropriate having regard to the facts and circumstances of the case that videoconferencing will sub-serve the cause of justice, it may so direct.

(iv) In a transfer petition, video conferencing cannot be directed.

(v) Our directions shall apply prospectively.

(vi) The decision in Krishna VeniNagam (supra) is overruled to the aforesaid extent.

Justice Dr. D.Y Chandrachud in his dissenting opinion held as follows :

9. The High Courts have allowed for video conferencing in resolving family conflicts. A body of precedent has grown around the subject in the Indian context. Thejudges of the High Court should have a keen sense of awareness of prevailing social reality in their states and of the federal structure. Video conferencing has been adopted internationally in resolving conflicts within the family. There is a robust body of authoritative opinion on the subject which supports video conferencing, of course with adequate safeguards. Whether video conferencing should be allowed in a particular family dispute before the Family Court, the stage at which it should be allowed and the safeguards which should be followed should best be left to the High Courts while framing rules on the subject. Subject to such rules, the use of video conferencing must be left to the careful exercise of discretion of the Family Court in each case.

10. The proposition that video conferencing can be permitted only after the conclusion of settlement proceedings (resultantly excluding it in the settlement process), and thereafter only when both parties agree to it does not accord either with the purpose or the provisions of the Family Courts Act 1984. Exclusion of video conferencing in the settlement process is not mandated either expressly or by necessary implication by the legislation. On the contrary the legislation has enabling provisions which are sufficiently broad to allow video conferencing. Confining it to the stage after the settlement process and in a situation where both parties have agreed will seriously impede access to justice. It will render the Family Court helpless to deal with human situations which merit flexible solutions. Worse still, it will enable one spouse to cause interminable delays there by defeating the purpose for which a specialised court has been set up.

11. The reference should in my opinion be answered in the above terms."....

This Court in the case of ***Prabhati Pattnaik*** (supra), relying on the decision in Krishna Veni, had observed as follows:

"it will be open to the transferee court to conduct the proceedings or record evidence of the witnesses who are unable to appear in court, by way of video conferencing."

The Supreme Court in the recent case of ***N.C.V. Aishwarya vs. A.S. Saravana Karthik Sha : 2022 SCC Online SC 1199***, has inter alia directed that, 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 Choudhury vs. Biswajit Mishra (TRP(C) No. 324*** of 2017) decided on 05.09.2022 along with ***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 discussed the difficulties which are faced by a husband when transfer applications filed by the wife are allowed without considering the convenience which may be faced by him and held that the convenience and inconvenience of both the parties should be considered anda balanced view adopted .

7. The power of transfer must therefore be exercised with caution and should not be done for the mere asking. The applicant/plaintiff, has the privilege to pick his own forum, the Court should therefore exercise its power so that both parties get a chance to participate in the trial and the principal guiding factor should therefore be the interest of justice.

8. In view of the above discussion, apart from the provisons of Section 24 of the C.P.C and the decisions of the supreme Court and this Court, the following factors have to be considered for deciding the prayer for transfer, namely :

(a) The wife has no independent source of income and is staying with her parents in Bhubaneswar alongwith her minor son.

(b) The distance between Bhubaneswar and Rourkela is more than 400 Kms.

(c) C.P.No.134 of 2019 filed by the wife for divorce is pending in Bhubaneswar where the opposite party – husband has already appeared and filed his written statement.

(d) As C.P.No. 134 of 2019 and C.P.No. 48 of 2021 involve the same parties and arise out of the same subject matter, to prevent conflict in decisions , C.P.No. 48 of 2021 should be tried by the same Judge .

9. In the facts of the case , as C.P.No. 134 of 2019 is already pending in the Court of the learned Family Judge, Bhubaneswar , in order to prevent conflicting decisions in the two cases , I am of the view that interest of justice would be served if the prayer for transfer is allowed .

10. The learned Judge, Family Court, Rourkela is requested to send the record of C.P. No. 48 of 2021 (**Abinash Mohapatravrs. Sonalija Jena**) to the Court of learned Judge, Family Court, Bhubaneswar by 18.11.2022. After which, the Learned Judge, Family Court, Bhubaneswar shall issue notice to both the parties for their appearance.

11. The apprehension of Mr. Prusty regarding danger to the life of opposite party if the case is transferred to Rourkela appears to be unfounded as he has already appeared in C.P. No. 134 of 2019 and filed his written statement . But this Court cannot turn a blind eye to the inconvenience which will be faced by him to come from Rourkela to Bhubaneswar to contest the case covering 800 kms. The learned Judge, Family Court, Bhubaneswar is therefore directed to post the cases involving the parties on the same date/(s) as far as possible and if there is no other impediment and to complete the proceedings expeditiously.

12. The TRP (C) is accordingly allowed.

13. Registry is directed a send a copy of this order to the Courts of the learned Judge, Family Court, Rourkela and Bhubaneswar by email for compliance.

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2022 (III) ILR - CUT- 1208

R.K. PATTANAIK, J.

CRLMC NO. 3973 OF 2012

P. ANANDA RAO @ ANANDA RAO .....Petitioner

.V.

R. KRISHORE PATANAIK .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 256, 378(4) – The Petitioner was acquitted under Section 256 Cr.P.C in a complaint Case and the case was closed by the learned J.M.F.C – The opposite party preferred revision before Additional Sessions Judge – The revision

was allowed – Whether revision is maintainable against the order of acquittal under Section 256 Cr.P.C ? – Held, No – The correct approach should be appeal under Section 378(4) of Cr.P.C. before the Hon'ble High Court.

Case Laws Relied on and Referred to :-

1. (2013)2 SCC 17 : Subash Chand Vs. State Delhi Administration.
2. 2009 Vol-IX AD (Delhi) 566 : Ravi Sharma Vs. State (NCT of Delhi) and Anr.
3. 2003(108)DLT 142 : Yudhvir Singh Vs. Nagmani Financial Services Private Ltd.
4. 1995 (II)OLR433 : Rabindra Behera Vs. Sridhar Samantaray & Ors.

For Petitioner : Mr. Amitav Tripathy
For Opp. Party : Mr. Jugal Kishore Panda.

JUDGMENT Date of Judgment: 01.11.2022

R.K. PATTANAIK,J.

1. Instant petition under Section 482 Cr.P.C. is at the behest of the petitioner questioning the correctness and judicial propriety of the impugned order dated 24th November, 2012 passed in Criminal Revision Petition No.20 of 2012 by the learned1st Additional Sessions Judge, Berhampur, Ganjam, whereby, order dated 9th August, 2010 in 1CC Case No.132 of 2007 of the learned J.M.F.C., Berhampur was set aside and such challenge is on the grounds inter alia that the same is untenable in law and therefore, deserves to be interfered with and set aside.

2. The complaint in 1CC Case No.132 of 2007 was filed by the opposite party under Section 138 NI Act, wherein, the petitioner entered appearance, however, when it was posted to 9th August, 2010 for hearing, the former did not turn up, as a result of which, the complaint was dismissed and the latter was acquitted under Section 256 Cr.P.C. and the case was closed by the learned J.M.F.C., Berhampur. Against the above order of acquittal, the opposite party preferred a revision which was allowed by the impugned order under Annexure-2 restoring the complaint to file. The aforesaid decision of the learned 1st Additional Sessions Judge, Berhampur, Ganjam is under challenge which is primarily on the ground that the revision was not maintainable as the order of acquittal under Section 256 Cr.P.C. was to be appealed in terms of Section 378 Cr.P.C.

3. Heard Mr. Amitav Tripathy, learned counsel for the petitioner and Mr. Jugal Kishore Panda, learned counsel for the opposite party.

4. Mr. Tripathy, learned counsel for the petitioner submits that the learned Sessions court fell into error by entertaining the revision when the opposite party was required to challenge such an order of acquittal by filing an appeal under Section 378 Cr.P.C. It is contended that against the order of acquittal even under Section 256 Cr.P.C., an appeal was to be preferred by the opposite party but the learned court below without any jurisdiction not only entertained the revision but also allowed the same and resultantly reinstated the complaint. Mr. Panda, learned counsel for the opposite party, on the other hand, would submit that there has been no wrong or illegality committed as the learned court below in order to do proper justice entertained the revision and on just ground set aside the order of acquittal and restored the complaint to file for a decision on merit and therefore, the impugned order under Annexure-2 does not call for any interference.

5. Position of law is loud and clear which is to the effect that an order of acquittal under Section 256 Cr.P.C. has to be challenged by an appeal under Section 378 Cr.P.C. In ***Subash Chand Vrs. State Delhi Administration (2013)2 SCC 17***, the Supreme Court held and observed that an order of dismissal of a complaint in default would have the effect of acquittal and therefore, an application under Section 378(4) Cr.P.C. seeking leave to appeal against the decision is maintainable, however, in that case, the appeal was rejected on merit. In ***Ravi Sharma Vrs. State (NCT of Delhi) and Another 2009 Vol-IX AD (Delhi) 566,*** it has been held that the only remedy available to the complainant against an order passed under Section 256 Cr.P.C. would be by way of an appeal under Section 378 Cr.P.C. Similarly, in ***Yudhvir Singh Vrs. Nagmani Financial Services Private Limited 2003(108)DLT 142,*** the Delhi High court concluded that when the complaint was dismissed as a consequence of failure on the part of the complainant, it results in an acquittal under Section 256 Cr.P.C. and therefore, an application for special leave to appeal under Section 378(4) Cr.P.C. would lie. The same view has been expressed by the Delhi High Court in ***M/s Logix Corporate Solutions Private Limited Vrs. State of NCT of Delhi and Another*** decided in Criminal Leave Petition No.158 of 2017 and ***CRLMA No.4579 of 2017*** and disposed of on 3rd February, 2020. So, it cannot be gainsaid that an order of acquittal under Section 256 Cr.P.C. has to be appealed and can only be entertained provided the leave is granted by the Court as per and in accordance with Section 378(4) Cr.P.C.

6. In the instant case, after the order of acquittal by the learned J.M.F.C., a revision was carried to the Sessions court which resulted in the passing of the impugned order under Annexure-2. In fact, an objection had been raised by the petitioner before the court below vis-à-vis maintainability of revision. However,

the Sessions court considered it appropriate to deal with the revision and even directed restoration of the complaint filed by the opposite party. The Sessions court relying upon a decision rendered in ***Rabindra Behera Vrs. Sridhar Samantaray and others 1995 (II)OLR433*** reached at a conclusion that a revision can be entertained in order to do proper justice.

7. In the decision of ***Rabindra Behera*** (supra), this Court, in the case of an acquittal under Section 256 Cr.P.C. though held that it is appealable in view of Section 378 Cr.P.C. yet treated it as a revision while exercising jurisdiction under Section 401 Cr.P.C. and remanded after restoring the case with an observation that even otherwise, the Court is not denuded of its power to suomotu revise an order of the inferior court where there is manifest error or illegality committed which resulted in miscarriage of justice. In fact, a Sessions court is having plenary powers to call for and examine records of any proceeding pending before a criminal court situate within its local jurisdiction for the purpose of satisfying itself as to the correctness of a finding recorded or returned which, however, shall not be exercised under Section 397 Cr.P.C. in relation to any interlocutory orders. Such power of a Sessions court shall have to be read with Section 399 Cr.P.C. The revisional power of this Court is specified in Section 401 Cr.P.C. In fact, where any proceeding by way of a revision is commenced in terms of Section 399(1) Cr.P.C., the provisions of sub-sections (2) to (5) of Section 401 Cr.P.C. shall apply to such proceedings and references so made therein to be construed as references to a Sessions court. However, as per Section 401(4) Cr.P.C., it is stipulated that where under the Code, an appeal lies but it has not been filed, no proceeding by way of revision shall be entertained at the instance of a party, who could have appealed. In other words, if an order is appealable but assailing it, a revision is filed, such revision cannot be entertained in view of Section 401(4) Cr.P.C. Furthermore, sub-section (5) of Section 401 Cr.P.C. specifies that where an appeal lies but an application for revision has been made by any person and the Court is satisfied that such move was under an erroneous belief that no appeal lies thereto and that it is necessary in the interest of justice so to do, the Court may treat the application as an appeal and dispose of the same accordingly. In the decision of Rabindra Behera(supra), this Court treated the proceeding as a revision under Section 401 Cr.P.C. for doing justice yet with a conclusion that an order of acquittal under Section 256 Cr.P.C. has to be appealed in view of Section 378 Cr.P.C. While concluding so, this Court in the aforesaid case referred to Section 401(5) Cr.P.C. and also observed that suomotu powers can be exercised in case of glaring defect or error in the procedure or point of law.

8. To sum up, an order of acquittal under Section 256 Cr.P.C. shall have to be challenged in appeal under Section 378 Cr.P.C. subject to a leave granted by the Court. If a special leave is sought for by the complainant in terms of sub-section(4) of Section 378 Cr.P.C. and the same is allowed, then the appeal is admitted and decided according to law. A revision cannot lie if the order is appealable in nature in view of Section 401(4) Cr.P.C. If erroneously a revision is filed when the order is appealable, then in that case, such revision can be treated as an appeal and disposed of as stipulated in Section 401(5) Cr.P.C. Referring to the aforesaid decision in ***Rabindra Behera*** ibid, the learned court below entertained the revision and disposed it of on merit and restored the complaint to the file of the court of learned J.M.F.C., Berhampur. In the considered view of the Court, the court below fell into error by exercising the revisional power under Section 397 read with Section 399 Cr.P.C. notwithstanding the bar contained in Section 401(4) thereof. If at all a revision is to be treated as an appeal as per Section 401(5) Cr.P.C., it can only be by this Court in case of an order of acquittal under Section 256 Cr.P.C. since because a Sessions court cannot entertain an appeal under Section 378 Cr.P.C. In other words, in case of an order of acquittal in a proceeding instituted upon complaint, an application for special leave shall have to be moved before this Court by the complainant. Such an exercise can only be undertaken by approaching this Court and in case, special leave to appeal is refused, no appeal from that order of acquittal shall lie under Section 378 (1) or (2)Cr.P.C. However, if the order is not appealable, a revisional court is having ample jurisdiction to rectify the mistake or error and even regularize a proceeding and not otherwise, when an appeal is to lie from such an order and furthermore, it cannot exercise jurisdiction under Section 401(5) Cr.P.C. to the extent and with reference to Section 378 Cr.P.C. where an occasion may arise for this Court alone to treat a revision as an appeal. Since this Court is possessed of the jurisdiction under Section 482 Cr.P.C., it has also the powers to pass appropriate orders and issue directions to do *ex debitio justicia,* a jurisdiction which does not lie with a Sessions court. A Sessions court again does not have the suomotu power alike this Court which is clearly evident from the expression 'the record of which has been called for by itself or *which otherwise comes to its knowledge'* (italicized to emphasize the existence of suomotu power of this Court which a Sessions court does not possess) employed in Section 401(1) Cr.P.C. Having discussed the relevant provisions, the Court reaches at a conclusion that the learned court below could not have entertained the revision for the following reasons, such as, the order under Section 256 Cr.P.C. is appealable in nature; a revision cannot lie when the order is to be appealed in terms of Section 378 Cr.P.C. with a special leave applied for by the complainant before this Court; when it cannot exercise powers

under Sections 401(5) Cr.P.C. and treat a revision as an application for appeal in view of Section 378(4) Cr.P.C. and lastly, it does not have the inherent jurisdiction or for that matter, suomotu power under Section 401(1) Cr.P.C. In the ultimate analysis, it can be said that the Sessions court instead of restoring the complaint should have directed the opposite party to approach this Court in appeal as per and in accordance with Section 378(4) Cr.P.C.

9. Despite a conclusion, as above, the question is, whether, in the facts and circumstances of the case, restoration of the complaint as has been allowed by the Sessions court should still be disturbed? In fact, this Court is not inclined to interfere with the impugned order dated 24th November, 2012 despite its disagreement with the reasoning of the revisional court having regard to the background facts which are related to the circumstances preceding the dismissal of the complaint. That apart, reiterating the view of this Court expressed in ***Rabindra Behera*** (supra) which is to effect that the courts are not respected on account of its power to legalize prejudice on technical ground but because it is capable of removing injustice and cognizant of the fact that a disposal should normally be on merits instead of technicality, such restoration of complaint ought not to be tinkered with.

10. It is ordered accordingly.

11. In the result, the petition stands dismissed for the reasons discussed herein above.

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2022 (III) ILR - CUT- 1213

R.K. PATTANAIK, J.

CRLMC NO. 4453 OF 2011

AJAYA KUMAR BARIK .....Petitioner

.V.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Whether an application under Section 482 Cr.P.C is maintainable to quash proceedings which are ex-facie bad for want of sanction as required under Section 197 Cr.P.C ? – Held, Yes. (Para 9)

Case Laws Relied on and Referred to :-

1. MANU/OR/0421/2017 : Satyabrata Lenka Vs. State of Orissa & Ors.
2. 2012 SCC Online Ori 316 : Sangram Keshari Behera Vs. Niladri Dhir
3. 1997(2) SCR 1139 : Sambhoo Nath Misra Vs. State of U.P. & Ors.
4. AIR 1986 SC 345 : Balbir Singh Delhi Administration Vs. D.N. Kadian, M.M. Delhi & Anr.

For Petitioner : Mr. Jagbandhu Sahoo, Sr. Adv.

For Opp. Parties : Mr. P.K. Muduli, AGA & Mr. P.S. Das

JUDGMENT Date of Judgment : 01.11.2022

R.K. PATTANAIK, J.

1. The petitioner has preferred the instant petition under Section 482 Cr.P.C. challenging the legality and judicial propriety of the impugned order of cognizance dated 16th April, 2011 under Annexure-1 passed in 1CC Case No.20 of 2009 by the leaned J.M.F.C., Kodala, Ganjam on the grounds inter alia that the same is not tenable in law and hence, liable to be quashed in the interest of justice.

2. Briefly stated, opposite party No.2 filed a complaint in the court of learned J.M.F.C. Kodala with regard to an incident dated 9th February, 2008 during which it is alleged that the petitioner and other police staff illegally seized his motorcycle claiming it to be stolen and in that connection, he was ill-treated and abused in filthy language, inasmuch as, the vehicle was not released despite showing proof regarding its ownership. After the complaint was received, the learned court below recorded the initial statement of the complainant and after conducting an enquiry in terms of Section 202 Cr.P.C., the impinged order under Anenxue-1 was passed and the petitioner was summoned under Annexue-2. According to the petitioner, the alleged incident related to seizure of a Hero Honda motorcycle from the possession of the brother of opposite party No.2 which was carried out on the complaint of one Akhay Kumar Mohapatra and with regard to its ownership, no valid documents could be produced and therefore, it was not released. The contention of the petitioner is that since the documents submitted by the petitioner failed to satisfy the ownership of the vehicle, it was not released in favour of opposite party No.2 and in order to harass him, the complaint was filed with false allegations made therein and the learned court below without properly verifying the documents and demanding a sanction in terms of Section 197 Cr.P.C. passed the order of cognizance under Annexue-1. It is alleged that the vehicle in question which was shown to have been purchased from M/s Rohan Auto Riders Pvt. Ltd. stood in the name of one Sunandan Baliarsingh, who claimed to have disposed it of in favour of opposite

party No.2 which was sought to be proved by an affidavit on the strength of which it was interimly released by the learned court below on an application under Section 457 Cr.P.C.

3. Mr.J.Sahoo, learned Senior Advocate appearing for the petitioner contends that in the facts and circumstances of the case, the court below fell into error in taking cognizance of the offences without insisting for sanction which is statutorily required in view of Section 197 Cr.P.C. before criminally prosecuting a public servant. While contending so, a decision of the Apex Court in the case of **D. Devaraja Vrs. Owais Sabeer Hussain** decided in Criminal **Appeal No.458 of 2020** by a judgment dated 18th June, 2020 which is with regard to sanction is referred to. Apart from above, the decisions in **Satyabrata Lenka Vrs. State of Orissa and others MANU/OR/0421/2017 and Sangram Keshari Behera Vrs. Niladri Dhir 2012 SCC Online Ori 316** are also placed reliance on while advancing a case for sanction. Thus, it is contended that the learned court below could not have taken cognizance of the offences without demanding sanction and hence, the impugned order under Annexue-1 is unsustainable in law.

4. Mr.Muduli, leaned AGA justified the decision of the learned court below whereby cognizance of the alleged offences was taken. Whereas the learned counsel appearing for opposite party No.2 contended that the conduct of the petitioner was unbecoming of a public servant and he committed serious illegality by making seizure of the vehicle without any justification and therefore, no sanction was required. While contending so, Mr. Das, learned counsel for the opposite party No.2 cited the decisions, such as, **Sambhoo Nath Misra Vrs. State of U.P. and others 1997(2) SCR 1139 and Balbir Singh Delhi Administration Vrs. D.N. Kadian, M.M. Delhi and Another AIR 1986 SC 345**.

5. Section 197 Cr.P.C. stipulates that when a public servant is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction of the Government. It does mean that a public servant not removable from his office save by or with the sanction of the Government cannot be criminally prosecuted unless a sanction under Section 197 Cr.P.C. is obtained provided the mischief which is alleged against him was committed while he was acting or purporting to act in the discharge of official duty. The law in this regard is well settled. If the act complained of has any nexus with the official duty, in that case, the public servant cannot be subjected to prosecution without sanction of the Government. The Apex Court in

D.Devaraja (Supra) elaborately discussed about the sanction referring to numbers of its earlier judgment and finally concluded that the object of Section 197 Cr.P.C. is to prevent public servants from being subjected to vexatious proceedings for the acts which are done in discharge of official duty or committed in excess of such duty or authority.

6. In the case at hand, admittedly, seizure of a vehicle was shown which was carried out by the petitioner and other police officials and according to opposite party No.2, it could not have been held in absence of a search warrant and registration of a case and such seizure was accomplished in order to wreck vengeance since he had lodged a complaint against said Bijaya Kumar Mohapatra, who was allegedly responsible for selling fake and misbranded medicine to him. The question is, under the circumstances and in relation to seizure of a vehicle claimed to have been owned by opposite party No.2, after entertaining the complaint at the latter's behest, whether the learned court below was to insist upon for a sanction under Section 197 Cr.P.C. before taking cognizance of the offences against the petitioner?

7. The opposite party No.2 alleged illegality against the petitioner for having seized the vehicle and detained it as a result of which he was humiliated and further sustained pecuniary loss. According to opposite party No.2, the petitioner misused the authority and even ill-treated and abused him during the incident of seizure. There is no denial to the fact that the petitioner seized the vehicle in or from the possession of opposite party No.2. While dealing with a case of misappropriation of public fund, the Apex Court in the case of **Sambhoo Nath Misra** (supra) held that it is not the official duty of a Government servant to fabricate record and misappropriate public funds in furtherance of or in the discharge of official duty rather the official position enables him to misuse the authority and such act cannot be said to be integrally connected or inseparably inter-linked with the crime committed in course of the transaction. In **Balbir Singh** (supra), the Apex Court summed up and held that if the act complained has no nexus, reasonable connection or relevant to the official act or duty of such public servant done or purported to be done in discharge of an official duty and is otherwise illegal, unlawful or in the nature of offence, in that case, the public servant cannot have shelter under Section 197 Cr.P.C. In the aforesaid decision, considering the facts of the case, the Apex Court observed that protection under Section 197 Cr.P.C. cannot be extended to the accused persons since the mischief was having no reasonable nexus or relevance to the official act or duty. Referring to the decisions of **Samboo Nath Misra** and **Balbir Singh** ibid, Mr. Das, learned counsel for opposite party No.2 contended that in the present case as well considering the circumstances leading to the seizure of vehicle which

was without any legal basis, no sanction was required and rightly therefore, the learned court below did not demand for sanction and proceeded to take cognizance of the offences vis-à-vis the petitioner and others.

8. While heavily relying upon the decision of **D. Devaraja** (supra), it is contended by Mr. Sahoo, learned Senior Advocate that since the alleged overt act or mischief said to have been committed while discharging official duty, the learned court below could have extended the benefit of Section 197 Cr.P.C, however, it did not do so and illegally proceeded to take cognizance of the offences. In **Sangram Keshari Behera** (supra), since the police officials were on duty in order to execute warrants of arrest whereafter the complaint was filed by claiming police excess, this Court held that since it was in due discharge of official duty, sanction was necessary and consequently quashed the order of cognizance. In **Satyabrata Lenka** (supra), it was held that before taking cognizance of the offences against public servants enquiry has to be conducted to ascertain as to whether the person against whom the complaint was filed was while discharging official duty at the time of alleged incident. By taking note of the above decisions, the Court is to decide as to if the learned court below was required to demand for sanction under Section 197 Cr.P.C. before proceeding against the petitioner at the time of considering whether to take cognizance of the offences or otherwise.

9. If the seizure of the vehicle has been carried out in due discharge of official duty, in that case, the learned court below was to demand sanction under Section 197 Cr.P.C. If it is otherwise and that the petitioner did mischief and illegally seized the vehicle by misutilising the authority and official position and committed the excess in the colour of discharging duty, no sanction would be required. The Apex Court in **D. Devaraja** (supra) while dealing with a matter concerning sanction held and observed that an application under Section 482 Cr.P.C. is maintainable to quash proceedings which are ex facie bad for want of sanction, frivolous or in abuse of process of court. It has been further held therein that to decide whether sanction is necessary, the test is whether the act is totally unconnected with the official duty or if there is a reasonable nexus with the official duty and in that case the allegation was with regard to gross mischief committed during custodial interrogation. The Supreme Court in the above case concluded that if the act alleged against a policeman is reasonably connected with discharge of his official duty, it does not matter if he has exceeded the scope of his powers and/or acted beyond the four corners of law. In the case at hand, the seizure of the vehicle was carried out by the petitioner which is alleged to be on the instigation of a person with whom opposite party No.2 was not pulling on well and in good terms and that some excess was committed by him

which in the considered opinion of the Court may have amounted to commission of offences, however, basically connected to the official duty or having nexus with the investigation and hence, sanction should have been insisted upon before proceeding with the complaint which is a view derived from the ratio of the Apex Court in **D. Devaraja** ibid.

10. It is ordered accordingly.

11. In the result, the petition stands allowed. As a necessary corollary, the impugned order of cognizance dated 16th April, 2011 under Annexure-1 passed in 1CC Case No.20 of 2009 is hereby quashed with a direction to the learned J.M.F.C., Kodala, Ganjam to demand sanction under Section 197 Cr.P.C. as against the petitioner before proceeding with the complaint and taking cognizance of the offences.

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2022 (III) ILR - CUT- 1218

SASHIKANTA MISHRA, J.

WPC (OAC) NO. 1067 OF 2018

RAMESH CHANDRA BISWAL & ORS. .....Petitioners

.V.

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

SERVICE LAW – Regularisation – Petitioners were engaged as High Skilled worker in between 24.09.1980 to 01.06.1992. – The Opposite Party department instead of regularizing their services issued order to work under the work-charged establishment by order dated 27.10.2008 – Whether such order is sustainable? – Held, No – It is apparent that though the petitioners render three decades of continuous service to the State but have been left in the lurch – Matter remitted back to the authority to take decision on regularization of services of the petitioner with due regards to all relevant factors like availability of post, seniority etc. (Para 16)

Case Laws Relied on and Referred to :-

1. (2006) 4 SCC 1 : Secretary, State of Karnataka & Ors. Vs. Umadevi & Ors.
2. (2010) 9 SCC 247 : State of Karnataka & Ors. Vs. M.L. Kesari & Ors.
3. OJC No.14196 of 1999 : State of Orissa & Ors. Vs.Dhaneswar Sahu & Anr.

4. WPC (OA) No. 157 of 2010 :Pravaranjan Kumar Panda Vs.Water Resources Department.
5. (2017) 4 SCC 113 : State of Tamil Nadu Vs. A. Singamuthu.
6. (2011) 2 SCC 429 : State of Rajasthan Vs. Dayalal.

For Petitioners : Mr. Upendra Kumar Samal, M.R. Mohapatra, S.P. Patra, A.K.Kar and B.R. Barick

For Opp. Party : Mr. H.K. Panigrahi,Addl. Standing Counsel.

JUDGMENT Date of Judgment: 07.04. 2022

SASHIKANTA MISHRA, J.

1. The petitioners in the present writ application seek to challenge the action of the Opposite Parties in taking them over to the work-charged establishment instead of regularizing their services. According to the petitioners, who claim to have been engaged as NMR/HR workers between 1980-1993, they are entitled to be regularized in service in view of the ratio laid down by the Apex Court in the case of ***Secretary, State of Karnataka and others vs. Umadevi and others***, reported in (2006) 4 SCC 1.

2. The factual matrix of the case is as follows:

All the 23 petitioners claim to have been engaged as NMR/HR workers by the Executive Engineer P.H. Division, Cuttack (Opposite Party No.4). While petitioner No.1 was engaged as Fitter Mistry on 24.09.1980, petitioner No.15 was engaged as High Skilled worker on 01.06.1992. All the other petitioners have been engaged similarly as Fitter Mistry/ Khalasi/ Helper/High Skilled worker in between the aforementioned two dates. On 28.10.1994, a provisional gradation list of NMR/HR personnel of Cuttack R.W.S.S. Division was published and circulated among 192 such workers of the Division inviting objections. The said gradation list was subsequently made final. After publication of the final gradation list, the petitioners and the other NMR employees regularly submitted representations to the authorities for regularization of their services. On 10.04.2006, a Constitution Bench of the Hon'ble Supreme Court of India rendered the judgment in ***Umadevi (supra)*** directing the Union and State Governments to take steps to regularize, as a one-time measure, the services of irregularly appointed persons, who have worked for ten years or more in duly sanctioned posts without orders of any Court or Tribunal. The petitioners submitted representation again laying their claim for regularization on the basis of the ratio of ***Umadevi***. However, the Government of Odisha in R.D. Department instead decided to absorb the NMR personnel in different categories of Class-IV posts under work- charged establishment in the

scale of pay of Rs.2550-55-2660-60-3200 with usual DA/HRA as sanctioned by Government from time to time. Basing on such letter of the R.D. Department bearing No.78991 dated 27.10.2008, the Opposite Party No.4 issued order to the petitioners to work under the work-charged establishment. It is the case of the petitioners that they were duly appointed against existing vacant posts in the regular establishment and have uninterruptedly worked for more than 10 years prior to the date of judgment passed in ***Umadevi***, that too without any order of the Court or Tribunal and therefore, their services need to be regularized from the date they joined in service. On such facts, the petitioners pray that they may be regularized from the date of their joining along with grant of financial and retirement benefits.

3. A common counter has been filed on behalf of all the Opposite Parties wherein the claim of the petitioners for regularization of their services has been sought to be repelled on the ground that they are not entitled to such benefit. The Opposite Parties have referred to the Work Charged Employees (Appointment and Conditions of Service) Instructions, 1974 (for short, "the Instructions 1974"), Finance Department Resolution dated 15.05.1997 and Water Resources Department Resolution dated 07.09.1995 to state that it is the policy decision of the Government as to how to regularize NMR/DLR and workcharged employees, which is reflected in the rules and circulars noted above. Accordingly, the petitioners have been brought over to the work-charged establishment and being subjected to the service conditions provided in the Instructions 1974 have accepted the same without offering any challenge since the year 2009. It is, therefore, stated that the petitioners cannot seek a relief *de hors* the service conditions provided in Instructions 1974. Referring to the provision of the Orissa Civil Services (Pension) Rules, 1992, it is further stated that in so far as the claim for pensionary benefits is concerned, the petitioners having been brought over to the work-charged establishment shall be governed under Rule 18(3) thereof, which provides for grant of minimum pension to a workcharged employee who has discharged service for five years or more. It is also stated that there is no provision in the Instructions 1974 to bring the work-charged employees to the regular establishment. The claim of the petitioners is described as misconceived on the ground that they have made a backdoor entry into Government service without being sponsored by the employment exchange or undergoing any recruitment process. It is finally stated that as per Finance Department resolution dated 15.05.1997, which is an existing scheme for absorption in regular establishment in supersession of all previous resolutions, a work-charged employee cannot claim the benefit of a regular employee. Therefore, there is no scope of regularization of such employees particularly, after the judgment of the Apex Court in ***Umadevi.***

4. Heard Mr. Upendra Kumar Samal, learned counsel for the petitioners and Mr. H.K. Panigrahi, learned Additional Standing Counsel for the State at length.

5. Mr. Samal would argue at the outset that all controversy relating to regularization of services of all types of casual employees including NMR/DLR/Job contract workers has been set at rest by the Apex Court in its judgment rendered in the case of ***Umadevi***. It is submitted that the petitioners fully fulfill the criteria laid down in ***Umadevi*** inasmuch as their initial appointments being against vacant sanctioned posts may be irregular but not illegal and they have admittedly worked for more than 10 years without intervention of any Court or Tribunal prior to the said judgment. Mr. Samal has also referred to the decision of the Apex Court in the case of ***State of Karnataka and others vs. M.L. Kesari and others***, reported in (2010) 9 SCC 247 to support his contention that the petitioners have fulfilled the criteria much prior to the cut-off date, i.e., 10.04.2006. On the basis of the above judgments, Mr. Samal contends that the only course open to the Opposite Parties-Authorities after ***Umadevi*** was to regularize the services of the petitioners but instead of doing so, the petitioners were brought over to the work-charged establishment which is not akin to regular service. This, according to Mr. Samal is in complete violation of the ratio of ***Umadevi*** as well as ***M.L. Kesari (supra)***. It is also submitted that though being work- charged employees the petitioners are entitled to the minimum pay scale of regular employees along with admissible allowances and gratuity etc. but are deprived of pensionary benefits, despite having put in decades of uninterrupted and unblemished service to the State.

6. Per contra, Mr H.K. Panigrahi has relied upon the decision of the Odisha Administrative Tribunal in the case of ***Hurusikesh Singh vs. State of Orissa and others*** in O.A. No.447 of 2006, as confirmed by this Court as well as the Apex Court. It is argued by Mr. Panigrahi that in the aforementioned case, the Tribunal after relying upon the provisions of Instructions 1974 held that the applicant therein who was a work-charged employee is not entitled to the benefit of regularization of his services. Mr. Panigrahi has also referred to two judgments of this Court, i.e., the case of ***State of Orissa and others vs.Dhaneswar Sahu and another in OJC No.14196 of 1999*** and the case of ***Pravaranjan Kumar Panda vs.Water Resources Department*** in WPC (OA) No. 157 of 2010. Mr. Panigrahi has, in particular, referred to the observation of the Division Bench in the case of ***Dhaneswar Sahu*** (supra) to the effect that without availability of posts in the regular establishment, a workcharged employee, even if he has completed five years of service, cannot become a regular employee. Referring to the case of ***Pravaranjan Kumar Panda*** (supra) Mr.Panigrahi has contended that the decision rendered in Hrusikesh Singh (supra) has been affirmed and the

prayer for regularization of the applicant therein was rejected. It is further argued by Mr. Panigrahi that the ratio of ***Umadevi*** does not lay down an inflexible rule that all temporary/casual employees shall have to be regularized in service, rather regularization has to be on the basis of a scheme. In this regard Mr. Panigrahi has referred to a decision of the Apex Court in the case of ***State of Tamil Nadu vs. A. Singamuthu***, reported in (2017) 4 SCC 113. The sum and substance of the argument advanced by Mr. Panigrahi is that a scheme for regularization of services of such employees having already been framed by the Government in the form of FD resolution dated 15.05.1997 and the petitioners having already been brought over to the work-charged establishment being governed under Instructions 1974,are not entitled to be regularized in service.

7. As is evident from the above narration, both parties have relied upon **Umadevi** (supra) besides other cases in support of their respective stands. It would therefore be profitable to first know the purport of the ratio of Umadevi before delving into the facts of the case.

The Apex Court has held under paragraph-53 of the judgment as under:

> *"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa (supra), R.N. Nanjundappa (supra), and B.N. Nagarajan (supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."*

8. The decision of ***Umadevi (supra)*** was further explained in the case of ***M.L. Kesari (supra)*** under paragraphs-8, 9 10 and 11 as follows:

"8. Umadevi (3) casts a duty upon the concerned Government or instrumentality, to take steps to regularize the services of those irregularly appointed employees who had served for more than ten years without the benefit or protection of any interim orders of courts or tribunals, as a one-time measure. Umadevi (3)1, directed that such one-time measure must be set in motion within six months from the date of its decision (rendered on 10.4.2006).

9 . The term "one-time measure" has to be understood in its proper perspective. This would normally mean that after the decision in Umadevi (3), each department or each instrumentality should undertake a one-time exercise and prepare a list of all casual, dailywage or ad hoc employees who have been working for more than ten years without the intervention of courts and tribunals and subject them to a process verification as to whether they are working against vacant posts and possess the requisite qualification for the post and if so, regularize their services."

(Emphasis supplied)

10. At the end of six months from the date of decision in Umadevi (3), cases of several dailywage/ad-hoc/casual employees were still pending before Courts. Consequently, several departments and instrumentalities did not commence the one-time regularization process. On the other hand, some Government departments or instrumentalities undertook the one-time exercise excluding several employees from consideration either on the ground that their cases were pending in courts or due to sheer oversight. In such circumstances, the employees who were entitled to be considered in terms of Para 53 of the decision in Umadevi, will not lose their right to be considered for regularization, merely because the one-time exercise was completed without considering their cases, or because the six month period mentioned in para 53 of Umadevi has expired. The one-time exercise should consider all dailywage/adhoc/those employees who had put in 10 years of continuous service as on 10.4.2006 without availing the protection of any interim orders of courts or tribunals. If any employer had held the one-time exercise in terms of para 53 of Umadevi, but did not consider the cases of some employees who were entitled to the benefit of para 53 of Umadevi, the employer concerned should consider their cases also, as a continuation of the one-time exercise. The one time exercise will be concluded only when all the employees who are entitled to be considered in terms of Para 53 of Umadevi, are so considered.

11. The object behind the said direction in para 53 of Umadevi is two- fold. First is to ensure that those who have put in more than ten years of continuous service without the protection of any interim orders of courts or tribunals, before the date of decision in Umadevi was rendered, are considered for regularization in view of their long service. Second is to ensure that the departments/instrumentalities do not perpetuate the practice of employing persons on daily-wage/ad-hoc/casual for long periods and then periodically

regularize them on the ground that they have served for more than ten years, thereby defeating the constitutional or statutory provisions relating to recruitment and appointment. The true effect of the direction is that all persons who have worked for more than ten years as on 10.4.2006 (the date of decision in Umadevi) without the protection of any interim order of any court or tribunal, in vacant posts, possessing the requisite qualification, are entitled to be considered for regularization. The fact that the employer has not undertaken such exercise of regularization within six months of the decision in Umadevi(3) or that such exercise was undertaken only in regard to a limited few, will not disentitle such employees, the right to be considered for regularization in terms of the above directions in Umadevi(3) as a one-time measure.

9. A careful reading of the observations made by the Apex Court in the aforementioned cases would make it abundantly clear that the benefits of regularization in service is not available to all irregularly engaged employees, but only to those who fulfill the criteria laid down therein, i.e., their appointments must be irregular but not illegal and they must have continued in work for more than 10 years uninterruptedly without protection of the order of any Court or Tribunal prior to 10.04.2006.Further, a corresponding duty has been cast upon the Government to undertake a one-time exercise and prepare a list of such employees to make necessary verification of their services and if found to be eligible, to regularize their services.

10. Coming to the case of ***A. Singamuthu (supra)*** relied upon by Mr. Panigrahi, it is seen that in the said case also the Apex Court emphasized as a matter of caution under paragraph -8.

"8. Part-time or casual employment is meant to serve the exigencies of administration. It is a settled principle of law that continuance in service for long period on part-time or temporary basis confers no right to seek regularization in service. The person who is engaged on temporary or casual basis is well aware of the nature of his employment and he consciously accepted the same at the time of seeking employment. Generally, while directing that temporary or part-time appointments be regularized or made permanent, the courts are swayed by the long period of service rendered by the employees. However, this may not be always a correct approach to adopt especially when the scheme of regularization is missing from the rule book and regularization casts huge financial implications on public exchequer."

Further, the Apex Court also referred to the observation made in Paragrah-48 of ***Umadevi***, which is as under:

" 48. It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the

State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the concerned department on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled."

The Apex Court also referred to a decision of ***State of Rajasthan vs. Dayalal, reported in (2011) 2 SCC 429*** wherein the well settled principles relating to regularization and parity in pay were laid down under paragraph-8 as follows:

"8. We may at the outset refer to the following well settled principles relating to regularization and parity in pay, relevant in the context of these appeals:

(i) High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularization, absorption or permanent continuance, unless the employees claiming regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and courts should not issue a direction for regularization of services of an employee which would be violative of constitutional scheme. While something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularized

(ii) Mere continuation of service by an temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be `litigious employment'. Even temporary, ad hoc or daily- wage service for along number of years, let alone service for one or two years, will not entitle such employee to claim regularization, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularization in the absence of a legal right.

(iii) Even where a scheme is formulated for regularization with a cut off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut off date), it is not possible to others who were appointed subsequent to the cut off date, to claim or contend that the scheme should be applied to them by extending the cut off date or seek a direction for framing of fresh schemes providing for successive cut off dates.

(iv) Part-time employees are not entitled to seek regularization as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularization or permanent continuance of part time temporary employees.

(v) Part time temporary employees in government run institutions cannot claim parity in salary with regular employees of the government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute.

(See : Secretary, State of Karnataka vs. Uma Devi - 2006 (4) SCC 1, M. Raja vs. CEERI Educational Society, Pilani - 2006 (12) SCC 636, S.C. Chandra vs. State of Jharkhand -2007 (8) SCC 279, Kurukshetra Central Cooperative Bank Ltd vs. Mehar Chand - 2007 (15) SCC 680, and Official Liquidator vs. Dayanand - 2008 (10 SCC 1)."

11. On a conjoint reading of the case laws referred to in the preceding paragraphs, it becomes evident that while ***Umadevi and M.L. Kesari*** enjoin upon the Central/State Governments to formulate a scheme for regularization of eligible employees, ***A Singamuthu*** inter alia, emphasizes the need to adhere to the scheme, if any, for such purpose.

12. Keeping the above principles of law in the background, the facts of the present case may now be examined.

Undisputedly, all the 23 petitioners have been engaged as NMR/HR workers under the administrative control of Opposite Party No.4 in between

1980 to 1993. As already stated, the Opposite Parties have referred to the FD resolution dated 15.05.1997 as being relevant to the case. Undoubtedly, the said resolution holds the field as it was issued in supersession of all previous orders/resolution/notification etc. issued by various departments of Government for regularization of NMR/DLR/Job contract and other such category of workers as mentioned in paragraph-13 thereof. According to the Opposite Parties, this is the existing scheme of the Government for absorption of such category of workers under the regular establishment prior to the judgment in ***Umadevi***. Several pre-conditions have been laid down in the said resolution including the condition that the workers should have worked under the administrative control of the department concerned directly for a minimum period of 10 years and they should have been engaged prior to 12.04.1993.

13. Having examined the aforesaid resolution, this Court finds that nowhere it mandates that the NMR/DLR/Job Contract workers are to be first brought over to the work-charged establishment before regularization of their services. Such being the position, it is not understood nor adequately clarified by the opposite parties as to on what basis the petitioners were brought over to the work-charged establishment in the year 2009, which is after the judgment passed in ***Umadevi***, even though they had put in nearly three decades of uninterrupted service and were, therefore, otherwise eligible to be considered for absorption in the regular establishment as per the ratio of ***Umadevi*** and even as per the resolution dated 15.05.1997. Reference has been made to the Resolution No.21828 dated 07.09.1995 of the Government in Water Resources Department, enclosed as Annexure-C to the counter, which provides for regularization of services of NMR and work-charged employees but then, after coming into force of the FD resolution dated 15.05.1997, the same stood automatically superseded. Therefore, reliance placed on the said resolution to justify the action of the authorities in bringing over the petitioners to the work-charged establishment in the year 2009 is entirely fallacious and untenable.

14. The Opposite Parties have also referred to the Instructions 1974 to contend that the petitioners having accepted and acquiesced to being brought over to the work-charged establishment without any challenge to their service conditions as provided in the said instruction, cannot now seek a relief de hors the provisions in Instructions 1974. This is a fallacious argument inasmuch as when the Constitution Bench of the highest Court of the land has placed a definite obligation on the Government (in ***Umadevi***) to act in a particular manner in respect of such category of employees and it has not done so, how can it turn around to question the so-called conduct of the employees by raising the plea of acceptance and acquiescence? To reiterate, the Apex Court in ***Umadevi*** as

explained in ***M.L. Keshari***, mandated that every department of the Government should undertake a one-time exercise of verification of such employees to consider if they are eligible to be regularized, and if so, to regularize them. This being the law of the land has to be followed in letter and spirit by all concerned. The concerned department in the instant case has however, acted as per its own decision overlooking the mandate of the Apex Court to simply bring the petitioners (and similarly placed other employees) to the workcharged establishment instead of undertaking the exercise as mandated in ***Umadevi***. The stand of the opposite parties is therefore, untenable.

This Court is also unable to agree with the other contention raised by the opposite parties that the petitioners being governed by the Instructions 1974 cannot seek any relief de hors such instructions. This is for the reason that undoubtedly Instructions 1974 are applicable to all work-charged employees but the same does not speak of regularization of such employees, but lays down their various service conditions. As already stated, even apart from Umadevi, the FD Resolution dated 15.05.1997 holds the field in the matter of regularization of not only NMF/DLR/Job Contract employees but also the work-charged employees. Significantly, the opposite parties have themselves stated so in their counter affidavit under paragraph-9, the relevant portion of which is extracted herein below:-

> ***"9. Xxx xxx xxx xxx***
>
> *Moreover, it is humbly submitted that the Finance Department in a subsequent resolution dated 15.5.1997 on the scheme for absorption of NMR/DLR/Job Contract Workers under Regular establishment vide Annexure-B have in supersession to all the orders/resolution/notification etc. issued by various department of Government for regularization of such category of workers issued norms and conditions for absorption in regular establishment. The Para-8 of the said resolution clearly states that while filling the regular vacant posts preference shall be given to work charged employees first. Where no suitable work charged employees are available to man the post, preference shall be given in the following order, i.e., NMR/DLR/Job Contract Workers. Thus, there is existing scheme for absorption in regular establishment as Finance Department Resolution dated 15.5.1997 vide Annexure-B which supersedes all previous resolutions including Finance Department Resolution dated 22.1.1965 dated 6.3.1990 issued in the subject matter of absorption.*
>
> *xxx xxx xxx xxx xxx xxx."*

However, the provisions of the Resolution were never applied in case of the petitioners.

15. It is also seen that the claim of regularization of the petitioners is sought to be repelled by the opposite parties by contending that they have made a

backdoor entry into Government service without being sponsored by the employment exchange or undergoing any recruitment procedure. In this context, it is significant to refer to the averments made under paragraph-6.10 of the writ petition to the effect that the petitioners were duly appointed against existing vacant posts in the regular establishment. Such averment has not been controverted in any manner in the counter affidavit. Even assuming for a moment that the petitioners were not validly engaged, the question is, how could they be retained for such an inordinately long period of time and secondly, how could a gradation list of such employees be prepared and finalized and thirdly, how could they be taken over to the workcharged establishment? Of course, this court is conscious of the proposition that mere continuance for a long period per se does not confer any right on the person concerned to claim regular appointment de hors the Constitutional requirement, but then the observations of the Constitution Bench in **Umadevi** under paragraph-53 thereof as referred to hereinbefore, cannot also be overlooked. The long and short of the issue at hand is, the petitioners claim to have fulfilled the criteria laid down in ***Umadevi*** and therefore, should at least have been considered for regularization of their services within six months of the passing of judgment in ***Umadevi***.

16. From the facts narrated hereinbefore, it is apparent that the petitioners, despite having put in merely three decades of continuous service to the State have been left in the lurch. Some of them have also retired in the meantime. The fact that the petitioners have continued for so long proves that there was work for them. If such be the case then, taking work from them for such a long period of time, but depriving them from the wages and other benefits payable/being paid to their counter-parts in the regular establishment is nothing, but exploitation of the labour force by the Government, which is not expected from it, as it is supposed to be a model employer. The direction of the Constitution Bench in ***Umadev***i, as amplified in ***M.L. Kesari*** is clear and unambiguous and places an obligation on the Government to regularize as one-time measure, all eligible casual employees who fulfill the criteria laid down therein within a period of six months. Alas, sixteen long years have passed since the date of judgment in ***Umadevi*** and yet there are no materials to suggest that the case of the petitioners was considered in pursuance of the ratio of ***Umadevi***. It would therefore, be in the fitness of things to remit the matter to the opposite parties to first take a decision with regard to regularization of the services of the petitioners with due regard to all relevant factors like availability of posts, seniority etc.

17. For the foregoing reasons therefore, the writ petition is disposed of with a direction to the opposite parties to consider the case of all the petitioners for regularization of their services in due deference to the ratio of ***Umadevi (supra***)

and if found eligible, to regularize their services in accordance with law. The above exercise shall be taken up and concluded within a period of three months from the date of the receipt of a copy of this order or on production of certified copy thereof by the petitioners.

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2022 (III) ILR - CUT- 1230

SASHIKANTA MISHRA, J.

W.P.C (OAC) NO. 4070 OF 2013

SUVENDU KUMAR ROUTRAY ……Petitioner

.V.

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

ORISSA CIVIL SERVICE (CCA) RULES, 1962 – Rule 29 – Consideration of Appeal – Duty cast upon the Appellate Authority – Held, since Rule 29 caste a positive obligation on the appellate authority to consider and dispose of the appeal filed by the delinquent in a particular manner, it has to be done in that manner – The provision under Rule 29 is intended to act as a safeguard against any arbitrary, unreasonable or illegal exercise of power by the disciplinary authority. (Para 9)

For Petitioner : Mr. J.K. Mishra (2)

For Opp. Parties : Mr. H.K. Panigrahi, Addl. Standing Counsel.

JUDGMENT Date of Judgment: 04.05. 2022

SASHIKANTA MISHRA, J.

In the present writ application, the petitioner seeks to challenge the order of punishment passed by the Disciplinary Authority (opposite party no.2) and the order passed by the Appellate Authority (opposite party no.1) in rejecting his appeal filed against the order of punishment.

2. Bereft of unnecessary details, the facts of the case are that while the petitioner was working as a Junior Clerk in Tangi Sub-Treasury, a proceeding was initiated against him on 28.12.1990 on several charges of misconduct. The petitioner submitted his reply denying the charges but the disciplinary authority decided to conduct an enquiry.Accordingly, an enquiry was conducted, which according to the petitioner was held without adhering to the principles of natural justice. The enquiry officer submitted his report on 24.03. 1992 holding the

petitioner guilty of the charges. Basing on the said report, the petitioner was visited with the punishment of withholding of the increments without cumulative effect by the disciplinary authority vide order dated 31.08.2010, which is enclosed as Annexure-5 to the writ petition. The petitioner preferred an appeal before opposite party no.1 raising several grounds including the ground of noncompliance of the principles of natural justice. The opposite party no.1 however, rejected his appeal by order dated 15.11.2012, which is enclosed as Annexue-7 to the writ petition. Challenging the order of the disciplinary authority as well as the rejection of the appeal preferred by the petitioner, he approached the erstwhile Odisha Administrative Tribunal in O.A. No. 4070(C) of 2013,which has since been transferred to this Court and registered as the present writ application.

3. A detailed counter affidavit, rejoinder and counter to the rejoinder have been filed by the parties. However, in view of the order proposed to be passed by this Court, it is felt unnecessary to go into the same.

4. It appears from the materials on record and the submissions made by learned counsel for the parties, the petitioner had previously approached the erstwhile Odisha Administrative Tribunal in O.A. No.377 of 1995 challenging the order of punishment originally imposed by the disciplinary authority. Learned Tribunal vide order dated 08.08.2006 set aside the order of punishment and directed the disciplinary authority (opposite party no.2) to proceed with the enquiry and continue the same from the stage of furnishing report of the enquiry officer to the petitioner by issuing notice to him to submit representation as he may wish to make against the findings of the enquiring authority and to finalize the proceedings as early as possible following the procedure to be adopted on receipt of the said representation. Pursuant to such order passed by the learned tribunal a show cause notice was issued to the petitioner along with a copy of the enquiry report purportedly as required under Rule 15(10)(i)(a) of OCS (CCA) Rules, 1962. The petitioner duly submitted his representation against the findings of the enquiry officer on 24.05.2007. However, by the order passed under Annexure-5,the disciplinary authority considered the representation of the petitioner as not convincing and satisfactory. Accordingly, show cause notice was issued to the petitioner proposing the punishment of withholding of three increments without cumulative effect. The petitioner also submitted his show cause reply on 09.03.2010, which according to the disciplinary authority, was not satisfactory and accordingly, the proposed punishment was imposed and the proceeding was finalized. The petitioner, as already stated, submitted an appeal to the opposite party no.1 raising several grounds, both factual and legal. By order dated 15.11.2012, which is enclosed as Annexure-7, the appellate authority

was of the opinion that the penalty imposed by the disciplinary authority is proportionate to the misconduct and accordingly held that the appeal petition being devoid of merit was therefore rejected.

5. Mr. J.K. Mishra, learned counsel appearing for the petitioner has argued that law requires the appellate authority to give proper and adequate reasons for its findings but in the instant case the appellate authority had rejected the appeal in a mechanical manner without in the least considering the specific grounds raised by the petitioner against the findings of the enquiry officer.

6. Mr. H.K. Panigrahi on the other hand, contends that when the appellate authority was of the opinion that the grounds raised by the petitioner are not convincing, he was not obliged to record his reasons in respect of each of the grounds so raised by the petitioner and therefore, according to him the impugned order does not warrant any interference by this Court.

7. In this context it would be apposite to refer to the provisions of the OCS(CCA) Rule, 1962, Rule 13 of which lists the penalties that may be imposed on a Govt. servant. Withholding of increments without cumulative effect is one of the penalties that may be imposed as per Rule-13. Rule22 provides that a member of the Odisha Civil Services Group-C or Group-D may appeal against an order imposing upon him any of the penalties specified in Rule13 to the authority specified in his behalf. In the instant case it is not disputed that the Principal Secretary to Govt. in Finance Department is the appellate authority in so far as the petitioner is concerned. While Rules-24 to 28 provide for the various aspects of preferring of such appeal, Rule-29 relates to the consideration of appeals by the appellate authority. It would be profitable to quote Rule-29 at this stage.

> *"**29. Consideration of Appeals** – (1) In the case of an appeal against an order imposing any of the penalties specified in Rule 13 the appellate authority shall consider –*
>
> *(a) whether the procedure prescribed in these rules has been complied with an,if not whether such non-compliance has resulted in violation of any provisions of the Constitution or in failure of justice.*
>
> *(b) whether the findings are justified; and*
>
> *(c) whether the penalty imposed is excessive, adequate or inadequate;*
>
> *and, after consultation with the Commission if such consultation is necessary in the case, pass orders-*
>
> *(i) Setting aside, reducing confirming or enhancing the penalty' or*

(ii) remitting the case to the authority which imposed the penalty or to any other authority with such direction as it may deem fit in the circumstances of the case;

Provided that –

(i) the appellate authority shall not impose any enhanced penalty which neither such authority or the authority which made the order appealed against is competent in the case to impose;

(ii) no order imposing an enhanced penalty shall be passed unless the appellant is given an opportunity or making any representation which be may wish to make against such enhanced penalty; and

(iii) if the enhanced penalty which the appellate authority proposes to impose is one of the penalties specified in Clauses (vi) to (ix) or Rule 13 and an inquiry under Rule 15 has not already been held in the case the appellate authority shall, subject to the provisions of Rule 18, itself hold such inquiry or direct that such inquiry be held and, thereafter on consideration of the proceedings of such inquiry and after giving the appellant an opportunity of making any representation which he may wish to make against such penalty, pass such orders as it may deem fit.

(2) In the case of an appeal against any order specified in Rule 23 the appellate authority shall consider all the circumstances of the case and pass such orders as it deems just and equitable."

As bare perusal of Rule -29 as quoted above makes it clear that a specific duty has been cast upon the appellate authority to consider whether the procedure has been complied with and if not, if the same has resulted in violation of any provisions of the constitution or failure of justice and whether the findings are justified on the evidence on record and finally whether the penalty imposed is justified.

8. Law is well settled that the appellate authority being a quasi-judicial authority has to act fairly with due application of mind and as such, he must peruse the entire evidence taken during the enquiry, the enquiry report, the charges along with explanation of the delinquent government servant so as to come to a reasonable conclusion. In other words, the appellate authority must apply his mind and pass an objective order without being influenced by the findings of the enquiry officer or of the disciplinary authority. Further, being the appellate authority, law mandates that it must pass a reasoned and speaking order.

9. Coming to the facts of the case, this Court finds that the appeal petition was disposed of by the appellate authority simply by holding that the penalty imposed by the disciplinary authority is proportionate to the misconduct. Evidently, all the grounds raised by the petitioner in his appeal petition relating

to lack of opportunity to cross-examine the witnesses, alleged manipulation of documents, utilization of documents by the enquiry officer behind his back etc. have not at all been taken into consideration. It goes without saying that when the statute requires a thing to be done in a particular manner, it has to be done in such manner or not at all. Since Rule-29 casts a positive obligation on the appellate authority to consider and dispose of the appeal filed by the delinquent in a particular manner, it has to be done in that manner. Since the statute confers power on the disciplinary authority to impose punishment on a delinquent government servant, the provision under Rule 29 is obviously intended to act as a safeguard against any arbitrary, unreasonable or illegal exercise of power by the disciplinary authority. After perusing the impugned order under Annexure-7 this Court is constrained to observe that the same is cryptic, non-speaking and entirely contrary to the statutory intent and therefore, deserves to be interfered with.

10. For the foregoing reasons therefore, this Court is of the view that the appellate authority should consider the appeal petition afresh and pass a reasoned order in accordance with law after granting opportunity of hearing to the petitioner, if he so desires.

11. The writ petition is therefore disposed by setting aside the order under Anneuxre-7 and by remitting the matter to opposite party no.1 to consider the appeal petition filed by the petitioner afresh strictly in terms of the provisions contained in Rule-29 of the OCS (CCA) Rules, 1962 and if the petitioner so desires, he may also be heard in person. The above exercise shall be completed within a period of two months from the date of communication of this order or on production of certified copy thereof by the petitioner and the decision of the appellate authority shall be communicated to the petitioner within fifteen days thereafter.

12. The writ petition is disposed of accordingly.

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2022 (III) ILR - CUT- 1234

A.K. MOHAPATRA,J.

ABLAPL NO. 9695 OF 2022

DEEPAK GUPTA .....Petitioner

.V.

ENFORCEMENT DIRECTORATE OF INDIA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 438 – Anticipatory bail – Law on anticipatory bail – Held, there exists no Act or Rules or any straight jacket formula to regulate grant of bail to an accused or a person who is apprehending arrest by police – The law on anticipatory bail has developed in a non-linear course, through a plethora of judgments passed by the Hon'ble Supreme Court – Guiding principles on the concept of anticipatory bail discussed with case laws. (Paras 20-37)

Case Laws Relied on and Referred to :-

1. (2013) 9 SCC 500 : Babubhai Bhimabhai Bokhiria Vs. State of Gujarat.
2. (1950) SCC 228 : A.K. Gopalan Vs. State of Madras.
3. (2022) SCC On Line SC 825 : Satender Kumar Antil Vs. Central Bureau of Investigation.
4. (2012) 1 SCC 40 : Sanjay Chandra Vs. CBI.
5. (1980) 2 SCC 565 : Gurbaksh Singh Sibbia Vs. State of Punjab.
6. AIR 1978 SC 597 : Maneka Gandhi Vs. Union of India.
7. 1983 SCC On Line Mad 163 : Roshan Beevi Vs. Joint Secretary to Government of Tamil Nadu.
8. (1980) 2 SCC 559 : Niranjan Singh Vs. Prabhakar Rajaram Kharote.
9. (2014) 16 SCC 623 : Sundeep Kumar Bafna Vs. State of Maharastra and Ors.
10. (1994) 3 SCC 440 : Directorate of Enforcement Vs. Deepak Mahajan.
11. (2004) 7 SCC 558 : Nirmal Jeet Kaur Vs. State of M.P.
12. (2005) 1 SCC 608: Sunita Devi Vs. State of Bihar.
13. (2005) 4 SCC 303 : Adri Dharan Das Vs. State of W.B.
14. (2002) 2 SCC 121 : State of Maharashtra Vs. Bharati Chandmal Varma.
15. (1992) 3 SCC 141 : CBI Vs. Anupam J. Kulkarni.
16. 1994 SCC (Crl) 1172 : Joginder Kumar Vs. State of U.P. and Ors.
17. (2018) 16 SCC 158 : Ashok Munilal Jain Vs. Directorate of Enforcement.
18. 2022 SCC On Line SC 929 : Vijay Madanlal Choudhary and Ors. Vs. Union of India and Ors.
19. (2005) 5 SCC 294 : Ranjitsingh Brahmajeetsing Sharma Vs. State of Maharashtra
20. (2019) 20 SCC 196 : Anokhi Lal Vs. State of Madhya Pradesh.
21. (2012) 1 SCC 40 : Sanjay Chandra Vs. CBI.
22. 2015 SCC 605 : Bhim Singh Vs. Union of India.
23. (2017) 9 SCC 499 :Common Cause Vs. Union of India.

For Petitioner : Mr. H.K. Mund

For Opp. Party : Mr. G. Agarwal

ORDER Date of Order: 25.11.2022

A.K. MOHAPATRA,J.

1. This matter is taken up through Hybrid Arrangement (Virtual /Physical Mode).

2. Heard Mr. Siddharth Luthra, learned Senior Advocate along with Mr. H.K. Mund, Advocate for the Petitioner and Mr. G. Agarwal, learned Special Counsel appearing for the Enforcement Department. Perused the records and materials placed before this court for consideration.

3. At the outset, the following precious words of Justice T.S.Thakur (former Judge, Supreme Court of India) expressed in the case of in ***Babubhai Bhimabhai Bokhiria vrs***. ***State of Gujarat*** reported in ***(2013) 9 SCC 500***, which redefined the criminal justice system in this Country, reverberates in the mind of this Court i.e. *"The essence of Article 21 of the Constitution of India lies not only in ensuring that no citizen is deprived of life and personal liberty except according to the procedure established by law, but also such procedure ensures both fairness and expeditious conclusion of the trial."* Therefore, it is apt to begin this judgment by prefacing it with Article 21 of the Constitution of India which states that no person shall be deprived of his right or his personal liberty except according to the procedure established by law.

4. A Constitution Bench of the Hon'ble Supreme Court in land mark case of ***A.K. Gopalan vrs. State of Madras; reported in (1950) SCC 228***. In paragraph-9 of the judgment has stated that "it cannot be disputed that the Article collected under the captioned (Right to Freedom) have to consider together to appreciate the extent of the fundamental rights. In the first place, it is necessary to notice that there is distinction between the rights given to citizens and persons. This is clear of perusal of the provision of Article 19 on the one hand and Articles 20, 21 and 22 on the other. In order to determine whether the right to abrize or infringe, it is first necessary to determine the extent the right given by Articles and the limitations prescribed in the Articles themselves permitting its curtailment. The inclusion of Article 13(1) and (2) in the Constitution appears to be a matter of abundant. Even in their absence, if any of the fundamental rights was ensuring by any legislation enactment, the Court has always the power to declare the enactment, to the extent it is transgresses the limit, validity. The existence of Article 13(1) and 13(2) in the Constitution, therefore, is not material for the decision on the question of the fundamental right is given and to what extent it is permitted to be abrize by the Constitution itself."

5. In the case at hand, the accused petition has sought for prearrest bail in connection with complaint case (PMLA No.40 of 2018) arising out ECIR No.01/2014/BSZO at Bhubaneswar Sub-zonal office of the Enforcement Directorate pending before the court of leaned Special Judge, Special Court, PMLA, Bhubaneswar. The complaint which was lodged by the Enforcement Directorate involves allegation which comes under the prevention of Money Laundering Act, 2002 Act. A case has been registered for the alleged commission of offence under Section 3 read with Section 4 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as "PMLA Act"). Since the petitioner apprehends arrest by E.D., he has approached this Court nu filing the anticipatory bail application under Section 438 of the Criminal Procedure Code.

6. Before delving into the facts of the case in detail, this Court deems it proper to highlight the validity of the aforesaid legislation, namely, PMLS Act, 2002. It is pertinent to mention here that the Constitution validity of PMLA Act shall put to test in the case of ***Bijay Madanlal Choudhury*** *and* ***others vrs. Union of India*** in Special Leave Petition (Criminal) No.3634 of 2014 and a batch of other similar cases which were disposed of by Hon'ble Supreme Court vide judgment dated 27.07.2022. The question that was involved and required adjudication by the Hon'ble Supreme Court in the above noted case was with regard to the pleas concerning validity and interpretation of certain provision of PMLA Act, 2002 and the procedure followed by the Enforcement Directorate while enquiring into/investigating of offence under the PMLA Act, being violative of the Constitution mandate. The Hon'ble Supreme Court after taking note of the facts of the cases and by referring to various judgments finally come to a conclusion which has been reflected in Paragraph187 of the aforesaid judgment. Although the review has been preferred before the Hon'ble Supreme Court against the judgment dated 27.07.2022 in the case of ***Bijay Madanlal Choudhury and others vrs. Union of India*** (supra), this Court while considering the present bail application shall have to keep in mind the conclusion as has been reflected in Paragraph-187 of the aforesaid judgment.

7. Reverting back to the facts of the present case, it is imperative to know exact sequence of events by going back in time. From the facts are available on record, it appears that, the petitioner herein is Director of **M/s. Sneha** Marketing Ltd. And M/s. Deepak Steel and Power Ltd. The gravamen of the complaints against the petitioner arises from the alleged fact that he was illegally raised iron/manganese ores of a higher value than what has been declared from the Ulliburu Mining Lease area apart from the allegation illegally raising mineral from areas adjacent minor mining lease areas and selling such minerals to his own concern thereby causing huge loss of revenue to the State exchequer.

8. Records placed before this Court reveals that initially Balasore Vigilance P.S. Case No. 30 of 2013 was registered against the Petitioner and various other persons for the aforementioned illegal mining and making liable for commission of alleged offences under Section 13(2) read with Section 13(1)(c)(d) of the Prevention of Corruption Act, 1988 (hereafter 'PC Act'), Sections 420, 409, 379, 411 read with Section 120-B of the Indian Penal Code, 1860 (hereafter 'IPC') Section 4 and 21(1) of the Mines and Mineral (Development and Regulation Act, 1957 (hereafter 'MMDR Act') and Section 3 of the Forest Conservation Act, 1980. The learned Special Judge (Vigilance), Keonjhar took cognizance of the offences and registered T.R. Case No. 01 of 2014 (V.G.R. Case No. 05 of 2013). The Petitioner was arrested and was in judicial custody for the same since

05.09.2013. The preliminary charge-sheet was filed on 31.12.2013 and the final charge-sheet was filed on 24.06.2014. The Petitioner is facing trial in the Court of the Special Judge (Vigilance), Keonjhar having been charged for offences punishable under Section 13(2) read with Section 13(1)(c)(d) of the PC Act and Sections 420, 409, 379, 411, 468 read with Section 120-B of the IPC. Although the trial has commenced, but the same is still continuing and nobody knows as to when the same will be completed. After multiple bail applications and a lapse of almost about seven years, keeping in mind the time the Petitioner was already in judicial custody, the completion of investigation and him being in custody for the maximum punishment possible under most of the Sections he was charged with, this Court vide it's order dated 28.09.2020 in BLAPL No. 1042 of 2020 was pleased to grant him interim bail, which was further confirmed and made final by the Hon'ble Supreme Court vide it's order dated 31.01.2022 in SLP (Crl.) No. 5544 of 2020. At present the Petitioner is enlarged on bail.

9. In the instant bail application under section 438 Cr.P.C., this Court, however, is not concerned with the aforementioned T.R. Case No. 01 of 2014, but with the proceedings emanating from ECIR No. 01/2014/BSZO at Bhubaneswar Sub-Zonal Offices of Enforcement Directorate corresponding to Complaint Case (PMLA) No. 40 of 2018 for alleged offences under Section 3 r/w Section 4 of the Prevention of Money Laundering Act, 2002 (hereafter 'PMLA'), Section13(2) read with Section 13(1)(c)(d) of the PC Act and Sections 420, 411 read with Section 120-B of the IPC and for which the present Petitioner has been constrained to approach this Court vide the present petition seeking anticipatory bail to secure his liberty and freedom as guaranteed under Article 21 of the Constitution of India.

10. It appears, from the materials on record, that for some of theoffences for which the Petitioner is charged with in T.R. Case No. 01 of 2014 being "scheduled offences" within the meaning of Section 2 (1)(y) of the PMLA, the Enforcement Directorate registered ECIR No. 01/2014/BSZO on 5.02.2014. Thereafter, the investigation commenced and since the Petitioner was already in judicial custody in Keonjhar in connection with T.R. Case No. 01 of 2014, the Enforcement Directorate filed a petition before the Learned Sessions Judge (Khurdha) at Bhubaneswar with the prayer to take the Petitioner into it's custody for interrogation for a period of fifteen days in Crl. Misc. Case No. 05 of 2014 arising out of ECIR No. 01/2014/BSZO. The said prayer was allowed vide the Learned Sessions Judge (Khurdha)'s order dated 03.07.2014 and the present petitioner with other accused was remanded to custody till 10.07.2014. On 10.07.2014, when the present Petitioner was produced in court, the Enforcement Directorate again sought for the custody of the Petitioner, in accordance with

law, for a period of thirteen more days for further investigation of the case/ interrogation of the petitioner.Vide order dated 10.07.2014, the present petitioner with other accused was remanded to the Enforcement Directorate's custody for ten days. In this period, the petitioner's statement was recorded by the Enforcement Directorate on 22.07.2014. As the matter stood thus, on 24.07.2014, the Assistant Director, Directorate of Enforcement filed a petition stating that the petitioner's interrogation was over and the petitioner could now be remanded to judicial custody. It is pertinent to note that a bare perusal of the order dated 24.07.2014 of the Sessions Judge (Khurdha) also reveals in clear terms that the Enforcement Directorate has not prayed for any further remand and the Petitioner and co-accused are no longer required in the case and therefore, the petitioner was directed to be produced before the Special Judge Keonjhar so as to enable them to be sent back to judicial custody in T.R. Case No. 01 of 2014.

11. The Opp. Party i.e the Enforcement Directorate on 11.04.2018 filed Complaint Case (PMLA) No. 40 of 2018 before the Court of the Learned Sessions Judge (Khurda) at Bhubaneswar under Section 45 of the PMLA against multiple accused persons including the present Petitioner. The Learned Sessions Judge (Khurda) took cognizance on 21.08.2018 and issued summons to the accused persons. Trial has since commenced but it appears, this trial as well is nowhere near completion.

12. The Petitioner herein has filed the present petition under Section 438 of the Criminal Procedure Code, 1973 seeking anticipatory bail in the event of his arrest in connection with Complaint Case (PMLA) No. 40 of 2018 pending before the Court of the Learned Sessions Judge (Khurda) at Bhubaneswar subject to the condition that he will abide by the terms and conditions likely to be imposed by this Court in the event of his release on pre-arrest bail and further subject to condition that he shall cooperate with the trial court for an early conclusion of the trial.

13. Per contra, Mr. G.Agarwal, learned Special Counsel appearing for the Enforcement Directorate opposes the release of the petitioner on pre-arrest bail by referring to the provisions contained in Section 45 of the PMLA Act, 2002 and submits that the same has been enacted to combat the menace money laundering having a wide repercussion on the financial system of the country.

14. Mr. Luthra, learned Senior Counsel for the Petitioner contends that the present petition may be allowed inter alia on the following main grounds:

a. During his custody in T.R. Case No. 01 of 2014 a production warrant appears to have been issued by virtue of which the Learned Sessions Judge (Khurda) had remanded the Petitioner's custody to the Special Court, PMLA in terms of Section 167 Cr.PC from 03.07.2014 to 10.07.2014. Upon his subsequent production on 10.07.2014 before the Learned Sessions Judge (Khurda), the Petitioner's custody was remanded to the Enforcement Directorate for ten days. During this period of remand to Enforcement Directorate, the Petitioner was subjected to custodial interrogation and his statement was recorded. When on 24.07.2014, the Enforcement Directorate did not seek his further custody and stated instead that no further interrogation was required, the Petitioner was sent back to the Superintendent, District Jail, Keonjhar for judicial custody in T.R. Case No. 01 of 2014. Therefore, it is clear that the order dtd. 24.07.2014 was in terms of Section 169 of the Cr.PC.

b. In the alternative, even if it is assumed for the sake of argument, that the order of 24.07.2014 is not to be treated as a release order, the fact remains that the complaint under PMLA should have been filed within 60 days. As the same was not done, the Petitioner is clearly entitled to default bail under Section 167(2) of the CrPC.

c. The Petitioner has already undergone imprisonment for about 6 years since the order dated 24.07.2014 of the Learned Sessions Judge (Khurda), albeit, in breach of Section 167(2) of the Cr.PC till his release on interim bail on 28.09.2020 in BLAPL No. 1042 of 2018 by this Court which was extended from time to time and was finally confirmed by the Hon'ble Supreme Court on 31.01.2022 in SLP (Crl.) No. 5544 of 2020. Thus, even if it is taken that the Petitioner's custody had not ended on 24.07.2014 or on the 60th day since he was remanded to Enforcement Directorate custody on 10.07.2014 and the Complaint Case No. 40/2018 was registered on 11.04.2018, it implies that he has already spent 6 years in custody even in the case registered at the instance of the Enforcement Directorate (with or without) a legitimate remand order. The maximum punishment prescribed being 7 years as stipulated in Section 4 of the PMLA, the present Anticipatory Bail petition ought to be allowed, keeping in view the Enforcement Directorates' contention that a NBW has been issued, although the same has been denied by the Petitioner, which gives rise to genuine apprehension of arrest.

d. Investigation in the matter has concluded and no new facts remain to be unearthed by the Enforcement Directorate which may require the custodial interrogation of the Petitioner. In fact, the alleged evidence unearthed in the course of investigation which the Opposite Party relies upon in its present Affidavit already finds mention in the Complaint Case (PMLA) No. 40 of 2018 filed on 11.04.2018 in Paragraph 7 i.e. "Brief discussion of evidence relating to offence of money laundering".

e. The Petitioner has already been subjected to rigorous custodial interrogation by E.D. and no useful purpose is going to be served by remanding the Petitioner to custody at this stage. Merely because trial has commenced and the Petitioner is enlarged on bail is not an *ipso facto* cause to belatedly arrest the Petitioner.

15. Per *contra,* Mr. Gopal Agarwal, learned Counsel for the Opp. Party i.e. the Enforcement Directorate submits as follows:

> f. The Petitioner was remanded to the Enforcement Directorate's custody for interrogation under Section 267 Cr.PC and not under Section 167 Cr.PC as alleged by the Petitioner. There is absolutely no material on record to show that the order of remand passed on 03.07.2014 or 10.07.2014 are under Section 167 Cr.PC. The Petitioner has never been arrested by the Enforcement Directorate in connection with Complaint Case (PMLA) No. 40 of 2018.
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> g. The Petitioner is accused of a serious economic offence and the quantum of punishment for money laundering offences being only 7 years cannot be the basis to undermine the gravity and seriousness of the offence committed by the accused person as the quantum of sentence is a matter of legislative policy.
>
> h. The Petitioner's case does not attract any relief in the nature of an anticipatory bail as the Ld. PMLA Court has taken cognizance of the case and the present case does not satisfy the rigors laid down in Section 45 of the PMLA.
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> i. The Petitioner ought to have approached the Ld. District and Sessions Court, Khurdha prior to approaching this Court.
>
> j. Grant of anticipatory bail at the stage of investigation will render the Enforcement Directorate unable to collect useful information which the accused has concealed. As there are allegations of the proceeds being laundered, the Enforcement Directorate has to be given sufficient freedom in the process of investigation. The length of his custody, the complaint case having been filed, trial having commenced cannot be treated as persuasive grounds for granting the relief sought for in this case, to the Petitioner.

16. Having heard the rival contentions on grant of pre arrest bail to the petitioner as has been raised by the learned counsels for the parties and on a conspectus of the background facts of the case as well as upon a close scrutiny of the materials placed before this Court for consideration by either side and further taking into consideration the affidavits filed by the learned counsel for the Opp. Party as well the written note of submissions, this Court, at the outset, would like to observe that it is the settled position of law that except where there are specific provisions in the PMLA that provides an alternative procedure, the provisions and procedure of Cr.PC shall apply to the cases registered and tried under the PMLA. Section 65 of the PMLA states that:

> *"The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, in so far as they are not inconsistent with the provisions of this Act, to arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under this Act."*

Given the mandate of Articles 21 and 22 of the Constitution of India, the powers under the PMLA in relation to the offences under the PMLA, have to be governed by the Cr.PC, if not expressly provided for alternatively in the PMLA. This is expressly recognized and acknowledged by Section 65 PMLA. Therefore, there exists absolutely no doubt with regard to the applicability of the procedural law in the case of the present nature.

17. In matters pertaining to bail, the Hon'ble Supreme Court in ***Satender Kumar Antil v. Central Bureau of Investigation*** reported in (2022) SCC OnLine SC 825 recently was of the opinion that:

> *"Liberty is one of the most essential requirements of the modern man. It is said to be the delicate fruit of a mature civilization. It is the very quintessence of civilized existence and essential requirement of a modern man."*

Further the Supreme Court of India in ***Sanjay Chandra v. CBI, (2012) 1 SCC 40***, has observed that:

> *"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.*
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> *22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.*
>
> *23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson."*

18. The concept of anticipatory bail was unknown to the old Code of Criminal Procedure of 1898. The Law Commission of India, in its 41st report, dated September 24, 1969, drew attention to the necessity of introducing a

provision in the Code, to enable the High Courts and the Session Courts to grant anticipatory bail, for protecting an accused or any person, who is apprehending or having a belief that they may be arrested for any non-bailable offence. The Law Commission was seized of the necessity for granting anticipatory bail arose because, at times, influential individuals tried to implicate their rivals in false cases for the purpose of disgracing them or for other purposes, by detaining them in jail for a couple of days. It was also observed that, with the accentuation of political rivalry, the aforesaid tendency showed signs of a steady increase. The Law Commission also suggested that it may not be practical to exhaustively enumerate conditions under which anticipatory bail may be granted, as the same may have been construed as prejudging the entire case. Hence, this was left to the discretion of the courts, without any fetters on such discretion in the statutory provision.

19. Accordingly, taking into consideration the Law Commission's report (and the need of the hour), the Parliament, while enacting the Code of 1973, introduced a provision for anticipatory bail under Section 438, under the heading *"Direction for grant of bail to person apprehending arrest".* Section 438 of the Criminal Procedure Code reads as follows:

> "*438. Direction for grant of bail to person apprehending arrest - (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Sessions for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely-*
>
> *(i) the nature and gravity of the accusation;*
>
> *(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offences;*
>
> *(iii) the possibility of the applicant to flee from justice; and*
>
> *(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail"*

The rest of the provision is not necessary for the purpose of considering the question raised. Upon a plain reading of the aforesaid provision, it is crystal clear that it confers concurrent jurisdiction on the High Court as well as the Court of Sessions. The wide discretion has been entrusted on the Court of Sessions as well as on the High Court to enlarge such person who comes to the Court, on anticipatory bail. Both the courts have got jurisdiction to enlarge the applicant on

anticipatory bail, considering the relevant guidelines in the said provision. As could be seen from the provision itself, there is no embargo or any rider incorporated under the provision that the person who approaches the High Court must first exhaust the said remedy before the Court of Sessions.

20. Furthermore, as stated here in above there exists no Act or Rules or any straight jacket formula to regulate grant of bail to an accused or a person who is apprehending arrest by police, be it regular or anticipatory. The law on anticipatory bail has developed in a non-linear course, through a plethora of judgments passed by the Hon'ble Supreme Court. The following cases are considered to be landmark breakthroughs in the law on anticipatory bail. The very first landmark judgment on anticipatory bail was passed by a Constitution bench of the Hon'ble Supreme Court on April 9, 1980, in ***Gurbaksh Singh Sibbia v. State of Punjab*** reported in ***(1980) 2 SCC 565***, which laid down the prevailing law of the land on this issue, along with some guiding principles on the concept of anticipatory bail. The Supreme Court, while considering personal liberty as a fundamental right under Article 21, declared that any provision of law, which deals with personal liberty of an individual cannot be unduly whittled down by reading restrictions into it, especially the ones, which find no mention in the statute itself. This judgment of the Hon'ble Supreme Court drew inspiration from the judgment passed in ***Maneka Gandhi v. Union of India reported in AIR 1978 SC 597***, which upheld the primacy of an individual's personal liberty and mandated all laws having an interface with personal liberty to be "*just, fair and reasonable"*.

21. Additionally, the Hon'ble Supreme Court held that courts should lean against imposition of unnecessary restrictions on the scope of Section 438 of the Code when no such restrictions have been imposed by the legislature. Further, the Hon'ble Supreme Court also stated that courts are entitled to impose restrictive conditions as they deem fit, but due consideration should be given to the seriousness and nature of the proposed charges. Furthermore, the Hon'ble Supreme Court laid down guiding principles *inter alia* being that (i) the applicant must show that he has "reason to believe" that he may be arrested for a non-bailable offence (ii) the High Court or the Sessions Court as the case may be must apply its own mind to the question and decide whether a case is made out for granting such a relief (iii) the filing of a First Information Report ("FIR") is not a condition precedent to the exercise of power under Section 438 (iv) anticipatory bail can be granted even after an FIR is filed, so long as the applicant has not been arrested (v) the provisions of Section 438 cannot be invoked after the arrest of the accused (vi) a blanket order of anticipatory bail should not generally be passed and (vii) the normal rule should not be to limit the operation of the order in relation to a period of time.

22. It is therefore clear that the question of granting an anticipatory bail arises only prior to the arrest or to put it in unambiguous terms, at the stage where the person seeking anticipatory bail is 'apprehending arrest'. It is befitting at this juncture to examine the concept of arrest and custody. The word 'arrest' is derived from the French 'Arreter' meaning 'to stop or stay' and signifies a restraint of the person. Black's Law Dictionary, 5th Edition (1979), defines "arrest" as:

> *"Arrest : To deprive a person of his liberty by legal authority. Taking, under real or assumed authority, custody of another for the purpose of holding or detaining him to answer a criminal charge or civil demand. ..... Arrest involves the authority to arrest, the assertion of that authority with the intent to effect an arrest, and the restraint of the person to be arrested..... All that is required for an 'arrest' is some act by officer indicating his intention to detain or take person into custody and thereby subject that person to the actual control and will of the officer, as formal declaration of arrest is required."*

23. The word 'custody' similarly finds mention in various enactments but it is also not defined under any enactment. The meaning of the term 'custody' is given in the Oxford English Dictionary, as follows:

> *"1. Safe-keeping, protection, charge, care, guardianship.*
>
> *2. The keeping of an officer of justice, confinement, imprisonment, durance.*
>
> *3. Guardianship."*

24. It is clear that the meaning of the word 'custody' has to be taken with reference to the context in which it is used. The question as to what would constitute arrest and custody has been the subject matter of decisions of different High Courts. This issue was grappled with by the Full Court of the High Court of Madras in the case of ***Roshan Beevi v. Joint Secretary to Government of Tamil Nadureported in 1983 SCC On Line Mad 163***, wherein the Hon'ble High Court was pleased to observe as follows:

> *"16. From the various definitions which we have extracted above, it is clear that the word 'arrest', when used in its ordinary and natural sense, means the apprehension or restraint or the deprivation of one's personal liberty. The question whether the person is under arrest or not, depends not on the legality of the arrest, but on whether he has been deprived of his personal liberty to go where he pleases. When used in the legal sense in the procedure connected with criminal offences, an arrest consists in the taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing, the commission of a criminal offence. The essential elements to constitute an arrest in the above sense are that there must be an intent to arrest*

under the authority, accompanied by a seizure or detention of the person in the manner known to law, which so understood by the person arrested. In this connection, a debatable question that arises for our consideration is whether the mere taking into custody of a person by an authority empowered to arrest would amount to 'arrest' of that person and whether the terms 'arrest' and 'custody' are synonymous.

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37. For all the discussions made above, we hold that 'custody' and 'arrest' are not synonymous terms. It istrue that in every arrest there is a custody, but not vice versa. A custody may amount to an arrest in certain cases but not in all cases but not in all cases. In our view the interpretation that the two terms 'custody' and 'arrest' are synonymous is an ultra legalist interpretation, which if accepted and adopted, would lead to a startling anomaly resulting in serious consequences."

25. In the case of ***Niranjan Singh v. Prabhakar Rajaram Kharote reported in (1980) 2 SCC 559*** the Hon'ble Supreme Court held that a person is said to be in "custody" as envisaged under the Cr.P.C. when he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. This word "custody" has been explained to have elastic semantics but its core meaning is that the law has takencontrol of the person. It was observed that *"the equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law."* A person can thus be in custody not merely when the police arrest him, produce him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions. In the said judgment the overarching principles of bail jurisprudence were laid down and which have been consistently followed by all courts including this court in the cases of ***Satindra Kumar Yadav v. State of Odisha*** reported in (2022) SCC Online Ori ***90; Gurdit Dang v. State of Odisha*** reported in 2021 SCC Online Ori 2361 and in the case of ***Tareque Ahmad v. State of Odisha*** reported in 2016 SCC Online Ori 835.

26. In ***Sundeep Kumar Bafna v. State of Maharastra and Ors. reported in (2014) 16 SCC 623*** the Hon'ble Supreme Court has concluded that custody, detention and arrest are sequentially cognate concepts. On the occurrence of a crime, the police is likely to carry out the investigative interrogation of a person, in the course of which the liberty of that individual is not impaired, suspects are

then preferred by the police to undergo custodial interrogation during which their liberty is impeded and encroached upon. If grave suspicion against a suspect emerges, he may be detained in which event his liberty is seriously impaired. Where the investigating agency is of the opinion that the detainee or person in custody is guilty of the commission of a crime, he is charged of it and thereupon arrested. This principle is reiterated by Pandian, J. in ***Directorate of Enforcement v. Deepak Mahajan*** reported in (1994) 3 SCC 440 that a person is in custody no sooner than he surrenders before the police or before the appropriate court. Similar enunciation of the law is also available in ***NirmalJeetKaur v. State of M.P***.reported in (2004) 7 SCC 558; ***Sunita Devi v. State of Bihar r***eported in (2005) 1 SCC 608 and ***Adri Dharan Das v. State of W.B***. (2005) 4 SCC 303 all of which are in sync with the view expressed in ***Niranjan Singh*** (supra).

27. Moving on, Section 167 of the Cr.P.C. clearly lays down that where investigation cannot be completed within twenty-four hours and the accused is under arrest with police, he has to be produced before the Magistrate for further detention if necessary. This is a salutary provision to safeguard the citizen's liberty so that police cannot illegally detain any citizen. Sub-sections (1) and (2) of Section 167 which are relevant for our purposes read as under:

> *"167. Procedure when investigation cannot be completed in twenty-four hours.—(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of subinspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.*
>
> *(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:*
>
> *Provided that—*
>
> *(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,—*

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police."

28. Sub-section (1) says that when a person is arrested and detained in custody and it appears that investigation cannot be completed within 24 hours fixed under Section 57 and there are grounds of believing that accusation or information is well founded, the officer in charge of the police station or the police officer making the investigation not below the rank of Sub-Inspector shall produce the accused before the nearest Judicial Magistrate. The mandate of sub-section (1) of Section 167 Cr.PC is that when it is not possible to complete investigation within 24 hours then it is the duty of the police to produce the accused before the Magistrate. Police cannot detain any person in their custody beyond that period. Therefore, sub-section (1) presupposes that the police should have custody of an accused in relation to certain accusation for which the cognizance has been taken and the matter is under investigation. Sub-section (2) says that if the accused is produced before the Magistrate and if the Magistrate is satisfied looking to accusation then he can remand the suspect/accused to the police for investigation not exceeding 15 days in the whole. But the proviso further gives a discretion to the Magistrate that he can authorise detention of the accused otherwise than the police custody beyond the period of 15 days but no Magistrate shall authorise detention of the accused in police custody for a total period of 90 days for the offences punishable with death, imprisonment for life or imprisonment for a term of not less than ten years (so far State of Odisha is concerned 90 days be read as 120 days vide Orissa Act 11 of 1997). It is further provided that no Magistrate shall authorise the detention of the accused person in custody for a total period of 60 days when the investigation relates to any other offence. Upon expiry of the period of 90 days (For Odisha 120 days) or 60 days as the case may be, and he shall be released if he is willing to furnish bail. In this connection in ***State of Maharashtra v. Bharati Chandmal Varma*** reported in (2002) 2 SCC 121 their Lordships have very clearly held that:

"11. For the application of the proviso to Section 167(2) of the Code there is no necessity to consider when the investigation could legally have commenced. That

proviso is intended only for keeping an arrested person under detention for the purpose of investigation and the legislature has provided a maximum period for such detention. On the expiry of the said period the further custody becomes unauthorised and hence it is mandated that the arrested person shall be released on bail if he is prepared to and does furnish bail. It may be a different position if the same accused was found to have been involved in some other offence disconnected from the offence for which he was arrested. In such an eventuality the officer investigating such second offence can exercise the power of arresting him in connection with the second case. But if the investigation into the offence for which he was arrested initially had revealed other ramifications associated therewith, any further investigation would continue to relate to the same arrest and hence the period envisaged in the proviso to Section 167(2) would remain unextendable."

29. Therefore, the position of law is very clear that if during the course of the investigation any further ramification comes to the notice of the police then the period will not be extendable. In ***CBI v. Anupam J. Kulkarni*** reported in (1992) 3 SCC 141 the Hon'ble Supreme Court observed as follows:

"In one occurrence it may so happen that the accused might have committed several offences and the police may arrest him in connection with one or two offences on the basis of the available information and obtain police custody. If during the investigation his complicity in more serious offences during the same occurrence is disclosed that does not authorise the police to ask for police custody for a further period after the expiry of the first fifteen days. If that is permitted then the police can go on adding some offence or the other of a serious nature at various stages and seek further detention in police custody repeatedly, this would defeat the very object underlying Section 167. [But their Lordships put an occasion and added that] limitation shall not apply to a different occurrence in which complicity of the arrested accused is disclosed. That would be a different transaction and if an accused is in judicial custody in connection with one case and to enable the police to complete their investigation of the other case they can require his detention in police custody for the purpose of associating him with the investigation of the other case. In such a situation he must be formally arrested in connection with other case and then obtain the order of the Magistrate for detention in police custody."

30. In so far as the concept of "formal arrest" is concerned, the procedure therefor has been dealt with by the Apex Court in the case of ***Joginder Kumar v. State of U.P***. and others reported in 1994 SCC (Crl) 1172 that:

".....no arrest can be made, because it is lawful for the police officer to arrest. The existence of power to arrest is one thing. The jurisdiction for exercise of it is quite another. Thus, he has got discretion and only in a case where such arrest is absolutely necessary, he shall resort to arrest. In all other cases, he may, without arresting the accused, proceed with the investigation and filed final reports. It is thus clear that in a case where the police officer investigating a certain case deems it necessary to arrest a person who is the accused as in another case and is already in judicial custody in connection with a different case there are two modes available for him to adopt. The first one is that, instead of effecting formal arrest, he can very well make an application

before the jurisdictional magistrate seeking a P.T. warrant for he production of the accused from prison. If the conditions required under Section 267 of the Code of Criminal Procedure, are satisfied, the Magistrate shall issue a P.T warrant for the production of the accused in court. When the accused is so produced before the court, in pursuance of the P.T. warrant, the police officer will be at liberty to make a request for remanding the accused, either to police custody or judicial custody as provided under Section 167 (1) of the Code of Criminal Procedure. At that time, the Magistrate shall consider the request of the police, peruse the case diary and the representation the accused and then pass an appropriate order either remanding the accused or declining to remand the accused. It is of course needless to state that while considering the request for remand, the Magistrate is required to hold a summary enquiry and it is a very serious judicial act be performed by the magistrates while remanding the accused as the personal liberty of the individual is curtailed. The second more which the police officer may adopt is to effect a formal arrest in prison has stated in the case of CBI v. Anupam J Kulkarni reported in (1992) 3 SCC 141 and thereafter to make a request to the jurisdictional magistrate for issuance of PT warrant for the production of the accused. When the accused is so produced before the magistrate, the police officer will be entitled to make a request for remand of the accused either in judicial custody or in police custody."

31. In fact, the Hon'ble Madras High Court in the case of ***State v. K.N. Nehru*** reported in ***2011 SCC On Line Mad 1984*** has succintly summarized the discussion made therein as follows;

"42. From the above discussions, the following conclusions emerge:

(1) When an Accused is involved in more than one case and has been remanded to judicial custody in connection with one case, there is no legal compulsion for the Investigating Officer in the other case to effect a formal arrest of the Accused. He has got discretion either to arrest or not to arrest the Accused in the latter case. The Police Officer shall not arrest the Accused ina mechanical fashion. He can resort to arrest only if there are grounds and need to arrest.

(2) If the Investigating Officer in the latter case decides to arrest the Accused, he can go over to the prison where the Accused is already in judicial remand inconnection with some other case and effect a formal arrest as held in Anupam Kulkarni case. When such a formal arrest is effected in prison, the Accused does not come into the physical custody of the Police at all, instead, he continues to be in judicial custody in connection with the other case. Therefore, there is no legal compulsion for the production of the Accused before the Magistrate within 24 hours from the said formal arrest.

(3) For the production of the Accused before the Court after such formal arrest, the Police Officer shall make an Application before the Jurisdictional Magistrate for issuance of P.T. Warrant without delay. If the conditions required in Section 267 of the Code of Criminal Procedure are satisfied, the Magistrate shall issue P.T. Warrant for the production of the Accused on or before a specified date before the Magistrate. When the Accused is so transmitted from prison and produced before the Jurisdictional Magistrate in pursuance of the P.T. Warrant, it will be lawful for the Police Officer to make a request to the learned Magistrate for authorising the detention of the Accused either in Police custody or in judicial custody.

(4) After considering the said request, the representation of the Accused and after perusing the case diary and other relevant materials, the learned Magistrate shall pass appropriate orders under Section 167(1) of the Code of Criminal Procedure.

(5) If the Police Officer decides not to effect formal arrest, it will be lawful for him to straightaway make an Application to the Jurisdictional Magistrate for issuance of P.T. Warrant for transmitting the Accused from prison before him for the purpose of remand. On such request, if the Magistrate finds that the requirements of Section 267 of the Code of Criminal Procedure are satisfied, he shall issue P.T. Warrant for the production of the Accused on or before a specified date.

(6) When the Accused is so transmitted and produced before the Magistrate in pursuance of the P.T. Warrant from prison, the Police Officer will be entitled to make a request to the Magistrate for authorising the detention of the Accused either in Police custody or in judicial custody. On such request, after following the procedure indicated above, the Magistrate shall pass appropriate orders either remanding the Accused either to judicial custody or Police custody under Section 167(1) of the Code of Criminal Procedure or dismissing the request after recording the reasons.

(7) Before the Accused is transmitted and produced before the Court in pursuance of a P.T. Warrant in connection with a latter case, if he has been ordered to be released in connection with the former case, the Jail Authority shall set him at liberty and return the P.T. Warrant to the Magistrate making necessary endorsement and if only the Accused continues to be in judicial custody, in connection with the former case, he can be transmitted in pursuance of P.T. Warrant in connection with the latter case."

32. Upon examining whether it is at all necessary that invariably in all cases such "formal arrest" is required to be effected in prison, when the accused is already lodged in prison in connection with some other case, it is needless to point out that though the police officer has got power to arrest, it does not mean that he has to resort to arresting the accused, irrespective of the need and justification for arrest. The accused persons shall not be arrested in a robotic fashion. Arrest needs to occur only if there are grounds and need to arrest, not otherwise. It goes without saying that if deemed fit, and in exercise of his discretion, the officer formally arrests the accused then when such a formal arrest is effected in prison, the accused does not come into the physical custody of the officer subsequently effecting the formal arrest at all, instead, he continues to be in judicial custody in connection with the other case. If the officer decides not to effect formal arrest, it will be lawful for him to straightaway make an application to the Jurisdictional Magistrate for issuance of P.T. warrant for transmitting the accused from prison before him for the purpose of remand. On such request, if the Magistrate finds that the requirements of Section 267 of the Code of Criminal Procedure are satisfied, he shall issue P.T. Warrant for the production of the accused on or before a specific date. It cannot be stressed upon enough to remind the Judicial Magistrates of their constitutional obligation, while exercising their right to remand an individual, since it involves the curtailment of right to life, as guaranteed in Article 21 of the Constitution of

India. The procedure that has been provided under the Cr.PC is common to both lighter offences and serious offences and hence irrespective of the nature of offence, the police is expected to follow the correct procedure failing which it will result in the violation of the fundamental right guaranteed under Article 21 of the Constitution of India.

33. The question of applicability of Cr.P.C. to the PML Act has been dealt with by the Hon'ble Supreme Court in the case of ***Ashok Munilal Jain v. Directorate of Enforcement***, reported in (2018) 16 SCC 158 has held as follows:

> *"3. We have gone through the orders passed by the trial court as well as by the High Court. We may state at the outset that insofar as the High Court is concerned, it hasnot given any reasons in support of its aforesaid view except endorsing the view of the trial court to the effect that the provisions of Section 167(2) Cr.PC are not applicable to the cases under the PMLA Act. This position in law stated by the trial court does not appear to be correct and even the learned Attorney General appearing for the respondent could not dispute the same. We may record that as per the provisions of Section 4(2) Cr.PC, the procedure contained therein applies in respect of special statutes as well unless the applicability of the provisions is expressly barred. Moreover, Sections 44 to 46 of the PMLA Act specifically incorporate the provisions of Cr.PC to the trials under the PMLA Act. Thus, not only that there is no provision in the PMLA Act excluding the applicability of Cr.PC, on the contrary, provisions of Cr.PC are incorporated by specific inclusion. Even Section 65 of the PMLA Act itself settles the controversy beyond any doubt in this behalf which reads as under:*
>
> *"65. Code of Criminal Procedure, 1973 to apply.—The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, insofar as they are not inconsistent with the provisions of this Act, to arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under this Act."*

34. In the context of the present case, it would be apt to state here that while considering the present bail application, a detailed examination of the material on record especially touching upon the merits of the case are not required to be undertaken, however, this Court is expected to supply sound reasons while exercising its discretionary power to enlarge the accused on pre arrest bail, as has been observed by the Hon'ble Supreme Court in many cases.

35. It would be pertinent to refer to another judgment of the Hon'ble Supreme Court delivered in ***Vijay Madanlal Choudhary and Ors. v. Union of India and Ors***. reported in 2022 SCC On Line SC 929, laying emphasis upon the further need to assign reasons as it contains an embargo against the grant of bail to a person accused of an offence under PML Act, unless the Public Prosecutor has been given an opportunity to oppose the application and the Court is satisfied that there are reasonable grounds for believing that such person is not guilty of such offence and that if released on bail, he is not likely to commit any offence,

while on bail. The learned counsels for the Enforcement Department as well as the petitioner relied upon this judgment in course of their argument before this court.

36. A useful reference in this context can be made to a three Judge Bench judgment of the Supreme Court in the case of ***Ranjitsingh Brahmajeetsing Sharma v. State of Maharashtra*** reported in (2005) 5 SCC 294 wherein the contours of the power of the Court to grantbail in the face of the prohibition contained in Section 21(4) of the Maharashtra Control of Organized Crime Act, 1999 arose for consideration. The prohibition against the grant of bail under Section 21(4) of the MCOC Act, 1999 is parimateria to the bar contained in Section 45(1) of the PMLA. In ***Ranjitsingh Sharma*** (supra) the Supreme Court elaborately narrated the approach to be adopted in arriving at the satisfaction as to whether the accused is "not guilty of such offence" and that the accused is "not likely to commit any offence while on bail". The relevant paragraphs are quoted hereunder:

> *"35. Presumption of innocence is a human right. [See Narendra Singh and Another Vs. State of M.P., (2004) 10 SCC 699, para 31] Article 21 in view of its expansive meaning not only protects life and liberty but also envisages a fair procedure. Liberty of a person should not ordinarily be interfered with unless there exist cogent grounds therefor. Sub-Section (4) of Section 21 must be interpreted keeping in view the aforementioned salutary principles. Giving an opportunity to the public prosecutor to oppose an application for release of an accused appears to be reasonable restriction but Clause(b) of Sub-section (4) of Section 21 must be given a proper meaning.*
>
> *36. Does this statute require that before a person is released on bail, the court, albeit prima facie, must come to the conclusion that he is not guilty of such offence? Is it necessary for the Court to record such a finding? Would there be any machinery available to the Court to ascertain that once the accused is enlarged on bail, he would not commit any offence whatsoever?*
>
> *37. Such findings are required to be recorded only for the purpose of arriving at an objective finding on the basis of materials on records only for grant of bail and for no other purpose .*
>
> *38. We are furthermore of the opinion that the restrictions on the power of the Court to grant bail should not be pushed too far. If the Court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the Court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. .....*
>
> *44. The wording of Section 21(4), in our opinion, does not lead to the conclusion that the Court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant*

bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the Legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the Court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the Court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.

45.It is, furthermore, trite that for the purpose of considering an application for grant of bail, although detailed reasons are not necessary to be assigned, the order granting bail must demonstrate application of mind at least in serious cases as to why the applicant has been granted or denied the privilege of bail.

46. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4) of Section 21 of the Act, the Court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby."

37. Interestingly, the Hon'ble Supreme Court even in the case of ***Vijay Choudhary*** (supra) has observed as follows:

"400. It is important to note that the twin conditions provided under Section 45 of the 2002 Act, though restrict the right of the accused to grant of bail, but it cannot be said that the conditions provided under Section 45 impose absolute restraint on the grant of bail. The discretion vests in the Court which is not arbitrary or irrational but judicial, guided by the principles of law as provided under Section 45 of the 2002 Act. While dealing with a similar provision prescribing twin conditions in MCOCA, this Court in Ranjitsingh Sharma (supra) held as under:

44.....

45.....

46..... (extracted above).

401. We are in agreement with the observations made by the Court in Ranjitsing Sharma (supra). The Court while dealing with the application for grant of bail need not delve deep into the merits of the case and only a view of the Court based on available material on record is required. The Court will not weight the evidence to find the guilt of the accused which is, of course, the work of trial Court. The Court is only required to place its view based on probability on the basis of reasonable material collected during

> *investigation and the said view will not be taken into consideration by the Trial Court in recording its finding of the guilt or acquittal during trial which is based on the evidence adduced during the trial. As explained by this Court in Nimmagadda Prasad, the words used in Section 45 of the 2002 Act are "reasonable grounds for believing" which means the Court has to see only if there is a genuine case against the accused and the prosecution is not required to prove the charge beyond reasonable doubt."*

Therefore, there is no doubt that the restrictions in the matter of grant of bail are required to be considered reasonably. If the Court having regard to the material brought on record is satisfied that, in all probability, the accused may not be ultimately convicted, an order granting bail may be passed. Conversely, it is not a mandatory requirement that the Court must arrive at a positive finding that the Petitioner has not committed an offence under the Act. This view has also been followed by the Hon'ble High Court of Bombay in ***Anil Vasantrao Deshmukh v. State of Maharashtra and Anr***. vide it's judgment and order dated 4.10.2022 in Bail Application No. 1021 of 2022, which has in turn attained finality after Special Leave Petition (Crl.) Diary No. 32078 of 2022 filed against aforesaid order dated 4.10.2022 which was disposed of by the Hon'ble Supreme Court recently vide it's order dated 11.10.2022.

38. The Petitioner in the case at hand has been charged under Sections 4 of the PML Act which provides for a maximum punishment of seven years. Section 13 (1) (c) (d) of the Prevention of Corruption Act which provides for the maximum punishment of seven years and under Sections 120 B, 379,409, 411 and 420 of the IPC. A perusal of Section 2(y) of the PML Act provides for the scheduled offences thereunder and Paragraph 1 relates to offences under the IPC which are "scheduled offences" within the meaning of the PML Act. Section 409 of the IPC does not figure as a scheduled offence under the schedule to the act. Therefore, all the other offences including the offences under the IPC have a maximum punishment of up to 7 years imprisonment.

39. Now reverting back to the facts of the present case, the core allegation which forms the foundation of the alleged offence is that the petitioner along with the other accused persons performed illegal mining in the Uliburu Iron Ore Mines and in that process amassed and mobilized illegal monies by defrauding the state exchequer and caused loss to it. On that basis an FIR was registered at Balasore Vigilance PS bearing No. 20 of 2013 for alleged offences under sections 13 (2) r/w 13 (1) (c) (d) of the Prevention of Corruption Act 1988, Sections 120-B/420/379/409/411 of IPC, Section 4 and 21 (1) of MMDR Act, 1957 and Section 3 of Forest Conservation Act, 1980. A final charge-sheet bearing number No. 6/2014 was submitted on 24.06.2014 by Vigilance Police, Balasore, Odisha before the Ld. Special Judge, Vigilance Court at Keonjhar. The Opposite Party registered the Enforcement Case Information Report bearing

ECIR No. 01/2014/BSZO as some of the offences under the alleged offences mentioned above were coming under "scheduled offences" as defined in the PMLA under Section 2(y) by lodging a complaint under Section 45 of the PMLA.

40. The substratum of the allegation with regard to the predicate offences seems to be one of illegal mining. The allegation is that under valuation has been done with regard to the quantum of material is raised and the state exchequer has been defrauded on account of non-payment of royalty. The primary contentions raised by the opposite party seems to be that at no stage had they taken the petitioner into "custody" and in any case no formal arrest had been affected. That being the case, although the petitioner has been enlarged on bail in the vigilance case and the fact remaining that the opposite party herein has never formally arrested the petitioner herein, nothing stops them from seeking his custody at the stage for custodial interrogation. It is for this reason that in their affidavit they have sought to stress and impress upon this court that the Petitioner's remand was sought under Section 267 Cr.PC and not under Section 167 Cr.PC. It is the opposite parties case that insofar as the enforcement cases concerned only "remand" was directed by the competent court and therefore could not be said that the petitioner had been arrested by the opposite party. Since no "arrest" had been affected by the opposite party in the enforcement case they now seek to take the petitioner into custody by effecting a formal arrest if and when required insofar as the enforcement cases are concerned. It is also stated by them that the fact that bail was granted by this court in the vigilance case and confirmed by the Hon'ble Supreme Court primarily on the ground that the petitioner had undergone a period of about six years and the maximum quantum of punishment was about seven years will have no consequence, insofar as the enforcement case is concerned.

41. A thorough scrutiny of the factual background of the present case indicates that the petitioner herein had been taken into custody and not "arrested" by the Opposite Party is evident from a perusal of the orders passed by the special court PMLA, Bhubaneswar. Orders dated 3.07.2014, 10.07.2014 and 14.07.2014 would indicate that thePetitioner had been taken into custody at the request of the opposite party by moving an application and upon such request, they were granted "remand" of the petitioner by the court concerned for a period of seven days and thereafter for an additional period of 10 days.

42. The analysis of the various judicial pronouncements in the preceding paragraphs with regard to the concept of arrest and custody unequivocally demonstrate that the Petitioner in the present enforcement case has never been

"formally arrested" by the Enforcement Directorate but has been remanded to their custody for the purposes of investigation. In the said context, the argument advanced before this court by Mr. Agarwal, learned counsel for the E.D. has substance in it. Therefore, it appears to this court that most likely the Enforcement Directorate officials have chosen to not exercise their discretionary power to "formally arrest" the Petitioner, probably because they did not feel the need to do so. Furthermore, since lodging of the ECIR to till date, the E.D. officials never bothered to formally arrest the petitioner and while the petitioner was in custody in connection with the vigilance case, he was taken on remand for interrogation by E.D. officials. After investigation was concluded, probably the necessity of arrest was never felt by E.D. The Petitioner had cooperated with investigation and had recorded his statement before the Enforcement Directorate which had led the Enforcement Directorate to state that they no longer require the custody of the Petitioner for the purposes of investigation. As such Section 167 Cr.PC which talks about the benefits of default bail when investigation cannot be completed post arrest is not applicable to the present factual situation and the Petitioner cannot claim any benefit of the said provision. Moreover, the orders passed by the Ld. Special Judge, Special PMLA Court at Bhubaneswar on 03.07.2014, 10.07.2014 and 24.07.2014 were in line with the provisions of Section 267 of the Cr.PC. Such ground realities also entail that the present pre arrest bail at the instance of the petitioner is maintainable, furthermore, the Petitioner can apply for and seek grant of anticipatory bail as he justifiably apprehends his formal arrest in the enforcement case by the E.D. officials, never having been arrested in the enforcement case before. This court is also unable to convince itself as to why the E.D. vehemently opposes the bail application of the petitioner at this juncture when they did not do anything for past several years to formally arrest the petitioner. The reply of Mr. Agarwal to the courts query was found lacking in many aspects and this court is unable to fathom the approach and strategy of the E.D. in opposing the bail application of the petitioner.

43. This being the peculiar situation of the present matter at hand, the question of the custody of the petitioner being granted to the Opposite Party all over again in respect of the same enforcement case is flawed in concept and misconceived in law. Once bail in the vigilance case had been granted by this court and affirmed by the Hon'ble Supreme Court that too the petitioner was detained in custody for almost 6 years out of maximum quantum of punishment that could be inflicted for the scheduled offences is 7 years, therefore, this court deems it proper and justified to consider the question of bail with regard to the Enforcement case from the standpoint of collective and combined view of the whole issue on conspectus of all the facts involved and the law applicable thereto.

44. In ***Anokhi Lal v. State of Madhya Pradesh*** reported in ***(2019) 20 SCC 196*** it has been reiterated that expeditious disposal of criminal matters should not be at the expense of basic elements of fairness and opportunity to the accused. In the case of ***Sanjay Chandra v. CBI*** reported in ***(2012) 1 SCC 40*** while dealing with a matter involving a public scam which was extremely prejudicial in nature, the Hon'ble Supreme Court sounded a word of caution while dealing with such matters and had that in cases where under trial prisoners are detained in jail custody indefinitely, Article 21 of the Constitution stands violated. In matters involving scams it was noted that usually a large number of witnesses are present and the trial usually takes a considerable amount of time to be completed. In such cases once the charge-sheet has been filed, the court may depending on the facts of the case, the court in seisin ought to decide such bail application on its own merits. While holding so it was alive to the fact that in some situations such lengthy trials may even prolong beyond the maximum sentence provided under the relevant law. In that case the punishment for the offence was for a maximum period of imprisonment of seven years. It was held therein that even if theaccused had a likelihood of being convicted, the period of detention already undergone during the trial stage would have a great bearing while deciding a bail application and such a factor should also be taken into consideration.

45. The Opposite Party claims that investigation is continuing which necessitates custodial interrogation of the present Petitioner and has pressed upon us some evidence in its present Affidavit. At this juncture, however, we note that the present matter has gone beyond the stage of investigation qua the present Petitioner to a substantial extent although, the Enforcement Directorate seeks to keep the door open for further investigation. Here, this court observes that the investigation has almost been concluded and no new materials whatsoever were brought to the notice of this court, albeit the case is lingering for almost more than half a decade now. Further, custodial interrogation several years after the institution of the case does not stand to any legal reason and justification. Hence, in the absence of any new incriminating materials against the petitioner and Mr. Agarwal's attempt to demonstrate the case relying the materials which are already on record would not change the ground position substantially and to the disadvantage of the petitioner.

46. It may not be out of place to refer to the case of ***Satender Kumar Antil v. CBI*** (supra) where the Hon'ble Supreme Court dealt with Section 436A of the Cr.PC. In the said case comprehensive directions were passed to formulate and carry out directions with regard to provisions of bail. While the dealing with different fact situations the cases were categorised into A, B, C and D categories/types of offences. Category C was categorised as offences punishable

under special acts containing stringent provisions for bail like NDPS (Section 37), PMLA (Section 45), UAPA (Section 43D), Companies Act (Section 212 (6), POCSO etc. while dealing with Section 436A of the code which has been inserted by Act 25 of 2005 the object of the amendment was gone into by the Hon'ble Apex court. The provision provides that when a person has undergone detention for a period extending to ½ of the maximum period of imprisonment specified for that offence, he shall be released by the court on his personal bond with or without securities. It has been noted that that the word "shall" clearly denotes the mandatory compliance of this provision. It has been noted therein that in cases where the provision applies the power has to be exercised sparingly with the principle governing the presumption of innocence of the accused has the provision is a substantive one, facilitating liberty being the core of the intendment of article 21. In fact the Hon'ble Supreme Court has also taken note of the earlier directions passed by it in the case of ***Bhim Singh v. Union of India*** reported in 2015 SCC 605 on the very same lines. Finally, the Hon'ble Supreme Court has concluded that with regard to category C of cases although the individual and enactments were not discussed individually as each special act has a specific objective behind it, followed by the rigours imposed therein, however, it has been clarified that the general principle governing bail would apply to these categories also. Thus, to make it clear, the provision contained in Section 436A of the Code would apply to the special acts also in the absence of any specific provision. Therefore, this court would unhesitantly conclude that the rigour, as provided under the special acts such as Section 45 of the PMLA Act as in the present case, would not come in the way as the liberty of the individual is paramount under Article 21 of the Constitution of India.

47. The Petitioner has been in the custody of the Enforcement Directorate wherein his statement has been recorded. He has been stated not to be required by the Enforcement Directorate themselves which stands recorded in order dated 24.07.2014 of the Special PMLA Court, Bhubaneswar. All the documentary evidence to be unearthed against the Petitioner is already in the custody of theOpposite Parties and in fact, assets of the Petitioner and his family members to the tune of Rs.386 crores have admittedly already been attached which is almost equal to the value of the amount of monies allegedly misappropriated. The Petitioner has surrendered his passport to the investigating agency in T.R. Case No. 01 of 2014 and as such no risk exists with regard to the fact that the petitioner might flee away from the country and the court of law. Furthermore, my attention was also drawn to the judgement of the Hon'ble Supreme Court in ***Common Cause v. Union of India*** reported in ***(2017) 9 SCC 499*** wherein similar allegations of illegal mining were levelled against multiple mining leaseholders in the State by the Central Empowered Committee. The Hon'ble

Supreme Court in the aforementioned matter levied "penalty" on all mining leaseholders to compensate for the environmental damage and the loss to revenue caused by their alleged actions. However, the Hon'ble Supreme Court had not deemed it appropriate to direct an enquiry by the Central Bureau of Investigation, as prayed for, against the mining leaseholders as it was held that *"what is of immediate concern is to learn lessons from the past so that rapacious mining operations are not repeated in any other part of the country"*. Since the aforementioned judgment, hardly any mining leaseholder has been proceeded against criminally and even from amongst the handful who have been, nobody has been convicted yet of offences under IPC or the PML Act.

48. In light of the discussion made here in above coupled with a conspectus of the surrounding facts and circumstances of the present case as well as the fact that the petitioner was in custody for almost 6 years in connection with the vigilance case which forms part of scheduled offence for the present case under PML Act and the fact that the custodial interrogation of the petitioner is over and the E.D.'s statement before court that custody of the petitioner is no more required and above all the fact that the petitioner was not formally arrested by the E.D. in the present case since the institution of the case by registering the ECIR further considering the factual background of this case with the touchstone of the test enunciated in the case of ***Ranjitsingh Sharma*** (supra), this court is persuade to form a prima facie opinion that, in all probabilities, the Petitioner may not be ultimately convicted especially as none of the other mining leaseholders who were penalised by the Hon'ble Supreme Court in the ***Common Cause case*** (supra) have been successfully charged/ convicted of similar predicate offences.

49. Furthermore, the mining operation as well as the mining laws, in the meanwhile, has undergone a drastic change, therefore, prima facie there exists no possibilities of such offences being repeated in the future. The apprehension of Mr. Agarwal that the petitioner might not cooperate with the trial and he may not appear before the trial court on each and every date the matter is posted to can very well be taken care of by imposing conditions while releasing the petitioner on pre arrest bail, further violation of such conditions would draw the penalty of curtailment of liberty granted to the petitioner by virtue of this order.

50. At this juncture, this Court as a constitutional would like to highlight another aspect of the matter. As has been said earlier, initially the Vigilance case was registered in the year 2013. The petitioner was arrested and taken into custody. Thereafter, the ECIR was submitted in 2014 and PMLA case was registered in 2018. After remaining custody for more than 6 years, the Petitioner

was released on bail by this Court and later on the same was confirmed by the Hon'ble Apex Court. Since 2013, the criminal proceedings are pending and it is not known as to how long the trial will continue. Considering the list of witnesses and the documents, the trial is not likely to conclude in the near future. Under such factual scenario this Court is not expected to remain as a mere spectator and allow the fundamental rights of the accused citizen to be infringed by the prosecution. Therefore, this Court is also of the considered view that concept of right to fair and speedy trial as has been guaranteed under Article 21along with the observation of the Supreme Court in ***Babubhai's*** Case (Supra) i.e. the accused cannot be subjected to tyranny of legal process which may go on endlessly for no fault of the accused himself, squarely applies to the facts of the case in hand and as such this court is under a constitutional obligation to protect such fundamental rights of the accused petitioner.

51. On a conspectus of the peculiar facts involved in the case at hand and the law applicable thereto, this Court, considers this the present case to be a deserving case for exercising it's discretion under Section 438 Cr.PC and to grant anticipatory bail to the present Petitioner and accordingly it is directed that the petitioner be released on bail in the event of his arrest by the E.D. officials in connection with Complaint Case (PMLA) No. 40 of 2018 pending before the Ld. Special Judge, Special Court, Bhubaneswar, Khurdha subject to such terms and conditions as the arresting officer would deem fit and proper in the facts and circumstances of the present case. Further, the release of the petitioner on pre arrest bail shall also be subject to following additional terms and conditions;

a. The Petitioner shall appear before the Ld. Special Judge, Special Court, PMLA, Bhubaneswar on each and every date the case is posted to without fail. In case of default in appearance for any insufficient reason it is open for the Ld. Trial Court to issue NBW against the Petitioner.

b. While on pre arrest bail the Petitioner shall not make any attempt whatsoever to tamper with or destroy the prosecution evidence.

c. While on pre arrest bail, the Petitioner shall not make any attempt whatsoever to threaten, influence, induce, gain over any of the prosecution witnesses.

d. The Petitioner shall cooperate with investigation if his cooperation is sought for by the Enforcement Directorate.

e. The Petitioner shall not leave the country under any circumstances and shall surrender his travel documents like passport etc, if not already surrendered before the trial court.

f. The Petitioner shall keep on informing about his whereabouts to the E.D. and shall provided his address and mobile number to the E.D. and keep the same updated from time to time.

g. Violation of any of the conditions mentioned herein above would entail cancellation of the bail granted to the Petitioner.

52. It is made clear that the observations made herein are *prima facie* for the purposes of the instant application and the trial Court shall decide the case in question on its own merits uninfluenced by any of the observations/findings given in this order, strictly in accordance with law by following the procedure.

53. With the aforesaid observations/directions, the anticipatory bail application stands allowed.

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2022 (III) ILR - CUT-1262

V. NARASINGH, J.

W.P.(C) NO. 24338 OF 2014

RAGHUNATH TRIPATHY ……..Petitioner

.V.

THE COMMISSIONER-CUM-SECRETARY, DEPARTMENT OF COOPERATIVE & ORS. ……..Opp.Parties

(A) CONSTITUTION OF INDIA, 1950 – Article 226 – Interference of the Court in policy decision – Prayer for enhancement of superannuation age – Held, whether the age of superannuation should be increased and if so, the date from which this should be effected is a matter of policy into which the High Court ought not to have interfered." (Paras 32,34)

(B) INTERPRETATION OF STATUE – The petitioner retired from service on 30.09.2014 at the age of 58 years as per the relevant Rules governing the field – The enhanced retirement age came into effect on 31.10.2014, after the amendment in the Service Rules – Whether the amended rule applicable to the petitioner retrospectively? – Held, No, cannot be made applicable retrospectively. (Para 35)

Case Laws Relied on and Referred to :-

1. 2015 (2) CLR 914 : Premalata Panda Vs. State of Odisha.
2. (2000) 3 SCC 435 : State of Punjab Vs. Boota Singh.
3. AIR 2021 SC 3457: New Okhla Industries Development Authority & Ors. Vs. B.D. Singhal & Ors.

For Petitioner : Mr. A.P. Bose

For Opp. Parties : Mr. S.N. Pattnaik, AGA (for O.P. Nos.1 & 2)
Mr. K.P. Nanda,(for O.P. No.4)

JUDGMENT Date of Hearing: 31.10.2022 & Date of Judgment: 15.11.2022

V. NARASINGH, J.

1. The petitioner. who was working as a Junior Supervisor in the office of the Berhampur Co-operative Central Bank, (hereinafter referred to as "the Central Bank", for convenience of ready reference) has approached this Court under Article 226 of the Constitution of India assailing the order passed by the Central Bank by order dated 23.07.2014 at Annexure-4, intimating him about his retirement of service with effect from 30.09.2014, on attaining the age of superannuation of 58 years and petitioner has also sought for a direction to the Opposite Party No.2 (The Registrar Co-operative Society), Opposite Party No.3. (Management-in-charge, Berhampur Co-operative Central Bankcum-Collector) and Opposite Party No.4-(The Secretary, Berhampur Co-operative Central Bank, Berhampur) "to bring him back to service" and allow him to continue till he attains age of 60 years.

2. The petitioner joined the service of Berhampur Cooperative Central Bank Ltd. on 15.02.1985.

3. It is on record that the Government of Odisha in Finance Department issued a resolution dated 28.06.2014 at Annexure-2 enhancing the retirement age from 58 to 60 years for the State Government employees making suitable amendment of Odisha Service Code and on a bare perusal of the said Annexure-2, it can be seen that the same was directed to be implemented with immediate effect.

4. On 13.08.2014, the Managing Committee of the Berhampur Cooperative Central Bank Ltd., Berhampur as per resolution No.1 resolved to request the Registrar Co-operative Society, Odisha, Bhubaneswar, to accord necessary approval for implementation of the enhancement of the retirement age of Berhampur Cooperative Central Bank Ltd., Berhampur employees from 58 to 60 years.

5. In the said resolution, which is at Annexure-3, the Chief Executive of the Bank was authorized to have correspondence in this regard with the Registrar Co-operative Society, Odisha, Bhubaneswar.

6. It is on record that the Registrar Cooperative Society took a decision on 29.09.2014 in exercise of power under Section 33-A of the OCS Act, 1962 to enhance the retirement age in respect of employees of all the Co-operative Society excepting the employees of the Co-operative Societies as at serial No.3 of the said order.

7. The order of the Registrar Co-operative Society (Opposite Party No.2) dated 29.09.2014 is extracted hereunder:-

> *"OFFICE OF THE REGISTRAR COOPERATIVE SOCIETIES, ODISHA, BHUBANESWAR*
>
> *xxx xxx xxx*
>
> ***WHEREAS**, movement in Cooperation Department in their Letter No.7531 dated 26.09.2014 interalia have intimated that in the meantime Government have been pleased to order that MoUfor revival of Short Term Cooperative Credit Structure (STCCS) was executed with Government of India and NABARD; and*
>
> *2. **WHEREAS,** in the said letter it has also been held that on the basis of the MoU, the OCS Act was amended to bring in required legal reforms for the STCCS; and*
>
> *3. **WHEREAS, it has further been held in the said letter that as per the amended provision of the OCS Act, the Registrar of Cooperative Societies, Odisha is to finalise the service condition of the Staff of Credit Cooperative Societies (OSCB, DCCB and PACS) in consultation with NABARD; and***
>
> *4. **WHEREAS,** it has been decided by the Government that in respect of all other Cooperatives the retirement age limit be enhanced to 60 years;*
>
> *5. **NOW THEREFORE**, in exercise of power u/s.33-A of the OCS Act, 1962, I Sri Dhiren Kumar Pattnaik, IAS, Registrar of Cooperative Societies, Odisha do hereby enhance theretirement age to 60 years in respect of employees of all the Cooperative Societies excepting the employees of the Cooperative Societies as at Sl. No.3 above and the order issued earlier in this context is modified to the above extent only.*
>
> *xxx xxx xxx*
>
> *Registrar*
> *Cooperative Societies, Odisha"*
> *(Emphasized)*

8. On a bare perusal of the said order, it can be seen that the decision was taken to enhance the retirement age to 60 years of employees of all the Co-operative Societies excepting the Cooperative Societies at serial No.3 i.e. Staff of Credit Cooperative Societies (OSCB, DCCB and PACS) pending consultation with NABARD.

9. It is the grievance of the petitioner that though ultimately the retirement age of employees of Co-operative Central Bank was enhanced to 60 years but the same was made effective from **31.10.2014**, for which he was deprived of the said extension of age of retirement from 58 to 60 years, since he retired with effect from **30.09.2014.**

10. It is the submission of the learned counsel for the petitioner that the action of the authorities in implementing the enhancement of age of Central Co-operative Bank with effect from 31.10.2014 is *per se* arbitrary in view of the resolution of the Finance Department enhancing the age of the Government employees from 58 to 60 years with effect from 28.06.2014.

11. It is submitted with vehemence that there is no rationale in treating the employees of the Central Co-operative Bank differently in view of the resolution of the Government even otherwise, it is submitted that since the Registrar Co-operative Society has taken the decision to enhance the retirement age of the Co-operative employees depriving the employees like the petitioner who have been working in Credit Co-operative Society from such enhancement of retirement age from 58 to 60 year, is *per se* arbitrary inasmuch as a homogenous class of Co-operative employees have been treated in a different manner.

12. To fortify his stand, learned counsel for the petitioner relied on the judgment of this Court in the case of ***Premalata Panda Vs. State of Odisha reported in 2015 (2) CLR 914.***

13. Learned AGA, Mr. S.N. Pattnaik appearing for the State opposed the prayer of the petitioner inter alia submitting that ex-facie the petitioner is not similarly circumstanced with the State Government employees, as such question of discrimination does not arise.

14. A counter affidavit has been filed by the Secretary, Berhampur Central Co-operative Bank-Opposite Party No.4, controverting the allegations made.

15. At this stage, it is apt to make a reference to the Central Cooperative Bank, Staff Service Rules, 2011, which is admittedly applicable to the employees of the Central Co-operative Bank in the State like the petitioner.

16. Rule-39 of the Central Co-operative Bank Staff Service Rules, 2011 deals "with retirement of services". The relevant clause of the said rule is extracted hereunder:-

> *"**39. Retirement of service**:*
>
> *The age of retirement of the employees working in the Bank will be as follows:-*

A.1. <u>The date of retirement of an employee other than the Support Staff working in a Bank is the date on which he or she attains the age of 58 years.</u> The date of retirement of Support Staff will be the date on which he or she attains the age of 60 years. Provided that the last day of the month shall be date of superannuation notwithstanding he/she attains the age of superannuation on any day during the same month. If the date of retirement falls on 1st day of the month, the incumbent will retire in the last day of the preceding month. (Emphasized)

xxx xxx xxx"

17. On a bare perusal of the order issued by the Registrar Co-operative Society dated 29.09.2014 at Annexure-8, it can be seen that while enhancing the retirement age of the employees of the Co-operative Society from 58 to 60 years in terms of the decision taken by the Government, the same was deferred in respect of staff of Credit Co-operative Societies, like the present one, in which the petitioner was admittedly an employee, for consultation with the NABARD, as evident from the communication dated 31.10.2014 of the Registrar of Cooperative Societies, Odisha.

18. The same is annexed as Annexure-10 and also relied upon by the Opposite Party No.4 as Annexure-D/4.

19. And, it was decided to enhance superannuation age of the employees of the Central Co-operative Banks from 58 to 60 years by carrying out necessary amendment of the Rules. The resolution passed by the Steering Group constituted by the Government in their meeting dated 29.10.2014, which has been reflected in the order of the Registrar of Cooperative Societies dated 31.10.2014 is extracted hereunder:-

"xxx xxx xxx

a) To enhance the superannuation age of the employees of Central Cooperative Banks from 58 years to 60 years and to amend the Rules i.e. exercise of statutory powers;

b) To amend the staff service rule of the Odisha State Coop Bank to enhance the age of the superannuation employees from 58 years to 60 years and to amend the Staff Service Rules of the OSCB accordingly in exercise of statutory powers;

c) To amend the staff service rules of PACS & LAMPCS to enhance the superannuation age from 58 years to 60 years in respect of the employees of PACS & LAMPCS and to amend the Staff Service Rules in exercise of the statutory power; And

Whereas, the said decision has been communicated by the Govt, Cooperation Deptt.in their letter No.8267 dated 30.10.2014.

xxx xxx xxx"

20. It is thus manifestly clear on a bare perusal of the said communication of the Registrar Co-operative Societies dated 31.10.2014, that in exercise of power conferred under Section 33-A of the OCS Act, 1962, the retirement age in respect of employees of the Cooperative Credit Societies was enhanced to 60 years and it was further observed that the respective rules governing the service conditions of the aforesaid employees are also modified to such extent and the modified rules were directed to be incorporated at the appropriate place of the respective clauses of the relevant Rules and it is also stated that such enhancement of age from 58 to 60 years in respect of employees of Co-operative Credit Societies shall come into force with immediate effect from 31.10.2014.

21. The relevant paras of the said communication of the Registrar, Cooperative Societies dated 31.10.2014 is extracted hereunder for convenience of ready reference:

> *"xxx xxx xxx*
>
> *Now, therefore, in exercise of power U/s.33-A of OCS Act, 1962, I Sri Dhiren Kumar Pattanaik, IAS, Registrar, Cooperative Socieities, Odisha, do hereby enhance the retirement age to 60 years in respect of employees of the Cooperative Credit Societies (OSCB, DCCB, LAMPCS, PACS (SCS and FSCS).*
>
> ***The respective rules governing service condition of the aforesaid employees are modified to the above extent only. This order be reflected in the appropriate place of the respective clauses of the relevant Rules.***
>
> *This order shall come into force with immediate effect."(Emphasized)*

22. It is submitted by the learned counsel for the Opposite Party No.4 that after consultation with the NABARD, Registrar Cooperative Society issued the letter enhancing the age of retirement to 60 years with effect from 31.10.2014 suitably modifying the rules relating to enhancement of age of retirement and admittedly the petitioner having retired on 30.09.2014, cannot claim the benefit of extended age of retirement from 58 to 60 years retrospectively.

23. It is further stated on behalf of Opposite Party No.4 that in terms of the relevant Rules relating to age of retirement, which were extracted hereinabove, the petitioner retired on attaining the age of 58 years.

24. As the petitioner retired during the currency of the said Rules, his claim to continue till 60 years is untenable as the amendment to the said Rules was only brought into effect from 31.10.2014 by virtue of the order/communication of the Registrar, Cooperative Societies hereinabove adverted to.

25. On a conspectus of materials on record, it is not in dispute that the petitioner is an employee of Co-operative Credit Society and is governed by the

Central Co-operative Bank Staff Service Rules, 2011 as quoted hereinabove. The said Rules prescribed the retirement age of the employees like the petitioner as 58 years, on the date of retirement of the petitioner as noted above.

26. The said Rule was amended with effect from 31.10.2014 as per the direction of the Registrar Co-operative Society. Admittedly, there being no amendment of the Rules governing the field retrospectively and the petitioner as a member of the Central Co-operative Society was a class by himself.

27. And, his claim to be treated at par with Government employees and the further submission of the learned counsel for the petitioner that employees of all the Co-operative Society form a homogenous class is untenable as there is intelligible differentia to treat the employees of Central Co-operative Services like the present petitioner differently in the context of the rules governing the field and same relating to the age of retirement with effect from 31.10.2014.

28. Hence, the contention that equals have been treated unequally does not stand to reason.

29. The judgment cited by the learned counsel for the petitioner in the case of ***Premalata Panda Vs. State of Odisha*** (Supra) is not applicable in the factual matrix of the case at hand.

Inasmuch as, on a bare perusal of the said judgment, it is seen that Premalata Panda-petitioner therein, was an employee of Cuttack Development Authority (CDA).

30. This Court on an analysis of the materials on record came to the finding that since CDA had no independent rules regarding the service condition of its employees, were governed by Orissa Service Code (OSC).

As such amendment to Rule 71(a) of OSC, enhancing/revising the age of retirement from 58 to 60 years was held to be ipso facto applicable from the date, from which such benefit was extended to others who are regulated by the OSC.

30(A). While, in the case at hand admittedly there are distinct rules governing service conditions of the petitioner, as already noted.

31. Learned counsel for the Opposite Party No.4 has relied on the judgment of the Apex Court in the case of ***State of Punjab v. Boota Singh*** *reported in (2000) 3 SCC 435* wherein the Apex Court has held that the benefit conferred by a particular Notification can only be claimed by those who retire after the date

stipulated in the notification and those who have retired prior to the stipulated date in the notification are governed by different rules, i.e. they are governed by the old rules i.e. the rules prevalent at the time when they retire.

It was further held that as the two categories of persons are governed by different sets of rules, they cannot be equated and that the grant of additional benefit has financial implications and the specific date for the conferment of additional benefits cannot be considered arbitrary.

32. Law is no longer *res integra* that in the matter of enhancement age of superannuation, the power of the Court is limited. Only when such enhancement is effected without any rationale, Courts can step in.

33. In this context, reliance is placed on the judgment of the apex Court in the case of ***New Okhla Industries Development Authority and Others Vrs. B.D. Singhal and Other*** reported in AIR 2021 SC 3457.

34. Paragraph-19 of the said judgment, which is of relevance, is quoted hereunder.

> ***"19****. Whether the age of superannuation should be enhanced is a matter of policy. If a decision has been taken to enhance the age of superannuation, the date with effect from which the enhancement should be made falls within the realm of policy. The High Court in ordering that the decision of the State Government to accept the proposal to enhance the age of superannuation must date back to 29 June 2002 has evidently lost sight of the above factual background, more specifically (i) the rejection of the original proposal on 22 September 2009; and (ii) the judgment of the Division Bench dated 17 January 2012 refusing to set aside the order rejecting the proposal on 22 September 2009 which has attained finality. But there is a more fundamental objection to the basis of the decision of the High Court. The infirmity in the judgment lies in the fact that the High Court has trenched upon the realm of policy making and has assumed to itself, jurisdiction over a matter which lies in the domain of the executive.* ***Whether the age of superannuation should be increased and if so, the date from which this should be effected is a matter of policy into which the High Court ought not to have entered."***
>
> ***(Emphasized)***

35. On a conspectus of materials on record, taking into account that the petitioner retired from service on 30.09.2014 on attaining the age of superannuation of 58 years as per the relevant Rules governing the field and the enhanced retirement age having came into effect from 31.10.2014, on suitable amendment being made to the service rules, cannot thus be made retrospectively applicable to the petitioner.

36. As such, the prayer of the petitioner does not merit consideration and accordingly, the same stand rejected.

37. No costs.

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2022 (III) ILR - CUT-1270

V. NARASINGH, J.

BLAPL NO. 8792 OF 2020

RAHUL PRATAP SINGH .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

BLAPL NO.8832 OF 2020

SUNDER SINGH @ SUNDER SINGH NAGAR .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

(A) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 37 r/w Section 439 of Cr.P.C – Offence under Section 20(b)(ii)(C) of NDPS Act – Duty of the Court while considering the application for bail – Held, the Court must be satisfied that there are reasonable grounds for believing that the person accused is not guilty of such an offence – Additionally, the Court must be satisfied that the accused person is unlikely to commit any offence while on bail. (Para 26)

(B) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 37 (1)(b)(ii) – The expression "reasonable grounds" – Indicated with case laws. (Paras 27-29)

Case Laws Relied on and Referred to :-

1. (2004) 3 SCC 549 : Collector of Customs, New Delhi Vs. Ahmadalieva Nodira.
2. (2020) 12 SCC 122 : State of Kerala & Ors Vs. Rajesh & Ors.
3. 2022 SCC Online SC 891 : Narcotics Control Bureau Vs. Mohit Aggarwal.

For Petitioners : Mr. S.S. Mishra, Mr. A.P. Bose

For Opp. Parties : Mr. K.K. Gaya, ASC.

ORDER Date of Hearing : 22.11.2022 : Date of Order :25.11.2022

V. NARASINGH,J.

1. Since both the cases arise out of the same P.S. Case (Jeypore Sadar P.S. Case No.181 of 2020), they were heard together on the consent of the parties and are being disposed of by this common order.

2. The Petitioners are accused in T.R Case No.68 of 2020 pending on the file of learned Special Judge, Koraput, arising out of Jeypore Sadar P.S. Case No.181 of 2020, for commission of offence under Sections 20(b)(ii)(C) of the N.D.P.S. Act and they are in custody since 15.09.2020.

3. Being aggrieved by the rejection of their application for bail U/s.439 Cr.P.C. by the learned Special Judge, Koraput-Jeypore by order dated 05.10.2020 in the aforementioned case, the present bail applications have been filed.

4. It is the case of the prosecution that on 15.09.2020, OIC, Aditya Mahakur of Jeypore Sadar P.S. got reliable information that contraband ganja is being loaded by some unknown peddlers in bushy jungle area near village Ambaguda Cold Store in a truck bearing registration number UP-15-CT-2848 and in a car bearing registration number DL-4-CAE-8617 and the said vehicles are likely to leave the spot within half an hour. Therefore, the O.I.C. reduced it into writing vide G.D. Entry No.09 and directed the S.I of Police of the said P.S to proceed to the spot to verify the authenticity of such information. The S.I of Police along with P.S. staff went to the spot at about 1.10 P.M and found the said vehicles are about to start and one blue colour Pulsar motorcycle bearing registration number OD-10-N-1219 was waiting there to escort both the aforesaid vehicles for which they immediately blocked the road and intercepted the said three vehicles.

4(A). And, on being asked the occupants of all three vehicles gave prevaricating statements. On suspicion, the S.I of police verified the said three vehicles and found some packets wrapped with brown colour cello tape kept inside the dalla of the truck and in the car covered with Tarpaulin, wherefrom acute smell of ganja was coming out. After following the procedure of search and seizure as per the N.D.P.S. Act, the S.I of Police recovered all total 59 numbers of packets from the truck and 30 numbers of packets from the car and on opening of those packets found contraband ganja inside it. On weighment of the contraband ganja, in toto it came to 725 Kg. 700 grams.

4(B). As the accused Petitioners and co-accused Prafulla Khemundu @ Rahul failed to show any licence or authority for such unlawful possession and

transportation of the contraband ganja in the truck and car, referred to hereinabove, involving more than the commercial quantity, the same were seized and the accused Petitioners were taken into custody.

5. It is on record that after investigation, final form has been submitted on 9.3.2021.

6. Heard Mr. S.S. Mishra along with Mr. A.P. Bose, learned counsel for the Petitioners and Mr. K.K. Gaya, learned Addl. Standing Counsel for the State.

7. Learned counsel for the Petitioners referring to the F.I.R, charge sheet and reports obtained under the R.T.I Act which are on record of the Sub-Divisional Officer, (Police), Balod, (Chhatisgarh) dated 18.09.2021 addressed to Superintendent of Police, District Balod (Chhatisgarh) and the report of the Superintendent of Police, Koraput dated 08.01.2022 along with the report of the Addl. S.P., Koraput dated 03.01.2022 submits with vehemence that ex facie it is a case of false implication and as such each day of continuance of the Petitioners in custody is illegal and they are to be released on bail forthwith notwithstanding commencement of trial.

8. Learned counsel for the State, Mr. Gaya refutes such submission and states that if report of the Sub-Divisional Officer (Police), Balod, (Chhatisgarh) dated 18.09.2021 addressed to Superintendent of Police, District Balod (Chhatisgarh) and the report of the Superintendent of Police, Koraput dated 08.01.2022 along with the report of the Addl. S.P., Koraput dated 03.01.2022 are considered in its proper perspective, the allegation of false implication does not stand to reason. Hence, he seeks dismissal of the bail applications.

9. It is on record that on 13.09.2020, Gunderdehi S.H.O in Chhatisgarh received an information from Cyber Cell Dhamtari that one person who is an accused of N.D.P.S Case of Jeypore Sadar, District-Koraput is transporting ganja in the vehicle bearing number DL-04-CE-4617 and is reaching Gunderdehi from Dhamantri Gunderdehi road and the vehicle was fitted with a sticker (Monogram) of Government of India. It is stated that on the basis of the information so received the vehicle was caught and there was no intoxicant found in the vehicle and two persons who are seated in the said vehicle are Rahul Pratap Singh and Sunder Singh @ Sunder Singh Nagar, Petitioners in the case at hand.

10. It is stated that the Petitioners were taken into custody and along with vehicle handed over to Sub-Inspector Aaditya Mahakur and his companion staff and they left to Gunderdehi on 13.09.2020 at 22.45.

11. It is strenuously urged by the learned counsel for the Petitioners Sri Mishra, referring to the report of the Superintendent of Police, Koraput that there is no material on record that the present Petitioners were released from custody on 13.09.2020 and in fact it is stated that they have been planted as an accused in the present F.I.R. (Jeypore Sadar P.S. Case No.181 of 2020 of Koraput district dated 15.09.2020).

12. On perusal of the inquiry report of the Addl. Superintendent Police., Koraput submitted to Superintendent Police., Koraput relating to detailed clarification of the physical enquiry at Gunderdehi Police Station, Chhatisgarh, it comes to the fore that S.I. Aditya Mahakur and his staff reached Gunderdehi on 13.09.2020 and as per the written requisition, Town Inspector (T.I), Gunderdehi P.S. Sri Rohit Malekar handed over the detained persons (Petitioners) to S.I Aditya Mahakur for verification and interrogation.

13. It is borne out from the said report that after thorough interrogation as no information could be collected from any of the Petitioners S.I. decided to leave the persons there instead of taking them to Jeypore. But after releasing them at Gunderdehi, S.I. Aditya Mahakur did not inform the local police about release of the detainees and returned back to Jeypore.

14. The Addl. S.P. in his report submitted to S.P., Koraput further observed that on inquiry S.I Aditya Mahakur stated that when he left for Gunderdehi on receiving information on 13.09.2020, he was out of P.S. premises. Hence, the receipt of such information could not be entered into the general diary. The Addl. S.P. has treated the same as "one type of unintentional omission on the part of the S.I. Mahakur".

14(A). It is further revealed from the report of the Addl. S.P. that on 15.09.2020 at about 12.40 P.M. S.I. Aditya Mahakur, OIC Jeypore Sadar P.S. received reliable information regarding loading of contraband ganja by one truck bearing registration number UP-15-CT-2848 and by one Innova vehicle bearing registration number DL-04-CAE-8617 in a bushy jungle area near village Ambaguda. Immediately S.I Mahakur entered the information in Jeypore Sadar P.S. G.D. vide entry No.09 dated 15.09.2020. He immediately sent a copy of GD to his superior SDPO, Jeypore. OIC Aditya Mahakur deputed a raiding party headed by S.I N.K. Toppo vide GD No.10 dated 15.09.2020. On the way S.I. N.K. Toppo arranged two independent witnesses namely Rabi Bagh and Nanda Harijan both are of village Umuri, P.S. Jeypore Sadar, Dist Koraput. They reached at the spot and conducted search and seizure in presence of independent witnesses and Executive Magistrate Sri Nilambar Peyari ORS, the then Addl.

Tahasildar Jeypore. S.I. Nabin Kumar Toppo carried out all the formalities as per the procedure of search and seizure envisaged under the N.D.P.S. Act. The detainees disclosed their names as Rahul Pratap Singh and Sundar Singh @ Sunder Singh Nagar. The contraband materials were seized and the detainees (Petitioners) were arrested.

15. On an analysis of such report, the S.P., Koraput agreed with the clarification by the Addl. S.P. that the Petitioners were not brought to Jeypore Sadar P.S. with S.I Aditya Mahakur and his staff on 13.09.2020 as alleged.

16. On close scrutiny of the reports of S.D.O., Chhatisgarh and S.P., Koraput, this Court is persuaded to hold that the allegation of false implication on account of the Petitioners being in custody/deemed custody from 13.09.2020, prior to occurrence in the case at hand (15.09.2020) and being planted as accused in the case at hand does not stand to reason and hence negated.

17. It is apt to note here that the present Petitioners have not alleged that they have been implicated falsely in the case at hand being brought from Gunderdehi either before the Executive Magistrate or before the independent witnesses at any time when the contraband ganja were recovered from their possession.

18. It is apt to note that the Petitioners have filed an application under Section 482 Cr.P.C which is registered as CRLMC No.2001 of 2021 for quashing the proceeding, which is pending adjudication.

19. It is needless to say that the same shall be considered on its own merit without being influenced by any observation which has been made herein.

20. Learned counsel for the Petitioners Sri Mishra has also relied on the property description on 25.08.2020 and 20.08.2020 at Jeypore Sadar P.S. Case No.151 dated 20.08.2020 in the final form to state that such seizure has nothing to do with the present Petitioners and as such indicates that in their anxiety to implicate the Petitioners the investigating agency has referred to materials which are completely unconnected.

21. On perusal of the final form it can be seen that as rightly pointed out under column no.10 relating to details of property reference has been made to Jaypore Sadar P.S. and G.D. No.9 dated 20.08.2020 but **it is also worth noting that relating to case at hand i.e. Jeypore Sadar P.S. Case No.181 dated 15.09.2020 theseizure has been reflected in serial nos.2 to 7 under the said column no.10** and it is pertinent to state here that the S.I. Shankar Panda is stated to be the I.O in respect of Jeypore Sadar P.S. Case No. G.D. No.09 dated

20.08.2020 as well as in the case at hand. Merely because a wrong case number has been reflected in the seizure list it cannot be a ground to discard the final form more so when it is stated at the Bar that trial has commenced and any further forensic examination of the final form would amount to pre-judging the issue pending trial, against the settled position of law.

22. It is pointed out by learned counsel for the State that the bail application of the co-accused Prafulla Khemundi @ Rahul from whose possession there was no recovery and the allegation is one of escorting the vehicles of the Petitioners containing the contraband has been rejected by this Court by order dated 31.01.2021 in BLAPL No.7662 of 2020, the present bail applications of the Petitioners with greater complicity does not merit consideration.

23. It is to be noted that in the case of said co-accused Prafulla Khemundi @ Rahul, question of false implication as in the present case was not urged.

24. Hence, rejection of the bail application of the co-accused cannot stand as a bar, as rightly stated by the learned counsel for the Petitioners, to consider the bail application of the Petitioners independently.

25. Section 37 of the NDPS Act reads as follows:

> "[37. **Offences to be cognizable and non-bailable**.-(1)
>
> Notwithstanding anything contained in the Code of Criminal Procedure Code, 1973 (2 of 1974) –
>
> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless -
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) The limitations on granting of bail specified in clause (b) of subsection (1) are in addition to the limitations under the Criminal Procedure Code, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.]

26. On a bare perusal of the non-obstante clause inserted in sub-section (1) and additional "limitations" stipulated in sub-section (2) of Section 37 outline the contours of the Court while considering bail application of one accused of having committed an offence under the NDPS Act.

26(A). Not only are the limitations imposed under Section 439 of the Criminal Procedure Code, 1973 are to be borne in mind, the restrictions placed under clause (b) of sub-section (1) of Section 37 have to be weighed and given its full play. The conditions imposed in subsection (1) of Section 37 is that (i) the Public Prosecutor ought to be given an opportunity to oppose the application moved by an accused person for release and (ii) if such an application is opposed, then the Court must be satisfied that there are reasonable grounds for believing that the person accused is not guilty of such an offence. Additionally, the Court must be satisfied that the accused person is unlikely to commit any offence while on bail. (Emphasized)

27. In **Collector of Customs, New Delhi v. AhmadalievaNodira** reported in **(2004) 3 SCC 549**, decision rendered by a Three Judges Bench of the apex Court, it has been held thus:—

> "7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused-respondent is concerned, are : the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. **The conditions are cumulative and not alternative**. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. **The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence**." [Emphasis added]

28. The expression "reasonable ground" came up for discussion in **State of Kerala and others v. Rajesh and others reported in (2020) 12 SCC 122** and the apex Court observed :

> "20. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. **The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence**. In the case on hand, the High Court seems to havecompletely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for." [As emphasized]

29. The apex Court in **Narcotics Control Bureau vrs. Mohit Aggarwal reported in 2022 SCC Online SC 891** while interpreting the meaning of "reasonable grounds" held as under:

> "14. To sum up, the expression "reasonable grounds" used in clause (b) of Sub-Section (1) of Section 37 would mean credible, plausible and grounds for the Court

> to believe that the accused person is not guilty of the alleged offence. For arriving at any such conclusion, such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence. Dove-tailed with the aforesaid satisfaction is an additional consideration that the accused person is unlikely to commit any offence while on bail.
>
> 15. We may clarify that at the stage of examining an application for bail in the context of the Section 37 of the Act, the Court is not required to record a finding that the accused person is not guilty. The Court is also not expected to weigh the evidence for arriving at a finding as to whether the accused has committed an offence under the NDPS Act or not. The entire exercise that the Court is expected to undertake at this stage is for the limited purpose of releasing him on bail. Thus, the focus is on the availability of reasonable grounds for believing that the accused is not guilty of the offences that he has been charged with and he is unlikely to commit an offence under the Act while on bail." (Emphasized)

30. On evaluation of the materials on record carefully and taking into account the rigors of Section 37 of the N.D.P.S. Act and the law governing the field as settled by the apex Court in the cases of **Ahmadalieva Nodira** (supra) and **Rajesh** (supra) and **Mohit Aggarwal** (supra) and being alive to the onus cast on the Court while considering the application for bail under the Special Act, this Court is persuaded to hold that the Petitioners do not satisfy the twin conditions as envisaged under Section 37 of the N.D.P.S. Act for favourable consideration of their bail applications and the contention relating to false implication has already been rejected for the reasons stated.

31. Hence, on a conspectus of the materials on record, this Court does not find any merit in their bail applications and the same stand rejected.

32. It is apt to state that observations made herein are for the limited purpose of considering the bail applications of the Petitioners and shall not be construed as expressing any opinion regarding their contention of false implication and consequential complicity being the subject-matter of CRLMC pending before this Court and the merits of the stand of the parties before the learned Trial Court.

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2022 (III) ILR - CUT- 1277

BIRAJA PRASANNA SATAPATHY,J.

W.P.(C) NO.10887 OF 2016

PRASANTA KUMAR PATEL .....Petitioner

.V.

ORISSA POWER TRANSMISSION CORPORATION LTD. & ORS. .....Opp. Parties

SERVICE LAW – Promotion – Petitioner's case was not considered by the Authority for promotion to the post of Asst. General Manager (Electrical) because of the rating "Average" in the EPAR pertaining to the year 2014-15 as per Clause 9.1 of the OPTCL Officers' Promotion Policy – The rating "Average" was never communicated to the Petitioner – Whether the Authority were justified in utilising such rating without communicating same to the Petitioner? – Held, No. – Every entry relating to an employee under the State or an instrumentality of the State should be communicated to the employee within a reasonable period – The decision of Opp. Parties in not giving promotion to the Petitioner basing on the recommendation of the DPC is not just and proper. (Para 25)

Case Laws Relied on and Referred to :-

1. (2008) 8 SCC 725) : Dev Dutt Vs. Union of India & Ors.
2. (2013)9 SCC 566) : Sukhdev Singh Vs. Union of India & Ors.
3. (2009) 16 SCC 146) : Abhijit Ghosh Dastidar Vs. Union of India & Ors.
4. (AIR 1991 SC 1216): Union of India & Ors. Vs. E.G. Nambudiri.

For Petitioner : M/s. Satyabrata Mohanty,S.S. Mohapatra, P.K. Das,S.K. Das.

For Opp. Parties: Ms. S. Pattnaik, Mr. B.K. Pattnaik, Mr. S.S. Parida.

JUDGMENT Date of Hearing: 16.11.2022: Date of Judgment:29.11.2022

BIRAJA PRASANNA SATAPATHY,J.

1. Heard Mr. Satyabrata Mohanty, learned counsel for the Petitioner and Ms. S. Pattnaik, learned counsel appearing for the Odisha Power Transmission Corporation Ltd.

2. This writ Petition has been filed inter alia with the following prayer:-

"Under the aforesaid facts and circumstances, it is therefore, prayed that this Hon'ble Court may graciously be pleased to

(i) Hold/declare the Petitioner is entitled for promotion to the post of Asst. General Manager (AGM) w.e.f the date of his admitted juniors were promoted to the post of AGM under Annexure-2 with all consequential monetary and seniority.

(ii) Pass such other order(s) or issue direction(s) as may be deemed fit and proper in the bona-fide interest of justice.

And for this act of kindness, the Petitioner shall as in duty bound ever pray."

3. It is contended by the learned counsel for the Petitioner that the Petitioner while was continuing as an Asst. Manager in the establishment of the

Opp. Parties, he was promoted to the post of Deputy Manager from 04.03.2014 vide order under Annexure-3. In the said office order while the Petitioner was placed at Sl. No. 58, O.P. No. 4 was placed at Sl. No. 59.

4. It is contended that in the provisional gradation list published by the Opp. Party-Corporation on 02.12.2013 of Electrical Engineers in Grade E-5 and below, the Petitioner while was placed at Sl. No. 66, the Private Opp. Party No. 4 was placed at Sl. No. 67.

5. Even though the Petitioner is placed above O.P. No. 4 in the rank of E-5, but ignoring his claim when the Opp. Party No. 3 was promoted to the post of Asst. General Manager (Electrical) in E-6 Grade vide order dtd.30.12.2015 under Annexure-2, the Petitioner moved RTI application seeking information of the ground for not giving him promotion to Grade E-6, even though he is admittedly senior to O.P. No. 4 in all respect in Grade E-5. The Petitioner when provided with such information vide letter dtd.18.03.2016 under Annexure-4 and from the said information he came across the proceeding of the Departmental Promotion Committee held on 23.12.2015. In the said proceeding the Petitioner found that even though he was placed at Sl. No. 3 of the seniority list in the rank E-5, but his case was not considered as the rating in the EPAR pertaining to 2014-15 i.e.01.04.2014 to 06.04.2014 stand as "Average", which is required to be "Good" as per Clause 9.1 of the OPTCL Officers' Promotion Policy. Because of such view of the DPC, the Committee did not recommend his name for promotion to the post of Asst. General Manager (Electrical) in E6 Grade while recommending O.P. No. 4 to the said rank. It is contended that pursuant to the said recommendation of the DPC dtd.23.12.2015 O.P. No. 4 was given promotion to the post of Asst. General Manager (Electrical) in E-6 Grade vide Office order dtd.30.12.2015 under Annexure2.

6. It is further contended by the learned counsel for the Petitioner that on receipt of the information under Annexure-4 the Petitioner prayed for furnishing information under RTI with regard to his EPAR for the period 01.04.2014 to 31.03.2015 and the same was supplied to him vide letter dtd.18.05.2016 under Annexure-5. From the said information the Petitioner further came to know that for the period from 01.04.2014 to 06.08.2014, even though the Reporting Officer as well as the Reviewing Officer reflected the EPAR of the Petitioner as "Good", but the Accepting Authority without assigning any reason held the EPAR of the Petitioner for the said period as "Average".

7. It is also contended that the said action of the Accepting Authority in treating the EPAR for the period from 01.04.2014 to 06.08.2014 as "Average"

was never communicated to the Petitioner and therefore, in absence of such communication, the same should not have been taken into consideration by the DPC while considering the claim of the Petitioner for his promotion to the rank E-6.

8. It is also contended that since the Reporting Officer as well as the Reviewing Officer treated the period from 01.04.2014 to 06.08.2014 as "Good", the Accepting Authority without assigning any reason should not have held the same as "Average". If at all the same was treated as "Average", then in view of the decision of the Hon'ble Apex Court reported in the case of ***Dev Dutt Vrs. Union of India &Ors. (2008) 8 SCC 725)*** and another decision of the Hon'ble Apex Court reported in the case of ***Sukhdev Singh Vrs. Union of India &Ors. (2013)9 SCC 566)*** as well as ***Abhijit Ghosh Dastidar Vrs. Union of India &Ors. (2009) 16 SCC 146),*** the view of the Accepting Authority in treating the EPAR as "Average" for the period in question should have been communicated to the Petitioner and in absence of that the said view of the Accepting Authority should not have been taken into consideration by the DPC.

9. Hon'ble Apex Court in the case of ***Dev Dutt*** in Para 14, 39, 40 & 44 has held as follows:

> *"14. In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a benchmark or not. Even if there is no benchmark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a "good" or "average" or "fair" entry certainly has less chances of being selected than a person having a "very good" or "outstanding" entry.*
>
> *39. In the present case, we are developing the principles of natural justice by holding that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the annual confidential report of a public servant, whether in civil, judicial, police or any other State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its upgradation. This in our opinion is the correct legal position even though there may be no rule/G.O. requiring communication of the entry, or even if there is a rule/G.O. prohibiting it, because the principle of non-arbitrariness in State action as envisaged by Article 14 of the Constitution in our opinion requires such communication. Article 14 will override all rules or government orders.*
>
> *40. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the authority concerned, and the authority concerned must decide the representation in a fair*

manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.

44. In State of Maharashtra v. Public Concern for Governance Trust (2007) 3 SCC 587, it was observed (vide para 39) :

"In our opinion, when an authority takes a decision which may have civil consequences and affects the rights of a person, the principles of natural justice would at once come into play."

10. Hon'ble Apex Court in the case of ***Sukhdev Singh*** in Para 8 has held as follows:-

"8. In our opinion, the view taken in Dev Dutt that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First, the communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice. We, accordingly, hold that every entry in ACR—poor, fair, average, good or very good—must be communicated to him/her within a reasonable period."

11. Similarly, Hon'ble Apex Court in the case of ***Abhijit Ghosh Dastidar*** in Para 4 & 5 has held as follows:-

"4. It is not in dispute that CAT, Patna Bench passed an order recommending the authority not to rely on the order of caution dated 22-9-1997 and the order of adverse remarks dated 9-6-1998. In view of the said order, one obstacle relating to his promotion goes. Coming to the second aspect, that though the benchmark "very good" is required for being considered for promotion, admittedly the entry of "good" was not communicated to the appellant. The entry of "good" should have been communicated to him as he was having "very good" in the previous year. In those circumstances, in our opinion, non-communication of entries in the annual confidential report of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his chances of promotion or getting other benefits. Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution. The same view has been reiterated in the above referred decision relied on by the appellant. Therefore, the entries "good" if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The respondent has no case that the appellant had ever been informed of the nature of the grading given to him.

5. Learned counsel appearing for the appellant has pointed out that the officer who was immediately junior in service to the appellant was given promotion on 28-8-2000. Therefore, the appellant also be deemed to have been given promotion from 28-8-2000.

Since the appellant had retired from service, we make it clear that he is not entitled to any pay or allowances for the period for which he had not worked in the Higher Administrative Grade Group A, but his retrospective promotion from 28-8-2000 shall be considered for the benefit of refixation of his pension and other retiral benefits as per rules."

12. It is accordingly contended that in view of the decisions of the Hon'ble Apex Court as cited (supra) since the EPAR of the Petitioner for the period 01.04.2014 to 06.08.2014 was never communicated after acceptance of the same by the Accepting Authority as "Average", the said entry in the EPAR cannot be taken into consideration by the DPC and accordingly not recommending his case for promotion, on the face of such recommendation in favour of the Private Opp. Party.

13. It is also contended that even though by the time the DPC held its meeting on 23.12.2015, further EPAR of the Petitioner for the period from 07.08.2014 to 31.03.2015 was available and the said period from 07.08.2014 to 31.03.2015 was treated as Very Good by the Reporting Officer, Reviewing Officer as well as by the Accepting Officer, but the DPC only take into consideration the EPAR for the period 01.04.2014 to 06.08.2014 while considering the claim of the Petitioner for promotion to the rank E-6.

14. It is submitted that since for the period from 07.08.2014 to 31.03.2015 the EPAR of the Petitioner was treated as "Very good" and the period form 01.04.2014 to 06.08.2014 was taken as "Average" by the Accepting Authority illegally without assigning any reason and the said entry since was never communicated to the Petitioner in terms of the decision of the Hon'ble Apex Court as cited (supra), the DPC completely erred in not recommending the case of the Petitioner while recommending the junior to the Petitioner i.e. O.P. No. 4 in its proceeding dtd.23.12.2015.

15. It is also contended that promotion from the rank of E-5 to E-6 is covered as per the guideline issued by the Corporation i.e. OPTCL Offficers' Promotion Policy. Para 9.1 & 9.2 of the said guideline is relevant for the aforesaid purpose and reproduced hereunder:-

"9.1 Suitability for promotion shall be on the basis of Annual Appraisal/Performance Appraisal reports of eligibility period as mentioned in clause 6.3 including the latest report with reference to the year of DPC which is to be rated as Good.

9.2 If any of the reports during the eligibility period is found to be Adverse" in overall and this had not been expunged, the Officer shall be declared unsuitable for promotion. In case

where one or more attributes in the Appraisal/performance Reports had been adverse but the overall rating is not below average and the adverse entries had not been expunged, the overall rating shall be downgraded to next below level for Merit-rating i.e. if overall rating is "Very Good" it would be treated as "Good" by D.P.C."

16. Making all such submission, Mr. Mohanty, learned counsel for the Petitioner submitted that even though the Petitioner was eligible for his promotion to the rank of E-6 by the time the DPC was held on 23.12.2015, but his case was not recommended by treating his EPAR for the period 01.04.2014 to 06.08.2014 as "Average". Therefore, it is contended that in view of the illegality committed by the Opp. Parties, the Petitioner is entitled to get the benefit of promotion to the rank of E-6 and further promotion extended in favour of O.P. No. 4 from the date O.P. No. 4 was extended with such benefit of promotion with all consequential service and financial benefits.

17. Ms. Pattnaik, learned counsel appearing for the Opp. Party-Corporation on the other hand made her submission taking into account the stand taken in the counter affidavit. It is contended that for the period from 01.03.2014 to 06.08.2014 though the Reporting Officer and the Reviewing Officer held the EPAR of the Petitioner as "Good", but the Accepting Officer since treated it as "Average", in view of the provision contained under Para 9.1 of the guideline, the claim of the Petitioner was not rightly recommended by the DPC and consequentially he was not given promotion to the rank of E-6 while giving such benefit to the Opp. Party No. 4 vide order dtd.30.12.2015 under Annexure-2. It is also contended that since the EPAR of the Petitioner for the period 01.03.2014 to 06.08.2014 was treated as "Average" and not an adverse, there was no occasion to communicate the said fact to the Petitioner.

18. It is also contended that since the Petitioner has not impleaded all the persons promoted vide order under Annexure-2, the writ Petition suffers from nonjoinder and misjoinder of Parties. It is further contended that as per the Clause 9.1 of the OPTCL Officers' Promotion Policy, promotion shall be on the basis of annual appraisal report of the eligibility period as mentioned in Clause 6.3 of the said policy including the latest report with reference to the year of DPC, which is to be rated as "Good". Since EPAR of the Petitioner for the period from 01.04.2014 to 06.08.2014 was "Average", his case was not considered by the DPC and no illegality has been committed.

19. Even though notice of the writ Petition was issued to O.P. No. 4, but nobody has entered appearance on behalf of the said Opp. Party. However, since this Court is not going to disturb the promotion extended in favour of O.P. No. 4, the matter was heard finally by this Court in presence of the learned counsels appearing for the Petitioner and OPTCL.

20. Heard learned counsel for the Parties. Perused the materials available on record. This Court after going through the same finds that in the rank E5, the Petitioner in the provisional gradation list published on 02.12.2013 under Annexure-1 was placed above the Opp. Party No. 4. In the office order dtd.04.03.2014, wherein the Petitioner and O.P. No. 4 were promoted to the post of Manager (Electrical) in E-5 grade, the Petitioner was placed above O.P. No. 4. But, the case of the Petitioner was not recommended by the DPC held on 23.12.2015 only on the ground that the EPAR of the Petitioner for the period from 01.03.2014 to 06.08.2014 since was marked as "Average" by the Accepting Authority, the Petitioner was not recommended on the face of such recommendation in favour of O.P. No. 4.

21. However, it is found that for the period 01.03.2014 to 06.08.2014 the Reporting Officer as well as the Reviewing Officer while treated the said period as "Good", but the Accepting Officer without assigning any reason held the same as "Average" and the said fact was never communicated to the Petitioner. Therefore, placing reliance of the decisions cited by the learned counsel for the Petitioner as cited (supra), since the view of the Accepting Officer in treating the EPAR as "Average" for the period 01.03.2014 to 06.08.2014 was never communicated, the said view of the Accepting Officer was not to be taken into consideration by the DPC. Not only that this Court further finds that the EPAR of the Petitioner for the period 07.08.2014 to 31.03.2015 was treated as "Very Good" by the Reporting Officer, Reviewing Officer as well as the Accepting Officer. By the time the DPC was held on 23.12.2015 the EPAR of the Petitioner for the entire period 01.03.2014 to 31.03.2015 was very much available. But the DPC only taking into account the EPAR for the period 01.04.2014 to 06.08.2014 did not recommend the case of the Petitioner.

22. As per the view of this Court the DPC should have taken into consideration the EPAR of the Petitioner for the entire period i.e. 01.04.2014 to 31.03.2015. Since the EPAR for the period 01.04.2014 to 06.08.2014, which was treated as "Average" by the Accepting Officer was never communicated to the Petitioner, the said view of the Accepting Officer could not have been taken into consideration by the DPC in view of the decision of the Hon'ble Apex Court as cited (supra).

23. This Court further finds that as per the Clause 9.1 of the OPTCL Officers' Promotion Policy, suitability for promotion shall be on the basis of annual appraisal report of eligibility period. Therefore, by the time the DPC was held on 23.12.2015 the CCRs of the entire period 01.04.2014 to 31.03.2015 was very much available and in view of the EPAR of the Petitioner as "Very Good"

for the period 07.08.2014 to 31.03.2015, the Petitioner should have been recommended for the post of Asst. General Manager (Electrical) in rank E-6.

24. This Court further finds that the decision relied on by the learned counsel appearing for Opp. Party-Corporation in the case of ***Union of India &Ors. Vs. E.G. Nambudiri (AIR 1991 SC 1216)*** is not applicable to the facts of the present case. This Court though does not dispute the stipulation contained in the circular issued by the Corporation on 13.03.2007, wherein it has been indicated that the view of the Accepting Authority shall prevail over the Reviewing Authority, but as the view of the Accepting Authority was never communicated to the Petitioner, the same should not have been taken into consideration by the DPC.

25. Therefore, taking into account the entirety of the matter, the stand taken by the learned counsel appearing for the Parties and in view of the decisions of Hon'ble Apex Court in the case of ***Dev Dutt*** as well as ***Abhijit Ghosh Dastidar***, this Court is of the considered opinion that the action of the Opp. Parties in not giving promotion to the Petitioner to the rank E-6 basing on the recommendation of the DPC is not just and proper.

26. Therefore, while holding so, this Court directs the Opp. Party Corporation to take a fresh decision on the Petitioner's claim by conducting a Review DPC. It is observed that while considering the claim of the Petitioner by conducting the Review DPC, the EPAR of the Petitioner for the period 07.08.2014 to 31.03.2015 and the decision of the Hon'ble Apex Court in the case of ***Dev Dutt*** as well as ***Abhijit Ghosh Dastidar*** be taken into consideration. On such reconsideration if it is found that the Petitioner is otherwise eligible, the Petitioner be given promotion to the rank of E-6 from the date O.P. No. 4 was given such promotion. The Petitioner be also given further promotion to the rank of E-7, if he is otherwise eligible as it is contended that O.P. No. 4 has been given such promotion in the meantime.

27. This Court directs the Opp. Party-Corporation to complete the entire exercise within a period of three (3) months from the date of receipt of this order. The financial benefit arising out of such extension of the benefit of the promotion be also extended within the aforesaid time period.

28. The writ Petition is disposed of with the aforesaid observation and direction.

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2022 (III) ILR - CUT- 1286

SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 4916 OF 2019

NARAYAN SWAIN .....Petitioner

.V.

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

(A) SERVICE LAW – Disciplinary Proceeding – Competent Authority –The Petitioner while working as Grama Panchayat Technical Assistant was removed from service by the Order of the Collector – Where as the Director, PR & DW Department, is the Appointing and Disciplinary Authority to take disciplinary action, including removal – Whether the order of removal passed by the Collector is sustainable under law? – Held, No – Law is well settled that if the power has been vested with the particular Authority, same can only be exercised by the prescribed manner. (Para 17)

(B) LEGAL MAXIM – "*Expressio Uniusest exclusion alterius*" means – 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 – Explained with case laws. (Paras 18,19)

Case Law Relied on and Referred to :-

1. (2015) 7 SCC 690 : Zuari Cement Limited Vs. Regional Director, Employees' State Insurance Corporation, Hyderabad & Ors.
2. (1875) LR I Ch D 426 : Taylor Vs. Tailor.
3. AIR 1936 PC 253 : Nazir Ahmad Vs. King Emperor.
4. (1999) 3 SCC 422 : Babu Verghese Vs. Bar Council of Kerala.
5. AIR 1964 SC 358 : State of Uttar Pradesh Vs. Singhara Singh.
6. AIR 2001 SC 1512 : Dhananjay Reddy Vs. State of Karnataka.
7. AIR 1999 SC 3558 : Chandra Kishore Jha Vs. Mahabir Prasad.
8. AIR 2008 SC 1921 : GujratUrjaVikas Nigam Ltd. Vs. Essar Power Ltd.
9. (2009) 6 SCC 735 : Ram DeenMaurya Vs. State of U.P.

For Petitioner : Mr. Sukanta Kumar Dalai

For Opp. Parties : Mr. Gajendra Rout, ASC

JUDGMENT Date of Judgment : 10.11.2022

SANJAY KUMAR MISHRA, J.

The Petitioner has preferred the present Writ Petition challenging the Order dated 27.01.2018, as at Annexure-4, vide which the Collector-Cum-CEO, Zilla Parishad, Angul, disengaged the Petitioner from service w.e.f. 21.12.2017

and terminated the Agreement made with him from the date of disengagement, so also Office Order dated 21.07.2018, as at Annexure-6, passed by the Director, Panchayati Raj & Drinking Water Department, vide which the Order dated 27.01.2018 issued by the Collector-Cum-CEO, Zilla Parishad, Angul, was upheld allegedly in exercise of the power conferred on him in terms of the Department Office Order dated 14.03.2018.

2. The factual matrix of the case, in brief, is that in terms of Advertisement for appointment/engagement of Grama Panchayat Technical Assistant (for short 'GPTA'), having qualification of Diploma (Civil) under Mahatma Gandhi National Rural Employment Guarantee Scheme on contractual basis, the Petitioner got selected and by Order dated 25.10.2010, he was appointed as such and posted at Kishorenagar Block.

The Petitioner, in terms of engagement and in consonance with Government guidelines, executed an Agreement with O.P. No.2 with certain terms and conditions on 02.03.2017. In course of service period, he discharged his duties with utmost sincerity and to the best satisfaction of the Authorities without any adverse remark.

While the matter stood thus, the Government decided to absorb the GPTAs as Junior Engineer in the Orissa Diploma Engineer Services Cadre of Panchayati Raj & Drinking Water Department, vide Department Resolution dated 19.03.2018. Pursuant to the same, the Director, PR & DW Department, issued letter to the Collector-Cum-Chief Executive Officer/Project Director, DRDA, Angul, for verification and authentication of the database of GPTAsunder regularization process. In the said list, the Petitioner's name finds place at Sl. No.13.

The Petitioner was discharging his duties with utmost sincerity having experience and on the eve of regularization of his service as per Government policy, all of a sudden, due to some ill motive and political vendetta, the Petitioner was implicated in a Vigilance Case and also arrested for some time. Pursuant to the same, on being informed by the Vigilance Department, the Collector-Cum-CEO, Zilla Parishad, Angul, by Order dated 27.01.2018, disengaged the Petitioner from service and also terminated the Agreement w.e.f. 27.01.2018 i.e. from the date of his disengagement.

3 Being aggrieved by such Order dated 27.01.2018, the Petitioner approached this Court in W.P.(C) No.5863/2018 challenging the Order of disengagement on the ground of violation of principles of natural justice, without

authority and contrary to the terms of contract, so also being contrary to the Office Order dated 14.03.2018.

4. It is further case of the Petitioner that Article 311 of the Constitution has laid down the procedure for removal and dismissal of the persons employed in civil capacity of the State and Union and the same is also applicable to contractual employees in terms of the settled position of law and the mandate of Constitution is that before dismissal, the concerned employee has to be given reasonable opportunity of hearing and without framing of charge or issuance of show-cause, nobody can be removed from service. But, in the case of the Petitioner, in gross violation to the mandate of Constitution, he has been thrown away from service. It has also been stated by the Petitioner that though the Agreement speaks his terms of appointment, but so far as disciplinary action is concerned, the same is completely silent and the disciplinary action and mode of procedure for giving effect to the disengagement/termination were given through different Government Circulars, which have been appended to Writ petition, as Annexure-5 Series.

In view of such Circulars, as at Annexure-5 Series, in the event, if any GPTA is implicated in a vigilance or criminal prosecution, he shall be disengaged temporarily by the disciplinary Authority i.e. Director, PR & DW Department, until further Order and disciplinary action shall be initiated against him under Para-9(a)(i) of Office Order dated 14.03.2018. As per the Office Order dated 27.04.2017, the report is to be sent by the Collector or by the Project Director, DRDA, to the Government and after receipt of a report, the PR & DW Department should issue a show cause notice to the concerned GPTA containing the charges directing him to submit his reply within a specified period not more than 30 days. The documents, if any, relied upon by the disciplinary Authority, should be communicated to the erring GPTA along with show cause notice. But in the case at hand, neither a show cause notice nor any document was given to the Petitioner. The Collector-Cum-CEO, Zilla Parishad, Angul, who is not the competent Authority, passed an Order dated 27.01.2018 by disengaging the Petitioner w.e.f. 27.12.2017, which is aproduct of non-application of mind and unsustainable in the eye of law. It is also stated that during pendency of W.P.(C) No.5863/2018, which was disposed of on 14.08.2018, the Order of disengagement passed by the Collector dated 27.01.2018, under Annexure-4, was confirmed with a retrospective effect, which is contrary to the terms of appointment and Government guidelines and hence, the said Writ Petition was withdrawn with a liberty to file a fresh Writ Petition. Accordingly, the present Writ Petition has been preferred by the Petitioner challenging the said Order

dated 27.01.2018, so also confirming Order dated 21.07.2018 passed by the Director, PR & DW Department.

5. It has further been contended that Office Order dated 21.07.2018, as at Annexure-6, clearly speaks that the Director, PR & DW Department is the Disciplinary Authority in respect of GPTA. But, in case of Petitioner, he has been removed from service by the Collector, who is not competent to disengage the Petitioner. Though ventilating his grievances with regard to revoking the Order of disengagement and re-engagement in service, the Petitioner gave series of representations, but all in vain. Because of such illegal action of the Authority concerned, the Petitioner was being debarred from the benefit of regularization in terms of Resolution dated 19.03.2018 of the PR & DW Department.

6. In response to averments made in the Writ Petition, the Opposite Parties have filed a Counter Affidavit. The sum and substance of the Counter Affidavit is that the Collector Cum-CEO, Zilla Parishad, Angul, has disengaged the Petitioner as the 1st Party of the Agreement vide Order dated 27.01.2018, which was also communicated to the P.R. Department and the Petitioner has received the said disengagement Order on 31.01.2018. It has also been confirmed by the Director, PR & DW Department, vide Office Order dated 21.07.2018. The Collector is competent to issue the Order of termination as the same has been issued prior to the Office Order dated 14.03.2018. It has also been contended in the Counter Affidavit that the Petitioner was a contractual employee and has been disengaged as per the Agreement made with the 1st Party and basing on letter dated 09.01.2018 of General Administration (Vigilance) Department, Cuttack. It is also the stand of the Opposite Parties that as per Paragraph-9 of the Agreement, as prescribed by the Government in PR & DW Department vide letter dated 21.08.2007, the Collector Cum-CEO, Zilla Parishad, Angul, as the 1st Party, has power to disengage the GPTAs without notice on the ground of misconduct during operation of Agreement. It is further stated that the Petitioner was caught red handed by the Vigilance Officials while demanding and accepting illegal gratification of Rs.21,000/- from the Complainant Basanta Kumar Sahoo inside his Government residential quarter and being forwarded, remained in custody from 14.12.2017 to 27.12.2017. The Collector-Cum-CEO, Zilla Parishad, Angul, was satisfied to disengage the Petitioner from the post on the basis of communication made by the General Administration (Vigilance) Department, Cuttack, vide letter dated 09.01.2018 and the same was rightly upheld by the Director, PR & DW Department, vide Office Order dated 21.07.2018.

7. This Court, after hearing the learned Counsel for the Parties, vide Order dated 20.09.2022, directed learned Counsel for the State, which is reproduced below for ready
reference.

> "2. Heard learned Counsel for the Petitioner so also for the Opposite Parties. Learned Counsel for the Petitioner submitted that vide Office Order dated 27.04.2017 as at Annexure-5 series, there is a mention that GPTAs will be engaged henceforth by the Director, PR instead of Collector and will be the Appointing and Disciplinary Authority to take disciplinary action, including removal, as and when required, on getting report from the Collector-Cum-CEO and BDO concerned and the Collector-cum-CEO, Zilla Parishad, Angul was incompetent to issue Office Order No.208, dated 27.01.2018, as at Annexure-4, impugned in the present Writ Petition.
>
> 3. Learned Counsel for the State seeks for a week's time to take instruction in the said regard as the said stand taken by the Petitioner has not been specifically dealt in the Counter Affidavit filed by the State.
>
> 4. List the matter after one week. Instruction, as prayed for, be obtained in the meantime."

8. Being so directed, learned Counsel for the State reiterates the stand taken in the Counter Affidavit and submits that in terms of Office Order dated 14.03.2018, to streamline the service conditions of the GPTAs and to make them accountable for any commission/omission, the Government in PR & DW Department, has been pleased to modify the guidelines issued earlier. In terms of Paragraph-9 of the said Office Order dated 14.03.2018, the Director, PR & DW Department, is the Appointing and Disciplinary Authority to take disciplinary action, including removal, as and when required, on getting report from Collector-Cum-CEO, Zilla Parishad, and BDO concerned.

9. In response to the argument advanced by the learned Counsel for the State, Mr. Dalai, learned Counsel for the Petitioner, submits that the said Office Order dated 14.03.2018 is in supersession of all previous Order issued in the said regard. In terms of Paragraph-1 of the said Office Order dated 14.03.2018, the Director, PR & DW Department, being the Appointing Authority as well as Disciplinary Authority in respect of the GPTAs, the impugned Order dated 27.01.2018, as at Annexure-4, passed by the Collector-Cum-CEO, Zilla Parishad, Angul, he being incompetent to pass such an Order, is without authority and hence, the impugned Order dated 27.01.2018, as at Annexure-4, so also confirming Order dated 21.07.2018, as at Annexure-6, are bad and liable to be set aside.

10. Learned Counsel for the State submits that since the Petitioner was engaged as GPTA in terms of the Agreement dated 01.04.2009, as at Annexure-A/4, entered into between the Collector-Cum-CEO, Zilla Parishad, Angul, as the 1st Party, the Present Petitioner being the 2nd Party to the said Agreement, his service conditions are abided by the terms of the said Agreement and the Collector-Cum CEO, Zilla Parishad, Angul, rightly exercised his power as the Disciplinary Authority in terms of Clause-9 of the said Agreement on the ground of misconduct committed by the Petitioner during operation of the said Agreement, as the Petitioner was implicated in a Vigilance Case and same was duly intimated to the Collector-Cum-CEO, Zilla Parishad, Angul, by the Deputy Secretary to Government, General Administration (Vigilance) Department, Cuttack, vide letter dated 09.01.2018, as at Annexure-B/4 to the Counter Affidavit.

Learned Counsel for the State submits that there is no illegality or irregularity in the impugned Order, as at Annexure-4, as the same is dated 27.01.2018,whereas the Office Order, as at Annexure-5 Series, is dated 14.03.2018 and it does not reflect that the same has been issued in supersession of previous Orders/letters issued in the said regard.

Learned Counsel for the State further submits that even if it is admitted for the sake of the argument, the disengagement Order issued by the Collector is illegal, there is an alternative provision of appeal in terms of Paragraph-9 (b) of the Office Order dated 14.03.2018, which has been appended to the Writ Petition as Annexure-5 Series, and in view of availability of such alternative remedy, the Writ Petition is not maintainable.

11. Mr. Dalai, learned Counsel for the Petitioner, submits that even prior to the Office Order dated 14.03.2018, a similar provision was there i.e. Office Order dated 27.04.2017, as at Annexure-5 Series, and Paragraph-9 of the said Office Order also prescribes the identical provision, which has been reiterated in the subsequent Office Order dated 14.03.2018 and in the bottom of both the said Office Orders dated 27.04.2017 and 14.03.2018, it has been clearly mentioned that the said Orders supersede all previous Orders/letters issued in the said regard and the submissions made by the learned Counsel for the State are incorrect and misleading, being contrary to the provisions detailed in the Office Orders, as at Annexure-5 Series.

Mr. Dalai, learned Counsel for the Petitioner further submits that the Order of disengagement of the Petitioner being contrary to the guidelines prescribed under Office Orders, as at Annexure-5 Series, and being dehors provisions enshrined in the said Office Orders, *is per se* illegal, and the

Collector-Cum-CEO, Zilla Parishad, Angul, being incompetent to issue the impugned Order dated 27.01.2018, the same deserves to be set aside.

Mr. Dalai, learned Counsel for the Petitioner, submits that had the impugned Order been passed in terms of the Office Order dated 27.04.2017, so also Office Order dated 14.03.2018 by the competent Authority i.e. Director, PR & DW Department, it would have been obligatory on the part of the Petitioner to prefer an Appeal in terms of the said Office Orders and as an incompetent person i.e. Collector, has issued the disengagement Order, the Petitioneris remediless and rightly has invoked writ jurisdiction for redressal of his grievances.

12. For proper adjudication of the matter, it is apposite to take note of Paragraphs-1, 3, 9 and 14 of the Office Order dated 27.04.2017, which read as follows:

> 1. The GPTAs will be henceforth engaged by Director, PR instead of Collector as in case of Junior Engineers and placed at the disposal of Collector for their detail posting within the District as per requisition received from Collector-cum-CEO of Zilla Parishad concerned.
>
> 3. The Collectors-cum-CEO, Zilla Parishad will renew the agreement subject to satisfactory performance of the GPTAs after one year under intimation to Government.
>
> 9. The Director, PR will be the appointing and disciplinary authority to take disciplinary action including removal as and when required on getting report from Collector-cum CEO and BDO concerned.
>
> 14. The GPTAs who are posted to Blocks by Collector-cum-CEO will be allotted GPs by BDO-cum-Programme Officer.
>
> The Revised Model of **AGREEMENT** is enclosed herewith for kind reference.
>
> All previous orders/letters issued in this regard are superseded.
>
> By the Order of the Governor
> Sd/-
> Commissioner-cum-Secretary to Government"
> (Emphasis supplied)

Similarly,Paragraphs 1 and 9 of the Office Order dated 14.03.2018 are reproduced hereunder:

> 1. The Director, Panchayati Raj, PR & DW Department shall be the appointing authority as well as Disciplinary Authority in respect of the GPTAs. As such, the engagement of GPTAs in different districts shall be decided by the Director, PR on the basis of the requisitions received from Collector-cum-CEO, Zilla Parishad of concerned districts.

9. The Director, PR, PR & DW Deptt. being the Disciplinary Authority of the GPT As, will initiate disciplinary action against them in the manner as mentioned below.

a) The Director, PR, Panchayati Raj & D.W. Department, being the Disciplinary Authority is empowered to initiate disciplinary action against the erring G.P.T.As. for their alleged lapses i.e. commission of financial irregularities, negligence in duties, demanding and accepting illegal gratification and any other misconduct etc. The following procedure is to be adopted for initiation of disciplinary action against the erring GPTAs.

i. On receipt of a report from the officers of P.R. & D.W. Department/Collectors/P.D., DRDAs/BDOs relating to lapses on the part of any GPTA and on the basis of prime-facie material, a show cause notice will be issued to the concerned GPTA containing the charges directing him/her to submit his/her reply within a specified period not more than 30 days. The documents, if any, relied by the Disciplinary Authority, shall be communicated to the erring GPTA along with the show cause notice.

ii. In case of prime-facie evidence of serious lapses on the part of any GPTA or in the event of being implicated in a Vigilance or criminal prosecution, the concerned GPTA shall immediately be disengaged temporarily by the Disciplinary Authority i.e. Director, PR until further order and disciplinary action shall be initiated against him/her as per para-9(a)(i) above.

iii. In case the erring GPTA does not submit her/ her show cause reply within the specified time, the matter may be decided exparte on its own merit as deemed just & proper. If the erring GPTA desired to be heard in person by the Disciplinary Authority, he/she will indicate the same specifically in his/her show cause reply.

iv. On receipt of the show cause reply and after giving such personal hearing, if so required, the Disciplinary Authority shall consider and dispose of the disciplinary proceeding on its merit. The Disciplinary Authority subject to his satisfaction may call for a report from relevant authority before disposal of the disciplinary proceeding.

b) If the Disciplinary Authority is of the opinion that he charges leveled against the erring GPTAs are established to his satisfaction, the Disciplinary Authority shall conclude the proceeding imposing any of the following penalties considering the gravity of the charges established against him.

i. Disengagement from the service.

ii. Temporary disengagement from service, which shall not be counted at the time of regularization of his/her service in the regular cadre.

iii. Recovery of such pecuniary loss caused to the Government or such other authority.

iv. Warning to be careful in nature.

c) In case of conviction of a GPTA in Vigilance Case, the nature of penalty to be imposed in him shall be as decided by the Disciplinary authority.

d) In case of being aggrieved with the order of the Disciplinary authority under Para -9(b) above, the erring GPTA may prefer appeal before the Principal Secretary to Government, P.R. & D. W. Department within 30 days from the date of receipt of the order.

e) Decision of the Principal Secretary to Government P.R. & D.W. Department in the matter shall be final and binding.

10. The Collector-cum-CEO is vested with the power of transferring Gram Panchayat Technical Assistants within the District, from one Block to other for smooth implementation of MGNREGA Scheme.

11. The GPTAs will be transferred from one district to another in the exigency of public service and on personal representation at Government level.

12. The GPTAs who are posted to Blocks by Collector-cum-CEO will be allotted PGs by BDO-cum-Programme Officer.

All previous orders/letters issued in this regard are hereby superseded."

By Order of the Governor
Sd/-
Principal Secretary to Government"
(Emphasis supplied)

13. It is amply clear from the said Office Orders (supra), the relevant provisions of which have been quoted above, since the Petitioner's services were brought to an end as a disciplinary measure because of his involvement in Vigilance P.S. Case No.57, dated 1312.2017 under Section 7 of the P.C. Act, 1988, based on the communication dated 09.01.2018 of the Deputy Secretary to Government, Government of Odisha, General Administration (Vigilance) Department, Cuttack, in terms of the Office Order dated 27.04.2017, which was in vogue, instead of the Director, PR& DW Department, who is competent to act as Disciplinary Authority and take disciplinary action, including removal, as and when required, on getting report from CollectorCum-CEO and BDO concerned, the impugned Order dated 27.01.2018 was issued by the Collector-Cum-CEO, Zilla Parishad, Angul, who is incompetent to issue the said Order. As it seems from the Office Order dated 21.07.2018, as at Annexure-6 of the Writ Petition, in order to patch up the lacuna in the impugned Order dated 27.01.2018, the Director, PR & DW Department passed the Office Order dated 21.07.2018, the relevant Paragraph of which reads as follows:

> "Now, therefore, the undersigned i.e. the Disciplinary Authority, in exercise of the power conferred upon him in terms of this Department Office Order No.5011, dated 14.03.2018, does hereby disengage the said Sri Narayan Swain, GPTA, Athamallick Block, Dist-Angul from the said post with effect from 27.01.2018 and consequently, the Order No.208, dated 27.01.2018 issued by Collector-cum-CEO, Zilla Parishad, Angul is hereby upheld."
>
> (Emphasis supplied)

14. From the said Paragraph, it is well revealed that though the Director, PR & DW Department, referring to Office Order dated 14.03.2018, styled himself as the "Disciplinary Authority", but simultaneously acted as an Appellate Authority, as observed vide Paragraph-9 quoted above, to the effect that Office Order dated 27.01.2018 issued by the Collector-Cum-CEO, Zilla Parishad, Angul, is upheld by him.

Needless to mention here that Paragraph-9 of the Office Order dated 27.04.2017 prescribes that the Director, PR & DW Department, is the Appointing and Disciplinary Authority to take disciplinary action, including removal. Similarly, the same provision has been reiterated in Paragraph-1 of the subsequent Office Order dated 14.03.2018. In Paragraph-9 of the said Office Order(supra), it has been detailed as to how disciplinary action will be initiated by the Director, PR & DW Department, he being the Disciplinary Authority of GPTAs. Further, Paragraph-9(c) of the said Office Order dated 14.03.2018 prescribes that if a GPTA is convicted in Vigilance Case, the nature of penalty imposed on him shall be decided by the Disciplinary Authority. Similarly Paragraph-9(d) of the said Office Order prescribes that if the GPTA is aggrieved by the Order passed by the Disciplinary Authority under Paragraph-9(b) of the said Office Order, he may prefer an Appeal before the Principal Secretary to Government, PR & DW Department within 30 days from the date of receipt of the said Order.

15. In Paragraph 10 of the Counter Affidavit filed by the Opposite Parties, it has been stated as follows:

> "That in reply to the averments made in Para-5(c) of the writ petition it is humbly submitted that as per Para-9 of the agreement prescribed by Govt. in P.R. & D.W. Department vide letter No.27556 dtd. 21.08.2007, the Collector-cum-CEO, Zilla Parishad, Angul as first party power to disengage the GPTAs without any notice on the ground of misconduct during this agreement period.True copy of the agreement dtd. 1.4.2009 is annexed herewith as Annexure-A/4."

16. Admittedly, the Collector-Cum-CEO, Zilla Parishad, Angul, was not competent to exercise his power as the Appointing/Disciplinary Authority of GPTAs as on the date of issuance of the impugned Order dated 27.01.2018 in view of the Office Order dated 27.04.2017, which was in vogue, vide which the power was vested on the Director, PR & DW Department, to act as the

Disciplinary Authority instead of the Collector and in the said Office Order, it has been clearly mentioned that "All previous orders/letters issued in this regard are superseded."

Further, though one of the impugned Order dated 27.01.2018 was passed by the Collector-Cum-CEO, Zilla Parishad, Angul, terminating the service of the Petitioner, the subsequent impugned Order was passed by the Director, PR & DW Department on 21.07.2018, referring to Office Order dated 14.03.2018 of the Government of Odisha, Panchayati Raj & Drinking Water Department, though the said Order had not seen the light of the day as on the date of passing of the Order of termination dated 27.01.2018 by the Collector-Cum-CEO, Zilla Parishad, Angul, and came into effect much after the impugned Order dated 27.01.2018, as at Annexure-4, was issued by the Collector.

17. Law is well settled that if the power has been vested with the particular Authority, same can only be exercised by the same Authority. In ***Zuari Cement Limited v. Regional Director, Employees' State Insurance Corporation, Hyderabad and others,*** reported in ***(2015) 7 SCC 690,*** the apex Court held that it is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this Rule is traceable to the decision in ***Taylor v. Tailor, reported in (1875) LR I Ch D 426***, which was subsequently followed by Lord Roche in ***Nazir Ahmad v. King Emperor, reported in AIR 1936 PC 253(2)*** and subsequently, the said principle has also been followed in ***Babu Verghese v. Bar Council of Kerala, reported in (1999) 3 SCC 422***.

18. In ***Nazir Ahmed v. King Emperor,*** reported in ***AIR 1936 PC 253,*** it was held that "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,*** reported in ***AIR 1964 SC 358, Dhananjay Reddy v. State of Karnataka,*** reported in ***AIR 2001 SC 1512, Chandra Kishore Jha v. Mahabir Prasad,*** reported in ***AIR 1999 SC 3558, Gujrat Urja Vikas Nigam Ltd. v. Essar Power Ltd.,*** reported in ***AIR 2008 SC 1921, Ram Deen Maurya v. State of U.P.,*** reported in ***(2009) 6 SCC 735.***

19. 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.

20. In view of such pleadings on record, so also arguments advanced by the learned Counsels f or the Parties, settled position of law and the provisions enshrined under Office Order dated 27.04.2017, as at Annexure-5 Series, this Court

is of the view that the impugned Order dated 27.01.2018, as at Annexure-4, issued by the Collector-Cum-CEO, Zilla Parishad, Angul, disengaging the Petitioner from Government service w.e.f. 21.12.2017 and terminating the Agreement of the Petitioner from the date of such disengagement, so also the confirming Order dated 21.07.2018 passed based on the disengagement Order dated 27.01.2018, issued by the Collector-Cum-CEO, Zilla Parishad, Angul, referring to Office Order dated 14.03.2018, which came into force much after issuance of disengagement Order dated 27.01.2018, are bad and liable to be set aside. Accordingly, both the Orders dated 27.01.2018 and 21.07.2018, as at Annexures - 4 & 6 respectively, are hereby set aside.

21. The Petitioner be reinstated in his service with all service benefits i.e. what he would have been entitled to had he been allowed to continue in the said post from the date his disengagement till the date of his reinstatement.

22. Needless to mention here that it is open for the Authority concerned to act against the Petitioner in terms of Office Orders dated 27.04.2017 and 14.03.2018, if so advised.

23. Accordingly, the Writ Petition is disposed of. No Order as to cost

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2022 (III) ILR - CUT-1297

G.SATAPATHY, J.

CRLMC NO.1327 OF 2015

JAGA SARABU .....Petitioner

.V.

STATE OF ORISSA & ANR. .....Opp. Parties

CRIMINAL PROCEDURE CODE, 1973 – Section 482 – Prayer to quash the order of cognizance taken against offences punishable under sections 498(A)/323/506/34 of IPC r/w 4 of D.P. Act – Plea of petitioner that as the opposite party is not the wife of Petitioner, she cannot maintain a criminal proceeding for offence under Section 498(A) of IPC – Whether such plea is sustainable under law? – Held, No – In view of the analysis of facts and discussions of law laid down by the Apex Court in *Reema Aggrawal Vrs. Anupam and another; (2004) 3 SCC 199* the proceeding under 498 (A) is maintainable – The impugned order cannot be interfered by this Court in exercise of inherent jurisdiction.

(Paras 7 & 9)

Case Laws Relied on and Referred to :-

1. (2004) 3 SCC 199 : Reema Aggrawal Vs. Anupam & Anr.
2. (2017) SCC online KER 12064 : Unnikrishnan @ Chandu Vs. State of Kerala.
3. (2011) 7 SCC 616 : A.Subash Babu Vs. State of Andhra Pradesh & Anr.

For Petitioner : Mr. A.Das
For Opp. Parties : Mr. S.N.Das, ASC.

JUDGMENT Date of Hearing: 13.10.2022: Date of Judgment: 29.11.2022

G. SATAPATHY, J.

1. The Petitioner by way of this application under Section 482 Cr.P.C seeks to quash the order passed on 20.03.2014 by learned S.D.J.M., Nabarangpur in G.R. Case No. 1174 of 2013 by which cognizance of offences was taken and process was issued against the Petitioner.

2. Facts as projected in this case in precise are one Aruna Sarabu of village Pilka lodged an FIR on 26.11.2013 before IIC Nabarangpur alleging therein that she had married to the Petitioner Jaga Sarabu of village Makia around three months ago and he kept her in his village Makia for three months. During her such stay for eighty days period, she was subjected to torture physically and mentally as well as she was not provided with food by her husband (Petitioner) and mother-in-law who also assaulted her. On 19.11.2013, her husband (Petitioner) went to police to lodge a false case against her and her husband (Petitioner) was asking to bring Rs.50,000/- from her father, otherwise he would kill her. The above fact was within the knowledge of villagers Makia and she had come to her mother by concealing herself to inform about these facts.

2.1. On the basis of the above F.I.R., Nabarangpur P.S. Case No. 323 dated 26.11.2013 was registered for commission of offences punishable under sections 498(A)/323/506/34 IPC r/w 4 of D.P. Act which was investigated into resulting in submission of charge-sheet against Petitioner and two others. Consequently upon conspectus of materials and documents produced by the I.O. and finding prima facie case, learned S.D.J.M., Nabarnagpur by the impugned order took cognizance of offences under Sections 498(A)/323/506/34 IPC r/w 4 of D.P. Act and issued process against the Petitioner and others. Feeling aggrieved with the impugned order, the Petitioner has approached this Court in this CRLMC to quash the order taking cognizance of offences.

3. In the course of hearing of the CRLMC, Mr. Anirudha Das, learned counsel for the Petitioner by placing the judgment passed by the Judge, Family Court, Nabarangpur in Cr.P. No. 64 of 2016 submits that the learned Judge,

Family Court has come to a finding that the O.P. No.2 is not the wife of the Petitioner and thereby, she cannot maintain a criminal proceeding for offence under Section 498(A) of IPC. It is also submitted by him that when O.P. No.2 is not the legally married wife of the Petitioner which is already established by the judgment of learned Judge, Family Court, Nabarangpur, the impugned order in this case has no sanctity under law and to attract an offence under Section 498(A) of IPC, there must be a legal relationship of husband and wife between the Petitioner and O.P. No.2, but that not being so in this case, the criminal proceeding against the Petitioner is otherwise bad in the eye of law. In order to buttress his contention, learned counsel for the Petitioner places reliance upon the decision in the case of ***Reema Aggrawal Vrs. Anupam and another; (2004) 3 SCC 199 and Unnikrishnan @ ChanduVrs. State of Kerala; (2017) SCC online KER 12064*** and prays to quash the impugned order.

3.1. On the contrary, Mr. S.N. Das, learned counsel for the State by relying upon the decision in the case of ***A.Subash BabuVrs. State of Andhra Pradesh and another; (2011) 7 SCC 616*** submits that the law declared in ***Reema Aggrawal*** (supra) is binding on all Courts and the Petitioner being the husband of O.P. No.2 cannot take the plea that the marriage was invalid and thereby the criminal proceeding for offence under section 498(A) is misdirected. It is further submitted that husband contracting second marriage during the subsistence of earlier marriage can be charged for offence under section 498(A) of IPC and merely because a judgment is rendered by learned Judge, Family Court in proceeding under section 125 of Cr.P.C. by itself cannot declare the status of O.P.No.2 as concubine or not the wife of Petitioner and whatever observation passed by the learned Judge, Family Court is on the basis of a proceeding under section 125 Cr.P.C. which is not binding upon this Court and the impugned order taking cognizance of offence having passed with sound judicial application of mind does not require any interference by this Court. It is, accordingly, prayed by him to dismiss the CRLMC.

4. After having considered the rival submissions of the parties, the moot question crops up for consideration in this CRLMC is whether the impugned order is bad in the eye of law for taking cognizance of offence under section 498-A of the IPC on account of finding of learned Judge, Family Court, Nabarangpur in a proceeding under section 125 of Cr.P.C concluding that the informant (O.P.No.2) is not the wife of Petitioner herein and thereby, the criminal trial arising out of such impugned order pursuant to the F.I.R. at the instance of the informant is otherwise then an abuse of process of the Court and the same needs to be set aside/quashed tosecure the ends of justice. Adverting to the contention of the Petitioner and examining the same on the principle of well

settled law, it appears that the Petitioner has relied upon the decision in **Unnikrishnan** (supra), but the same having rendered on appreciation of evidence onrecord by the Appellate Court is not applicable to the present case at hand since evidence is yet to be recorded in this case and the facts under which the present criminal case runs is on the claim of the informant who claims herself to be the wife of the Petitioner through a marriage in the F.I.R. which facts can be considered independently in the course of trial. More so, in the relied on case, on the basis of admitted statement of the deceased wife revealing some acts of cruelty said to have undergone during her live in relationship with the accused, the High Court of Kerala considering the same to be a ground has observed the accused to be entitled for acquittal for offence under section 498-A of IPC by allowing the appeal. The case at hand is at the stage of taking cognizance of offence and issuance of process to the accused, but trial is yet to be conducted. However, on conspectus of FIR and statement of witnesses would go to disclose about marriage between the Petitioner and O.P. No.2 which need to be established during the trial and since there appears some materials for taking cognizance of offence under section 498-A of IPC, it would not be proper to come to a conclusion that the O.P No. 2 is not the wife of the Petitioner merely on the basis of finding of the Family Court which is also rendered in a proceeding under section 125 of Cr.P.C. which is by nature a proceeding for grant of maintenance to wife, children and parents, but strict proof of marriage between the parties in a proceeding under section 125 of Cr.P.C. normally should not be insisted upon as a condition precedent for grant of maintenance to the wife.

5. It is true that learned Judge, Family Court has concluded by his judgment in Cr.P. No. 64 of 2016 which is admittedly a proceeding U/S 125 of Cr.P.C. that the O.P. No.2 (Petitioner therein) cannot be treated as the wife of Petitioner (O.P. therein) but such conclusion can be arrived at in a civil proceeding to declare the status of a woman as such, if the person claiming for such declaration makes out a case for the relief on assessment of evidence and pleadings on record, but the learned Judge, Family Court herein at best could have concluded while refusing to grant maintenance by his judgment that the Petitioner could not establish her relationship with O.P. as husband and wife.

6. Be that as it may, both the parties in this case rely upon the decision in ***Reema Aggrawal*** (Supra) wherein the Apex Court at Paragraph-18 of the judgment has observed as follows.

> *"The concept of "dowry" is intermittently linked with a marriage and the provisions of the Dowry Act apply in relation to marriages. If the legality of the marriage itself is an*

issue, further legalistic problems do arise. If the validity of the marriage itself is under legal scrutiny, the demand of dowry in respect of an invalid marriage would be legally not recognizable. Even then the purpose of which Sections 498-A and 304-B IPC and Section 113-B of the Indian Evidence Act, 1872 (for short "the Evidence Act") were introduced, cannot be lost sight of. Legislation enacted with some policy to curb and alleviate some public evil rampant in society and effectuate a definite public purpose or benefit positively requires to be interpreted with a certain element of realism too and not merely pedantically or hyper technically. The obvious objective was to prevent harassment to a woman who enters into a marital relationship with a person and later on, becomes a victim of the greed for money. ***Can a person who enters into a marital arrangement be allowed to take shelter behind a smokescreen to contend that since there was no valid marriage, the question of dowry does not arise? Such legalistic niceties would destroy the purpose of the provisions. Such hairsplitting legalistic approach would encourage harassment to a woman over demand of money****. The nomenclature "dowry" does not have any magic charm written over it. It is just a label given to demand of money in relation to marital relationship. The legislative intent is clear from the fact that it is not only the husband but also his relations who are covered by Section-498-A. The legislature has taken care of children born from invalid marriages. Section- 16 of the Hindu Marriage Act deals with legitimacy of children of void and voidable marriages. Can it be said that the legislature which was conscious of the social stigma attached to children of void and voidable marriages closed its eyes to the plight of a woman who unknowingly or unconscious of the legal consequences entered into the marital relationship? If such restricted meaning is given, it would not further the legislative intent. On the contrary, it would be against the concern shown by the legislature for avoiding harassment to a woman over demand of money in relation to marriages. The first exception to Section 494 has also some relevance. According to it, the offence of bigamy will not apply to "any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction". It would be appropriate to construe the expression "husband" to cover a person who enters into marital relationship and under the color of such proclaimed or feigned status of husband subjects the woman concerned to cruelty or coerces her in any manner or for any of the purposes enumerated in the relevant provisions __ Sections 304-B/498-A, whatever be the legitimacy of the marriage itself for the limited purpose of Sections 498-A and 304-B IPC. Such an interpretation, known and recognized as purposive construction has to come into play in a case of this nature. The absence of a definition of "husband" to specifically include such persons who contract marriages ostensibly and cohabit with such woman, in the purported exercise of their role and status as "husband" is no ground to exclude them from the purview of Section 304-B or 498-A IPC, viewed in the context of the very object and aim of the legislations introducing those provisions.*

7. The plea of no marriage was canvassed for the Petitioner in the course of hearing of this CRLMC, but in a proceeding under section 482 of Cr.P.C., this Court is not sitting over a case in exercise of original jurisdiction to decide the status of the parties by way of declaration which can be done by a Civil Court in exercise of power under section 34 of the Specific Relief Act, 1963 after undertaking a full-fledged trial. It is no doubt advanced for the Petitioner that a criminal proceeding under section 498-A of the IPC is not maintainable against

the Petitioner for want of valid marriage, but after going through the uncontroverted allegations appearing in the FIR and statement of witnesses under section 161 Cr.P.C., this Court does not find any substance to conclude that a proceeding under section 498-A of IPC is not maintainable against the petitioner. Law is well settled that a criminal proceeding can be quashed where the basic ingredients of the offences are not constituted/disclosed from a bare reading of the uncontroverted allegations appearing FIR and other materials so collected by the Investigating Agency. It is also extremely unfair and harsh to a woman who claims herself to be wife of a person by entering into a marital relationship and later on become a victim of desertion by the said person taking plea of absence of a valid marriage. The obvious objective of enacting offence under section 498-A of IPC is to secure the prevention of harassment to a woman from cruelty meted out to her by husband or his relatives. The aforesaid being the sacred object of offence under section 498-A of IPC, whether a person who enters into a marital relationship be allowed to take the refuge behind a smokescreen to take the plea that since there was no valid marriage, the proceeding under section 498-A of IPC against him is not maintainable, but such plea having deleterious effect on the morality of the women entering into a kind of relationship of marriage with that person, it would not be proper for a Court to undertake hair splitting scrutiny of materials on record in a proceeding under section 482 of Cr.P.C. to conclude that the proceeding under section 498-A of IPC is not maintainable for want of valid marriage which would not only encourage harassment of women but also demoralizes them.

8. In ***Subash Babu*** (Supra), the Apex Court at paragraph-55 and 57 has observed as follows.

> *55. "In view of the firm and clear law laid down on the subject, this Court is of the confirmed view that the High Court was* ***not justified*** *at all in quashing the proceedings initiated against the appellant under section 498-A of the Penal* ***Code on the ground that Respondent No. 2 was not the "wife" within the meaning of Section 498-A IPC and was not entitled to maintain a complaint under the said provision****. The question therefore which arises for consideration of the Court is whether the said finding recorded by the High Court can and should be set aside in the present appeal which is filed by the husband." (Emphasis supplied by bold letters)*

> *57. "This Court does not find any substance in the above mentioned argument of the learned counsel for the appellant. The law declared by this Court in* ***Reema Aggrawal*** *(supra) was binding on all courts including the learned Single Judge of the High Court of Andhra Pradesh who decided the present case in view of the salutary provisions of Article 141 of the Constitution. The learned single Judge of the High Court could not have afforded to ignore the law declared by this Court in* ***Reema Aggrawal*** *while considering the question whether proceedings initiated by Respondent No.2 for commission of the offence punishable under Section 198-A IPC should be quashed or*

not. The High Court has completely misdirected itself in quashing the proceedings for the offence punishable under section 498-A IPC. There is no manner of doubt that the finding recorded by the High Court that Respondent No. 2 is not the wife within the meaning of Section 498-A of the Penal Code runs contrary to the law declared by this Court in ***Reema Aggrawal****."*

9. In view of the analysis of facts stated above and discussions of law laid down by the Apex Court in ***Reema Aggrawal (supra) and A. Subash Babu (supra)*** and taking into consideration the uncontroverted allegation appearing in the FIR and statement of witnesses together with other documents collected in the course of investigation, this Court does not find any substance on the submissions advanced for the Petitioner which merits consideration for the proceeding under section 498-A of IPC to be not maintainable against the Petitioner, rather there appears prima facie materials for proceeding against the Petitioner for offences alleged against him and thereby, the learned Court of S.D.J.M., Nabarangpur has not committed any illegality in taking cognizance of offences by the impugned order which cannot be interfered by this Court in exercise of power of inherent jurisdiction as the same has been passed on proper legal scrutiny of materials on record. Hence, it is ordered.

10. In the result, this CRLMC is dismissed on contest but in the circumstance without any cost.

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2022 (III) ILR - CUT-1303

CHITTARANJAN DASH, J.

CRLMC NO.3756 OF 2016

KULAMANI PARIDA .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Petitioner is a Chartered Accountant challenges the order of cognizance of offence under Sections 420/467/468/471/120-B of IPC – The Petitioner performed his professional duty as per the instruction, document supplied by the client – Whether cognizance of the offence against the Petitioner is sustainable? – Held, No – Neither the Petitioner is part of allegedly business transaction nor the document in question allegedly to have been forged and fabricated or is attributed to the present

Petitioner in absence of material showing his personal interest in any gain/loss of the parties conducting business except that he retains his professional interest – The learned court below having not specifically recorded any reason travelled in taking cognizance against the Petitioner and as such liable for being interfered by way of exercising the jurisdiction under Section 482 of Cr.P.C. (Para 16)

Case Laws Relied on and Referred to :-

1. (2010) 46 OCR 623 : Nrusinghnath Mishra Vs. Republic of India.
2. (2015) I ILR, Cuttack 1122 : Nimain Charan Mohanty Vs. Republic of India.
3. (2013) I OLR SC 74 : Central Bureau of Investigation, Hyderabad Vs. K. Narayan Rao.

For Petitioner : Mr. R.K. Rout
For Opp. Party : Mr. J. Katikia, AGA

JUDGMENT Date of Judgment: 09.11.2022

CHITTARANJAN DASH*, *J.

1. Heard learned counsel for the parties.

2. By means of this application, the Petitioner seeks to quash the order dated 17th October, 2015 passed in C.T. Case No.3664 of 2014 by the S.D.J.M., Bhubaneswar whereby the court took cognizance of offence under Sections 420/467/468/471/120-B IPC involving the Petitioner along with others.

3. The background facts of the case is that on 22nd September, 2014 the complainant, K. Jagannathan, Chief Manager, State Bank of Travancore, Bhubaneswar Branch situated over Plot No.N-1/40, IRC Village, Nayapalli, Bhubaneswar, Dist. Khurda alleged that the State Bank of Travancore, Bhubaneswar Branch had sanctioned financial assistance to the tune of Rs.600 lakhs (working capital limit of Rs.500 lakhs and letter of credit limit of Rs.100 lakhs) to M/s. Chhotray Suppliers, a partnership firm having its office at Plot No.2008/1199, Nayapalli, Bhubaneswar. Mr. Siba Narayan Chhotray is the Managing partner and Mrs. Swapna Chhotray is the partner of the firm. Mr. Siba Narayan Chhotray is also the Managing Director of M/s. Srabani Constructions Pvt. Ltd wherein Mrs. Swapna Chhotray is the Director. Necessary security and documents were executed by Mr. Siba Narayan Chhotray and Mrs. Swapna Chhotray in favour of State of Bank of Travancore, Bhubaneswar Branch as per the terms and conditions laid down

in the sanction letter given by the complainant, inter alia, on mortgage of immovable property belonging to Mrs. Swapna Chhotray and M/s. Srabani Constructions Pvt. Ltd., Nayapalli, Bhubaneswar. M/s. Srabani Constructions Pvt. Ltd. had mortgaged the property situated over Plot No.89, pertaining to Khata No.82/23 measuring Ac.0.721 decimals in Mouza-Damodarpur, Khandagiri, Bhubaneswar in favour of State of Bank of Travancore, Bhubaneswar Branch belonging to M/s. Srabani Constructions Pvt. Ltd. which they obtained through sale deed bearing No.4872, dated 24th September, 2004 of SRO, Khandagiri. The mortgage was created by Sri Siba Narayan Chhotray in the capacity as the Managing Director of the company vide Resolution dated 18th December, 2012. Mr. Siba Narayan Chhotray and Mrs. Swapna Chhotray remained guarantors to the facility granted in favour of M/s. Chhotray Suppliers and executed guarantee documents in favour of State of Bank of Travancore, Bhubaneswar Branch. Mr. Siba Narayan Chhotray in the capacity as Managing Director of M/s. Srabani Constructions Pvt. Ltd. registered the charge in respect of the mortgaged property in favour of the Bank with Registrar of Companies, Cuttack on 20th December, 2012 by filing Form No.8. During the course of operation of working capital account for the cash credit limit to the tune of Rs.500 lakhs, M/s. Chhotray Suppliers serviced the interest charge regularly. Bank in regular course of business for search report on 16th June, 2014 noticed that at Registrar of Companies, Bank's charge over the mortgaged property has been shown as satisfied on 12th June, 2013. That the alleged accused persons in the above referred C.T. Case stated to have submitted a scanned letter of "No Objection Certificate" purportedly issued by the Bank stating that M/s. Chhotray Suppliers have repaid the entire dues to the Bank (working capital Rs.500 lakhs and letter of credit limit of Rs.100 lakhs) in full and there is no outstanding from M/s. Chhotray Suppliers along with charge satisfaction in Form No.17 digitally signed by Sathua Laxmidhar, (an employee working under Mr. Siba Narayan Chhotray,). as Chief Manager of the State Bank of Travancore, Bhubaneswar Branch to the Registrar of Companies satisfying corporate guarantee of M/s. Srabani Constructions Pvt. Ltd. to secure cash credit/letter credit limit is lifted/cancelled. The contents of the charge satisfaction Form No.17 are certified by one Kulamani Parida, the Chattered Accountant of M/s. Chhotray Suppliers (the Petitioner in the present application).

4. Whereas, no such letter has been issued and signed by the Chief Manager, State Bank of Travancore, Bhubaneswar Branch. The loan was

never satisfied as on 12th June, 2013. When the matter of forgery and impersonation was brought to the notice of the accused persons such as Mr. Siba Narayan Chhotray, Mrs. Swapna Chhotray, Kulamani Parida, the present Petitioner, M/s. Chhotray Suppliers, M/s. Srabani Constructions Pvt. Ltd. they admitted the forgery orally and had submitted letters. However, the total dues to the Bank had been fully remitted by them on 25th August, 2014. The above said persons being accused of the above act connived and conspired in siphoning off the public money with an intention to defraud the Bank and accordingly the case was registered and investigated into.

5. On the basis of the complaint of the Bank as narrated above, received by EOW, Bhubaneswar, the EOW P.S. Case No.23/14 under Sections 467/468/471/420/120-B IPC was registered and on the direction of the S.P. E.O.W, investigation commenced into the matter.

6. The Investigating Officer having taken up the investigation, examined the complainant and the witnesses, seized the connected documents from State Bank of Travancore, Bhubaneswar Branch as well as from M/s. Srabani Constructions Pvt. Ltd. verified the Form No.8 and Registrar of Companies, received the certified computer generating documents from the Registrar of Companies under requisition. On scrutiny of Bank statements of M/s. Chhotray Suppliers, it is ascertained that M/s. Chhotray Suppliers closed their Account No.67205271336 with State Bank of Travancore, Bhubaneswar Branch on 25th August, 2015 and that the said Bank to have given a certificate on 23rd September, 2014.

7. It further revealed that on 10th June, 2013 the said persons submitted Form No.17 before the Registrar of Companies, Cuttack claiming that they have repaid the loan amount to State Bank of Travancore, Bhubaneswar Branch and declaring that there is no outstanding against the company whereas on scrutiny it is ascertained that on 10th June, 2013 M/s. Chhotray Suppliers was having outstanding of Rs.4,99,85,793.41 to be paid to the State Bank of Travancore, Bhubaneswar Branch in the said Account No.67205271336. On scrutiny of Form No.17 at the Registrar of Companies it is also ascertained that Sri Siba Narayan Chhotray puts his digital signature on Form No.17 showing that the company namely M/s. Srabani Constructions Pvt. Ltd. satisfying the corporate guarantee on 12th June, 2013 including a scanned letter of "No Objection Certificate" purportedly issued by the Bank on 10th June, 2013 stating that M/s. Chhotray Suppliers have

repaid the entire dues to the Bank in full and there is no outstanding from M/s. Chhotray Suppliers and copy of the extract of the minutes of the meeting of Board of Directors as on 10th June, 2013 at the office of the company at 11 a.m. regarding closure of the said loan. One Sathua Laxmidhar an employee under M/s. Chhotray Suppliers puts his digital signature as Chief Manager, State Bank of Travancore, Bhubaneswar Branch. The present Petitioner, namely, Kulamani Parida, Chattered Accountant of M/s. Chhotray Suppliers also to have put his digital signature certifying the satisfaction of charge in Form No.17. Allegedly, therefore, all the above persons submitted forged documents created purposefully.

8. It is further alleged that during interrogation of Kulamani Parida, Chattered Accountant of M/s. Srabani Constructions Pvt. Ltd. it is ascertained that on 10th June, 2013 Mr. Siba Narayan Chhotray of M/s. Srabani Constructions Pvt. Ltd. gave letter to him (Kulamani Parida) enabling him to file Form No.17 before the Registrar of Companies, Cuttack in favour of M/s. Srabani Constructions Pvt. Ltd. along with a scanned letter of 'No Objection Certificate" purportedly to have been issued by State Bank of Travancore, Nayapalli, Bhubaneswar and other connected documents of the said company. Accordingly, the present Petitioner Kulamani Parida submitted Form No.17 before the Registrar of Companies regarding satisfaction of charge over the mortgaged property but examination of Form No.17 reveals that he had not verified from the concerned Bank regarding issue of "No Objection Certificate" in favour of M/s. Chhotray Suppliers. The investigation further revealed that the certificate enrollment form regarding application for digital signature in favour of Kulamani Parida, Sri Siba Narayan Chhotray and Laxmidhar Sathua, has been registered by Tata Consultancy Pvt. Ltd., Hyderabad in favour of Kulamani Parida vide Enrollment No.2672765 valid for two years, Laxmidhar Sathua vide Enrollment No.2823689 and Sri Siba Narayan Chhotray created two digital signature vide Certificate Enrollment Form No.2914143 and 2698034 respectively valid for two years. Laxmidhar Sathua also changed his name as Sathua Laxmidhar.

9. During investigation, it is further revealed from the document that the seized documents were sent for examination and opinion of the hand writing bureau and opinion was obtained and on verification, it is found that documents were forged.

10. Be that as it may, the investigation revealed that the present Petitioner Kulamani Parida in connivance and conspiracy with Sri Siba Narayan Chhotray, Mrs. Swapna Chhotray and M/s. Chhotray Suppliers and M/s. Srabani Constructions Pvt. Ltd. along with Laxmidhar Sathua created fake "No Objection Certificate" and got the signature of the Chief Manager, State Bank of Travancore, Nayapalli, Bhubaneswar Branch forged and in a fraudulent manner submitted the form before the Registrar of Companies, Cuttack representing the same to be charged in documents. Consequent upon registration of the case against the above said persons, the learned S.D.J.M., Bhubaneswar took cognizance of the offences involving the Petitioner and others as impugned herein.

11. It is submitted by learned counsel for the Petitioner that in due discharge of his professional duty the Petitioner submitted the "No Objection Certificate" in Form No.17 before the Registrar of Companies as was supplied to him by his client M/s. Chhotray Suppliers. According to the learned counsel it is the duty and responsibility of the client to supply the document necessary for compliance for its onward submission before the competent authority and there is no scope for the Chattered Accountant to go behind the document to ensure that the documents in question supplied by the client is genuine or not. As a professional, the Chattered Accountant discharged his duty on good faith and submitted the form before the Registrar of Companies not being aware of the manner in which the document in question asked to be submitted before the Registrar of Companies was procured by the client. Consequently, nothing can be attributed to the Chattered Account as regards the duty discharged by him as required of him professionally as instructed/directed by the client. Relying upon the decision in the cases of ***Nrusinghnath Mishra – v. Republic of India,*** reported in ***(2010) 46 OCR 623, Nimain Charan Mohanty v. Republic of India*** reported in ***(2015) I ILR, Cuttack 1122 and Central Bureau of Investigation, Hyderabad v. K. Narayan Rao,*** reported in ***(2013) I OLR SC 74***. Learned counsel for the Petitioner seeks quashing of the order of cognizance vis-à-vis the Petitioner.

12. Learned Additional Government Advocate for the State, on the other hand, vehemently opposed the contention raised by the learned counsel for the Petitioner and *inter alia* submitted that the documents submitted before the Registrar of Companies by the Petitioner as a Chartered Accountant ought to have verified its genuineness before being submitted and cannot escape the

rigor of law on the plea of his discharge of duty as professional on good faith and submitted the impugned order taking cognizance to be just and proper.

13. In the case of Central ***Bureau of Investigation v. K. Narayana Rao,***the Apex Court held as under :

> 23) A lawyer does not tell his client that he shall win the case in all circumstances. Likewise a physicianwould not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be given by implication is that he is possessed of the requisite skill in that branch of profession which he is practicing and while undertaking the performance of the task entrusted to him, he would be exercising his skill with reasonable competence. This is what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of the two findings, viz., 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.
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> 24) In ***Jacob Matghew vs. State of Punjab &Anr. (2005) 6 SCC 1*** this court laid down the standard to be applied for judging. To determine whether theperson charged has been negligent or not, he has to be judged like an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices.
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> 25) In ***Pandurang Dattatraya Khandekar vs. Bar Council of Maharashtra &Ors (1984) 2 SCC 556***, thisCourt held that "…there is a world of difference between the giving of improper legal advice and thegiving of wrong legal advice. Mere negligence unaccompanied by any moral delinquency on the part of a legal practitioner in the exercise of his profession does not amount to professional misconduct.
>
> 26) Therefore, the liability against an opining advocate arises only when the lawyer was an active participant in a plan to defraud the Bank. In the given case, there is no evidence to prove that A-6 was abetting or aiding the original conspirators.
>
> 27) However, it is beyond doubt that a lawyer owes an "unremitting loyalty" to the interests of the client and it is the lawyer's responsibility to act in a manner that would best advance the interest of the client. Merely because his opinion may not be acceptable, he cannot be mulcted with the criminal prosecution, particularly, in the absence of tangible evidence that he associated with other conspirators. At the most, he may be liable for gross negligence or professional misconduct if it is established by acceptable evidence and cannot be charged for the offence under Sections 420 and 109 of IPC along with other conspirators without proper and acceptable link between them. It is further made clear that if there is a link or evidence to connect him with the other conspirators for causing loss to the institution, undoubtedly, the prosecuting authorities are entitled to proceed under criminal prosecution. Such tangible materials are lacking in the case of the respondent herein.
>
> 28) In the light of the above discussion and after analyzing all the materials, we are satisfied that there is no prima facie case for proceeding in respect of the charges alleged

insofar as respondent herein is concerned. We agree with the conclusion of the HighCourt in quashing the criminal proceedings and reject the stand taken by the CBI.

14. In the case of ***Nrusinghnath Mishra – v. Republic of India***, this Court while dealing with the matter in respect to the professional duty of an Advocate held as under:

At this juncture, it would be profitable to note that the other co-accused is an advocate, who was engaged by the New India Assurance Company Ltd. to investigate the case and while performing such professional work, he sent a report that he could not trace out any records regarding hospitalization of the petitioner at S.C.B. Medical College, Hospital. There is no material whatsoever to show prima facie that the coaccused in order to cause an illegal gain to either himself or the petitioner or to cause illegal loss to the company gave such a report. A report or opinion rendered by an advocate, to his client, if found to be incorrect, cannot constitute an offence when nothing is shown that such report or opinion is purposefully given to commit any offence. The prosecution has also notcome out with any material disclosing meeting of mind between the two accused persons to bring home the charge under section 120-B IPC. Rather, the allegation in the F.I.R. was made that the co-accused conspired with one Beni Madhan Dwivedi, who was functioning as a Divisional Manager and the said Beni Madhab Dwivedi is not an accused in the charge sheet filed.

5. The impugned order passed by the learned C.J.M. taking cognizance of the offence under sections 420/120-B IPC ex-facie shows non-application of judicial mind by the learned C.J.M. It is a settledposition of law that when a charge sheet is filed after investigation against the accused persons alleging commission of offence, the court taking cognizance is to apply his judicial mind to find out as to whether there is any material showing that such offence hasbeen committed.

6. The Court, while exercising jurisdiction under section 482 Cr.P.C. to quash a criminal proceeding, no doubt, should exercise such power sparingly and with circumspection. If, however, it is found that on accepting the materials produced by the prosecution, which were collected during investigation along with the F.I.R. in its entirety, do not disclose commission of any offence, the court is to quash the criminal proceeding in order to prevent abuse of the process of the court and to secure the ends of justice. (See State of West Bengal and others v. Swapan Kumar Guha and others , AIR 1982 SC 949, State of Haryana and others v. Ch. Bhajan Lal and others, AIR 1992 SC 604, Sanu Das and another v. State of Orissa and another , 1999 (I) OLR 442, G. Sagar Suri and another v. State of U.P. and others , (2000)18 OCR (SC) 355, Ajaya Mitra v. State of M.P. and others (2003) 25 OCR (SC) 226, Uma Shankar Mishra v. State of Orissa, (2003) 25 OCR 611 and Hira Lal Hari Lal Bhagwati v. CBI New Delhi, (2003) 25 OCR (SC) 770).

7. In the instant case, accepting the entire materials produced by the prosecution along with the charge sheet in its entirety, no offence is made out against the petitioner as well as the co-accused. Allowing the case to continue would only amount to abuse of the process of the court as the chance of conviction is bleak. Hence, to secure the ends of justice, this Court finds that this is a fit case where the entire proceeding is to be quashed to secure the ends of justice.

15. In the case of ***Nimain Charan Mohanty v. Republic of India***, this Court relying on the deceision reported in the case of ***Central Bureau of Investigation, Hyderabad v. K. Narayana Rao*** held as under:

> "9. Having gone through the order of the learned Special Judge, C.B.I., it appears that the learned Special Judge has entered into conjectures and surmises and has held that the petitioner has submitted a false legal opinion about the genuineness of the document in question. This finding regarding the legal opinion about the genuineness of the document in question does not arise in this case. The moot question that is to bedecided at this stage is, if there are sufficient materials on record to find out if the present petitioner has entered into a criminal conspiracy with other accused persons to return the N.S.Cs. in favour of main accused and inpursuance to such criminal conspiracy he deliberately rendered an illegal opinion. In the case of ***Central Bureau of Investigation, Hyderabad v. K. Narayana Rao*** (supra), the Supreme Court has held that a lawyer owes an "unremitting loyalty" to the interests of the client. The Supreme Court has further held that merely because his opinion may not be acceptable he cannot be mulcted with the criminal prosecution, particularly, in absence of tangible evidence that he associated with other conspirators. The Supreme Court has further held that at the most, he may be liable for gross negligence of professional misconduct if it is established by acceptable evidence and cannot be charged of the offence under Sections 420 and 109 of the I.P.C. along with other conspirators without proper and acceptable link between them. It is further made clear by the Supreme Court that if there is a link or evidence to connect him with the other conspirators for causing loss to the institution, undoubtedly, the prosecuting authorities are entitled to proceed under criminal prosecution. Such tangible materials were lacking in the reported case.
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> 11. In this case, having gone through the records produced by the learned Retainer Counsel for the C.B.I., this Court has come to the conclusion that there is not an iota of evidence to show that there is a conspiracybetween the petitioner and the other accused persons. The only admitted fact is the opinion given by the petitioner appears to be illegal. The opinion given in the case may not be legal in view of the fact that investigation of the case was pending. However, even if the N.S.Cs are returned to the main accused after keeping copies thereof, the prosecution can well rely on the secondary evidence after laying foundation as envisaged under Section 65 of the Evidence Act and in no way the prosecution case can be weakened by the conduct of the petitioner. Nowhere in the charge-sheet filed by the C.B.I., the Investigating Agency, hasclarified how and with whom the present petitioner has entered with a conspiracy as consequence of which he gave a wrong opinion to release the stolen/forged N.S.Cs. There is also no material, direct or circumstantial, to hold that the petitioner has entered into a criminal conspiracy with other accused."

16. In the case in hand, admittedly the present Petitioner is the Chattered Accountant of M/s. Chhotray Suppliers and M/s. Srabani Constructions Pvt. Ltd. In sequel, discharging his professional duty the Petitioner carried out the instructions given by the said firm for being complied with in his professional front. Admittedly, the document, i.e. the "No Objection Certificate" in question supplied by the client to the Petitioner for being annexed with the Form No.17. The declaration submitted in Form No.17 is one at the instruction of the client only. Needless to say that while discharging the professional duty as Chattered

Accountant in submitting the compliance before the authority the Petitioner need to depend upon his client in procuring the document such as the statement of the Bank and other documents pertain to the compliance. Consequently, nothing can be attributed that the Chattered Accountant has any role either in preparing or procuring the document for being placed before the authority and to ascertain the genuinity thereof since consequence of supply or procurement of such document would obviously go to the client and not to the professional. It is in such view of the matter when the entire gamut of allegations is summed up would reveal that the action performed by the Petitioner in submitting the Form No.17 before the Registrar of Companies along with the documents such as "No Objection Certificate" is in due discharge of the compliance of the direction of the client and there cannot be a conspiracy allegedly to have been entered into by the Petitioner along with client. It is indeed true that the Court while exercising the jurisdiction under Section 482 Cr.P.C. need to circumspect the overall facts emerging the allegation and to arrive at a conclusion as to if there appears material constituting offence against the Petitioner.

17. In such view of the matter, the allegation appearing in the F.I.R. and the complaint of the Bank vis-à-vis the Petitioner does not make out a case constituting the offences under Sections 420/467/468/471/120-B IPC as neither the Petitioner is part of the business transaction allegedly to have conducted by the co-accused persons having interest therein nor that the document in question allegedly to have been forged and fabricated is attributed to the present Petitioner in absence of a material showing his personal interest in any gain/loss of the parties conducting business except that he retains his professional interest. This Court while dealing with the matter is alive of the fact that the offences alleged are the category of offence involving the moral aptitude and detrimental to the society in general but have strong conviction that the act of the Petitioner in discharging his professional duty is above all the allegations alleged save and except discharging part of his professional duty. Consequently, this Court finds no material to proceed against the Petitioner attributing the criminal liability so as to continue the proceeding. The learned court below having not specifically recorded any reasoning vis-à-vis the present Petitioner erroneously travelled in taking cognizance against the Petitioner and is as such liable for being interfered with exercising the jurisdiction under Section 482 Cr.P.C.

18. Accordingly the proceeding in C.T. Case No.3664 of 2014 passed by the S.D.J.M., Bhubaneswar is hereby directed to be quashed.

19. The CRLMC is disposed of.

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