THE INDIAN LAW REPORTS
(CUTTACK SERIES)

Containing Judgments of the High Court of Orissa.

Mode of Citation
2023 (I) I L R - CUT.

FEBRUARY - 2023

Pages : 321 to 624

Edited By

MADHUMITA PANDA, ADVOCATE

LAW REPORTER
HIGH COURT OF ORISSA, CUTTACK.

Published by : High Court of Orissa.
At/PO-Chandini Chowk, Cuttack-753002
Printed at - Odisha Government Press, Madhupatna, Cuttack-10

Annual Subscription : ₹ 300/-

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Corrigendum

There was an inadvertent Typographical error in the judgment dated 18th October 2022 reported in 2022(III) ILR Cut. 450. The word "contributory" wherever appears in the Judgment preceding word "negligence" be deleted.

By order dt 26.10.2022 passed in WP(C) No. 16845 of 2012

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Rabi Padhan : (Since Dead Through His Legal Heirs) & Ors.-V-State of Orissa & Ors.
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2023 (I) ILR - CUT-321

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

STREV NO. 64 OF 2017

M/s. GENERAL TRADERS, BERHAMPUR .....Petitioner

.V.

STATE OF ODISHA (COMNR. OF COMMERCIAL TAXES,CUTTACK) .....Opp. Party

CENTRAL SALES TAX ACT, 1956 – Section 5(3) and 5 (4) – Whether mere non-production of agreement executed between the Indian Exporter and the Foreign Buyer would invalidate the claim of the petitioner/penultimate seller for exemption under Section 5(3) of the CST Act – Held, No – When there is no adverse finding of any short in this regard, mere non production of agreement would not invalidate the claim of petitioner for exemption. (Para 6.17)

Case Laws Relied on and Referred to :-

1. (2000) 118 STC 315 (HP) : Gujarat Ambuja Cement Ltd. & Anr. Vs. Assessing Authority-cum-Assistant Excise and Taxation Commissioner and Ors.
2. (2015)79 VST 25 (Karn) : Fosroc Chemicals (India) Pvt. Ltd. Vs. The State of Karnataka.
3. S.A. No.87(C) of 2012-13: M/s. Lalbaba Roller Flour Mills, Nayabazar, Cuttack Vs. State of Odisha.
4. (2011) 42 VST 330 (Mad) : V. Win Garments Vs. Additional Deputy Commercial Tax Officer, Central-I Assessment Circle, Tirupur.
5. (1992) 86 STC 453 (Ori) : Tilakraj Mediratta Vs. State of Odisha and Ors.
6. 2015 (I) ILR-CUT 637 : Manisha Enterprises & Ors. Vs. State of Odisha &Ors.
7. (2010) 9 SCC 524 : State of Karnataka Vs. Azad Coach Builders Pvt. Ltd. and Anr.
8. 2021 (I) OLR 828 : National Aluminium Company Ltd. Vs. Deputy Commissioner of Commercial Taxes, Bhubaneswar-III Circle, Bhubaneswar.
9. (2012) 54 VST 1 (Ori) : Jindal Stainless Ltd. Vs. State of Odisha.
10. STREV No.69 of 2012 : State of Odisha Vs. Chandrakanta Jayantilal,Cuttack.
11. (2015) 81 VST 80 = 2014 SCC On Line Ori 442 : Srinivas Traders Vs.State of Odisha

For Petitioner : Mr. Jagabandhu Sahoo,Sr.Adv. & Ms. Kajal Sahoo

For Opp. Party : Mr. Susanta Kumar Pradhan, ASC,(CT & GST Organisation)

JUDGMENT Date of Judgment : 08.12.2022

M. S. RAMAN, J.

1. The petitioner, a partnership firm, assailed Order dated 18.05.2017 in Second Appeal No.58(C) of 2015-16 passed by the learned Odisha Sales Tax Tribunal, Cuttack ('Tribunal') directed against Order dated 30.04.2015 of the Additional Commissioner of Sales Tax, (Appeal), South Zone, Berhampur in connection with Audit Assessment framed under Rule 12(3) of the Central Sales Tax (Odisha) Rules, 1957 (in short referred to as, "CST(O) Rules") by the Joint Commissioner of Sales Tax, Ganjam Range, Berhampur pertaining to tax periods from 01.06.2006 to 31.03.2010.

Questions of law framed by this Court:

2. While entertaining the revision petition, this Court vide Order dated 28th November, 2017 framed the following questions of law:

> *"A) Whether in view of production of 'H' Forms and export documents including Bill of Lading in respect of claim under Section 5(3) and 5(4) of the CST Act, it is lawful and proper for the First Appellate Authority to remand the matter to the Assessing Authority for fresh assessment?*
>
> *B) Whether in absence of appeal or cross objection by the State and in view of Circular dated 20.04.2015 of the Commissioner of Commercial Taxes, Odisha the learned Tribunal is justified to render findings for reconsideration on the issue of imposition of penalty under Section 12(3)(g) of the CST(O) Rules, 1957?"*

Facts of the case:

3. Tax Audit being undertaken, on the basis of Audit Visit Report submitted under Rule 10 of the Central Sales Tax (Odisha) Rules, 1957 (for brevity referred to as "CST(O) Rules"), Assessment was framed under Rule 12(3) vide Order dated 27.02.2013 raising a demand to the tune of Rs.29,91,752/- (tax of Rs.9,97,250.73 + penalty of Rs.19,94,501.46) by the Joint Commissioner of Sales Tax, Ganjam Range, Berhampur (be called, "Assessing Authority") rejecting the claim of the petitioner-dealer for exemption from payment of Central sales tax under Section 5(3) of the Central Sales Tax Act, 1956 (herein after referred to as "CST Act") on account of inter-State sale in the course of export.

3.1. The case of the petitioner-dealer is that Indian exporters having placed order on it to supply goods, such as niger seed, gingelly seed and turmeric, pursuant to contract entered into/purchase order being received from the Foreign Buyer(s), the petitioner at the material period sold those goods in the course of inter-State trade or commerce and in turn received Certificate of Export in Form 'H' prescribed under Rule 12(10) of the Central Sales Tax (Registration and Turnover) Rules, 1957 (referred to as "CST (R&T) Rules"). Accordingly, the goods being sold in the course of export, as penultimate seller it claimed exemption under sub-section (3) on compliance of requirement under sub-section (4) of Section 5 of the CST Act.

3.2. On the contrary while disallowing such a claim of the petitioner, the Assessing Authority has observed as follows:

> *"*** The dealer claimed that the contract between the Indian Exporters with him and the contract between the Indian Exporter and foreign buyers formed an integrated activity in the course of export. So, all the sales effected by him to the Indian Exporters are exempted from payment of tax as per Section 5(3) of the CST Act. Here, the instant dealer-firm is not a direct exporter.* ***The Indian Exporters have purchased goods from the dealer-assessee in order to fulfill a contract with the foreign buyers.*** *The dealer-assessee was under no contractual obligation to the foreign buyers either directly or indirectly. The obligations of the dealer were to the Indian Exporters. The immediate and direct causeof the movement of goods and export was the contract between the*

Indian Exporter and foreign buyers. That was the contract which occasioned export and not the contract between the instant dealer and Indian Exporter. It is the only a contract which occasions the export of goods that will be entitled to exemption under Section 5(1) of the CST Act. Only and the only sale or purchase that is the direct and immediate cause of export of the goods outside the territory of India is the 'sale or purchase in course of export'. In this case, the sale between the Indian Exporters and the foreign buyers, being the direct and immediate cause of export was the 'sale in course of export'. The sale between M/s. General Traders, Berhampur and the Indian Exporters was a sale preceding the sale that caused export or a sale for the purpose of complying an order for export or for facilitating export. That was a sale for export. All such preceding sales in a chain of sales are sales for export.
***
So, the sales falling under Section 5(1) and 5(3) are now sales in course of export. This is subject to compliance of other conditions like furnishing of declaration in Form H and documents evidencing export as per contract.

Against the above sales, the dealer although submitted H Form but failed to produce the agreement copies or sale contracts or purchase order of the foreign buyer, copies of agreement made between the Indian Exporter and foreign buyer*. Since the dealer failed to comply the conditions of Section 5(3) of the CST Act, the export sale to the tune of Rs.30288489.50 is disallowed and treated as inter-State sale and taxed in appropriate rate of tax."*

3.3. Appeal being preferred under Section 9(2) of the CST Act read with Section 77 of the Odisha Value Added Tax Act, 2004, the Additional Commissioner of Sales Tax (Appeal), South Zone, Berhampur (be called, "Appellate Authority") observed as follows:

*"*** At the appeal hearing stage the dealerappellant appeared and furnished supporting documents like bill of lading, purchase orders towards claim of exemption of export sale amounting to Rs.2,98,93,489.50 but failed to produce the agreement copies or sale contract or purchase order of the foreign buyer with the Indian Exporter for want of which the learned AO disallowed the claim of exemption of sale invoking contravention of provision of Section 5(3) of the CST Act. Further, the dealer-appellant could not be able to furnish Form H for the transaction (niger seeds) of Rs.3,95,000/-exported through Dinesh Kumar Toshniwal, Vizianagaram during the period 2007-08. In absence of declaration Form H the claim of exemption of export sale is not considered and the same is taxed at the appropriate rate.* ***Further the dealer-appellant has been allowed sufficient opportunity for production of copies of agreement between Indian Exporter and Foreign Buyer but the dealer-appellant could not be able to produce such copies of agreement****. Hence, in absence of supporting documentary evidences the transaction of export sale invoking provision of Section 5(3) of the CST Act could not be considered as true and correct and the above transaction is treated as deemed sale under the CST Act and is taxed at appropriate rate."*

Observing thus, the Appellate Authority confirmed the disallowance of claim of the petitioner for exemption in respect of transactions of sale in the course of export under Section 5(3) of the CST Act.

3.4. The petitioner-M/s. General Traders carried the matter further before the Tribunal in Second Appeal invoking provisions of Section 9(2) of the CST Act, 1956 read with Section 78 of the Odisha Value Added Tax Act, 2004. The learned Tribunal affirmed the Appellate Order by observing thus:

> *"6. *** in the instant case the additional demand has been raised due to non-filing of C declaration forms and due to disallowance of claim of exempted sale to the tune of Rs.3,02,88,489.50 and Rs.3,95,000.00 towards export of niger seeds since in the first case, the copies of purchase order of the foreign buyer/sale contract/agreement copies could be produced and in the second case no H form could be produced. *** Moreover, against the export sale of Rs.3,02,88,489.50 the dealer could not produce purchase order of the foreign buyer/sale contgract/agreement copies for which the said amount was not allowed as exempted sale as contemplated under Section 5(3) of the CST Act, though H forms have been submitted. In such type of transaction, we would like to say that the learned STO is to see as to whether the goods involved in the transactions referredto above have really moved out of the territory of India after thorough verification of the connected documents to be produced at the time of assessment afresh. In case the dealer is able to convince the learned STO that there wasactually export of materials and the goods have crossed the border of Indian territory then, the exemption as contemplated under Section 5(3) of the CST Act to be allowed as deduction while arriving at the NTO of the dealer appellant for the calculation of its final tax liability."*

3.5. Since much stress was laid by all the fact-finding authorities on the production of copy of contract between the Foreign Buyer and the Indian Exporter, contending that, that is not the requirement under the statute, the petitioner has approached this Court by way of the present Sales Tax Revision under Section 9(2) of the CST Act read with Section 80 of the Odisha Value Added Tax Act.

The contentions of the counsel for the petitioner:

4. Sri Jagabandhu Sahoo, Senior Advocate appearing with Ms. Kajal Sahoo, Advocate for the petitioner submitted that there being no dispute that the petitioner had produced before the authorities necessary Certificate of Export in Form H supported by copies of bill of lading and purchase orders, said documents were sufficient evidence to say that the goods supplied to the Indian Exporters were sent outside the territory of India. Mere nonproduction of copy of agreement between Indian Exporter and Foreign Buyer could not have been the ground to disbelieve the penultimate sale in course of export falling within ambit of subsections (3) and (4) of Section 5 of the CST Act. When the Certificate of Export 'H', prescribed under Rule 12(10), issued by the exporter as per requirement of provisions contained in subsections (3) and (4) of Section 5 was produced supported by documents, like purchase order and bill of lading, before the authorities, in absence of defects being pointed out in such certificate(s), there was no occasion for the Revenue Authorities to discard statutory form and doubt the veracity of the transactions particularly when the exporter filled up said form by disclosing inter alia agreement number/purchase order number and furnished information regarding bill of lading indicating transport of goods to outside the territory of India.

4.1. It is next urged by Sri Jagabandhu Sahoo, learned Senior Advocate for the petitioner that the First Appellate Authority being satisfied that the Assessment in question was framed on the basis of observations made in the Audit Visit Report after thorough examination of books of account and other documents. The demand is raised on account of non-production of copy of agreement between the Indian

Exporter and the Foreign Buyer, though Certificate of Export in Form 'H' was submitted supported by necessary documents to justify claim of exemption under Section 5(3) of the CST Act and non-furnishing of certain declaration in Form C in respect of certain transactions of interState sale in order to avail benefit of concessional rate of tax in terms of Section 8 of the said Act. Having applied his mind and finding that there was no contumacious conduct on the part of the petitioner in non-production of aforesaid documents, the Appellate Authority had correctly deleted the penalty as imposed by the Assessing Authority under Rule 12(3)(g) of the CST (O) Rules. The learned Senior Counsel submitted that non-furnishing of declaration forms does not attract imposition of penalty. He would further submit that the Commissioner of Commercial Taxes, Odisha, issued a Circular bearing No.42-III(I)38/09/CT, dated 20thApril, 2015, by referring to Gujarat Ambuja Cement Ltd. and Anr. Vrs. Assessing Authority-cum-Assistant Excise and Taxation Commissioner and Ors., (2000) 118 STC 315 (HP); Fosroc Chemicals (India) Pvt. Ltd. Vrs. The State of Karnataka, (2015)79 VST 25 (Karn); M/s. Lalbaba Roller Flour Mills, Nayabazar, Cuttack Vrs. State of Odisha, S.A. No.87(C) of 2012-13, disposed of vide Order dated 3rd April, 2014 of the Odisha Sales Tax Tribunal and Gajalaxmi Iron Works, Industrial Estate, Kalunga, Rourkela Vrs. State of Odisha, S.A. No.53 of 2011-12, disposed of vide Order dated 18th December, 2013 of the Odisha Sales Tax Tribunal instructed the field formation not to impose penalty in cases of bona fide non-submission of declaration forms. As the Sales Tax Department is not keen in enforcing penalty imposed under Rule 12(3)(g) of the CST (O) Rules on account of non-submission of declaration form, the learned Odisha Sales Tax Tribunal should not have interfered with the First Appellate Order.

Contention of the opponent-Revenue:

5. *Per contra*, Sri Susanta Kumar Pradhan, learned Additional Standing Counsel submitted that mere filing of Form 'H' would not suffice to allow exemption from payment of Central sales tax under Section 5(3). The claimant is obligated to produce documents to the satisfaction of the authorities for the said purpose to rule out possibility of erroneous claims being made by the penultimate seller. All the authorities including the learned Odisha Sales Tax Tribunal were satisfied that there is requirement of production of copy of agreement between the Indian Exporter and the Foreign Buyer as the same would not only indicate that the sale by the petitioner-penultimate seller to the exporter is in order to comply with the terms of "agreement or order for such export", but also would show that the goods so supplied by the petitioner to the exporter have, in fact, been move out of the territory of India. This facilitates ascertainment of the quantum of goods sold in the course of inter-State trade or commerce by way of export so as to enable the Assessing Authority to consider exemption under Section 5(3) of the CST Act.

5.1. With regard to imposition of penalty under Rule 12(3)(g) of the CST (O) Rules, Sri Susanta Kumar Pradhan, learned Additional Standing Counsel for the

CT&GST Organisation would submit that Circulars being issued for guidance, the quasijudicial authority like Odisha Sales Tax Tribunal is not bound by such circular issued by the Commissioner of Commercial Taxes. He submitted that Rule 12(3)(g) of the CST (O) Rules mandatesimposition of penalty at the rate of twice the amount of tax assessed. The learned Tribunal did not commit any error in law while setting aside the Appellate Order and remanding the matter to the Assessing Authority for fresh consideration in view of interpretation put forth by this Court while considering parimateria provision contained in Section 42(5) of the Odisha Value Added Tax Act, 2004, in the cases of National Aluminium Company Ltd. Vrs. Deputy Commissioner of Commercial Taxes,Bhubaneswar-III Circle, Bhubaneswar, 2021 (I) OLR 828 and Jindal Stainless Ltd. Vrs. State of Odisha, (2012) 54 VST 1 (Ori).Said decision has also been subsequently followed and discussed in the case of State of Odisha Vrs. ChandrakantaJayantilal, Cuttack, STREV No.69 of 2012, vide Order dated 05.07.2022.

Discussion regarding question No. A:

6. From the pleadings and arguments advanced by respective parties, it transpires that the claim of exemption of penultimate sale in course of export is denied by the Assessing Authority which is affirmed by the First Appellate Authority as also the Odisha Sales Tax Tribunal on the ground of non-production of copy of agreement between the Indian Exporter and the Foreign Buyer.

6.1. The First Appellate Authority clearly outlined the dispute as follows:

> *"*** At the Appeal hearing stage the dealer appellant appeared and furnished supportingdocuments like bill of lading, purchase orders towards claim of exemption of export sale amounting to Rs.2,98,93,489.50 but failed to produce the agreement copies or sale contract or purchase order of the foreign buyer with the Indian Exporter for want of which the learned AO disallowed the claim of exemption of sale invoking contravention of provision of Section 5(3) of the CST Act. ***"*

6.2. On consideration of rival contentions, it is, thus, necessary to examine as to whether in spite of the fact that the petitionerpenultimate seller furnishes Certificate of Export in Form 'H' as prescribed under Rule 12(10) of the CST (R&T) Rules along with supporting documents, like purchase orders and bill of lading, before the appropriate authorities, there is requirement to submit copy of agreement between the Indian Exporter and the Foreign Buyer in order to claim exemption under sub-section (3) read with sub-section (4) of Section 5.

6.3. Chapter-II of the CST Act deals with formulation of principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of import or export. Section 5 thereof deals with "when is a sale or purchase of goods said to take place in the course of import or export". While sub-section (1) of Section 5 speaks about direct export and claim of exemption by the exporter; sub-section (3) as inserted with

effect from 01.04.1976 by virtue of Central Sales Tax (Amendment) Act, 1976, entitles the penultimate seller to claim exemption in respect of sale of goods to the exporter. To avoid difficulties for claiming exemption under sub-section (3), sub-section (4) has been inserted vide Finance Act, 2005.

6.4. The provisions contained in sub-sections (3) and (4) of Section 5 of CST Act read as follows:

> *"(3) Notwithstanding anything contained in subsection (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export.*
>
> *(4) The provisions of sub-section (3) shall not apply to any sale or purchase of goods unless the dealer selling the goods furnishes to the prescribed authority in the prescribed manner a declaration duly filled and signed by the exporter to whom the goods are sold in a prescribed form obtained from the prescribed authority."*

6.5. The term "prescribed" has been defined under Section 2(e) of the CST Act to mean "prescribed by rules made under this Act".

6.6. Section 13(1) thereof empowers the Central Government to frame rules *inter alia* providing for:

> *"(d) the form in which and the particulars to becontained in any declaration or certificate to be given under this Act, the State of origin of such form or certificate or declaration shall be produced or furnished."*

6.7. Rule 12(10) of the CST (R&T) Rules prescribes as follows:

> *"(10) (a) The declaration referred to in subsection (4) of Section 5 shall be in Form H and shall be furnished to the prescribed authority upto the time of assessment by the first assessing authority.*
>
> *(b) The provisions of the rules framed by the respective State Government under sub-sections (3), (4) and (5) of Section 13 relating to the authority from whom and the conditions subject to which any form of certificate in Form 'H' may be obtained, the manner in which such form shall be kept in custody and records relating thereto maintained and the manner in which any such forms may be used and any such certificate may be furnished in so far as they apply to declaration in Form 'C' prescribed under these rules shall mutatis mutandis apply to certificate in Form 'H'."*

6.8. The statutory Form 'H' as appended to CST (R&T) Rules is reproduced hereunder:

> *"Original*
> *The Central Sales Tax*
> *(Registration and Turnover)Rules, 1957.*
> *Form H*
> *Certificate of export*
> *[See Rule 12(10)]*

Serial No. _____
Name of the issuing State _____
Office of issue _____

Seal of the issuing authority

Date of Issue
Name and complete address of the exporter _____

Registration No. of the Exporter under the Central Sales Tax Act, 1956 if any.
To

_____
(Name and complete address of the seller)
Sales Tax registration number of the seller

(a) under the relevant State sales tax law
(b) under the Central Sales Tax Act, 1956

Certificate I: Certified that the goods (the particulars whereof have been specified in items (1) and (2) of the Schedule below) supplied in pursuance of our purchase order No. _____ dated _____ purchased from you as per Bill/Cash Memo/Challan No. _____ dt. _____ for Rs. _____ have been sold by me/us, in the course of export out of the territory of India, as per details given in Item (3) to (6) of the said Schedule, and that the said goods were purchased from you by me/us after, and for the purpose of complying with, the agreement or order No. _____ dated _____ for or in relation to such export. Certificate II: It is further certified that non-liability to tax under the Central Sales Act, 1956, in respect of goods referred to in Certificate I has not been claimed from any other person and that no other certificate for such non-liability has been issued to any other person in India in respect of those goods.

Certificate III: It is further certified that in case the goods covered by this certificate are reimported into India by me/us after their export, I/we undertake to inform the sales tax authority of the person to whom this certificate has been supplied, about the fact of such reimport within a period of one month from the date of reimport of the said goods into India.

THE SCHEDULE

A. Particulars of goods
(1) Description of goods _____
(2) Quantity of goods _____
B. Details regarding export

(3) Name of airport, seaport or land customs station through which the goods have been exported. ____

(4) Name of the airlines/ship/railway/goods vehicle or other means of transport through which the export has taken place._____

(5) Number and date of air consignment note/bill of lading/railway receipt or goods vehicle record or postal receipt or any other document in proof of export of goods across the customs frontier of India (Certified copy of such air consignment note/bill of lading/railway receipt/goods vehicle record/postal receipt/other document to be enclosed)

(6) Description, quantity/weight and value of the goods exported under the document referred to in item (5) above _____

VERIFICATION

The above statements are true to the best of my knowledge and belief and nothing has been concealed therefrom.

Signature with date.
(Name of the person signing the certificate)
(Status of the person signing the certificate in relation to the exporter).
Note: To be furnished to the prescribed authority in accordance with the rules made by the State Government under Section 13."

6.9. Conjoint reading of aforesaid provisions makes it clear that exemption from payment of Central sales tax on the transactions falling under sub-section (3) is available to the selling dealer on compliance of terms of sub-section (4) of Section 5 of the CST Act read with Rule 12(10). In other words, in order to avail benefit of exemption from payment of Central sales tax on transaction of sale to the exporter under sub-section (3) of Section 5, sub-section (4) *ibid*. read with Rule 12(10) of CST (R&T) Rules explicitly requires furnishing of a declaration in Form 'H' duly filled and signed by the exporter to whom goods are sold. Minute scrutiny of Form 'H' makes it clear that the exporter who declares the goods sold by the penultimate seller has been exported out of the territory of India and fills in the information, like purchase order number with date, challan number with date. The exporter is obliged to fill in the agreement number and date entered into between the exporter and the foreign buyer. As per Certificate-I appended to Form H, the exporter certifies that the very goods purchased from the penultimate seller is for the purpose of complying with the agreement for or in relation to such export. Descriptions as regards goods and details of transport are required to be furnished by the exporter as required under the Schedule appended to said Form H. The exporter is also required to supply copy of consignment note/bill of lading/railway receipt/goods vehicle record/postal receipt, etc. Nothing in the said Form 'H' is required to be done by the penultimate selling dealer. The penultimate selling dealer is only required to furnish the Certificate of Export in Form 'H' as received from the exporter to the prescribed authority with the copies of documents as specified in said Form 'H'. Neither the statute nor the rules or the contents of Certificate of Export in Form 'H' requires the penultimate selling dealer to furnish *"the agreement copies or sale contract or purchase order of the foreign buyer with the Indian Exporter"*.

6.10. Apt here to refer to the decision rendered by the Madras High Court rendered in the case of *V. Win Garments Vrs. Additional Deputy Commercial Tax Officer, Central-I Assessment Circle, Tirupur, (2011) 42 VST 330 (Mad).* In the said case it has been observed as follows:

"4. According to the learned counsel for the petitioner, though the petitioner has not produced the agreement with foreign buyers, the petitioner has filed Form-H and other documents in support of his claim and the order of the assessing authority without insisting those documents and by considering the production of agreement with foreign buyers, is unfair and arbitrary and is bad in law. This Court finds considerable force in such argument

advanced on the side of the petitioner. ***What is required on the part of the petitioner is to prove the factum of the transaction and once he is able to do so with sufficient and satisfactory documents, the value of the same is exempted from tax liability and no rule lays it mandatory to produce the agreement with the foreign buyers****. That being so, the failure on the part of the assessing authority to consider the documents already produced by the petitioner and to pass appropriate orders in the light of the same amounts to non-application of mind and the impugned order, which is the outcome of the same cannot be legally allowed to stand. The learned counsel for the petitioner has also in the course of hearing, produced the copy of the order passed by our High Court dated 30.08.2004 in W.P. No. 24354 of 2004 made in M/S. Rolls Appliances (P) Limited Vrs. The Commercial Tax Officer and order dated 05.04.2004 in W.A. No.4 of 2003 in M/s. South India Hosiery Manufacturers Association Vrs. The State of Tamil Nadu and others. The perusal of the orders reveal that identical issue was raised in both the matters before the Hon'ble Division Bench and the learned Single Judge and our High Court has in both the cases considering the submission made by the petitioners therein, set aside the identical impugned orders and remanded the matter to the assessing authority with liberty given to the petitioner therein, to produce sufficient materials to convince the assessing authority about the genuineness of the claim made by the petitioner. In my considered view, the petitioner herein, is also entitled to get such opportunity as such the impugned order passed by the appellate authority is hence to enable the petitioners to avail such opportunity, set aside."*

6.11. It is apposite to refer to the Judgment of this Court in the case of *Tilakraj Mediratta Vrs. State of Odisha and Others, (1992) 86 STC 453 (Ori)* rendered in the context of declaration forms visà-vis claim of deduction from gross turnover while computing taxable turnover under the Odisha Sales Tax Act, 1947. In the said case selling dealer in order to be entitled to the deduction was required to produce at the time of assessment the declaration in Form IA, which he was required to obtain from the purchasing dealer. This Court held,

"6. Under Section 5(2)(A)(a)(i) the sale of any goods notified from time to time as tax-free under section 6 is deducted from the gross turnover of a selling dealer for the purpose of computation of taxable turnover. In other words, a selling dealer who produces evidence to show that it sold goods covered by notification issued under Section 6 and the conditions and exceptions are complied with, is entitled to a deduction while its taxable turnover is computed. The selling dealer in order to be entitled to the deduction has to produce at the time of assessment the declaration form I-A which it has obtained from the purchasing dealer. In the instant case, there is no dispute that the purchasing dealer had issued form I-A to the petitioner. It is also not disputed that the certification of the unit is in terms of the requirement of entry 26-A of the list of exempted goods. According to the department, if the goods have not been utilised for the purpose indicated in the declarations, deduction to the selling dealer is not to be allowed. In our view, the stand is fallacious. It is not for the selling dealer to go after the purchasing dealer to find out as to in what manner the latter utilizes the goods which it has purchased on the strength of the declaration forms in order to be entitled to the deduction. Such a requirement would fasten an impossible burden on the selling dealer. The question, however, has rightly been posed by the learned counsel for the department that if there is misuse, on whom the department shall lay its hands. It is the purchasing dealer who is getting exemption on fulfilment of certain conditions. Therefore, if goods purchased on the basis of the declaration are put to a different use, the benefit of exemption is to be denied to it. The selling dealer cannot be faulted if there is any diversion or change of user. In this connection, the fifth proviso to sub-section (1) of section 5 of the Act is relevant, and has application.

> *7.Therefore, in our view the authorities were not correct in taxing the petitioner for any alleged change in user of the goods purchased by issue of Form IA by the purchasing dealer. It is open to the department to appropriately levy tax on opposite party No.7 if it is established that the goods purchased by it on the strength of Form IA was put to a different use or that there has been any contravention of the declaration."*

6.12. The aforesaid decision was referred to larger Bench of this Court in the case of *Manisha Enterprises Vrs. State of Odisha, OJC No.13383 of 1999* to find out whether the view expressed in Tilakraj Mediratta (supra) is in conflict with another division Bench Judgment of this Court rendered in the case of *State of Odisha Vrs. Sahoo Traders, SJC No.27 of 1990, disposed of on 22.12.1994. Vide Manisha Enterprises &Ors. Vrs. State of Odisha &Ors., 2015 (I) ILR-CUT 637* this Court in Full Bench (3-Judges) held,

> *"13. Taking into consideration the provisions of the Act, as contained in Section 5(2)(A)(a)(i) and Section 5(2)(A)(a)(ii) and decisions in the case of State of Odisha Vrs. M/s. Sahoo Traders (supra) and Tilakraj Mediratta Vrs. State of Odisha, (supra), we are of the considered view that there is no conflict of opinion in the decisions rendered by this Court in both the aforesaid cases, i.e., State of Odisha Vrs. M/s. Sahoo Traders (SJC No.27 of 1990, disposed of on 22.12.1994) and TilakrajMedirattaVrs. State of Odisha, (1992) 86 STC 453 (Ori)."*

6.13. While answering the question "Whether in the facts and circumstances of the case, the Tribunal was correct in rejecting the declarations in Form-IV, which were furnished by the purchasing dealers to the Petitioner, for purchase of logs, as manufacturers", this Court in the case of *Odisha Forest Development Corporation Ltd. Vrs. State of Odisha, STREV 74 of 2004, vide Judgment dated 22.03.2022*, held as follows:

> *"9. *** As far as issue (i) is concerned, the Court notes that in the present case nothing has been brought on record to enable either the Tribunal or this Court to come to a conclusion that the saw mill manufacturers who purchased the logs of wood from the Petitioner did not subject the logs to manufacturing or processing. That was an enquiry that could have been undertaken by the Assessing Officer (AO)/Sales Tax Officer (STO). It was not incumbent on the selling dealer to enquire whether the saw mill manufacturer furnishing a declaration in Form IV was or was not entitled to avail of the concessional rate of sales tax.*
>
> *10. *** As explained by this Court in Tilakraj Mediratta (supra) "It is not for the selling dealer to go after the purchasing dealer to find out as to in what manner the latter utilizes the goods which it has purchased on the strength of the declaration form in order to be entitled to deduction. Such requirement would place on an impossible burden on the selling dealer". To the same effect is the decision in M/s. Bharat Petroleum Corporation Ltd. (supra) [State of Odisha Vrs. M/s. Bharat Petroleum Corporation Ltd., 93 (2002) CLT 364]."*

6.14. In yet another decision being *Kalinga Timber, Jagatpur, Cuttack Vrs. State of Odisha represented by the Commissioner of Sales Tax, STREV No.63 of 2011, vide Judgment dated 05.07.2022,* it has been stated as follows:

> *"9. Applying the ratio of the above decision [TilakrajMedirattaVrs. State of Odisha, (1992) 86 STC 453 (Ori)] to the case on hand, it is seen that the declaration in Form IV does not disclose the intention of the purchasing dealer to use the size goods purchased as 'packing*

materials'. Consequently, the selling dealer cannot be saddled with any liability of tax. If indeed, the Department finds that the purchasing dealer has used the purchased goods for the purpose other than that disclosed in the declaration form, it would be open to the Department to proceed against the purchasing dealer. It is, therefore, not justified on the part of the Department to pass on that liability to the selling dealer."

6.15. With regard to the terms "agreement" and "order" contained in Section 5(3) of the CST Act, the Hon'ble Supreme Court of India in *Consolidated Coffee Ltd. Vrs. Coffee Board, Bangalore, (1980) 46 STC 164 = AIR 1980 SC 1468 = (1980) 3 SCC 358* made certain pertinent observations:

"The aforesaid provision [Section 5(1) of the CST Act] was examined by this Court in two leading cases, namely, Coffee Board Bangalore Vrs. Joint Commercial Tax Officer, Madras &Anr., (1970) 25 STC 528 (SC) and Mohd. Serajuddin etc. Vrs. State of Orissa, (1975) 36 STC 136 (SC) and a certain interpretation had been accorded by this Court to the expression 'in the course of export' and according to these decisions the last sale, immediately preceding the sale occasioning the export of goods out of India (hereinafter called the 'penultimate sale'), however closely related to the final export, was held not to be the course of export but only for export and hence liable to tax and according to the petitioners it was with a view to remove the difficulties caused by these and other similar decisions that the Parliament enacted the new sub-section (3) of Section 5 and added a proviso to Section 6(1) by the Amending Act (103 of 1976).

***

It is thus clear to us that Section 5(3) formulates a principle of general applicability in regard to all penultimate sales provided they satisfy the specified conditions mentioned therein *and there is no question of the said provision creating a legal fiction as has been contended for by counsel. The contention, therefore, that Section 5(3) is beyond the power or authority of Article 286(2) and, therefore, ultra vires, must be rejected.*

***

The material words which prescribe the two conditions on satisfying which the penultimate sale is to be regarded as a sale in the course of export are: 'If such last sale or purchase (meaning the penultimate sale or purchase) took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export.' It is true that Parliament has not said 'the agreement or order for or in relation to such sale occasioning the export', but has used the phrase 'the agreement or order for or in relation to such export.' But in our view two aspects emerge very clearly on a close scrutiny of this phrase which by implication show that the 'agreement' spoken of there refers to the agreement with a foreign buyer and not an agreement with a local party containing a covenant to export.

***

Applying this rule of construction [noscitur a sociis] it becomes clear that 'the agreement' occurring in the phrase must mean the agreement with a foreign buyer and not the agreement with a local party containing a covenant to export. Secondly and more importantly, the user of the definite article 'the' before the word 'agreement' is, in our view, very significant. Parliament has not said 'an agreement' or 'any agreement' for or in relation to such export and in the context the expression 'the agreement' would refer to that agreement which is implicit in the sale occasioning the export. Between the two sales (the penultimate and the final) spoken of in the earlier part of the sub-section ordinarily it is the final sale that would be connected with the export, and, ***therefore, the expression 'the agreement' for export must refer to that agreement which is implicit in the sale that occasions the export.*** *The user of the definite article 'the', therefore, clearly suggests that the agreement spoken of must be the agreement with a foreign buyer. As a matter of pure construction it appears to us clear,*

therefore, that by necessary implication the expression 'the agreement' occurring in the relevant phrase means or refers to the agreement with a foreign buyer and not an agreement or any agreement with a local party containing the covenant to export.

***

Two things become clear from this Statement; first, Mohd. Serajuddin's decision (supra) [Mohd. SerajuddinVrs. State of Orissa, (1975) 2 SCC 47] is specifically referred to as necessitating the amendment and secondly, penultimate sales made by small and medium scale manufacturers to an export canalizing agency or private export house to enable the latter to export those goods in compliance with existing contracts or orders are regarded as inextricably connected with the export of the goods and hence earmarked for conferral of the benefit of the exemption. But here again, 'existing contract' with whom is not clarified. In other words, on this crucial point the Statement is silent and does not throw light on whether the existing contract should be with a foreign buyer or will include any agreement with a local party containing a covenant to export. Therefore, the question will again depend upon proper construction and, as we have said above, in the matter of construction the two aspects discussed earlier show that by necessary implication 'the agreement' spoken of by Section 5(3)refers to the agreement with a foreign buyer.

***

However, in support of his construction counsel for the petitioners pressed into service two aspects arising from the Statement of Objects and Reasons, namely, (a) that the exemption was intended to be extended even to small and medium scale manufacturers who manufacture goods for foreign market but have to depend upon a canalising agency or private export house for the export of their goods and (b) that the object of granting the exemption was to promote our exports in fiercely competitive international markets and, according to counsel, both these objectives would be frustrated if the narrow construction was placed on the expression 'the agreement as meaning the agreement with a foreign buyer and that the construction suggested by him would carry out the objectives. ***It is true that the benefit of the exemption was intended to be extended to small and medium scale manufacturers desirous of exporting their goods but the requirement of the new provision is not that they must procure or have with them a foreign buyer's contract but the requirement is that before they complete the sale of their goods to the canalizing*** **agency of** ***the private export house there must be in existence a foreign buyer's contract to implement which they should have sold their goods to such agency or export house. In the nature of things such manufacturers who have no expertise of export trade are not expected to have a foreign buyer's contract with them and it would be sufficient compliance of the provision if the canalising agency or the export house has with it the foreign buyer's contract. It would, therefore, be incorrect to say that the benefit of the exemption depends upon the fortuitous circumstance of a foreign buyer's contract being available with such manufacturer when he sells his product to the agency or the export house.*** *No hardship as is sought to be suggested is involved and we do not agree that by the construction which we are inclined to place on the expression 'the agreement' occurring in Section 5(3) the small or medium scale manufacturers would be deprived of the benefit of the exemption. In fact, the construction which we are inclined to accept would be in consonance with the trade practice obtaining in export trade, namely, that normally the export activity commences with securing or obtaining an export contract or a firm order from a foreign buyer as the first step towards the ultimate export [vide: observations of this Court in State of Mysore Vrs. The Mysore Spg. and Mfg. Co. Ltd., (1958) 9 STC 190 (SC) where obtaining a firm order from overseas buyer is described the first out of nine steps enumerated in the entire procedure for export]. As regards the other aspect it is clear to us that two public interests are involved; promotion of the exports of the country is one public interest while augmentation of the States' revenues through sales tax is the other and it is obvious that if the liberal construction, as suggested by*

the counsel for the petitioner, is accepted the former public interest will undoubtedly be served while the latter will greatly suffer and if the narrow construction is accepted the latter public interest will be served and the former will suffer. It is difficult to say that the Parliament intended to prefer one and sacrifice the other. In fact the granting of exemption to penultimate sales was obviously with a view to promote the exports but limiting the exemption to certain types of penultimate sales that satisfy the two specified conditions displays an anxiety not to diminish the States' revenues beyond a certain limit. The section n any case gives no indication that one public interest is to be preferred to the other and therefore, in our view, the matter must again depend upon the proper construction of the language employed. On construction we are of the view that by implication the expression 'the agreement' occurring in Section 5(3) refers to the agreement with a foreign buyer."

6.16. The 5-Judge Constitution Bench of the Hon'ble Supreme Court of India in the case of *State of Karnataka Vrs. Azad Coach Builders Pvt. Ltd. and Anr., (2010) 9 SCC 524* laid down the principles in respect of entitlement to claim exemption under Section 5(3) of the CST Act, which are as follows:

"26. When we analyse all these decisions in the light of the Statement of Objects and Reasons of the amending Act 103 of 1976 and on the interpretation placed on Section 5(3) of the CST Act, the following principles emerge:

i. To constitute a sale in the course of export there must be an intention on the part of both the buyer and the seller to export.

ii. There must be obligation to export, and there must be an actual export.

iii. The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export.

iv. To occasion export there must exist such a bond between the contract of sale and the actual exportation, that each link is inextricably connected with the one immediately preceding it, without which a transaction sale cannot be called a sale in the course of export of goods out of the territory of India.

27. The phrase "sale in the course of export" comprises in itself three essentials:

(i) that there must be a sale;

(ii) that goods must actually be exported;
and

(iii) that the sale must be a part and parcel of the export.

The word "occasion" is used as a verb and means "to cause" or "to be the immediate cause of". Therefore, the words "occasioning the export" mean the factors, which were the immediate cause of export. The words "to comply with the agreement or order" mean all transactions which are inextricably linked with the agreement or order occasioning that export.The expression "in relation to"are words of comprehensiveness, which might both have a direct significance as well as an indirect significance, depending on the context in which it is used and they are not words of restrictive content and ought not be so construed. Therefore, the test to be applied is, whether there is an inseverable link between the local sale or purchase and export and if it is clear that the local sale or purchase between the parties is inextricably linked with the export of the goods, then a claim under Section 5(3) for exemption from State sales tax is justified, in which case, the same goods theory has no application.

***

> *29. We may also indicate that the burden is entirely on the assessee to establish the link in transactions relating to sale or purchase of goods and to establish that the penultimate sale is inextricably connected with the export of goods by the exporter to the foreign buyer, which in this case the assessee has succeeded in establishing."*

6.17. As is revealed from the orders of the authorities in the instant case it is not in dispute that Certificate of Export in Form 'H' as issued to the petitioner-penultimate seller is in order and free from defect. This indicates that the exporter has supplied information with regard to date of agreement with the foreign buyer or the date of purchase order placed by the foreign buyer. Said form also contains details of transport and bill of lading. It is recorded as a matter of fact by the authorities that the petitioner produced purchase order and bill of lading for verification of the authorities. In view of provisions of the statute and the decisions referred to above, this Court is of the considered opinion that the petitioner has discharged its burden in the instant case and the authorities could very well have ascertained from the details mentioned in the Certificate of Export in Form 'H' supported by bill of lading and purchase order whether the agreement/purchase order preceded the procurement of goods by the Indian Exporter from the petitioner-penultimate seller. There being no adverse finding of any sort in this regard, this Court is, therefore, comes to conclusion that mere non-production of agreement entered into between the Indian Exporter and the Foreign Buyer would not invalidate the claim of the petitioner-penultimate seller for exemption under Section 5(3) of the CST Act. Furthermore, the authorities have not complained that the petitioner has not complied with the terms of sub-section (4) of Section 5. The disallowance of claim of the petitioner under Section 5(3) of the CST Act has been made by the Assessing Authority and confirmed by the Appellate Authority and the Odisha Sales Tax Tribunal was on account of non-production of copy of agreement between the Indian Exporter and the Foreign Buyer. In view of discussions made supra, there is no scope for this Court left but to overrule the view expressed by the authorities.Therefore, this Court is inclined to set aside the Order dated 18.05.2017 passed by the learned Odisha Sales Tax Tribunal in S.A. No.58(C) of 2015-16.

Discussion regarding question No. B:

7. As regards question No.(b), it may be relevant to notice Rule 12(3)(g) of the CST (O) Rules.

7.1. Rule 12(3)(g) as it stood during the relevant point of time is reproduced hereunder:

> *"Without prejudice to any interest or penalty that may have been levied or imposed under any of the provisions of the Act, an amount equal to twice the amount of tax assessed under clause (e) or (f) shall be imposed by way of penalty in respect of any assessment completed under the said clauses."*

7.2. It is seen that said provision is parimateria with the provision contained in Section 42(5) of the Odisha Value Added Tax Act. This Court is not in a position to

accept the argument of Sri Susanta Kumar Pradhan, learned Additional Standing Counsel that the decisions rendered earlier in the cases of *National Aluminium Company Ltd. Vrs. Deputy Commissioner of Commercial Taxes, Bhubaneswar-III Circle, Bhubaneswar, 2021 (I) OLR 828; Jindal Stainless Ltd. Vrs. State of Odisha, (2012) 54 VST 1 (Ori) and State of Odisha Vrs. Chandrakanta Jayantilal, Cuttack, STREV No.69 of 2012*, vide Order dated 05.07.2022 are applicable to the instant case, for the Commissioner of Commercial Taxes has issued Circular dated 20.04.2015. Said Circular has been issued by taking conscious decision by respecting Judgments of the Karnataka High Court, the Himachal Pradesh High Court as also the orders of the Odisha Sales Tax Tribunal. The circular being a benevolent one, this Court feels it expedient to impress upon all concerned to follow it in the circumstances enumerated therein.

7.3. It may be beneficial to reproduce the Circular dated 20.04.2015 issued by the Commissioner of Commercial Taxes, Odisha, which was circulated amongst Special Commissioner of Commercial Taxes (Enforcement), All Additional Commissioners (Head Office), Joint Commissioners of Commercial Taxes of all Territorial Ranges, All Deputy Commissioners of Commercial Taxes, Assistant Commissioners of Commercial Taxes, Commercial Tax Officers in charge of Circles, Assessment Units, Commercial Tax Officers in charge of Investigation Units and Commercial Tax Website for information and necessary action:

> *"Office of the Commissioner of Commercial Taxes:*
> *Odisha : Cuttack*
>
> *No. 42/III(I)38/09/CT* *dated, 20/04/2015*
>
> *CIRCULAR*
>
> *Sub: Non-levy of mandatory penalty on audit assessment under Central Sales Tax Act*
>
> *Madam/Sir,*
>
> *It has come to my notice that in many case the assessing authorities are imposing penalty equal to twice the amount of tax assessed in the assessments due to non-submission of declaration forms as per Rule 12(3)(g) of the CST (O) Rules, 1957. As per Rule 12(3)(a), (e) and (f) of the CST(O) Rules, 1957, the tax audit, if results in detection of suppression of purchases or sales or both, erroneous claims of deduction, evasion of tax or contravention of any provision of the Act affecting the tax liability of the dealer, the Assessing Authority (AA) is required to do assessment of the dealer and impose penalty equal to twice the amount of tax assessed in such assessment as per Rule 12(3)(g) of the CST(O) Rules, 1957.*
>
> *In cases of non-production of 'C' Forms, it has been noticed that there is no uniformity and consistency in the approach by the departmental officers as to whether penalty is leviable for non-production of 'C' Forms or not. It is seen that assessing officers and appellate officers are interpreting the provisions of the relevant statutes in a varying manner. This is leading to unnecessary litigation which is affecting the dealers adversely and also not bringing any revenues to the department when orders are set aside in the OSTT and in the higher judicial forums. In order to obviate such dissimilar approach by the different assessing authorities, in cases of non-production of 'C' Forms, there is a need to issue this circular based on the decisions of the Odisha Sales Tax Tribunal and the judiciary.*

As the provision of the Central Sales Tax Act, 1957 stands, in cases relate to non-production of 'C' Forms, appropriate tax is to be levied by applying the higher rate of tax as prescribed under Section 8(2) of the CST Act. In this context, it is to be mentioned here that the imposition of penalty at the time of audit assessment for non-submission of 'C' Forms may or may not be proper in all cases. The conditions precedents for imposition of penalty under Clause (g) of Rule 12(3) as provided in Clause (a) of the said Rule are:

1. *Suppression of purchase or sale or both;*
2. *Erroneous claim of exemption or deduction;*
3. *Evasion of tax;*
4. *Contravention of any provision of the Act affecting the tax liability of the dealer.*

It is required to determine whether failure to furnish declaration in Form 'C' against the bona fide claim of concessional rate of tax falls under the ambit of any of the offences stated above.

The Odisha Sales Tax Tribunal in the case of M/s Sri Lalbaba Roller Flour Mills, Nayabazar, Cuttack Vrs. State of Odisha in S.A. No. 87 (C) of 2012-13 dated 03.04.2014 have observed that

[to quote]

"The dealer respondent has been assessed under Rule 12(3) of the CST (O) Rules, 1957 and the disputed amount of penalty has been imposed on the amount of the tax assessed or the turnover not supported with declarations due to failure on the part of the dealer to furnish the required declaration in Form "C" and "H". Since there was no allegation of Audit visit report and the dealer respondent has produced the required books of accounts excepting the declarations as already cited above, which are beyond his control and also the facts remains that the dealer has not concealed / suppressed any part of its turnover and has also been assessed appropriately on the turnover not supported with the declarations, for which the levy of penalty u/r 12(3)(g) of the CST (O) Rules by the learned STO is not justified and hence is liable to be deleted."

Similarly in another judgment in the case of M/s Gajalaxmi Iron Works, Industrial Estate, Kalunga, Rourkela Vrs. State of Odisha in S.A. No. 53 of 2011-12 dated 18.12.2013, the Hon'ble Odisha Sales Tax Tribunal have given a clear finding along similar lines which reads as follows:

[to quote]

"On a careful reading of Rules 12(3)(g), I find that the imposition of penalty can be made in this provision only where there has been assessment under clause (e) or (f) of the said rules. On a reading of the aforesaid two rules I find that non-submission of "C" forms is not covered for assessment under the same rules. Therefore, considering submissions from both sides I come to a positive finding that the filing of "C" form is an optional condition to avail of concessional rate of tax and non-compliance of the same will only debar the dealer to get the exemption of tax benefit.

In the Judgment of Gujarat Ambuja Cement Ltd. and Another Vrs. Assessing Authority-cum-Assistant Excise and Taxation Commissioner and Others reported in (2000) 118 STC 315 (HP), it has been observed by theHon'ble High Court of Himachal Pradesh that for the provisions of the CST Act and Rules made thereunder, the question of filing of Form 'C' is envisaged only in order to avail of concessional or reduced rate of taxation. Such Forms are permitted to be filed not only before the finalization of the assessment and even at the appellate and revisional stages in cases where the availing of concession is dependent upon filing of C Forms the non-filing of 'C'Forms or the filing of defective 'C' Forms may only render the assessee liable to pay at the full rate of taxation without the benefit of

concessional rate in their favour, and the filing of 'C' Forms being optional and a mere condition to avail of the concessional rate contemplated in the statutory provision as such, the lapse, if any, cannot be considered to operate as a penal or forfeiture clause. It will be appropriate to quote the relevant portion:

'Case law are innumerable where the courts, including the apex Court, have held that even at the appellate stage the assessee may be allowed to file 'C' forms or file rectified and proper forms if those filed were found to be defective in any manner or for any reason. Further Sri Shanti Bhusan learned Senior Counsel is also right in contending that in a case where the availing of concession is dependent upon filing 'C' form, the non-filing of 'C' form or filing of defective C forms may only render the assessee liable to pay at the full rate of taxation without the benefit of concessional rate in their favour, and the filing of 'C' forms being optional and a mere condition to avail of the concessional rate contemplated in the statutory provision as such, the lapse, if any, cannot be considered to operate as a penal or forfeiture of clause. Being an optional benefit available, non availing of the same or non-compliance of such provision, in any event, cannot be held to be non-compliance with the provisions of the Act, Rules and notifications, envisaged in the notification dated January, 1996. Placing such interpretation would amount to being not merely perfidious, but vitiated by perversity of approach also."

Similarly the Hon'ble High court of Karnataka in case of Fosroc Chemicals (India) Pvt. Ltd. Vrs, the State of Karnataka in STRP Nos. 130, 136-168 & 169-170 of 2014 is of opinion that on a representation made by the purchaser the dealer company has sold the goods claiming concessional rate of tax. When the purchaser is unable to produce the 'C' Forms for any reason whatsoever, then the liability is cast on the assessee to pay tax under the State VAT Act. The said tax ought to have been paid on the date of sale, if there is a delay in payment of the said tax then there is automatic and mandatory interest in terms of State VAT Law.

On a plain reading it emerges that mere nonsubmission of declaration in Form 'C' against a bona fide transaction does not constitute an offence under rule 12(3)(a) of the CST(O) Rules so as to attract liability to imposition of penalty under Clause (g) of the said Rule. The filing of 'C' Form being optional and a mere condition to avail concessional rate, the lapse, if any, cannot be considered to operate as a penal clause. Being an optional benefit available to the dealer, the nonavailing of the same or non-compliance with such provision, in any event, cannot be held to be noncompliance with the provisions of the Act, Rules and notifications. It is not only that tax liability is affected but when tax liability is affected by contravention of any conditions mentioned in Rule 12(3)(a) of the CST(O) Rules, then only penalty can be imposed. On the other hand the submission of declaration forms is not strictly in the control of the assessee dealer, since it is to be obtained from the purchasing dealer and submit before the assessing authority to avail concessional rate of tax. Non-submission of Forms is not an incentive for the assessee as he has to pay higher rate of tax as prescribed under Section 8(2) of the CST Act. Hence, no intention can be attributed to the assessee for his failure to submit declaration in Form 'C'.

In view of the above facts it is required to impress upon all assessing/appeal authorities that non-filing of Form 'C' and 'F' Form for a bona fide transaction in terms of the provision of Clause (a) of the Rule 12(3) of the CST (O) Rules, will not attract penalty under Clause (g) of the said Rule in the absence of substantive provision for such imposition under the Section 9(2) of the CST Act or CST (R&T) Rules.

Commissioner of Commercial Taxes
Odisha, Cuttack Dated:
20/04/2015"

7.4. In view of the aforesaid Circular issued by the Commissioner of Commercial Taxes, instructing not to enforce penalty under Rule 12(3)(g) in the circumstance where there was non-filing of declaration forms in respect of bona fide transactions, particularly in absence of substantive provision for such imposition under Section 9(2) of the CST Act, this Court is of the considered opinion that the First Appellate Authority was justified in deleting penalty as imposed by the Assessing Authority while finalizing Audit Assessment.

7.5. In the First Appellate stage, the petitioner had been granted relief with respect to penalty for non-submission of statutory forms. There was neither cross-appeal nor cross-objection by the Revenue. It deserves to be noted, therefore, that in the appeal of the petitioner-dealer, the Odisha Sales Tax Tribunal was not legally correct to grant relief to the opponent-State of Odisha by remanding the matter to the Assessing Authority to take action as deemed proper "as per requirement of statute" qua matter of imposition of penalty.

7.6. This Court in the case of *Srinivas Traders Vrs. State of Odisha, (2015) 81 VST 80 = 2014 SCC On Line Ori 442* has opined as follows:

> *"In view of the above, we are of the considered opinion that in absence of any appeal or cross-appeal by the Revenue, the Tribunal ought not to travel beyond the dispute raised by the petitioner in its appeal. Therefore, the Tribunal should not have disallowed the relief granted to the petitioner by the First Appellate Authority by restoring the assessment order when the Revenue has no grievance against grant of such relief to the petitioner by the First Appellate Authority."*

Conclusion and decision:

8. For the discussions made in foregoing paragraphs and the reasons stated above, both the question Nos.A and B are answered in the negative in favour of the petitioner-dealer and against the State of Odisha-Revenue.

9. In the result, this Court sets aside the Order dated 18.06.2017 of the Tribunal and the corresponding orders of the First Appellate Authority and the Assessing Authority to the above extent and allows the sales tax revision petition but, in the circumstances, with no order as to costs.

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2023 (I) ILR - CUT- 339

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

W.A. NO. 163 OF 2017 (WITH BATCH)

M/s. SUSHREE AUTOMOTIVES .....Appellant

.V.

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

(A) ODISHA MOTOR VEHICLES TAXATION ACT, 1975 – Section 5 r/w communication dated 29th March, 2016 issued by the Transport Authority – Whether the order/communication is tenable in law in view of Section 5 of the OMVT Act, which is a charging Section as well as a machinery provision? – Held, Not tenable – The impugned instruction dated 29th March, 2016 changes the very basis of the above 'taxable event' as well as the portion of Section 5 of the OMVT Act. (Para 59)

(B) ODISHA MOTOR VEHICLES TAXATION ACT, 1975 – Whether State Transport Authority can issue instruction regarding collection of tax? – Held, No – The change sought to be brought out under the impugned instruction cannot be brought merely issuing an instruction under Rule 177 of the OMV Rules rather by way of amending the statute.

(Para 59.VI)

For Appellant : Mr. Samvit Mohanty, Mr.Jaydeep Pal,Mr. S.S.Mohanty, Mr.P.K.Dash,Mr. A.N.Das,Mr. D.K. Sahoo-1,Mr.Sidharta Ray, Mr. S.S. Rao,Mr.Avijit Pal, Mr. Nalinikanta Dash, Mr. Ramesh Agarwal, Mr.Deepak Kumar Mohapatra & A.N.Das,S.C.

For Respondents : Mr.Pravakar Behera, Standing Counsel.

JUDGMENT Date of Judgment:21.12.2022

BY THE BENCH

1. These appeals are directed against a judgment dated 18th May 2017 passed by the learned Single Judge in a batch of writ petitions rejecting the challenge made therein to the validity of a circular dated 29th March, 2016 issued by the Transport Commissioner-cum-Chairman, State Transport Authority (STA), whereby all the Regional Transport Officer (RTOs) were directed to collect tax from the dealers/manufacturers of motor vehicles on the basis of total number of vehicles possessed and registered during the entire year by the dealer. The learned Single Judge also negatived the challenge to the consequential demand notices issued by the various RTOs.

2. The learned Single Judge in the impugned judgment, which was common to the batch of writ petitions, chose to consider W.P.(C) No.5648 of 2017 by the Odisha Automobiles Dealers Association (OADA) as the lead petition. It was noted by the learned Single Judge, as far as the said petition was concerned, that OADA was a trust, the members of which were engaged in a business of hypothecation, leasing or hire-purchase of motor vehicles. As far as the Petitioners in the remaining writ petitions before the learned Single Judge were concerned, they were themselves dealers in motor vehicles and engaged in the business of selling of motor vehicles. It

is not in dispute that all of them answered the description of the expression 'dealer' within the meaning of Section 2 (8) of the Motor Vehicles Act, 1988 (MV Act).

Relevant provisions

3. As far as the MV Act is concerned, it is an Act made by Parliament and it is therefore a 'Central Act'. It has been enacted with reference to Entry-35 of List-III of the Schedule-VII of the Constitution which reads as under:

> "Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied."

4. In terms of Section 39 of the MV Act, registration of a motor vehicle is compulsory. Section 39 of the MV Act reads as under:

> "39. Necessity for registration
>
> No person shall drive any motor vehicle and no owner of a motor vehicle shall cause or permit the vehicle to be driven in any public place or in any other place unless the vehicle is registered in accordance with this Chapter and the certificate of registration of the vehicle has not been suspended or cancelled and the vehicle carries a registration mark displayed in the prescribed manner:
>
> Provided that nothing in this section shall apply to a motor vehicle in possession of a dealer subject to such conditions as may be prescribed by the Central Government."

5. As far as the proviso to Section 39 of the MV Act is concerned, reference is required to be made to Rule 33 of the Central Motor Vehicles Rules, 1989 (MV Rules) which reads as under:

> "33. Condition for exemption from registration.
>
> For the purpose of the proviso to section 39, a motor vehicle in the possession of a dealer or manufacturer of automobile or automobiles ancillaries or a test agency specified in rule 126 shall be exempted from the necessity of registration subject to the condition that he obtains a trade certificate from the registering authority having jurisdiction in the area in which the dealer or manufacturer of automobiles or automobile ancillaries or a test agency specified in rule 126 has his place of business in accordance with the provisions of this Chapter."

6. Rule 33 of the MV Rules, therefore, exempts "a dealer of automobiles or automobile ancillaries or a test agency in terms of Rules 126" from the necessity of registration, subject to obtaining "a trade certificate from the registering authority".

7. Rules 34 and 35 of the MV Rules provide the procedure for application, grant or renewal of the trade certificate (TC). The application has to be made in Form-16 appended to the MV Rules and has to be accompanied with an appropriate fee as specified in Rule 81 of the MV Rules.

8. The purposes for which a motor vehicle with a TC may be used is specified in Rule 41 of the MV Rules which reads as under:

> "41. Purposes for which motor vehicle with trade certificate may be used:-

> The holder of a trade certificate shall not use any vehicle in a public place under that certificate for any purpose other than the following:
>
> (a) for test, by or on behalf of the holder of a trade certificate during the course of, or after completion of, construction or repair; or
>
> (b) for proceeding to or returning from a weigh bridge for or after weighment, or to and from any place for its registration; or
>
> (c) for a reasonable trial or demonstration by or for the benefit of a prospective purchaser and for proceeding to or returning from the place where such person intends to keep it; or
>
> (d) for proceeding to or returning from the premises of the dealer or of the purchaser or of any other dealer for the purpose of delivery; or
>
> (e) for proceeding to or returning from a workshop with the objective of fitting a body to the vehicle or painting or for repairs; or
>
> (f) for proceeding to and returning from airport, railway station, wharf for or after being transported; or
>
> (g) for proceeding to or returning from an exhibition of motor vehicles or any place at which the vehicle is to be or has been offered for sale; or
>
> (h) for removing the vehicle after it has been taken possession of by or on behalf of the financier due to any default on the part of the other party under the provisions of an agreement of hire-purchase, lease or hypothecation."

9. It is not in dispute that all of the Appellants herein have applied for or obtained TC. Rule 39 of the MV Rules states that a trade registration mark that has been assigned in respect of each TC granted or renewed under Rule 35 of the MV Rules shall not be used upon more than one vehicle at a time or upon any vehicle other than a vehicle "*bona fide* in possession of the dealer or manufacturer of automobile or automobile ancillaries" in the course of his business or any type of vehicle other than the one for which the TC is issued. Rule 39 (2) requires a TC to be carried on a motor vehicle in a weatherproof circular folder and the trade registration mark is required to be exhibited in a conspicuous place in the vehicle. The contention of the Appellants has been that the same TC can be used in multiple types and multiple vehicles, subject to the condition that it cannot be used simultaneously on two vehicles.

10. The scheme of grant of a TC is a legislative acknowledgement of the fact that there is a time period between the manufacturer delivering to the dealer a certain number of vehicles meant for sale which then a dealer keeps in his possession at a given point in time, and the ultimate sale of such vehicles. When the dealer applies for a TC, he is expected to specify the number of vehicles for which he is applying for a TC. A perusal of the Form-16 appended to the MV Rules reveals that the dealer is expected to specify in column 5 "number of certificates required" and in column 6 "class of motor vehicles in respect of which certificate is required". A declaration is appended to such form where the applicant declares that the TC is required by him "*for bona fide trade purpose*".

11. Form 17 appended to the MV Rules sets out the form of the TC and which sets out the trade number assigned in respect of the certificate. This is the trade registration mark referred to in Rule 39 of the MV Rules.

12. The MV Act is obviously not an Act which levies any taxes on motor vehicles. The taxation statute as far as Odisha is concerned, is the Odisha Motor Vehicles Taxation Act, 1975 (OMVT Act). The OMVT Act is traceable to Entry-57 of List-II of Schedule-VII of the Constitution, which reads as follows:

> "Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of Entry-35 of List-III"

13. Section 3 of the OMVT Act states that there shall be levied on every motor vehicle used or kept for use within the State, a tax at the rate specified in Schedule-I and Schedule-III. Section 3-A talks of the levy of an additional tax which is applicable on every public service vehicle and goods carriage "used or kept of use within the State". Section 4 provides that the tax shall be paid in advance to the Taxing Officer "by the registered owner or person having possession or control of the vehicle." Section 4-A talks of one-time tax in respect of every vehicle of the description specified in Schedule I, "which is used personally or kept for personal use".

14. Section 5 of the OMVT Act specifically deals with a tax that shall be paid in advance at an annual rate "by a manufacturer or dealer in motor vehicles in respect of the vehicles in his possession in the course of his business as such manufacturer or dealer under the authorization of a TC granted under the MV Rules". Section 5 reads as under:

> *5. Tax payable by Manufacturers and Dealers*
>
> Notwithstanding the provisions contained in Sections 3, 3-A, 4 or 4-A, a tax at the annual rate specified below shall be paid in advance by a manufacturer or dealer in motor vehicles in respect of the vehicles in his possession in the course of his business as such manufacturer or dealer under the authorization of trade certificate granted under the Motor Vehicles Rules:

Description of motor vehicle	*Annual rate*
1. Motor Cycles-	
(a) where the total number of vehicles does not exceed ten	Rs.2000.00
(b) where such total number exceeds ten	Rs.2000.00 Plus Rs.200.00 for each vehicle exceeding ten
2. Motor vehicles other than Motor Cycles weighing not more than 3048 kilograms unladen-	
(a) where the total number of vehicles does not exceed ten	Rs.5,000.00

(b) where such total number exceeds ten.	Rs.5000.00 Rs.500.00 for each vehicle exceeding ten
3. Motor vehicles weighing more than 3048 kilograms unladen—	
(a) where the total number of vehicles does not exceed ten.	Rs. 10,000.00
(b) where such total number exceeds ten.	Rs. 10,000.00 Rs. 1000.00 for each vehicle exceeding ten.

15. It is thus seen that Section 5 is a separate taxing provision. The liability of tax which is to be paid at an annual rate and in advance falls on the manufacturer or dealer in motor vehicles. Such vehicles have to be in possession in the course of business of such manufacturer or dealer "under the authorization of TC". The tax is therefore specific to vehicles in possession of the manufacturer or dealer by virtue of the TC granted. The taxable event, which attracts tax liability under Section 5, is the possession of vehicles "under the authorization of TC".

16. Under the 2nd proviso to Rule 7 of the Odisha Motor Vehicles Taxation Rules, 1976 (OMVT Rules), dealers or manufacturers paying tax under Section 5 of the OMVT Act are to submit a declaration. The form of such declaration is given in Form-XIV appended to Odisha Motor Vehicles Rules, 1993 (OMV Rules), which reads as under:

"FORM XIV (See Rule 36(1))

Furnishing of information in respect of the vehicles sold by manufacturer or dealer

1. Name of the Dealer or Manufacturer (Trade Certificate Holder) with address.

2. Trade Certificate No.

3. Details of Sale (Category-wise)

Date of Sale	Sale letter No.	Name and address of purchaser	Engine No.	Chassis No.	Trade Regd. Mark allotted	RTO to whom endorsed for Registration
(1)	(2)	(3)	(4)	(5)	(6)	(7)

Signature of Trade Certificates Holder

Certificate

This is to certify that the maximum number of vehicles covered under the trade certificates has never been exceeded at any point of time

Signature of Trade Certificate Holder

17. The case of the Appellants is that the tax in terms of Section 5 of the OMVT Act has to be paid annually in advance for the maximum number of vehicles for which the TC has been issued to be kept in possession by them at any given point in time for the purposes specified in Rule 41 of the MV Rules. Therefore, this tax is in respect of the total number of such vehicles as specified in TC.

18. Rule 36 of the OMV Rules requires the manufacturer or dealer to furnish to the registering authority, information in Forms-XIII and XIV in respect of the vehicles received in stock and sold during every month by the 15th of the succeeding month. Form-XIV also contains a declaration that the dealer has not had in his possession vehicles exceeding the total number covered under the TC at any point in time.

Impugned communication

19. The problem that arose for the Appellants was the impugned communication dated 29th March, 2016, issued by the STA, which reads as under:

> "To,
>
> All Regional Transport Officers,
>
> Sir,
>
> It is observed that there is huge leakage of M.V revenue at dealer/manufacturer points while collecting tax for vehicle in their possession.
>
> As per the Rule-35 of CMVR-1989 an application for the grant/renewal of trade certificate shall be made in form-16 accompanied by appropriate fees as specified in Rule-81 by the dealer/manufacturer. Separate application shall be made for each class of vehicles as per rule 34 of CMV Rules. On receipt of application from the dealers, the grant/renewal of trade certificate is issued under Rule-35 of CMVR-1989 by the Registering Authority to the dealers/manufacturers.
>
> Accordingly under Rule-36 of OMV Rules 1993(1). Themanufacturer/dealer shall furnish to the registering Authority having jurisdiction in the locality with the information in Form XIII & XIV, in respect of the vehicles received in stock & sold by him during every month by 15th of the succeeding month.
>
> (2) The manufacturer/dealer should furnish the copy of the certificate in form-21 prescribed under rule-47 of CMV Rule1989 to the registering authority & the concerned region when the vehicle is intended to be registered.
>
> All the dealers or manufacturers are bound to submit monthly returns in form-XIII & XIV under rule-36 of OMV-1993. A certificate in form-XIV are being furnished to the registering authority that the maximum nos. of vehicles covered under the trade certificate has never been exceeded at any point of time. This needs to be obtained from each dealer/manufacturer scrupulously.
>
> Section-5 of OMVT act 1975-entails that- Notwithstanding the provisions contained in 1 [Section 3,3-A,4,4-A or 4-B], a tax at the annual rate specified below shall be paid in advance by a manufacture of dealer in Motor vehicles in respect of the vehicles in his

possession in the course of his business as such manufacture or dealer under the authorization of trade certificate granted under the Motor Vehicles Rules.

While reviewing the mv revenue collection of different RTOs, it is found that the tax are being collected in advance from the dealers for the nos. of vehicles mentioned in their trade certificate which is not in conformity with the total no of registration of vehicles made by the dealers. You are therefore directed to collect the tax from the dealers/manufacturers on the basis of total no. of vehicles possessed & registered during the entire year by the dealer.

Further, you are instructed to be more vigilant at dealer points through regular checking & conducting raids to collect the tax for the vehicles possessed by the dealers.

Transport Commissioner,
Odisha."

20. It is obvious from a reading of the above communication that the trigger point was the detection by the STA that the number of vehicles mentioned in the TC of the dealers "is not in conformity with the total number of registration of vehicles made by the dealers." Therefore, directions were issued to the RTOs to collect tax from the dealers/manufacturers on the basis of the total number of vehicles "possessed and registered" during the entire year by the dealer. In other words, tax was to be collected under Section 5, OMVT Act was not confined to vehicles possessed under the authorization of the TC granted.

Grounds of challenge before the Single Judge

21. The above communication was challenged on several grounds before the learned Single Judge. One ground was that the said tax was beyond the scope of Section 5 of the OMVT Act and secondly that it could not be by means of a mere communication from the STA that there was no authority with the STA to issue such a communication regarding collection of tax. The Appellants contended that TC holders or dealers were not required to keep in possession vehicles in excess of what is stated in the TC. As far as the tax payable at the time of registration is concerned, Sections 3, 4-A and 4-B of the OMVT Act are relevant. Therefore, irrespective of the number of vehicles sold by the dealer in a year, tax under Section 5 of the OMVT Act was only to be demanded in respect of vehicles possessed under the TC. It was also pointed out that the assumption that the dealer had kept vehicles in his possession beyond that specified in the TC was not preceded by any enquiry and there was no show-cause notice issued to such dealer before raising the demand.

22. The above submissions were countered by the Respondent-STA by contending that even if at a given point of time the dealer does not possess vehicles in excess of those covered by the TC but if at the end of the year it was found that the dealer had sold vehicles beyond the number indicated in the TC, then also it will be liable to pay the TC tax in respect of each vehicle since he had possessed "such number of vehicles which had been sold by him". The contention of the STA was that when a vehicle was sold, a sale certificate is issued in Form-XXI and a registration made in

Form-XX. The sale certificate is to be granted by the manufacturer or the dealer in Form XXI. Therefore, it was contended that if at a given point in time it is found that a dealer has kept vehicles in excess of that covered by the TC then the tax in the TC fee and TC tax have both to be paid in respect of each vehicle sold.

Impugned order of the learned Single Judge

23. The learned Single Judge on an analysis of the relevant provisions of the MV Act, OMVT Act, MV Rules, OMV Rules and the OMVT Rules, came to the following conclusions:

> (i) Section 5 of the OMVT Act is a charging Section in respect of a TC holder whereunder the dealer is liable to pay tax in respect of vehicles in his possession in the course of his business under the authorization of the TC granted under the MV Rules.
>
> (ii) Admittedly, the dealers who had been paying tax as per the TC issued against the maximum number of vehicles possessed at a given point of time and the same has also been paid in advance.
>
> (iii) Section 5 was unambiguous that the tax thereunder shall be paid in advance by the dealer in respect of vehicles "in course of his business" under the authorization of TC. Possession of a vehicle by the dealer in the course of his business and sale thereof and consequential registration "are intrinsically connected to each other".
>
> (iv) The expression "vehicle in possession in the course of his business" has wide implication. "Therefore, once the vehicle is in possession in course of the business of a dealer under the authorization of trade certificate, at the end of twelve months, if it is ascertained that the dealer was in possession of vehicles in excess of the number indicated in the trade certificate for which no advance tax has been collected, in that case, the dealer is liable to pay the tax in consonance with the circular issued by the opposite parties. Needless to say that under a trade certificate, the dealer is obliged to retain the number of vehicles mentioned therein and not beyond that at a given point of time, but that ipso facto cannot disentitle him to pay tax in respect of the vehicles in his possession in course of business. In other words, if the dealer possesses vehicles in course of his business, he is liable to pay the tax in consonance with the circular issued by the authority concerned."
>
> (v) Since no vehicle could be sold for the purpose of registration without the dealer being in possession of such vehicle, if at the end of twelve months it was found that the dealer had possession of vehicles even not exceeding the number of vehicles in possession at a given point of time as per the TC issued, then he is liable to pay the tax "at the end of twelve months, if it is found that the dealer having remained in possession of number of vehicles even not exceeding the number of vehicles in possession at a given point of time as per the trade certificate issued, then he is liable to pay the tax as demanded by the authority concerned because such vehicles were in possession in course of his business."

24. It was therefore concluded that the STA had not committed any illegality in issuing the said communication dated 29th March, 2016. Reference was made to Rule 177 of the OMV Rules and it was concluded that the Commissioner was well within his competence for issuing such instruction, which was only to give effect to Section 5 of the OMVT Act.

Proceedings and pleadings in these appeals

25. In many of these appeals while issuing notice, this Court passed an interim order to the effect that the Appellants would be liable to comply with the impugned communication dated 29th March, 2016 "prospectively from the date of the impugned judgment of the learned Single Judge, but no recovery of arrear dues shall be made from the Appellants till the disposal of the writ appeals".

26. In the course of hearing of these appeals, this Court in W.A. No.245 of 2017passed the following order on 18th October, 2022:

> "1. The Court would like the State to file an affidavit indicating clearly whether pursuant to the impugnedletter/instruction dated 29th March, 2016 of the Transport Commissioner what is being charged per vehicle sold is the additional fee in terms of Section 5 of the Orissa Motor Vehicles Taxation Act, 1975 (OMVT Act). The Court would also like an affidavit to be filed on behalf of the Appellant whether the additional incidents of Trade Certificate Tax (TC Tax) in terms of Section 5 of the OMVT Act and Trade Certificate Fees (TC fees) in terms of Rule 81 of the Central Motor Vehicle Rules, 1989 has beenpassed on to the customer and has in fact been paidby the customer. Both sets of affidavits be filed with advance copies served on the other side before the next date.
>
> 2. List on 5th December, 2022.
>
> 3. The interim order passed earlier shall continue till then."

27. Pursuant thereto, an affidavit dated 3rd December 2022 has been filed by the STA in W.A. No.223 of 2017 inter alia stating as under:

> "3. That pursuant to the impugned instruction dated29.03.2016 issued by the Transport Commissioner, no extra tax at the annual rate has been collected from the vehicles under the possession of the manufactures or dealers of motor vehicles in courseof business by the Taxing Officer-cum-RTOs in Odisha except the tax prescribed under Section 5 ofthe OMVT Act, 1975."

28. It is further pointed out that under Section 5 of the OMVT Act, the following amounts are charged per vehicle

Sl.No.	Description of motor vehicle	Tax per vehicle
1	Motor Cycle	Rs.200/-
2	Motor vehicle other than motor cycles weighing not more than 3048 kilograms unladen	Rs.500/-
3	Motor vehicle other than motor cycles weighing more than 3048 kilograms unladen	Rs.1000/-

29. A separate affidavit dated 2nd December 2022 has been filed on behalf of the dealers in W.A. No.180 of 2017 stating as under:

> "3. That it is humbly submitted that not all dealers have passed on the additional incidence of Trade Certificate Tax (TC Tax) in terms of Section 5 of the OMVT Act and Trade Certificate Fees (TC Fees) in terms of Rule 81 of the Central Motor Vehicles Rules, 1989, to the customers. Some dealers may have passed on the additional incidence to the customers whereas others have paid it from their own resources."

30. The said affidavit refers to an instruction dated 12th January 2022 issued by the STA to all the RTOs asking them to ensure that the dealers will clearly display on the notice board the details of the payment to be made by the purchaser for each category of vehicle and that no extra payment requires to be made other than that mentioned therein.

31. On behalf of the Appellants, this Court has heard the submissions of Mr. Samvit Mohanty, Mr. Jaydeep Pal, Mr. S.S. Mohanty, Mr. P.K. Dash, Mr. A.N. Das, Mr. D.K. Sahoo-1, Mr. S.S. Rao, Mr. Avijit Pal, Advocate, Mr. Sidharta Ray, Mr. Nalinikanta Dash, Mr. Ramesh Agarwal and Mr. Deepak Kumar Mohapatra, learned counsels for the respective Appellants and on behalf of the STA, this Court has heard the submissions of Mr. Pravakar Behera, learned Standing Counsel.

Submissions on behalf of the Appellants

32. The arguments on behalf of the Appellants could be summarized as under:

(i) The STA misconstrued the statutory provision and ignored the well-established and long-standing practice under which the tax under Section 5 of the OMVT Act was levied only in respect of the total number of vehicles as mentioned in the TC. Under the authority of the TC, the dealer was entitled to keep a certain number of vehicles in his possession. If the dealer was to pay tax under Section 5 for all the vehicles that came into his possession annually during the course of his business, then the qualifying expression "under the authorization of trade certificate" occurring in Section 5 would lose all significance. It would become irrelevant whether the dealer maintains the maximum number of vehicles authorized under the TC or not at any given point in time since anyway every vehicle sold by him had to suffer tax. Such an interpretation would render Section 5 of the OMVT Act totally redundant.

(ii) Section 5 of the OMVT Act had to be strictly construed since it was a charging section in a taxation statute. The Commissioner could not have changed the taxable event from vehicles in possession under a TC to all vehicles "possessed and registered during the entire year". This in any event could not be done by mere instruction by the Commissioner.

(iii) The field of taxation for motor vehicles in respect of TC was already occupied by the MV Act, which was a Central Act and there was no further scope for any further taxation by the State in respect of TC. Further, the MV Rules being notified later than the OMVT Act could prevail. Therefore, Section 5 of the OMVT Act was ultra vires the Constitution and beyond the legislative competence of the State. Reliance was placed on the judgment in ***Deep Chand v. The State of Uttar Pradesh AIR 1959 SC 648***, which has subsequently been followed in a large number of judgments of the Supreme Court.

Submissions on behalf of the STA

33. Mr. PravakarBehera, learned Standing Counsel for the STA submitted that once a vehicle is in possession in the course of business of a dealer under the authorization of a TC issued under the MV Rules and at the end of twelve months, it was ascertained that the dealer was in possession of vehicles in excess of the number indicated in the TC for which no advance tax had been collected, the dealer was liable to pay tax in consonance with the circular dated 29th March, 2016. If a dealer possessed any vehicle in the course of his business, he has to pay tax in terms of the circular dated 29th March, 2016.

34. As regards legislative competence of the State to collect tax from manufacturers/dealers in respect of vehicles possessed under a TC, the complete answer according to Mr. Behera was provided in respect of an identical provision under the Bihar Motor Vehicles Taxation Act (BMVT Act) by the Patna High Court in ***M/s. Tata Engineering and Locomotive Company Limited v. State of Bihar, AIR 1999 Pat 62***,which was affirmed by the Supreme Court of India with the dismissal of the Special Leave Petitions filed against the said judgment. A subsequent challenge by manufacturers of motor vehicles to demands raised against them under Section 6 of the BMVT Act was again negatived by the Jharkhand High Court, Ranchi Bench in ***TELCO Limited v. State of Jharkhand (2003) 1 JLJR 601 and R.K. Automobile v. State of Bihar AIR 2004 Jhar 426.*** The appeals filed against both the judgments were dismissed by the Supreme Court of India in ***Tata Motor Limited v. State of Jharkhand (2020) 15 SCC 438***. In the said judgment, the Supreme Court reaffirmed the correctness of the judgment of the Patna High Court in ***M/s. Tata Engineering and Locomotive Company Limited (supra)***. It was held that the mere fact that a manufacturer/dealer did not obtain a TC would not absolve such manufacturer or dealer the liability to pay tax under Section 6 of the BMVT Act in respect of vehicle in his possession in the course of his business.

35. As regards the demand notices, Mr. Behera submitted that those were issued by the RTO indicating the number of vehicles for which the dealer had obtained TC and the number of vehicles the dealer possessed and sold. Accordingly in respect of the balance number of vehicles, the demand notice for payment of tax under Section 5 of the OMVT Act was issued. Inasmuch as the dealer had to also apply for a TC for such excess vehicles and pay an application fee i.e., the TC fee that was also sought to be collected under Rule 34 read with Rule 81 of the MV Rules. In any event the challenge to the imposition of the TC fees under Rule 81 of the MV Rules was never raised in the writ petitions before the learned Single Judge.

Analysis and reasons

36. At the outset, it requires to be noticed that as far as the challenge to the constitutional validity of Section 5 of the OMVT Act is concerned, it is no longer res integra. The constitutional validity of an identical provision, viz., Section 6 of the BMVT Act was upheld by the Patna High Court in ***M/s. Tata Engineering and Locomotive Company Limited v. State of Bihar*** (supra) which was affirmed by the Supreme Court by the dismissal of Special Leave Petitions challenging the said decision. The said decision was reaffirmed by the Supreme Court in Tata Motor Limited v. State of Jharkhand (supra) in 2020. In particular, the following paragraphs of the latter judgment of the Supreme Court made the position abundantly clear:

> "20. We may point out that before the High Court, the appellants had challenged the vires of Section 6 on the ground that the State Legislature lacks competence to make a provision of this nature. It was pointed out that Section 6 levies the tax on a manufacturer or a dealer of

> motor vehicles merely on "possession" thereof by such a manufacturer or adealer. It was argued that the Bihar Act was enacted by the State Legislature under Entry 57 of List II (State List) of VII Schedule to the Constitution ofIndia, which entry does not empower the State Legislature to impose tax on vehicle merely on possession. This entry reads as under:
>
> "57. Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tram-cars subject to the provisions of Entry 35 of List III."
>
> 21. The High Court, however, rejected this contention with the reason that under this entry, taxes on vehicles which are suitable for use on roads can be imposed and it was undisputed case of the parties that the vehicles manufactured by the appellants are suitable for use on roads. Therefore, the provision which stipulates the manufacturer or a dealer of a motor vehicle, in respect of the motor vehicle in his possession in the course of business as such a manufacturer or dealer shall pay tax, is within the legislative competence of Entry 57. This contention has been raised before us as well. However, we do not agree with the appellants as thereasoning given by the High Court is the correct analysis of Schedule VII List II Entry 57 to the Constitution."

37. Therefore the challenge raised by the Appellants to the constitutional validity of Section 5 of the OMVT Act and the corresponding Rules under the OMVT Rules is hereby rejected. Therefore, as far as the present case is concerned, the Court is required only to examine the constitutional validity of the instructions issued by the STA by its communication dated 29th March, 2016 requiring the RTOs to collect from each dealer tax under Section 5 of the OMVT Act "on the basis of total number of vehicles possessed and registered during the entire year by the dealer". It is this communication that has been upheld by the learned Single Judge in the impugned judgment which is under challenge in these appeals.

38. In the written submission filed on behalf of the STA, reliance is placed both on the decisions of the Patna High Court in ***M/s Tata Engineering and Locomotive Company Limited v. State of Bihar(supra) (rendered in 1999)*** and the judgment of the Supreme Court of India in ***Tata Motor Limited v. State of Jharkhand*** (supra) (rendered in 2020) to contend that there is an obligation under Section 5 of the OMVT Act on all the dealers to pay the tax as stipulated thereunder. These two decisions, however, did not address the question of interpretation of Section 6 of the BMVT Act, which is identically worded as Section 5 of the OMVT Act. In other words, in the said two decisions, the question was not whether for the purposes of payment of tax thereunder by the dealer, the number of vehicles "possessed and registered" during the entire year by the dealer, could form the basis, notwithstanding that the provision itself states that it is in respect of "vehicles in his possession in the course of his business" as dealer, "under the authorization of trade certificate granted under the Motor Vehicles Rules".

39. At this stage, it requires to be noticed that in a taxing statute, there is a 'charging section' which indicates what the "taxable event" is. It is a settled position in law as explained in several decisions of the Supreme Court of India including ***Khyerbari Tea Co. v. State of Assam AIR 1964 SC 925; M.P. Cement Manufacturer's Association v. State of M.P. (2004) 2 SCC 249 and Gujarat***

Ambuja Cements v. Union of India AIR 2005 SC 3020 that it is the charging section in a taxing statute that indicates the nature of the tax imposed. In the "Principles of Statutory Interpretation" (13th Edition, 2012) by Justice G.P. Singh, it has inter alia been stated (at page 823) as under:

> "The nature of the tax imposed by a statute has tobe determined by examining the pith and substance of the statute and by paying more attention to the charging section than to the basis or machinery adopted for assessment and collection of tax for the nature of tax is different from the measure of tax."

40. In the same commentary, it is unambiguously stated that (at page 826) "a taxing statute is to be strictly construed." It is further stated (at pages 827-828) as under:

> "In fiscal legislation a transaction cannot be taxed on any doctrine of "the substance of the matter" asdistinguished from its legal signification, for a subject is not liable to tax on supposed "spirit of the law" or "by inference or by analogy."

41. It has further been observed (at p. 829) by quoting the decision in ***Ormond Investment Co. v. Betts (1928) AC 143*** as under:

> "The proper course in construing revenue Acts is togive a fair and reasonable construction to their language without leaning to one side or the other but keeping in mind that no tax can be imposed without words clearly showing an intention to lay the burden and that equitable construction of the words is notpermissible. Considerations of hardship, injustice or anomalies do not play any useful role in construingtaxing statutes unless there be some real ambiguity. It has also been said that if taxing provision is "so wanting in clarity that no meaning is reasonably clear, the courts will be unable to regard it as of any effect."

42. As further explained in same commentary by Justice G.P. Singh (at page 855) is as under:

> "It must also be borne in mind that the rule of strict construction in the sense explained above applies primarily to charging provisions in a taxing statute and has no application to a provision not creating a charge but laying down machinery for its calculation or procedure for its collection, and such machineryprovisions have to be construed by the ordinary rule of construction."

43. Bearing the above principles on mind, if one approaches the charging section in the present taxing statute viz., the OMVT Act, then it is plain that Section 5 of the OMVT Act is one of the charging Sections as regards holders of TCs. It must be noticed that there are other charging Sections of the OMVT Act, namely, Sections 3,3-A, 4 and 4-A dealing with different kinds of taxes for each of which there is a 'taxable event'. For e.g., in ***Goodyear India Ltd. v. State of Haryana AIR 1990 SC 781***, the Supreme Court observed that: "It is well-settled that what is the taxable event or what necessitates taxation in an appropriate Statute, must be found out by construing the provisions. The essential task is to find out what is the taxable event." In the present case, we are only concerned with the scope and ambit of one charging Section viz., Section 5 of the OMVT Act. The 'taxable event' in relation to the said charging section has to be ascertained.

44. Section 5 of the OMVT Act can be construed both as a 'charging section' since it specifies the taxable event, viz., the possessing of vehicles under a TC as well as the machinery Section which provides the means of assessing and calculating the tax which is payable. Section 5 of the OMVT Act states that what the annual rate of the TC tax would be for the total number of vehicles possessed under the authorization of the TC. For e.g., for motor vehicles other than the motor cycles where the total number of vehicles does not exceed ten, it is Rs.2000/- and a further Rs.200/- for each vehicle in excess of ten. The expression "under the authorization of trade certificate" has to be read together with the preceding expression "vehicles in his possession in the course of his business".

45. Therefore, while reading a charging Section like Section 5 of the OMVT Act, applying the rules of strict construction, care has to be taken to ensure that the scope of liability is not enhanced by misinterpreting the charging section itself.

46. The learned Single Judge accepted the plea of the STA that Section 5 of the OMVT Act enables collection of tax thereunder on every vehicle which is "possessed and registered during entire year by the dealer". In order to determine what these total number of vehicles "possessed and registered during the entire year" might be, the impugned communication instructed the RTO to find out the total number of vehicles "received in stock and sold" by such dealer. The yardstick applied was the "registration of vehicles made by the dealers".

47. An important shift that has occurred by virtue of the letter dated 29th March, 2016 is that the basis of levying the TC tax, viz., the 'taxable event', has itself been altered. While the provision talks of tax being levied in respect of the vehicles possessed by the dealer "under the TC" held by such dealer, the impugned instruction changes it to the tax having to be paid, not limited to the vehicles under the possession of the dealer under the TC, but in respect of every vehicle that has been sold through the dealer or, as the words in the instructions state the total number of vehicles "possessed and registered during entire year by the dealer".

48. There is force in the contention of the Appellants that this shift in the very basis on which the TC tax is levied cannot be brought about by a mere instruction issued by the Commissioner STA, but only by an amendment and that too to the main charging Section itself. This is because in view of the settled legal position, which has been adverted to hereinbefore, there has to be certainty as far as the taxation statutes are concerned. The words have to clearly show 'an intention to lay the burden' and 'equitable construction of the words' is not permissible. In a taxing statute, the words have to be taken exactly as they appear. In the present case, there is no ambiguity insofar as Section 5 of the OMVT Act is concerned, that the TC tax has been collected in respect of vehicles possessed by the dealer "under the authorization of the TC". The TC specifies the number of vehicles that can be possessed thereunder. Where the number of vehicles exceeds the said number, then

for every such excess vehicle an additional fee is chargeable. For instance, "for every ten or less number of vehicles in excess of ten"the additional fee chargeable is mentioned.

49. The impugned instruction dated 29th March, 2016 proceeds on the presumption that every vehicle registration obtained by the dealer as a result of the vehicle being sold through him has been 'possessed' under the TC. As a result, the necessity of ascertaining if at any given point in time the number of vehicles possessed by the dealer under the TC is in excess of what is mentioned in the TC, is dispensed with. As a result of this changed interpretation, the very purpose of a TC appears to have been rendered redundant. Whether the dealer possesses under the TC the number of vehicles mentioned therein or in excess of that number, the impugned instruction brings about a 'deeming fiction' that every vehicle sold through the dealer for which he has obtained registration, should be presumed to have been held by him under the TC. This is not the purpose for which Section 5 of the OMVT Act was enacted.

50. The learned Single Judge while focusing on the expression "in respect of vehicles in his possession in the course of his business" omitted the important words following this expression viz., "under the authorization of trade certificate granted under the Motor Vehicle Rules". This disjointed reading of Section 5 of the OMVT Act has resulted in the learned Single Judge accepting the interpretation placed by the STA, which in the opinion of this Court is erroneous.

51. The impugned instruction appears to have been triggered by what the Commissioner perceived to be an under-collection of motor vehicle revenue. If that was the perceived problem, then the solution was not to issue an instruction, but perhaps to amend the statute. The Commissioner appears to have adopted a shortcut and by exercising the powers under Rule 177 of the OMV Rules simply issued an 'instruction' which then became binding on all the RTOs.

52. The learned Single Judge appears to have relied on Rule 177 of the OMV Rules itself to uphold the validity of instruction. What was perhaps not noticed was that Rule 177 is merely an enabling provision as far as the binding effect of instructions issued by the Transport Commissioner to the RTOs is concerned. It does not empower the Transport Commissioner to change the very basis of a charging section i.e. Section 5 of the OMVT Act.

53. There is merit also in the contention of the dealers that if the interpretation placed by the Transport Commissioner on Section 5 of the OMVT Act, as accepted by the learned Single Judge, were to be affirmed, then the requirement under Rule 7 of the OMVT Rules, 1976 of the dealers having to give a declaration regarding the number of vehicles possessed under the TC would become entirely redundant. Likewise, the declaration in Form-XIV of the OMV Rules 1993 which also contains a similar declaration would become redundant. The learned Single Judge does not

appear to have, while upholding the circular dated 29th March, 2016, discussed either Rule 7 of the OMVT Rules 1976 or Form-XIV of the OMV Rules, 1993.

54. The concept of a TC is that it can be used on several vehicles of the same make and model which are possessed by the dealer under the TC limited to the purposes specified in Rule 41 of the MV Rules. Since the purposes for which the vehicles are used is clearly specified in Rule 41 of the MV Rules, there can be no apprehension of misuse by the dealer of such vehicles for purposes other than Rule 41 of the MV Rules. It will have to be found as a fact that there has been such misuse for which there would have to be an enquiry of some sort preceded by a notice to the concerned dealer.

55. The other significant feature of Section 5 of the OMVT Act is that the tax therein is to be paid at an 'annual rate' and 'in advance'. If, as stated in the impugned instruction, the tax under Section 5 of the OMVT Act has to be paid on the number of vehicles sold for which the registration is obtained by the dealer, it will not be possible for the dealer to anticipate in 'advance' how many such vehicles will be sold much less pay such tax 'in advance' at an 'annual rate'. These words, 'in advance', and 'annual rate' are elements of Section 5 which gives it the characteristic of a machinery provision since they define the basis on which the tax will be collected. The impugned instruction even changes this nature of Section 5 of the OMVT Act by changing the very basis on which the tax will be collected. On this score also the impugned instruction issued is without the authority of law and far in excess of the powers and jurisdiction of the Commissioner. Such kind of a change can possibly be brought about, particularly in a taxing statute, only by amending the law itself and not otherwise. It is even doubtful if such a change can be brought by merely amending the OMVT Rules as that would change or expand as the case may be the 'taxable event' as well as the 'machinery provision' of the taxing statute which again would be impermissible in law. The amendment would have to be to the statute itself.

56. For all of the aforementioned reasons, this Court is unable to subscribe to the view of the learned Single Judge that the interpretation placed on Section 5 of the OMVT Act through the impugned instruction is correct and in consonance with the legislative intent behind Section 5 of the OMVT Act and the scope and ambit of that provision. In other words, this Court is of the considered view that the instruction dated 29th March, 2016 is ultra vires Section 5 of the OMVT Act and therefore cannot be sustained in law. Accordingly, this Court quashes the impugned instruction dated 29th March, 2016.

57. The next issue to be considered is the validity of the demand notices issued by STA to each of the Appellants on the basis of the impugned instructions dated 29th March, 2016. The said demand notices were not preceded by a show cause notice and an inquiry as to whether in fact a dealer has possessed vehicles in excess

of number stated in the TC for which no TC tax has been paid. There cannot be any presumption as regards this and an opportunity has to be given to the dealer to show cause as to why the excess TC tax should have been collected since the number of vehicles found in his possession under the TC was contrary to the declarations given by him in FormXIV appended to the 1993 OMV Rules. Since in any event no such enquiry preceded the issuance of impugned demand notices, they are bad in law on that score as well. Since the demand notices have themselves been held to be bad in law, the TC fees obviously cannot be collected. The TC fees can be collected strictly only in terms of Rule 81 of the MV Rules and only in respect of the vehicles which the dealer has in his possession under the TC. Accordingly, all the impugned demand notices issued to the respective Appellants both for TC tax and TC fees in respect of vehicles 'possessed and registered' in excess of the vehicles covered by the TC issued, are hereby quashed.

58. The next issue to be addressed is the refund of the excess TC tax and TC fees collected by the STA on the strength of the interim order passed by this Court in these appeals in terms of which a stay was granted only vis-à-vis the arrears of TC tax and TC fees prior to the impugned notification dated 29th March, 2016. In other words, by the interim order passed in these appeals by this Court, the STA was permitted to give prospective effect to the impugned instruction dated 29th March, 2016 as a result of which in the period following the said interim order the dealers have been paying the excess TC tax and TC fees. The question of refund of this excess amount to the dealer would arise only where that burden has not been passed on by the dealer to the customer. It is for this reason, this Court had in its order dated 18th October, 2022, called for an affidavit from the dealers. The affidavit filed by the dealers is not categorical in this regard. It merely states that "some dealers may have passed on the additional incidence to the customers whereas the others have paid it from their own resources". In view of this vague statement, it is not possible for this Court to direct refund of excess TC tax and TC fees collected by virtue of the impugned instruction issued by the STA to the RTOs. However, what is clear is that the collection hereafter of TC tax and TC fees on the basis of the impugned instructions dated 29th March, 2016 will have to cease forthwith.

59. To summarize the conclusions in this judgment;

(i) Section 5 of the OMVT Act is a charging Section and in a taxing statute, it has to be strictly construed.

(ii) The challenge to the constitutional validity of Section 5 of the OMVT Act is rejected.

(iii) The taxable event under Section 5 of the OMVT Act is the possession of vehicles by the dealer under the TC certificate issued under the MV Rules.

(iv) Section 5 is both the charging Section as well as the 'machinery provision'. It indicates that TC tax will become payable in respect of the vehicles possessed by the dealer under the TC certificate and also specifies what is the tax payable if the number

of vehicles found in possession under the TC certificate exceeds that number. It also clearly specifies that the tax is to be collected at an annual rate and in advance.

(v) The impugned instruction dated 29th March, 2016 changes the very basis of the above 'taxable event' as well as the portion of Section 5 of the OMVT Act in so far as it is also a "machinery provision".

(vi) The change sought to be brought out under the impugned instruction dated 29th March, 2016 cannot be brought about by merely issuing an instruction under Rule 177 of the OMV Rules, but only by amending the statute itself.

(vii) The impugned instruction dated 29th March, 2016 is therefore ultra vires the OMVT Act and is hereby quashed. The effect of this is that collection of TC tax and TC fees will not be hereafter be made in terms of the impugned instruction, but only strictly in accordance with Section 5 of the OMVT Act read with Rule 81 of the MV Rules.

(viii) Since there is ambiguity whether the dealers have passed on the additional incidence of its TC tax and the TC fees to the customers, no refund is required to be made to the Appellants of such excess TC tax and TC fee collected.

60. For all of the aforementioned reasons, the impugned judgment of the learned Single Judge is hereby set aside. The writ appeals are allowed but, in the circumstances, with no order as to costs.

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2023 (I) ILR - CUT- 357

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

STREV NO. 37 OF 2017

M/s. INDERA LEATHERS .....Petitioner

.V.

STATE OF ODISHA .....Opp.Party

ODISHA VALUE ADDED TAX RULE, 2005 – Rule 42 – Whether the audit visit without any prior notice U/r 42 of the OVAT Rules is justified? – Held, not justified – Prior notice to the dealer is mandatory.

For Petitioner : Mr. Sidhartha Ray, Sr. Adv.

For Opp.Party : Mr. S.K. Pradhan, ASC

ORDER Date of Order : 17.01.2023

BY THE BENCH

1. The following questions were framed by this Court by its order dated 22nd June, 2017 for determination in the present petition which arises out of an order dated 31st March, 2017 passed by the Odisha Sales Tax Tribunal in S.A. No. 321(V) of 2015-16 filed by the Appellant-dealer for the tax period 1st November, 2007 to 30th September, 2008:

"A. Whether in the facts and circumstances of the case, the audit visit without any prior notice u/s 42 of the OVAT Rules, 2005 can be justified?

B. Whether in the facts and circumstances of the case, the revised returns prior to the audit and voluntary payment of tax can be rejected by taking recourse to the proviso contained in sub section (5) to Section 33 of the OVAT Act, 2005?

C. Whether in the facts and circumstances of the case, the Assessing Officer can initiate and complete the assessment u/s. 42 of the OVAT Act, 2004 beyond the period for which the tax audit has been made?

D. Whether in the facts and circumstance of the case, the imposition of two times penalty is justified particularly when the Petitioner has discharged its tax liability by filing the revised return along with the higher amount of tax before receipt of any notice for tax audit?"

2. As far as the first question above is concerned, Mr. S.K. Pradhan, learned Additional Standing Counsel for the Department on instructions states that factually no notice was issued to the Petitioner prior to the audit visit. Rule 42 of the OVAT Rules, 2005 makes prior notice to the dealer of the audit visit mandatory.

3. In that view of the matter, all the consequential proceedings beginning with the audit visit report and the assessment framed on that basis and consequential orders are unsustainable in law and are hereby set aside.

4. The question A is answered in the negative, i.e., in favour of the Assessee and against the Department. In view of the answer to Question A, the other questions need not be answered.

5. The revision petition is disposed of. The excess tax paid by the Assessee together with interest thereon be refunded to the Assessee in accordance with the relevant Rules.

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2023 (I) ILR-CUT- 358

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

W.P.(C) NO. 8927 OF 2022

SRI BENU MADHAV TRIPATHY .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Article 226 & 227 – Public Interest Litigation has been filed challenging the re-engagement of Opposite Party No.7, as Managing Director of the Odisha State Co-operative Bank Ltd., in violation of Section 35-B (1) (b) of the Banking Regulation Act, 1949 as well as Section 28 (3-b) (1) of the Orissa Co-operative

Societies Act, 1962 – Whether writ of quo warranto can be issued? – Held, Yes – Where a clear violation of the statutory provisions in the appointment of holder of a public post is made writ of quo warranto can and should be issued. (Para 31)

Case Laws Relied on and Referred to :

1. (2002) 1 SCC 33 : Ghulam Qadir Vs. Special Tribunal.
2. (2006) 11 SCC 731 : B.Srinivasa Reddy Vs. Karnataka Urban Water Supply & Drainage Board Employees' Association.

For Petitioner : Mr. P.K. Rath.

For Opp.Parties : Mr. A.K. Parija, Advocate General
Mr. Iswar Mohanty, ASC [For State of Odisha]
Mr. Budhadev Routray, Sr. Adv.
Mr. Gautam Misra, Sr. Adv. [For OP No.7]
Mr. Sunil J. Mathews, Mr. K.P. Nanda. [For OP No.8]

JUDGMENT Date of Judgment : 25.01.2023

Dr. S. MURALIDHAR, C.J.

1. Challenging the re-engagement of Sri Gopabandhu Satpathy, Opposite Party (OP) No.7, as Managing Director (MD) of the Odisha State Co-operative Bank Ltd., Bhubaneswar (OP No.8) by a Notification dated 2nd March, 2002 issued by the General Administration and Public Grievance Department (GA Department), Government of Odisha (OP No.2), the present petition has been filed as a Public Interest Litigation (PIL) seeking issuance of a writ of *quo warranto*.

2. The main ground of challenge is that the above re-engagement is in violation of Section 35-B(1)(b) of the Banking Regulation Act, 1949 (BR Act) as well as Section 28(3-b)(1) of the Orissa Co-operative Societies Act, 1962 (OCS Act).

3. In the present petition that was filed on 7th April, 2022, notice was issued by this Court on 21st April, 2022. After pleadings were completed this Court, on 14th September, 2022 set down the petition for final hearing. On that date, Sri A.K. Parija, learned Advocate General (AG) appearing for the State of Odisha (OP Nos.1 and 2), stated that in the meanwhile within two weeks a fresh advertisement would be issued for filling up of the post of the MD of the OP No.8-Bank. On 8th December, 2022 the Court was informed that the said advertisement had been issued on 25th November, 2022 with the last date of submission of the applications being 22nd December, 2022. However, on that date Mr. P.K. Rath, learned counsel for the Petitioner stated that notwithstanding that the post may have been advertised afresh, the continuation of the present incumbent was illegal and since his term was expiring on 28th February 2023, the petition should be heard at an early date. Thereafter, the present petition was heard finally on 17th January, 2023 and judgment was reserved.

4. This Court has heard the submissions of Sri P.K. Rath, learned counsel for the Petitioner, Sri A.K. Parija, learned AG appearing for the State of Odisha (OP Nos.1 and 2), Sri Budhadev Routray and Sri. Gautam Misra, learned Senior Advocates for OP No.7 and Mr. Sunil J. Mathews along with Mr. K.P. Nanda, learned counsel for OP No.8-Bank.

Preliminary objections

5. There were several preliminary objections raised to the maintainability of the present petition as a PIL. The first is that Rule 8 of the Orissa High Court Public Interest Litigation Rules, 2010 (HC PIL Rules), which reads as under, has not been complied with by the Petitioner prior to filing of the present petition:

> "8. Before filing a PIL, the petitioner must send a representation to the authorities concerned for taking remedial action, akin to what is postulated in Section 80 CPC. Details of such representation and reply, if any, from the authority concerned along with copies thereof must be filed with the petition. However, in urgent cases where making of representation and waiting for response would cause irreparable injury or damage, petition can be filed straightway by giving prior notice of filing to the authorities concerned and/or their counsel, if any."

6. In countering the above objection, Mr. Rath, learned counsel for the Petitioner, emphasized the later portion of Rule 8 of the HC PIL Rules which permits the PIL petition to be filed straightway without giving prior notice "in urgent cases, where making of representations and waiting for response would cause irreparable injury or damage".

7. The present petition was filed on 7thApril, 2022 challenging the impugned order dated 2nd March, 2022 issued by the GA Department, Government of Odisha, re-engaging OP No.7 as MD of OP No.8-Bank for a period of one year with effect from 1st March, 2022. From the point of view of the Petitioner, since the legality of the re-engagement was being challenged, the matter was indeed urgent. Nevertheless, on 21st April, 2022 when notice was accepted on behalf of the State, they did not offer to treat the present petition as a representation for the purposes of Rule 8 of the HC PIL Rules and to dispose it of in a time-bound manner. At this stage, the respective stands of not only the State [OP Nos.1 to 4], OP No.7 and OP No.8 are known. With each of them defending the impugned order of re-engagement it can be safely stated that the deferment of the present petition awaiting the disposal of the Petitioner's representation would have been an empty formality and would have inevitably resulted in the Petitioner again coming to this Court. At this stage, hardly a month remains as far as the tenure of the re-engagement of OP No.7 is concerned. Consequently, this preliminary objection is negatived.

8. The next preliminary objection is that the Petitioner failed to disclose in the writ petition that he is the member of a political party viz., the Indian

National Congress (INC) and since this has a material bearing on the petition, it should be dismissed on this ground alone. It is stated that the Petitioner is President of the District Congress Committee at Sundargarh, and has filed the present petition with political motives.

9. Sri Gautam Misra, learned Senior Counsel appearing on behalf of OP No.7 elaborating on this objection submitted that OP No.8-Bank had declined the prayer of Sri Bhabani Prasad Majhi, an Ex-President of the Sundargarh District Central Cooperative Bank, and an active member of the Congress Party in Sundargarh district for release of "NABARD sanctioned re-finance amount in favour of the District Central Cooperative Bank" in connection with which another writ petition is stated to be pending in this Court. It is claimed that since the present Petitioner is a 'political associate' of Sri Majhi, this petition has been deliberately filed to drag OP No.8 into litigation by making personal allegations against OP No.7.

10. The Court finds that the above long-winded attempt at establishing some connection between the Petitioner and OP Nos.7 and 8 through Sri Majhi is a bit far-fetched. Nowhere is it suggested that the present Petitioner had anything to do with the issue concerning the request of the Sundargarh District Cooperative Bank for release of the NABARD sanctioned refinance amount. In this background, the non-disclosure of the political affiliation of the Petitioner does not appear to have any immediate relevance for the issue raised in the present petition, viz., whether the procedure envisaged under the BR Act or the OCS Act in re-engaging a person as MD of the OP No. 8-Bank has been followed? In ***Ghulam Qadir vs. Special Tribunal*** (2002) 1 SCC 33 it was held as under:

> "38. There is no dispute regarding the legal proposition that the rights under Article 226 of the Constitution of India can be enforced only by an aggrieved person except in the case where the writ prayed is for habeas corpus or quo warranto. Another exception in the general rule is the filing of a writ petition in public interest. The existence of the legal right of the petitioner which is alleged to have been violated is the foundation for invoking the jurisdiction of the High Court under the aforesaid Article. The orthodox rule of interpretation regarding the locus standi of a person to reach the court has undergone a seachange with the development of constitutional law in our country and the constitutional courts have been adopting a liberal approach in dealing with the cases or dis-lodging the claim of a litigant merely on hyper-technical grounds. If a person approaching the court can satisfy that the impugned action is likely to adversely affect his right which is shown to be having source in some statutory provision, the petition filed by such a person cannot be rejected on the ground of his having not the locus standi. In other words, if the person is found to be not merely a stranger having no right whatsoever to any post or property, he cannot be non-suited on the ground of his not having the locus standi."

11. Consequently, the above preliminary objection is also rejected.

Procedure under the GA Department Resolution

12. In order to understand the main ground of challenge on merits to the re-engagement of OP No.7 as MD of OP No.8-Bank, it is necessary to set out the text of the impugned notification dated 2nd March, 2022 which reads thus:

> "NOTIFICATION
>
> Bhubaneswar, Dated the 02nd March, 2022
>
> No. GAD-SER1-IAS-0023-2016-5880/AIS.I
>
> In pursuance of the provisions contained in Para-4 of the General Administration Department Resolution No.23750/Gen. dtd. 27.08.2014, Shri Gopabandhu Satpathy, IAS (Retd.) is re-engaged as Managing Director, Odisha State Co-operative Bank for a period of one year w.e.f. 01.03.2022.
>
> By order of the Governor
> Manoj Kumar Mohanty
> Special Secretary to Government"

13. It must straightway be noted that the source of power for the said re-engagement of OP No.7 as MD, is stated to be the resolution dated 27th August, 2014 of the GA Department. However, the said resolution which sets out the 'comprehensive guidelines relating to engagement of retired government servants' has nothing to do with appointment of an MD of a Co-operative Bank. It applies only to re-engagement of retired government servants for government assignment.

14. In any event, even the said guidelines do not appear to have been followed. Para 3 of the said guidelines issued under GA Department resolution dated 27th August, 2014 is titled 'Selection Process' and states that the selection of retired government servants will be through an open advertisement and that there will be a Selection Committee for the post required to be filled up by re-employment. Admittedly in the present case, no advertisement was issued immediately prior to the re-engagement of OP NO.7 as MD of OP NO.8. No Selection Committee met to choose him for the post. Clearly, Para 3 of the said guidelines, even assuming that it applies, has not been complied with. Therefore, with the very source of the re-engagement of the OP No.7 as stated in the impugned Notification dated 2nd March 2022 being legally flawed, the said impugned notification cannot be legally sustained.

Procedure under the OCS Act

15. Mr. Parija, learned AG, then sought to justify the reengagement of OP No.7 as MD by referring to his initial appointment as MD of OP No.8-Bank at a time when he was still working in the Government. Reference was drawn to an order issued by the Registrar, Cooperative Societies, Odisha on 1st July, 2020 referring to a GA Department notification dated 29th June, 2020 appointing OP No.7 as MD of OP No.8-Bank being "approved in terms of Section 28(3-b)(1) of the OCS Act and the

Rules framed thereunder". Reference is also made to a resolution passed by the OP No.8-Bank delegating powers to OP No.7 in terms of bye-laws of the Bank. It appears that on 7th March, 2022 the Joint Registrar, Cooperative Societies also issued a similar order approving the re-engagement of OP No.7 as MD of OP No.8-Bank for a period of one year with effect from 1st March, 2022 under the same provision viz., Section 28(3-b)(1) of the OCS Act.

16. Mr. P. K. Rath, learned counsel for the Petitioner drew attention to the wording of Section 28(3-b)(1) of the OCS Act, which reads thus:

> "28. xxx xxx xxx
>
> (3-b) (1): Notwithstanding anything contained in this Act, there shall be a Chief Executive for every society, by whatever designation called, who shall be appointed on whole time basis by the Committee subject to the approval of the Registrar. Such Chief Executive shall be deemed to be a member of the Committee in the case of an apex society and any other society or class of societies as the State Government may, by notification from time to time, specify."

17. Mr. Rath submitted that the above provision applies to appointment of a Chief Executive of a Co-operative Bank "on whole time basis." Secondly, it indicates that the appointment has to be made by the Committee of the Co-operative Society constituted under Section 28(1) of the OCS Act and not by the Government as has been done in the present case. Thirdly, it was pointed out that it envisages approval being granted by the Registrar of Co-operative Societies whereas the order in this case it has been issued on 7th March, 2022 by the Joint Registrar.

18. In reply, Mr. Parija, learned AG appearing for the State referred to a Government resolution in terms of which the powers of the Registrar exercisable for the purposes of Section 28 of the OCS Act have been delegated to the Joint Registrar. It is accordingly submitted that the Joint Registrar, Co-operative Societies could have validly issued the order dated 7th March, 2022. Next, Mr. Parija submitted that Section 41 of the OCS Act envisages direct partnership of the State Government and cooperative Societies and in this case, on instructions, he stated that the State Government has a 25% share in the Opposite Party No.8 Co-operative Society Bank. He submitted that the Government therefore would have a say in the re-engagement of an ex-bureaucrat as MD on a temporary basis for one year pending appointment of a regular incumbent.

19. Mr. Parija submitted that in 2018 an advertisement had been issued for appointment of an MD of the OP NO.8-Bank on regular basis but no one was found suitable for such appointment. He submitted that the re-engagement of Opposite Party No.7 as MD of Opposite Party No.8-Bank was provisional and only for a limited period of one year and since an advertisement had already been issued, this Court ought not to interfere with the impugnmed notification of re-engagement. He added that OP No.7 had an impeccable reputation and good established credentials when he was working as MD on a regular basis of the OP No.8-Bank prior to his re-

engagement. Thirdly, he submitted that any interference with the impugned order of re-engagement of a former bureaucrat as MD of a Co-operative Bank of the State would have farreaching ramifications for all other appointments made by the Government to similar posts in other bodies in which the Government had a stake.

20. The above submissions have been considered. It is abundantly clear that the engagement of a person as Chief Executive, or by any other name called which could include an MD, in terms of Section 28 (3-b) (1) of the OCS Act has to be on (a) whole time basis and (b) only by the Committee of the concerned Cooperative Society and not by the Government. In fact, there is no provision in the OCS Act that envisages the State Government appointing either a Chief Executive or an MD of a Co-operative Bank. The 'Committee' has been defined under Section 2(c) of the OCS Act to mean "the managing committee of a Society by whatever name called, to which the management of the affairs of the Society is entrusted by or under this Act or by the Bye-laws of the Society". It is not understood, therefore, how the Registrar of Co-operative Societies or his delegate, the Joint Registrar, has been granting 'approval' under the said provision to the engagement or re-engagement of OP No.7 as MD of OP No. 8-Bank. It is also not understood how the GA Department of the State Government has issued the advertisement for filling up of such post on a regular basis since the appointment has to be under Section 28(3-b) of the OCS Act by the Committee constituted under Section 28(1) of the OCS Act and by no other body, including the State Government.

21. It may also be noted here that there is no provision in the OCS Act for engagement of a person as Chief Executive of OP No.8-Bank on provisional basis for a temporary period. It only envisages appointment on 'whole time basis' and that too by the Committee, as defined under Section 2(c) of the OCS Act and as constituted under Section 28(1) of the OCS Act. Therefore, notwithstanding the earlier orders of appointment of OP No.7 as MD of OP No.8-Bank and the impugned Notification dated 2nd March, 2022 or its approval by the order issued by the Joint Registrar of Co-operative Societies on 7th March, 2022, the fact remains that in the present case the re-engagement was not by the Committee of the OP No. 8-Bank as contemplated by Section 28(1) of the OCS Act.

22. In the writ submissions filed on behalf of the State, it is contended that the tenure of the Committee of Management of OP No.8-Bank had expired and no new Committee had been constituted under Section 32(1) of the OCS Act. It is stated that if a new Committee is not constituted due to failure of the State Cooperative Election Commission to conduct an election, the Management of the Society would vest in the Registrar of Cooperative Societies and the Registrar shall have the power to exercise all the functions of the Committee including the power to appoint MD/Chief Executive under Section 28(3-b) of the OCS Act.

23. A perusal of the order dated 7th March, 2022 of the Joint Registrar reveals that it only conveys 'approval' to the reengagement of OP No.7 as MD of OP No.8-

Bank by the impugned Notification dated 2nd March, 2022 of the Government, which as already noticed, has no say in the matter. Further, the text of Section 28(3-b) of the OCS Act itself indicates that the approval is to be granted by the Registrar for a 'whole time' appointment and not a provisional or temporary re-engagement. Even if one were to accept that in the absence of elections, it is Registrar who exercises the functions of the Committee of the OP No. 8-Bank in terms of Section 28(1) of the OCS Act, then the Registrar could have only issued an order of appointment (not reengagement) and that too on 'whole-time basis'. Then again, such order could not have been issued by the Government of Odisha. Going by the procedure now adopted for filling up the post of MD on whole time basis i.e. issuance of an advertisement, it is plain that even that procedure was not followed by the Registrar prior to the re-engagement of OP NO. 7 as MD of OP No. 8-Bank on provisional basis. The Court, therefore, concludes that both the impugned Notification dated 2nd March 2022 issued by the GA Department re-engaging OP NO. 7 as MD of OP No. 8-Bank, as well as the order dated 7th March 2022 issued by the Joint Registrar, Cooperative Societies 'approving' such re-engagement, are in violation of Section 28 (3-b)(1) of the OCS Act, and are, therefore, legally unsustainable.

24. It was repeatedly urged both by Mr. Routray and Mr. Misra, learned Senior Counsel appearing for OP No.7 that he was fully 'qualified' for being appointed as MD of OP No.8-Bank and no writ of *quo warranto* could issue to quash his re-engagement.

25. The above submission overlooks the fact that a writ of *quo warranto* has been sought in the instant case not on the ground that OP No.7 lacks the essential qualifications for the post of MD but that the mandatory statutory procedure to be followed under the OCS Act and the BR Act for such appointment has not been followed.

Procedure under the BR Act

26. The central ground of challenge to the re-engagement of OP No.7 as MD of OP No.8-Bank is that Section 35-B (1) (b) of the BR Act which requires prior approval of the Reserve Bank of India (RBI) for such re-engagement has not been complied with.

27. Earlier, the said provision was deleted from the BR Act by way of an amendment with effect from 1st March, 1966. However, by Amendment Act 39 of 2020 dated 29th September, 2020, the provision contained in clause (y) of Section 56 was omitted from the BR Act meaning thereby that Section 35-B(1)(b) of the BR Act stood revived. The Government of India by a Gazette Notification notified the date of coming into force of the revived Section 35-B(1)(b) of the BR Act to be 1st April, 2021. The said provision reads as under:

"35-B. xxx xxx xxx

> (1) (a) xxx xxx xxx
>
> (b) no appointment or re-appointment or termination of appointment of a chairman, a managing or whole-time director, manager or chief executive officer by whatever name called, shall have effect unless such appointment, reappointment or termination of appointment is made with the previous approval of the Reserve Bank.
>
> Explanation. --For the purposes of this sub-section, any provision conferring any benefit or providing any amenity or perquisite, in whatever form, whether during or after the termination of the term of office of the chairman or the manager or the chief executive officer by whatever name called or the managing director, or any other director, whole-time or otherwise, shall be deemed to be a provision relating to his remuneration."

28. Mr. Parija, learned AG, referred to the fact that OP No.8-Bank had by a letter dated 3rd March, 2022 intimated NABARD and RBI of the re-engagement of OP No.7 as MD of OP No.8-Bank and neither RBI nor NABARD had communicated any objection to such re-engagement. He accordingly submitted that there was substantial compliance with the requirement of Section 35-B(1)(b) of the BR Act.

29. The Court is unable to accept the above submission. Section 35-B(1)(b) of the BR Act makes it clear in no uncertain terms that appointment or re-appointment of an MD of a Cooperative Society Bank, which would include OP No.8-Bank, cannot have effect unless it is made "with the previous approval of the Reserve Bank." There is no document placed on record indicating that there was any 'previous approval' of the RBI to the reengagement of OP No.7 as MD of OP No.8-Bank. In fact, in issuing the impugned Notification dated 2nd March, 2022 the G.A. Department, Government of Odisha appears to have completely overlooked the aforementioned mandatory requirement under Section 35-B(1)(b) of the BR Act.

30. The outcome of the above discussion is that the impugned Notification dated 2nd March, 2022 re-engaging OP No.7 as MD of OP No.8-Bank for a period of one year with effect from 1st March, 2022 is not only in violation of the binding provisions of Section 28(3-b)(1) read with Section 28(1) of the OCS Act but is also contrary to Section 35-B(1)(b) of the BR Act and is, therefore, unsustainable in law.

31. As held in ***B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees' Association (2006) 11 SCC 731*** "Writ of Quo warranto does not lie if the alleged violation is not of a statutory provision." In other words, where a clear violation of the statutory provisions in the appointment of a holder of a public post is made out, as in the present case, such writ of *quo warranto* can and should be issued. As explained hereinbefore, it is abundantly clear that the re-engagement of OP No.7 as MD of OP No.8-Bank it is contrary to both the aforementioned statutory provisions and, therefore, the case for issuance of a writ of *quo warranto* is made out.

32. The Court clarifies that the above conclusion does not in any manner reflect on the capability or integrity of OP No.7 or his qualification to hold the post of MD of OP No.8-Bank since that is not in issue in the present petition. It is also clarified by this Court that since what is under challenge in the present petition which seeks a writ of *quo warranto*, is the legality of order of reengagement of OP No.7 as MD of OP No.8-Bank, this judgment would not ipso facto result in invalidating any other appointment made by the Government of any person to any other post in a public body or a Co-operative Bank. The validity of such orders of appointment will have to be examined on a case-by-case basis.

33. For all of the aforementioned reasons, the Court quashes the impugned Notification dated 2nd March, 2022 issued by the G.A. Department re-engaging OP No.7 as MD of OP No.8-Bank and the consequential order dated 7th March, 2022 issued by the Joint Registrar, Co-operative Societies approving the said reengagement of OP No.7.

34. The writ petition is allowed in the above terms. No order as to costs.

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2023 (I) ILR – CUT - 367

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

W.A. NO.1335 OF 2022

(Arising out of W.P.(C) No.8484 of 2022)

STATE OF ODISHA & ORS. .....Appellants

.V.

RABINARAYANA MOHAPATRA .....Respondent

(A) LETTERS PATENT APPEAL – Scope of interference – Held, the scope of interference is within a narrow compass. (Para 6)

(B) ODISHA SERVICE CODE – Rule 77 – Withheld of increment – Whether it can be done automatically during the period of suspension? – Held, No – The same can be withheld by the competent authority through the official order. **(**Para 4)

Case Law Relied on and Referred to :-

1.2020 (II) ILR - CUT - 398 : AninditaMohanty Vs. The Senior Regional Manager, H.P. Co. Ltd., Bhubaneswar & Ors.

For Appellants : Mr. D.R. Mohapatra, Sr. Standing Counsel (School & Mass Education Department)

For Respondent : Mr. Manas Pati

ORDER Date of Order: 03.11.2022

BY THE BENCH

1. The instant intra-court appeal is directed against the order dated 07.04.2022, as modified vide order dated 13.05.2022, passed by the learned Single Judge in the aforementioned Writ Petition, whereby the appellant/employer has been directed to sanction and disburse the annual increment subject to the outcome of the Vigilance/Departmental proceedings pending against the Respondent-Petitioner.

2. Learned counsel for the appellants submits that the Respondent, while working as Head Clerk inthe Office of the BEO, Brahmagiri was caught red handed by the vigilance authorities for accepting gratification on 15.04.2017 and was taken into custody and a Vigilance P.S. Case No.18/15.04.2017 was registered under Section 13(2) read with Sec.13(1)(d)/7 PC Act, 1988. The respondent was putunder suspension w.e.f. 16.04.2017 in contemplationof a disciplinary proceeding, however he was reinstated on 12.12.2017 pending conclusion of the disciplinary proceedings. It is thus contended thatthe annual increment which fell due after 16.04.2017 could not be granted in view of the suspension period w.e.f. 16.04.2017 to 12.12.2017 as an appropriate decision qua that period would only be possible on conclusion of the departmental/vigilance proceedings. In support, reliance has been placed on Rule 77 of the Odisha Service Code.

On the other hand, learned counsel for the Respondent submits that his client has superannuated from his service w.e.f. 30.04.2022 onattaining the age of superannuation and is receiving provisional pension due to non-conclusion of the disciplinary proceedings. He further submits that no order of withholding of the annual increment due for 2017-2018 and onwards has been passed and therefore the provision of the Rule 77 do not come to the aid of the department/appellant for withholdingthe annual increment due for the year 2017-2018 and also the subsequent years till his date of superannuation.

3. After hearing learned counsel for the parties, we find that the present Writ Appeal is devoid of any merits.

4. Before we advert to the facts of the case, it would be advantageous to examine Rule 77 of the Odisha Service Code :

> "**77. AN INCREMENT SHALL ORDINARILY BE DRAWN AS A MATTER OF COURSE UNLESS IT IS WITHHELD**.
>
> An increment shall ordinarily be drawn as a matter of course unless it is withheld. The authority empowered to make a substantive appointment to the post which a Government servant holds, may, if it considers that the conduct of such Government servant has not been good or that his work has not been satisfactory, withhold an increment from him. In the Police Department Superintendents are empowered to withhold increments of Sergeants and Sub-Inspectors. **In ordering the withholding of an increment such authority shall state the period for which it is withheld and whether the postponement shall have the effect of postponing future increments**."

A careful perusal of the aforesaid Rule reveals that an employee as a matter of course ordinarily earns his annual increment, however the same can be withheld by the competent authority if the same considers that the conduct of the employee/ Government servant has not been good or that his work is not satisfactory by passing of an order. It no where contemplates an automatic withholding of an increment for the periods a Government servant/ employee remains under suspension on the plea that there is a break in service. Not only it is incumbent on the competent authority to pass an order withholding the increment in the given case but also state the period for which it shall remain withheldand also as to whether the postponement of the increment shall have the cascading effect of postponing future increments.

5. Concededly in the present case the respondent is facing a departmental proceedings and a vigilance case and the competent authority, in our consideredview was fully competent to withhold the increment for the relevant period/year. However, admittedly no order of withholding the increment for the relevantyear 2017-2018 has been passed. The learned Single Judge in our view has rightly directed the employer/department to extend the benefit of the annual increment subject to the pending vigilance case. There is another aspect that the respondent has suffered extreme prejudice as not only he has been denied the benefit of annual increment for therelevant year 2017-2018 but also his subsequent increments till his date of superannuation have also not been released in the absence of any order whichis contemplated by the aforesaid Rule 77.

6. Now turning to the scope of interference in Letters Patent Appeals/Writ Appeals with the order passed by the learned Single Judge, this Court in the case of ***AninditaMohantyVrs.The Senior Regional Manager, H.P. Co. Ltd., Bhubaneswar & Ors., 2020 (II) ILR – CUT -398*** held as follows:

> *"Let us first examine the power of the Division Bench while entertaining a Letters Patent appeal against the judgment/order of the Single Judge. This writ appeal has been nomenclatured as an application under Article 4 of the Orissa High Court Order, 1948 read with Clause 10 of the Letters Patent Act, 1992. Letters Patent of the Patna High Court has been made applicable to this Court by virtue of Orissa High Court Order, 1948. Letters Patent Appeal is an intra-Court appeal where under the Letters Patent Bench, sitting as a Court of Correction, corrects its own orders in exercise of the same jurisdiction as vested in the Single Bench. (Ref: (1996) 3 Supreme Court Cases 52, BaddulaLakshmaiahVrs. ShriAnjaneya Swami Temple). The Division Bench in Letters Patent Appeal should not disturb the finding of fact arrived at by the learned Single Judge of the Court unless it is shown to be based on no evidence, perverse, palpably unreasonable or inconsistent with any particular position in law. This scope of interference is within a narrow compass. Appellate jurisdiction under Letters Patent is really a corrective jurisdiction and it is used rarely only to correct errors, if any made.*
>
> *In the case of B. Venkatamuni Vrs. C.J. Ayodhya Ram Singh reported in (2006) 13 Supreme Court Cases 449, it is held that in an intra-Court appeal, the Division Bench undoubtedly may be entitled to reappraise both questions of fact and law, but entertainment of a letters patent appeal is discretionary and normally the Division Bench would not, unless there exist cogent reasons, differ from a finding of fact arrived at by the Single Judge. Even a Court of*

first appeal which is the final Court of appeal on fact may have to exercise some amount of restraint. Similar view was taken in the case of Umabai Vrs. Nilkanth Dhondiba Chavan reported in (2005) 6 Supreme Court Cases 243. In the case of Commissioner of Income Tax Vrs. Karnataka Planters Coffee Curing Work Private Limited reported in (2016) 9 Supreme Court Cases 538, it isheld that the jurisdiction of the Division Bench in a writ appeal is primarily one of adjudication of questions of law. Findings of fact recorded concurrently by the authorities under the Act concerned (Income Tax Act) and also in the first round of the writ proceedings by the learned SingleJudge are not to be lightly disturbed.

Thus a writ appeal is an appeal on principle where the legality and validity of the judgment and/or order of the Single Judge is tested and it can be set aside only when there is a patent error on the face of the record or the judgment is against established or settled principle of law. If two views are possibleand a view, which is reasonable and logical, has been adopted by a Single Judge, the other view, howsoever appealing may be to the Division Bench; it is the view adopted by the Single Judge, which would, normally be allowed to prevail. If the discretion has been exercised by the Single Judge in good faith and after giving due weight to relevant matters and without being swayed away by irrelevant matters and if two views are possible onthe question, then also the Division Bench in writ appeal should not interfere, even though it would have exercised its discretion in a different manner, were the case come initially before it. The exercise of discretion by the Single Judge should manifestlybe wrong which would then give scope of interference to the Division Bench."

7. In this view of this matter, we find no grave error or fault in the order passed by the learned Single Judge warranting interference.The Writ Appeal is accordingly dismissed.

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2023 (I) ILR-CUT- 370

S. TALAPATRA, J & MISS. SAVITRI RATHO, J.

WPCRL NO. 143 OF 2022

ANIL PRUSTY @ ANIL KU. PRUSTY .....Petitioner

.V.

STATE OF ODISHA & ANR. .....Opp.Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Section 167 and 309 r/w Article 21 of the Constitution of India – The Petitioner is facing the trial for commission of offences under Sections 376 (2)(f), 376 (3) of the IPC as well as under section 6 of POCSO Act, 2012 and Section 3(2),(5) and 3(1)(i)(w)(ii) of the SC & ST (Prevention of Atrocities) Act – Whether Custodial detention can be continued without taking cognizance even after filing of the charge sheet – Held, No – Usually, the remand as granted by the Court U/s 167 (2) of Cr.P.C continues if the Cognizance is taken within the period of remand, but after expiry of that period no court can extend the remand unless the cognizance has been taken in the meantime. (Para 21)

Case Laws Relied on and Referred to :

1. CRLMC No. 257 & 309 of 1986 (Judgment Dt. 25.09.1996): Durel Behera & Ors. Vs. Suratha Behera & Ors.
2. (2013) 3 SCC 77 : Suresh Kumar Bhikamchand Jain Vs. State of Maharashtra & Anr.

For Petitioner : Mr. D.Panda.

For Opp.Parties : Ms. S.Patnaik, Addl.Govt. Adv.

JUDGMENT Date of Judgment : 25.01.2023

S. TALAPATRA, J.

By means of this writ petition, the orders dated 11.10.2022 and 22.10.2022, remanding the Petitioner, namely, Anil Prusty @Anil Kumar Prusty to the jail custody by the Special Court (POCSO), Cuttack in Special G.R. Case No.111 of 2022 [arising from Lalbag P.S. Case No.180 of 2022] have been challenged.

2. The facts as relevant for appreciating the challenge may briefly be noted at the outset. After filing of the police report, within the meaning of Sections 173(2) of the Code of Criminal Procedure (Cr.P.C. in short), no cognizance of the offence, based on the said police report, was taken. It has been asserted that till the day of filing of the writ petition, no such cognizance has been taken, on the said police report. The Petitioner has been sent up for facing the trial for commission of offences under Sections 376(2)(f), 376(3) of the IPC, Section 6 of POCSO Act, 2012 and Section 3(2), (5) and 3(1)(i)(w)(ii) of the SC & ST (Prevention of Atrocities) Act, 1989. The Petitioner has contended that the custodial detention without taking cognizance, after filing of the chargesheet, cannot be continued. Only after taking cognizance, the custodial detention can be extended under Section 309(2) of the Cr.P.C. Hence, the orders dated 16.10.2022 and 20.10.2022 are contrary to Article 21 of the Constitution of India, in as much as the Special Court was not authorized, in the circumstances, as noted above, to pass such orders extending detention.

3. One Arun Sethi lodged the first information report (F.I.R.) at Lalbag Police Station on 05.08.2022 and based thereon, Lalbag P.S. Case No.108 of 2022 under Section 376(2)(f) of the IPC, Section 6 of the POCSO Act, 2012 and Sections 3(2)(5) of the SC & ST (Prevention of Atrocities) Act, 1989 has been registered. The informant disclosed in the F.I.R. that his minor daughter (name withheld) aged about 15 years, who was studying Standard-X at Stewart School, Cuttack (hereinafter referred to as the victim) used to go for tuition daily to the private tuition centre of the Petitioner at his house. On 31.07.2022 (Sunday) at 9.30 pm when the victim was about to leave the said tuition centre with her friend, the Petitioner called her to a nearby room and touched her body including her private parts. The victim was stunned by the said obnoxious conduct. The Petitioner threatened her to not disclose the incident to anyone. That night, the victim did not inform anything. On advice of one of her friends, the victim disclosed the entire episode to her mother. Thereafter, the information about the occurrence was lodged on 05.08.2022. The police arrested

the Petitioner on 07.08.2022 and he was produced before the Special Court (POCSO), Cuttack. He was remanded to judicial custody.

4. It emerges from the records that the charge-sheet (the police report) was filed on 02.10.2022 in the Special Court (POCSO), Cuttack, but, without taking cognizance, the case was posted on 11.10.2022 and on that day the case was adjourned to 20.10.2022, as the Presiding Judge was not available. In the order dated 11.10.2022, it has been noted that "*as no P.O. had joined, cognizance order will be passed after his joining*".Without passing any formal order of remand, the Petitioner's production had been ordered on the next date i.e. 22.10.2022. On 22.10.2022 when the Presiding Judge, Special Court (POCSO) in-Charge, Cuttack took up the bail petition of the Petitioner for consideration, it was submitted for and on behalf of the Petitioner that, he was not pressing the bail petition on merit but, it was contended that since no cognizance has been taken, the detention of the Petitioner was unlawful and hence, he was entitled to be released forthwith from the custody. On that day i.e. 22.10.2022, the Presiding Judge in the face of such submission by his order observed as follows:

> *".....charge-sheet was filed by the I.O. on 02.10.2022 after the sad demise of the Presiding Officer on 02.09.2022, means after a period of one month. As such, the Court was lying vacant in absence of regular Presiding Officer and this Court (Presiding Officer of SC & ST (PoA) Act has been kept in-charge of his routine duty. It is apt to mention that the power of cognizance of offences in relation to POCSO Court is conferred upon the regular Presiding Officer of that Court by the Hon'ble High Court and the in-charge Court had not been conferred upon such power in that regard."*

5. Mr. D. Panda, learned counsel appearing for the Petitioner has quite empathetically submitted that the Petitioner is under illegal detention, in as much as from the date of filing of the charge-sheet i.e. 02.10.2022, the Special Court cannot exercise its power for directing the custodial detention under Section 167(2) of the Cr.P.C. After filing of the charge-sheet, the order of remand can only be passed under Section 309(2) of the Cr.P.C. Mr. Panda, learned counsel has submitted that on 02.10.2022, no remand order under Section 167(2) of the Cr.P.C. was statutorily permissible nor should the Petitioner be remanded to the custody by exercise of the power vested under Section 309(2) of the Cr.P.C., as cognizance of offence was yet to be taken. Thus, custodial remand after 11.10.2022 is illegal, being not in accordance with the procedure established by law.

6. Ms. S. Patnaik, learned Additional Government Advocate has in reply contended that the special circumstances from which the situation has arisen has to be taken note of, otherwise there will be miscarriage of justice. The Presiding Judge of the Special Court (POCSO), Cuttack died and for his death the said court had no Presiding Judge. Only the formal charge was with one Presiding Officer, not empowered to take cognizance. According to her, the Judge-in-

Charge did not take the cognizance as he perceived that he had no power to take cognizance and only the regular Judge can take the cognizance. This irregularity cannot be allowed to frustrate the very object of justice based on the technical objection raised by the Petitioner. Ms. Patnaik, learned Additional Government Advocate has relied on a few decisions including ***Durel Behera and Others vs. Suratha Behera and Others*** (judgment dated 25.09.1986 delivered in Criminal Miscellaneous Cases No. 257 and 309 of 1986). In that decision, this Court had occasion to observe that unauthorized or illegal detention of an accused does not invalidate his subsequent valid detention. If the detention of an accused is unauthorized or invalid because of infringement of the provisions contained in Section 167(2) or 309(2) of the Code, he may make an application for habeas corpus or pursue other remedies as are available to him under the law. In that judgment, one decision of the Karnataka High Court in ***Gyanu Madhu Jamkhandi and Ors. v. State of Karnataka*** has been referred to, where it has been observed as follows:

> *"In the absence of valid orders of remand, the detention of the petitioner in custody for the period referred to above was illegal and so he is entitled to be enlarged on bail, though not on appreciation of facts relating to the charges brought against him, but purely on legal grounds."*

It has been observed further that the illegal detention, by itself and taken alone, is no ground for 'bail' as the same has not been recognised by the Code. Bail is no remedy and has never been conceived or intended in law to be a remedy for illegal detention. If the detention is illegal, remedy is not to seek the bail, but to seek release by a writ of *habeas corpus*. the observation as made in ***Durel Behera*** (supra) by this Court has not broken any new ground in the criminal jurisprudence. The observation reads as follows:

> *"Where an accused succeeds on application for a writ of habeas corpus on the ground of illegal detention, he may be re-arrested and remanded to custody having regard to the gravity and the nature of the offence alleged to have been committed by him. If, however, he is released on bail on the ground that his detention was illegal, his bail can be cancelled only on the ground that he has misused the privilege of bail*."

7. Mr. Panda, learned counsel has placed his reliance on the celebrated decision Re. ***Madhu Limaye and Ors***: (1969) 1 SCC 292 where having referred to Article 22 of the Constitution of India, the Apex Court has observed thus:

> "*Once it is shown that the arrests made by the police officers were illegal, it was necessary for the State to establish that at the stage of remand, the Magistrate directed detention in jail custody after applying his mind to all relevant matters. Remand orders are patently routine and appear to have been made mechanically.* ***If their detention in custody could not continue after their arrest because of the violation of Article 22 (1) of the Constitution they were entitled to be released forthwith****. The orders of remand are not such as would cure the constitutional infirmities*." [Emphasis supplied].

Mr. Panda, learned counsel has placed his further reliance on the decision of the Apex Court in ***Suresh Kumar Bhikamchand Jain v. State of Maharashtra and Anr.***: (2013) 3 SCC 77, which decision has been relied by the Delhi High Court in ***Deepak v. The State (Government of NCT Delhi)*** [the order dated 07.02.2022 passed in Criminal Revision No.16 of 2022].

8. In ***Suresh Kumar Bhikamachand Jain*** (supra), the Apex Court had framed the following issues for determination:

> *"2. This case has thrown into focus certain important issues regarding the right of an accused to be released on bail under Section 167(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C"). One of such issues concerns the power of the Magistrate to pass orders of remand even beyond the period envisaged under Section 167(2) CrPC. In the instant case, despite charge-sheet having been filed, no cognizance has been taken on the basis thereof. The learned Magistrate has, however, continued to pass remand orders, without apparently having proceeded to the stage contemplated under Section 309 Cr.P.C."*

From those issues, what surfaced prominently is that, although, the charge-sheet had been filed within the time stipulated under Section 167(2) Cr.P.C., sanction to prosecute the Petitioner had not been obtained (in the case of ***Suresh Kumar Bhikamchand Jain***), as consequence whereof, no cognizance was taken of the offence. Notwithstanding, the remand orders were continued to be made and the Petitioner remained in the magisterial custody. In answering the question whether the Magistrate or the trial court can pass any order of remand in terms of Section 167(2) Cr.P.C. beyond the period of prescribed therein, the Apex Court has clearly observed as follows:

> *"14. The power of remand is vested in the Court at the very initial stage before taking of cognizance under Section 167(2) Cr.P.C. Once cognizance is taken, the power to remand shifts to the provisions of Section 309 Cr.P.C., under which the Trial Court is empowered to postpone or adjourn proceedings and, for the said purpose, to extend the period of detention from time to time. Section 309(2) Cr.P.C. contemplates a situation where if the Court after taking cognizance of an offence or commencement of trial finds it necessary to postpone the commencement of, or adjourn, any inquiry or trial, it may, for reasons to be recorded, postpone or adjourn the inquiry or trial on such terms as it thinks fit, for such time as it considers reasonable, and* ***may by of warrant remand the accused, if in custody****, for a period of fifteen days at a time."*

9. For purpose of reference, Section 167 of the Cr.P.C. [the relevant part] and Section 309 of the Cr.P.C. are extracted below:

> ***167. Procedure when investigation cannot be completed in twenty four hours-***
>
> *(1) xxx xxx xxx*
>
> *(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 of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage.

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorize detention in the custody of the police.

Explanation I.- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.

Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic vedio linkage, as the case may be.

Provided further that in case of a woman under eighteen years of age, the detention shall be authorized to be in the custody of a remand home or recognized social institution.

* * * * * *

309. Power to postpone or adjourn proceedings.-

(1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

Provided that when the inquiry or trial relates to an offence under section 376 to 376-D of the Indian Penal Code (45 of 1860), the inquiry or trial shall, as far as possible, be completed within a period of two months from the date of commencement of the examination of witness.

(2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.

[Provided also that-

(a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;

(b) the fact that the pleader of a party is engaged in another court, shall not be ground for adjournment.

(c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be]

Explanation 1.- If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2.- The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused.

[Emphasis supplied]

10. A bare reading would bring out that the power of remand under Section 167 of the Cr.P.C. is exercisable during investigation and such power is restricted by stipulation of time. Similarly, after the cognizance is taken, the power of remand of the accused is derived from Section 309(2) of the Cr.P.C.

11. In Section 309 of the Cr.P.C. it has been clearly provided that after taking cognizance of an offence or commencement of trial, the concerned court may by way of warrant remand the accused, if in custody, for a period as prescribed by the proviso. It is evident that no specific provision is available in the statute for remand for the period after the charge-sheet is filed (under Section 173(2) of the Cr.P.C.) and cognizance is yet to be taken.

12. Whether during that period, any court or any Judge-in-Charge of the proceeding can remand the accused to further detention or not?

13. The old provision of the Criminal Procedure Code, 1898 has also been referred by Mr. Panda, learned counsel appearing for the Petitioner Section 344 of the old Cr.P.C. postulated provisions is *pari materia* to Section 309 of the Cr.P.C. It provided that, if for the absence of any witness, or any other reasonable cause it becomes necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, the court may, if it thinks fit, by order in writing stating the reasons therefor, from time to time postpone or adjourn the same on such terms as it thinks

fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody; No Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

14. The comparison of the old and the new provisions shows that the law did not take a new turn by efflux of time. Both these provisions (Section 167 of the Cr.P.C. and Section 309 of the Cr.P.C.) are in tune with Article 22 of the Constitution of India. Article 22 embodies a rule, which has always been recognised, as vital and fundamental for safeguarding the personal liberty in all legal systems where the rule of law prevails.

15. In ***Madhu Limaye*** (supra), the Apex Court had occasion to observe that *once it is shown that the arrests made by the police officers were illegal, it was necessary for the State to establish that at the stage of remand the Magistrate directed detention in jail custody after applying his mind to all relevant matters.* The remand cannot be mechanical. Whether the remand is at all required or not, that has to be assessed by the court after the statutory periodicity. If such assessment is not made, the remand as directed can be questioned and can be interfered with.

16. In ***Serious Fraud Investigation Office vs. Rahul Modi and Ors***. (the order dated 07.02.2022 delivered in Criminal Appeals No.185-186 of 2022): SCC Online SC/53 the Apex Court had occasion to dwell upon Section 167(2) with its proviso. It has been observed in the said report as follows:

> *"15. A close scrutiny of the judgments in **Sanjay Dutt v. State**: (1994) 5 SCC 410, **Mohamed Iqbal Madar Sheikh & Ors. v. State of Maharashtra**: (1996) 1 SCC 722 and **M. Ravindran v. Intelligence Officer, Directorate of Revenue Intelligence** would show that there is nothing contrary to what has been decided in **Bhikamchand Jain** (supra). In all the above judgments which are relied upon by either side, this Court had categorically laid down that the indefeasible right of an accused to seek statutory bail under Section 167(2), Cr.P.C. arises only if the charge-sheet has not been filed before the expiry of the statutory period. Reference to cognizance in **Madar Sheikh** (supra) is in view of the fact situation where the application was filed after the charge-sheet was submitted and cognizance had been taken by the trial court. Such reference cannot be construed as this Court introducing an additional requirement of cognizance having to be taken within the period prescribed under proviso (a) to Section 167(2), Cr.P.C, failing which the accused would be entitled to default bail, even after filing of the charge-sheet within the statutory period. It is not necessary to repeat that in both **Madar Sheikh** (supra) and **M. Ravindran** (supra), this Court expressed its view that non-filing of the chargesheet within the statutory period is the ground for availing the indefeasible right to claim bail under Section 167(2), Cr.P.C. The conundrum relating to the custody of the accused after the expiry of 60 days has also been dealt with by this Court in **Bhikamchand Jain** (supra). It was made clear that the accused remains in custody of the Magistrate till cognizance is taken by the relevant court. As the issue that arises for consideration in this case is squarely covered by the judgment in **Bhikamchand Jain** (supra), the order passed by the High Court on 31.05.2019 is hereby set aside.*

17. Let us look back to ***Suresh Kumar Bhikamchand Jain*** (supra). In that occasion, the Apex Court had observed as follows:

"17. In our view, grant of sanction is nowhere contemplated under Section 167 Cr.P.C. What the said Section contemplates is the completion of investigation in respect of different types of cases within a stipulated period and the right of an accused to be released on bail on the failure of the investigating authorities to do so. The scheme of the provisions relating to remand of an accused, first during the stage of investigation and, thereafter, after cognizance is taken, indicates that the Legislature intended investigation of certain crimes to be completed within 60 days and offences punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, within 90 days. In the event, the investigation is not completed by the investigating authorities, the accused acquires an indefeasible right to be granted bail, if he offers to furnish bail. Accordingly, if on either the 61st day or the 91st day, an accused makes an application for being released on bail in default of chargesheet having been filed, the Court has no option but to release the accused on bail. The said provision has been considered and interpreted in various cases, such as the ones referred to hereinbefore. Both the decisions in Natabar Parida's case(supra) and in Sanjay Dutt's case (supra) were instances where the charge-sheet was not filed within the period stipulated in Section 167(2) Cr.P.C. and an application having been made for grant of bail prior to the filing of charge-sheet, this Court held that the accused enjoyed an indefeasible right to grant of bail, if such an application was made before the filing of the charge-sheet, but once the chargesheet was filed, such right came to an end and the accused would be entitled to pray for regular bail on merits.

18. None of the said cases detract from the position that once a charge-sheet is filed within the stipulated time, the question of grant of default bail or statutory bail does not arise. As indicated hereinabove, in our view, the filing of chargesheet is sufficient compliance with the provisions of Section 167(2)(a)(ii) in this case. Whether cognizance is taken or not is not material as far as Section 167 Cr.P.C. is concerned. The right which may have accrued to the Petitioner, had charge-sheet not been filed, is not attracted to the facts of this case. Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of Section 309 Cr.P.C., it cannot be said that the accused is entitled to grant of statutory bail, as envisaged in Section 167 Cr.P.C. The scheme of the Cr.P.C. is such that once the investigation stage is completed, the Court proceeds to the next stage, which is the taking of cognizance and trial. An accused has to remain in custody of some court. During the period of investigation, the accused is under the custody of the Magistrate before whom he or she is first produced. During that stage, under Section 167(2) Cr.P.C., the Magistrate is vested with authority to remand the accused to custody, both police custody and/ or judicial custody, for 15 days at a time, up to a maximum period of 60 days in cases of offences punishable for less than 10 years and 90 days where the offences are punishable for over 10 years or even death sentence. In the event, an investigating authority fails to file the charge-sheet within the stipulated period, the accused is entitled to be released on statutory bail. In such a situation, the accused continues to remain in the custody of the Magistrate till such time as cognizance is taken by the Court trying the offence, when the said Court assumes custody of the accused for purposes of remand during the trial in terms of Section 309 Cr.P.C. The two stages are different, but one follows the other so as to maintain a continuity of the custody of the accused with a court." *[Emphasis supplied]*

18. It is noteworthy that, the Apex Court has in no uncertain terms laid down the law that Section 167 of the Cr.P.C. is concerned with the stage of investigation. There is no dispute in the present case that the charge sheet has been filed within the period as prescribed by Section 167 of the Code. But the case has not proceeded to the stage of Section 309 of the Cr.P.C. Ordinarily, during the period of investigation, the accused is under the custody of the Magistrate before whom he or she is first

produced if he is not granted bail. During the stage of investigation, the Magistrate is vested with authority under Section 167(2) of the Cr.P.C to remand the accused to custody. It has been further laid down that in the event, an investigating authority fails to file the charge-sheet within the stipulated period, the accused is entitled to be released on statutory bail as a matter of right. In that situation, the accused continues to remain in the custody of the Magistrate till cognizance is taken by the court trying the offence by virtue of the last remand order passed before the statutory period was expired. After taking the cognizance or with commencement of trial, power to remand an accused on due consideration falls within the ambit of Section 309 of the Cr.P.C.

19. The solitary question that arises for consideration in this case is that whether the remand of the Petitioner as directed by the Judge-in-charge, Special Court is authorized by law or not. As discussed, there is no specific law how the remand of the accused is to be dealt with after filing of the charge-sheet and before the cognizance of the offence is taken on the basis of the police report by the trial court.

20. We have noted that every remand requires assessment whether the remand is required or not. We hold that the reasons given by the judge in the orders dated 02.10.2022 and 11.10.2022, as passed in Spl. G.R. Case No.111 of 2022 are not based on assessment. However, the order dated 22.10.2022, as passed in the said Spl. G.R. Case No.111 of 2022 by the ADJ-cum-Judge Spl. Court, Cuttack has to be looked at keeping in view the scheme of the POCSO Act, in as much as, the Special Court is declared by the State on due consultation and person can take over the power of the Special Court for taking cognizance unless and until such powers are vested with him expressly. Hence, it is observed thus:

> "*The record is awaiting taking cognizance consequent upon the joining regular Presiding Officer and in case, the bail is granted to him, there is chance influencing by him leading to tampering of prosecution evidence."*

It has been opened that in absence of the regular Presiding Officer, taking of cognizance is beyond his competence. Hence, the Judge-in-charge has not taken the cognizance.

21. We entirely agree with the submission made by Mr. Panda, learned counsel that no express power has been provided in the statute to remand the accused after filing of the charge sheet and before taking of cognizance based on the police report. In the ordinary course, either after commitment or after filing of the charge-sheet, cognizance is taken by the concerned judge. Only the Special Judge would have taken cognizance. On account of absence of the Special Judge [under the POCSO Act] no cognizance can be taken. Hence, stricto sensu, the orders of remand after filing of the chargesheet and before the taking the cognizance, as referred before, are not valid orders. In ***Suresh Kumar Bhikamchand Jain*** (supra), it has been clearly laid down that, "*the accused continues to remain in the custody after filing of the*

chargesheet till such time as cognizance is taken by the court trying the offence, when the said court assumes custody of the accused for purpose of remand during the trial in terms of Section 309 of the Cr.P.C".

We cannot, in consideration of the said exposition, hold that until the cognizance is taken by the Special Court, the accused be deemed to have been in the custody, if the charge-sheet had been filed within the time. We have been persuaded to consider the dislocation caused by sudden death of the Special Judge under POCSO Act. But detention can only be continued in accordance with the procedure as established by law. We cannot rewrite the law. We are to be governed by the law. Usually, the remand as granted by the Court under Section 167(2) of the Cr.P.C. continues if the cognizance is taken within the period of remand. But after expiry of that period, no court can extend the remand unless the cognizance has been taken in the meantime. Hence, on expiry of the period of remand as given under Section 167(2) of the Cr.P.C., as no cognizance was taken, the orders of remand, as challenged are invalid for absence of jurisdictional competence.

22. If cognizance is still not taken, in view of the above observation, the Petitioner be released forthwith on execution of the bond of Rs.50,000/- (Rupees fifty thousand) supported by two sureties of the like amount upon obtaining undertaking that the Petitioner shall attend the trial, if cognizance is taken of the offence, based on the police report. But, if on taking cognizance, any order has been passed by the regular Special Judge [under POCSO Act] remanding the Petitioner, this order will not be given effect to.

23. Before parting with the records, we would clarify that if the cognizance is not taken within the period of remand, as extended in exercise of the power under Section 167 of the Cr.P.C., the Special Court will lose its authority to extend the period of remand. The order of remand by way of extension or passing fresh order can only be passed after taking cognizance and in exercise of the power under Section 309(2) of the Cr.P.C.

24. In the result, this petition stands allowed to the extent as indicated above.

25. No order as to costs.

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2023 (I) ILR-CUT- 380

Dr. B.R. SARANGI, J.

W.P.(C) NO. 9247 OF 2020

SRIKANTA KUMAR BEHERA .....Petitioner

.V.

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

SERVICE LAW – Regularization – The petitioner working on daily wage basis as a Night Watchman – Prayed for regularisation of his service with retrospective effect – Held, since the hostel are run by the University Authorities, the persons engaged therein in housing and non-mess department have to be regularized in accordance with the provisions of statute and principles of law and equity. (Para 19)

Case Laws Relied on and Referred to :

1. O.J.C. No. 4411 of 1997 (disposed of on 02.12.1998) : Rabinarayan Mishra & Ors.Vs. State of Orissa & Ors.
2. 2021 (Supp.) OLR 552 : Rajib Lochan Mahanta Vs. Vice Chancellor, Utkal University.
3. AIR 2006 SC 1806 : Secretary, State of Karnataka Vs. Umadevi.
4. 77 (1994) CLT 70 : Dhrubananda Mishra & Ors.Vs. Vice Chancellor, Utkal University.
5. OJC No. 13005 of 1999 (disposed of on 27.01.2006) : Parikhit Malik Vs. Chancellor Utkal University.
6. AIR 2010 SC 2587 : State of Karnatak Vs. M.L. Keshari.
7. AIR 2013 SC 3567 : Nihal Singh Vs. State of Punjab.
8. (2015) 8 SCC 265 : Amarkant Rai Vs. State of Bihar & Ors.

For Petitioner : Mr. Jagannath Patnaik, Sr. Adv.
M/s. B. Mohanty,T.K.Patnaik,A.Patnaik,
S. Patnaik, B.S.Rayaguru,S.Mohapatra & R.K. Pati

For Opp.Parties : M/s.Guru Prasad Mohanty & H.P. Mohanty.

JUDGMENT Date of Hearing : 13.12.2022 : Date of Judgment : 20.12.2022

Dr. B.R. SARANGI, J.

The petitioner, who is working on daily wage basis as a Night Watchman in Malati Devi Chhatri Nivas of Utkal University, Bhubaneswar, has filed this writ petition seeking regularisation of his service with retrospective effect from the date he joined the post, by quashing the order dated 30.08.2019 passed by the Registrar, Utkal University-opposite party no.3 under Annexure-2, whereby the representation filed by the petitioner has been rejected in compliance of the order dated 25.02.2019 passed by this Court in W.P.(C) No. 2013 of 2019, and further seeks for grant of equal pay for equal work, which his counterparts in regular service are getting.

2. The facts of the case, in brief, are that under the Utkal University there are 10 hostels and all are situated within the University Campus. They are:-

(1) Gopabandhu Chhatranivas,
(2) Madhusudan Chhatranivas,
(3) Fakirmohan Chhatranivas,
(4) Pt. Nilakantha Chhatranivas,

(5) Godavarish Chhatranivas,
(6) Kasturiva Chhatrinivas,
(7) Ramadevi Chhatrinivas,
(8) Saraladevi Chhatrinivas,
(9) Brahmakumari Chhatrinivas, and
(10)Malati Devi Chhatri Nivas.

The petitioner is working as Night Watchman on daily wage basis in Malati Devi Chhatri Nivas. As per the provisions contained in the Utkal University Act, 1966 and Regulations governing the field, all the P.G. hostels inside the campus of the University and the employees employed therein are subject to disciplinary control of the University. The students of the said hostels are also subject to the disciplinary control of the University for their activities in the hostels and are responsible for such conduct. The petitioner, being an employee, is a part and parcel of the University and is being under one of the establishment of the University like other employees.

2.1 Some of the employees of the non-mess category had filed a writ petition bearing O.J.C. No.4411/1997, which was disposed of on 02.12.1998. In the said writ petition, this Court decided that if hostels are run by the University authorities, the persons/employees engaged, either in the messing department or non-messing department, are to be regularized and maintained by the University in accordance with the provisions of the Statute and other principles of law and equity. The University authorities can make the Scheme to regularize the services of the non-messing staff in the hostels. Such scheme should be formulated regarding the nature and scope of employment and to provide equal pay for equal work like the regular employees. It was also directed that the University authorities shall frame the Scheme, as above, for regularization of the services of the non-mess employees attached to the hostels, including the petitioners therein, within a period of one year from the date of the judgment, and send the same to the State Government within that period. The State Government shall take a decision thereof within a period of 6 months from the receipt of the Scheme from the University to create such posts as would be found necessary and release the financial benefits for the posts as admissible. Until such Scheme is framed and decision is taken by the Government, the services of the petitioner shall not be dispensed with.

2.2 The State Government filed SLP, before the apex Court challenging the judgment dated 02.12.1998 passed by this Court in 0.J.C. No.4411 of 1997, which was ultimately dismissed. Thereby, in compliance of the said judgment dated 02.12.1998, a Scheme was prepared and benefit was extended to the workers, who had filed O.J.C No.4411 of 1997 by regularizing their services. But the petitioner, who is continuing and working in the same post, has not yet been regularized due to inaction of the opposite parties. Even though the Government has already sanctioned 78 number of posts, but the post held by the petitioner has not been created nor has the service of the petitioner been regularized. As against non-regularization of his

service, the petitioner, who had rendered continuous service for more than six years, filed a representation for regularization of his service. But the authority did not take any step for regularization of his service. As a consequence thereof, the petitioner filed W.P.(C) No. 2013 of 2019 with a similar prayer for regularization of his service. The said writ petition was disposed of vide order dated 25.02.2019 with a direction to opposite party no.3 to dispose of the representation of the petitioner and also directed to take a decision with regard to regularization of service of the petitioner within three months from the date of production of the certified copy of the order. On receipt of such order, the opposite party no.3, vide order impugned dated 30.08.2019, rejected the claim of the petitioner for regularization. Hence, this writ petition.

3. Mr. Jagannath Patnaik, learned Senior Counsel appearing along with Mrs. Soma Patnaik, learned counsel for the petitioner vehemently contended that the petitioner is working in the University since last 7 years without any break. Though services of similarly situated persons and juniors to the petitioner have already been regularized, but the case of the petitioner for regularization has been ignored. It is further contended that the services of 78 nonmess employees of Utkal University working under different hostels have already been regularized by the University, pursuant to the directions of this Court dated 02.12.1998 in O.J.C. No. 4411 of 1997, but, when the question of regularization of the service of the petitioner came, the same was rejected by opposite party no.3 taking a different stand that the regularization of the service of the petitioner cannot be done.

3.1 It is further contended that 78 posts were created by the Government of Odisha to accommodate the nonmess employees of Utkal University, pursuant to the direction of this Court in the earlier writ petition, i.e., O.J.C No. 4411 of 1997. By the time the petitioner sought for regularization of his service, out of 78 nearly 20 employees had already been retired from service. Thereby, posts are lying vacant in the University against which the petitioner's case can be considered for regularization. But the authorities, without applying their mind, rejected the representation of the petitioner and denied him the benefit of regularization of service, which is arbitrary, unreasonable and contrary to the provisions of law and also violates Articles 14 and 16 of the Constitution of India. To substantiate his contention, learned Senior Counsel appearing for the petitioner has placed reliance on the judgment of this Court in the case of ***Rabinarayan Mishra and others v. State of Orissa and others, O.J.C. No. 4411 of 1997 disposed of on 02.12.1998***, which has been made confirmed by the apex Court in the Special Leave Petition, and also on the case of ***Rajib Lochan Mahanta v. Vice Chancellor, Utkal University, 2021 (Supp.) OLR 552.***

4. Mr. Guru Prasad Mohanty, learned counsel appearing for the University, per contra, contended that the petitioner’s claim for regularization of service cannot be acceded to, as because he is not an employee of the University being selected by the

committee and appointed by the Registrar. He also never gets his daily/monthly work dues from the University Office. He disputed the fact that the petitioner has been working over 06 years and contended that had he worked over a period of 06 years, he could have made an application much earlier before the appointing authority and could have mentioned the date he joined in service. According to him, as per the provisions of the Orissa Universities Recruitment and Promotion of Non-Teaching Employees Rules, 1991, the employees are entitled to get the benefits, where the powers has been given to the Syndicate and the functionaries. Thereby, the employees, who are appointed and regulated under specific provisions of the Rules and the Regulations stated therein, are only entitled to get such benefits, whereas the petitioner has never been engaged in compliance to the provisions of the Rules and Regulations governing the field. It is admitted by him that there are altogether 10 hostels existing in the University campus and employees are serving in all the hostels duly appointed by the University authority, but not the writ petitioner for which he is unable to specifically state the date from which he is serving. Thereby, fictitious persons who might be engaged to perform temporary daily works for a couple of days or a week only claim to get regular benefits, which are not admissible to them. Thereby, the relief sought by the petitioner cannot be granted and, as such, the writ petition is liable to be dismissed. The petitioner also cannot get the advantage pursuant to the judgment passed by this Court in O.J.C. No. 4411 of 1997. Thereby, contended that the rejection of representation vide Annexure-2 dated 30.08.2019 is well justified and does not require any interference by this Court at this stage.

4.1 It is also further contended that as a matter of principle and in compliance of the direction given by this Court in O.J.C. No. 4411 of 1997, the Scheme was prepared by the University and the Government, as matter of principle, sanctioned 78 posts and appointments were made on regular basis to the employees who were rendering service and had approached this Court by filing O.J.C. No. 4411 of 1997. Thereby, as a one time measure the posts having been created and filled up by the opposite parties, no further benefit can be granted to the petitioner. To substantiate his contention, reliance has been placed on the judgment of the apex Court in the case of ***Secretary, State of Karnataka v. Umadevi, AIR 2006 SC 1806.***

5. This Court heard Mr. Jagannath Patnaik, learned Senior Counsel appearing along with Mrs. Soma Patnaik, learned counsel for the petitioner and Mr. G.P. Mohanty, learned Counsel appearing for the opposite parties no. 2 to 4 in hybrid mode and perused the record. Pleadings have been exchanged between the parties and with the consent of learned Counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

6. The Utkal University Act, 1966 provides under Section 75(19) that the Syndicate shall have the power and functions to establish the College and maintain the University Laboratories, Libraries and the Institute of Research. Sub-section (25)

of Section 76 of the Act also provides that the Syndicate shall have powers to establish and maintain hostels. Section 75(15) of the Act also provides that the misconduct of the students in the hostels when brought to the notice of the Syndicate shall be taken cognizance by the Syndicate. Section 154 of the Statute defined the 'Hostel' to mean a place of residence of the students of the University maintained and recognized by the University in accordance with the provisions of the Act. Section 157 of the Statute provides that the students living in the hostels shall be under the disciplinary control of the Superintendent and theAssistant Superintendent of the concerned hostels and may be assigned to individual members of their College staff for such additional supervision as may be necessary.

7. The legislatures of the State of Orissa, under the Orissa Act 5 of 1989, framed a law called "Orissa Universities Act, 1989". Under section 3 thereof it has been prescribed that the Universities named therein shall be deemed to have been established under the said Act and under sub-section (i) of Section 3 the name of the Utkal University has been indicated and it is stated that that the said Utkal University has been established under the Utkal University Act, 1966. Thus, the Utkal University having been established under the Orissa Universities Act, 1989, the provisions of the said Act are applicable after commencement of the said Act. Furthermore, pursuant to the power conferred under sub-section (3) of Section 24 of the Orissa Universities Act, 1989, the State Government has framed a statute called the Orissa Universities First Statute 1990. Similar provision has been also made in Section 29 as provided under Section 75 of the old statute. Section 21/23 of the Statute has provided to establish and maintain P.G. Departments constituting Colleges and not affiliated to Colleges. The Colleges maintained and established by the University such as Utkal University,Vani Vihar, the candidates of the P.G. Hostels are established and maintained by the University. In the Statute 21 (18) it has been provided that general inspection is to be done by the Colleges and Hostels at a fixed periods and the Syndicate has similar power to establish and maintain the University Laboratories, Libraries and institute of research Under Section 21(17) of the Statute. In view of such position of law vis-a-vis hostels attached to the University, the employees engaged on N.M.R./D.L.R. basis in the hostels are to be considered as the employees of the University and they need to be given necessary protection and facilities by regularizing their services and enjoyment of the service benefits like the regular employees. Provided further that such appointments are to be done in consonance with the statute applicable to them.

8. With a view to formulating a codified recruitment and promotion rules for non-teaching posts of the Universities, the Chancellor had placed the issue to the Standing Committee of the Vice-Chancellor, vide Chancellor's Office letter dated 17.11.1988, pursuant to which in the Vice-Chancellor's Coordination Committee Meeting held on 16.02.1989, it was decided that the Standing Committee of the Vice-Chancellors' shall prepare the Draft Recruitment and Promotion Rules. After

the same was prepared, the Chancellor, on consultation with the Government in Education Department, was pleased to approve the Rules, called the "Orissa Universities Recruitment and Promotion of Non-Teaching Employees Rules, 1991", which came into force on the date of its publication in the official gazette or the University Gazette, as the case may be. Rules-10 and 34 of the said Rules state as follows:-

> *"10. (1) Recruitment to all Class-IV posts shall be made by means of a competitive test as may be determined by the appointing authority.*
>
> *(2) All the vacancies arising in the Class-IV posts shall be notified to all the Employment Exchanges within the jurisdiction of the University concerned.*
>
> *(3) The Selection Committee constituted by the Vice-Chancellor for the purpose of appointment to the post of Class-IV employees, shall consider the candidates sponsored by different Employment Exchanges.*
>
> *(4) The Selection Committee may also consider the candidates applied for in response to open advertisement issued for the purpose.*
>
> *xxx xxx xxx*
>
> *"34 When it is considered by the Chancellor on the recommendation of the Vice-Chancellor that it is necessary or expedient so to do in the interest of the University and justice, he may, by order, relax any of the provisions of these rules in respect of any case or class of cases or class of persons."*

9. In view of the aforementioned Rules, it is made clear that Recruitment to all Class-IV posts shall be made by means of a competitive test, as may be determined by the appointing authority, and, as such, the same has to be notified to all the Employment Exchanges within the jurisdiction of the University concerned and there will be a selection committee, which may also consider the candidates applied for in response to open advertisement issued for the purpose. Thereby, a detailed procedure has been envisaged under the Rules to be appointed against Class-IV post. Nothing has been placed on record that the engagement of the petitioner has been done in consonance with the rules, as mentioned above. As such, no committee has been formed nor any appointment has been made by following due process of selection, nor compliance of the provision has been made. But he was allowed to continue to discharge the duties assigned to him. Thereby, the engagement of the petitioner is absolutely irregular one.

10. May it be noted that Registrar is the only appointing authority for Class-IV employees of the University and nothing has been placed on record to show that appointment of the petitioner was made by the Registrar of the University. Even if the petitioner has been receiving remuneration from the Superintendent of the hostel, but fact remains due to non-production of the document to show that the petitioner was engaged by the Registrar, Utkal University, who is the appointing authority, the engagement of the petitioner by incompetent person comes within the purview of irregular engagement. Even though, the petitioner has moved the authority for regularization of his service, the same has been rejected on the ground that on

16.11.2016, the listed employees were given employment after the Scheme was framed and they were recruited after they were selected by a committee.

11. The University First Statute 1990 under Statute 258 prohibits any such appointment. Besides, Rule 10 of the 1991 Rules prohibits any appointment without any selection. Therefore, engagement/appointment of the petitioner if would be taken into consideration, the same is contrary to the Statute and the Rules governing the field.

12. In the case of ***Umadevi*** (supra) it has been made clear that unless the appointment is in terms of the relevant rules and by way of a proper competition among qualified persons, the same would not confer any right on the appointee. While saying so, the apex Court at paragraphs 34 and 44 of the judgment held as follows:-

> *"34. While answering an objection to the locus standi of the Writ Petitioners in challenging the repeated issue of an ordinance by the Governor of Bihar, the exalted position of rule of law in the scheme of things was emphasized, Chief Justice Bhagwati, speaking on behalf of the Constitution Bench in Dr. D.C. Wadhwa & Ors. Vs. State of Bihar & Ors. (1987 (1) S.C.R. 798) stated:*
>
> *"The rule of law constitutes the core of our Constitution of India and it is the essence of the rule of law that the exercise of the power by the State whether it be the Legislature or the Executive or any other authority should be within the constitutional limitations and if any practice is adopted by the Executive which is in flagrant and systematic violation of its constitutional limitations, petitioner No. 1 as a member of the public would have sufficient interest to challenge such practice by filing a writ petition and it would be the constitutional duty of this Court to entertain the writ petition and adjudicate upon the validity of such practice."*
>
> *Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have*

described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates."

xxx xxx xxx

44. 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 bypassing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

Therefore, the Constitution Bench of the apex Court in the case of ***Umadevi*** (supra) has deprecated the practice of appointment of persons without following due procedure, but permitted regularization of the services of the employees, whose engagement is irregular but not illegal, as mentioned above.

13. In the present case, it is apparent that earlier similarly situated employees had approached this Court by filing OJC No. 4411 of 1997 ***(Rabinarayan Mishra and others v. State of Orissa and others)***, which was disposed of on 02.12.1998 and this Court in paragraphs-16 and 17 of the judgment held as follows:-

"16. This Court, in view of the facts disclosed in the case, and in view of the principles of law involved in the matter, in of the considered view that if Hostels are run by the University authorities, the persons engaged therein either in the Housing Department or Non-Messing Department have to be regularized and maintained by the University in accordance with the provisions of the Statute and other principles of law and equity. The University authorities can make a Scheme to regularize the services of the Non-Messing staff in the Hostels including the case of the petitioners as situation permits. A special Scheme should be formulated regard being had to the nature and scope of employment, financial implication of the posts and proper pay protection and also the principle of equal pay for equal work vis-à-vis the regular employees.

> *17. For the foregoing reason, we dispose of the writ application. We direct the University authorities to frame a Scheme as above for proper regularization of the Non-Mess employees attached to the Hostels including the petitioners within a period of one year from the date of communication of the judgment and send the same to the State Government within that period. The State Government shall take a decision thereon within six months of receipt of the Scheme from the University to create such posts as would be found necessary and release the financial benefits for the posts as admissible. Until such Scheme is framed and decision is taken by the State Government, the services of the petitioner shall not be dispensed with. We make no order as to costs."*

The judgment of this Court was also assailed before the apex Court by filing SLP, which was dismissed. Therefore, the judgment so passed by this Court having been confirmed by the apex Court, the Scheme was formulated and recommendation was made for creation of 78 posts. In pursuance thereof, the services of the petitioners of the said writ petition were regularized. By the time the present petitioner approached this Court, out of 78 sanctioned posts, 20 have fallen vacant due to retirement of those employees. Therefore, 20 vacancies are available, where the petitioner can be absorbed on regular basis.

14. In ***Rajib Lochan Mahanta*** (supra), the claim for regularization was granted to a similarly situated person, who was working as a Group-D employee, relying upon the Division Bench judgment of this Court in ***Dhrubananda Mishra and others vs. Vice Chancellor, Utkal University, 77 (1994) CLT 70***, wherein it was held that regularization has been accepted as a part and parcel of condition of service and specifically for those, who had completed five years of continuous service. Since all the nine petitioners in the said writ petition had completed more than five years of 3 continuous service, so a case of regularization was made out and the Division Bench of this Court directed the opposite parties to take early steps for regularization of those petitioners, along with other eligible employees, by framing an appropriate scheme and, thereafter, to regularize as per the seniority of the incumbents. It was also directed that apart from the basic pay, those petitioners at all be entitled to dearness and additional dearness allowance only being paid to the regular hands. That entitlement would be given effect from the date of passing of the judgment, i.e., 13.01.1993. It is apparent that on regularization, the incumbents would get the pay and other allowances as are available to regularly employed employees.

15. The aforesaid judgment of the Division Bench was challenged before the apex Court in SLP (C) No. 9240 of 1993 and the same was dismissed on 13.02.1996. Consequentially, the order passed by the Division Bench was confirmed. After confirmation of the judgment of this Court, the University on 23.05.1996 prepared a seniority list of daily wagers working in its establishment. In compliance of the judgment passed by the Division Bench of this Court in ***Dhrubananda Mishra*** (supra), the services of the petitioners therein have been regularized. Similar regularization has been made in compliance of the order passed by this Court in OJC No. 13005 of 1999 disposed of on 27.01.2006 ***(Parikhit Malik vs. Chancellor Utkal***

University). The said order was challenged in SLP No. 19829 of 2006 and the apex Court, vide order dated 16.02.2009, dismissed the said SLP. Thereby, large a number of persons have been regularized in terms of various orders passed in different writ petitions as well as contempt petitions. But the present petitioner has been discriminated.

16. So far as the claim of the petitioner in the present writ petition is concerned, if the judgment of the apex Court in ***Umadevi*** (supra) is considered, the direction contained in paragraph-44 thereof clearly indicates that the object behind the aforesaid direction is of 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 the courts or tribunals before the decision in ***Umadevi*** (supra) 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 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. Following the aforesaid principles rendered in the case of ***Umadevi (supra), in the case of State of Karnatak v. M.L. Keshari, AIR 2010 SC 2587***, the apex Court held that case of such employees who have completed ten years of service and do not possess the educational qualification prescribed for the post, at the time of their appointment may be considered for regularization in suitable lower posts considering their length of service rendered to the organization.

17. In ***Nihal Singh v. State of Punjab, AIR 2013 SC 3567***, the apex Court directed for regularization of service of the appellants creating new posts and on such regularization, the appellants would be entitled to all the benefits of service attached to the posts, which are similar in nature in the category of police service of the State, and also awarded cost to be paid to each of the appellants in the said case.

18. In the case of ***Amarkant Rai v. State of Bihar and others, (2015) 8 SCC 265***, referring to the cases of Umadevi, M.L.Keshari and Nihal Singh, mentioned supra, the apex Court came to a conclusion that the appellant served the University for more than 29 years in the post of Night Guard and he has serviced the college on daily wage basis, and therefore, directed the authority to regularize the service of the appellant in the said case retrospectively w.e.f. 03.01.2002.

19. In view of the aforesaid fact and circumstances, since the hostel are run by the University Authorities, the persons engaged therein in housing department and nonmess department have to be regularized and maintained by the University in accordance with the provisions of statute and other principles of law and equity. As against sanctioned posts of 78, as per the Scheme formulated earlier in compliance

to the order dated 02.12.1998 passed in OJC No. 4411 of 1997, 20 persons have retired from service and there exist vacancies, against which if the service of the petitioner can be considered for regularization, it will not cause any prejudice to the University authorities. In the event any vacancy is not available for any reason and the same has already been filled up, then the University authorities can formulate a Scheme to regularize the services of the petitioner and all other similarly situated persons, who are working in the hostel. As such, the said Scheme has to be prepared taking into account the nature and the scope of the employment, financial implication of the posts and proper pay protection and also the principle of equal pay for equal work vis-à-vis the regular employees. If the petitioner can be adjusted against the existing vacancy befitting his qualification, experience, then his case be considered by constituting a selection committee and by giving regular appointment in terms of the rules applicable, so that the irregularities, which have been created with regard to engagement can be sorted out. In the event no vacancy is available, then even when on the basis of the scheme prepared their cases will be regularized, they have to follow due procedure of rules for regularization. Needless to say, the Scheme should be prepared within a period of six months of the issue of the judgment to create such posts as would be found necessary and release the financial benefits for the posts as admissible. Until such Scheme is framed and decision is taken by the State Government, the services of the petitioner shall not be dispensed with.

20. This writ petition is accordingly allowed. However, there shall be no order as to costs.

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2023 (I) ILR – CUT - 391

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

W.P(C) NO. 35185 OF 2022

EGLOBETECH INDIA PVT. LTD., BHUBANESWAR .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 – Tender Matter – Whether the Court should exercise its discretion where ultimate decision resulting in cancellation of the auction has been passed by the Authority ?– Held, Yes – In furtherance of public interest in exercise of power under Articles 226 of the Constitution this Court can examine the action taken by the authority while conducting the auction of State largesse. (Para 8-14)

Case Laws Relied on and Referred to :-

1. (2007) 1 SCC 477 : Rajasthan Housing Board Vs. G.S.Investment.
2. (1999) 1 SCC 492 : AIR 1999 SC 393:Raunaq International Ltd. Vs.I.V.R. Construction Ltd.
3. (2001)2 SCC 118 : S. Ramanathan Vs.Union of India.
4. (1999) 4 SCC 727 : AIR 1999 SC 1801:Punjab Communications Ltd. Vs. Union of India.
5. (2000) 7 SCC 425 : Consumer Action Group Vs.State of Tamil Nadu.
6. (2004) 11 SCC 1 : Indian Banks' Association Vs.M/s Devkala Consultancy Service.
7. (2004) 11 SCC 417: Nandkishore Ganesh Joshi Vs. Commissioner, Municipal Corporation of Kalyan & Dombivali.

For Petitioner : Mr. S. Palit, Sr. Adv., M/s. A. Mishra, A. Kejriwal, A Parija, S. Bose & A. Pradhan.

For Opp. Parties: Mr. P.P. Mohanty, AGA, [O.Ps.No.1-3]
Mr. M. Kanungo, Sr. Adv ***&*** Mr. S.R. Mohanty [O.P.4]

JUDGMENT Decided On: 17.01.2023

Dr. B.R.SARANGI, J.

The Petitioner, by means of this writ petition, seeks to quash the order dated 15.12.2022 under Annexure-6, as well as the Tender Call Notice No.4059 dated 30.11.2022 under Annexure-5 issued by opposite party no. 3-Tahasildar, Gondia, and further to issue direction to opposite parties no.1 to 3 to conduct a fresh tender after providing sufficient individual notice to all the earlier bidders, who participated in the previous tender process, pursuant to tender call notice dated 29.06.2020.

2. The factual matrix of the case, in a nutshell, is that the Tahasildar, Gondia-opposite party no.3 issued Tender Call Notice dated 29.06.2020 inviting tenders for grant of "Nihal Prasad Morrum Quarry" on long term lease of five years. Pursuant thereto, the petitioner and opposite party no.4 were potential bidders. Opposite party no.4 had quoted the highest rate of additional charge, i.e. Rs.467/- per cum, but he was not declared as successful due to submission of incomplete application. Therefore, the petitioner, being the second highest bidder, was declared as successful, for having quoted additional charge of Rs.315/- per cum. The petitioner was issued with a letter dated 31.08.2020 to deposit security money amounting to Rs.11,55,000.00. In the said letter, it was further stated that since the petitioner had already deposited Rs.2,10,000/- as earnest money in the shape of demand draft, it was to deposit the rest amount of Rs.9,45,000.00 as security money. In response to the said letter, the petitioner deposited the aforesaid amount and was issued with a money receipt on 02.09.2020.

2.1 Then, opposite party no.4 filed W.P.(C) No.21744 of 2020 and this Court, vide order dated 04.09.2020, disposed of the said writ petition holding that the action of the opposite party-authorities in rejecting the bid of opposite party no.4 cannot be said to be unjust and illegal and it would not be appropriate to direct the

opposite party-authorities to settle the quarry in question in favour of opposite party no.4, even though he was the highest bidder. Opposite party no.4 assailed the said order before the apex Court by preferring Civil Appeal No.6990 of 2022 arising out of SLP (C) No.13876 of 2020 and the apex Court, vide order dated 27.09.2022, disposed of the said case with the following direction:-

> *"7. In the peculiar facts and circumstances of the case on record, where the original grant of lease was to take effect from June, 2020 for a period of five years and a result of the pendency of the matter before this court nothing has been worked with respect to said quarry, we deem it appropriate to pass the following directions:*
>
> *(a) The concerned Authority shall re-advertise and issue fresh tender call notice for grant of lease for appropriate period.*
>
> *(b) All the concerned, including the appellant as well as respondent No.4 herein, shall be entitled to make the claim after following all due process.*
>
> *(c) The contract shall be awarded to the successful parties purely in accordance with law".*

In compliance thereof, opposite party no.3 issued fresh advertisement vide Annexure-5 dated 30.11.2022 for grant of "Nihal Prasad Morrum Quarry" on lease for the relevant period, pursuant to which opposite party no.4 has quoted the additional charge as Rs.82.27 per cum making a vast difference of Rs.232.73/- per cum, which is unreasonably lower than the bid offered by the petitioner in previous bid causing loss to the State Exchequer. Therefore, opposite party no.3 does not have any valid justification for accepting such an unreasonably low bid in a subsequent bidding conducted in compliance of order dated 27.09.2022 passed by the apex Court without refunding the security money of the petitioner. Hence, this writ petition.

3. Mr. S. Palit, learned Senior Counsel appearing for the petitioner contended that the sole contention of opposite party no.4 before the apex Court was that in the event the bid is settled in favour of the petitioner,pursuant to earlier tender call notice, the State Exchequer would put to loss because of the price quoted by the petitioner. It is also contended that opposite party no.4 had quoted Rs.467/- per cum as additional charges, whereas the petitioner had quoted Rs.315/- per cum. Pursuant to order dated 27.09.2022 passed by the apex Court in Civil Appeal No.6990 of 2022 arising out of SLP (C) No.13876 of 2020, when a fresh auction notice was issued, the very same opposite party no.4 quoted Rs.82.27 per cum causing colossal wastage of public money and, as such, there is a clear case of cartel between the officer and the bidder, who are in the helm of affairs putting the Government source into auction. It is contended that pursuant to earlier tender call notice, once opposite party no.4 quoted Rs.467/- per cum as additional charges, how could he quote Rs.82.27 per cum as the additional charges for the selfsame source, pursuant to fresh auction conducted by opposite party no.3 in compliance of order dated 27.09.2022 passed by the apex Court. This fact having come to the knowledge of the petitioner,

in favour of whom, pursuant to earlier tender dated 29.06.2020, the source was settled and the security amount was deposited before the authority, it has approached by means of this writ petition bringing to the notice of this Court as to how the Government sources are put to auction by the officers of the State by affecting the Government revenue. Therefore, the petitioner seeks for interference of this Court.

3.1 It is further contended that the petitioner was not a bidder pursuant to the second tender call notice dated 30.11.2022 issued by the Tahasildar, Gondia. Looking at the very low price fixed by the Tahasildar, Gondia, petitioner desisted himself from participating in the auction, since earlier bid of the petitioner was accepted at Rs.315/- per cum as additional charges. It is further contended that even though the petitioner is not a bidder to the second tender call notice, but its bid, pursuant to earlier tender call notice, was accepted and it had deposited the requisite amount, which has not been refunded as on the date of issuance of the fresh tender call notice on 30.11.2022 or as yet and, as such,the earlier bid has not been cancelled while issuing second tender call notice on 30.11.2022. Therefore, the petitioner did not participate in the tender process, in pursuance of the second tender call notice dated 30.11.2022 issued by the Tahasildar, Gondia.

4. Mr. P.P. Mohanty, learned Additional Government Advocate appearing for the State-opposite parties contended that since the petitioner has not participated in the tender process, pursuant to the second tender call notice dated 30.11.2022, it has no *locus standi* to file the writ petition and, as such, the petitioner is not a bidder to the said tender call notice.

5. Mr. M. Kanungo, learned Senior Counsel appearing along with Mr. S.R. Mohanty, learned counsel for opposite party no.4 contended that opposite party no.4 is the successful bidder having quoted Rs.82.27 per cum as additional charge. In the event any order is passed by this Court, it will cause prejudice to him and, as such, it is contended that opposite party no.4 was the highest bidder, pursuant to earlier tender call notice issued by the Tahasildar, Gondia, by quoting Rs.467/- per cum as additional charges, but his bid was not accepted because of defective application and the source was settled in favour of the second highest bidder,namely, the present petitioner. Therefore, pursuant to second tender call notice dated 30.11.2022, when opposite party no.4 participated and quoted Rs.82.27 per cum, the source is to be settled in his favour. Since opposite party-authority is going to settle the source by following the due process of law, the same cannot be called in question in this writ petition. Therefore, this Court may not interfere with the process of tender issued by the Tahasildar, Gondia

6. This Court heard Mr. S. Palit, learned Senior Counsel appearing for the petitioner; Mr. P.P. Mohanty, learned Additional Government Advocate appearing for the State-opposite parties and Mr. M. Kanungo, learned Senior Counsel appearing along with Mr. S.R. Mohanty, learned counsel for opposite party no.4 in

hybrid mode. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

7. The factual matrix, as narrated above, clearly depicts as to how and in what manner the power vested with the authority to be discharged statutorily has been usurped. As such, the State authorities are vested with the power to save the exchequer of the State, which is nothing but the properties of the State, but, in the instant case, the same have been utilized in such a manner causing colossal wastage of State exchequer.Meaning thereby, with eyes wide open in the broad day light illegalities have been committed by the statutory authority.

8. In ***Rajasthan Housing Board v. G.S. Investment***, (2007) 1 SCC 477, the apex Court held that even if some defect was found in ultimate decision resulting in cancellation of the auction, the Court should exercise its discretionary power under Art. 226 of the Constitution of India with great care and caution and should exercise it only in furtherance of public interest. The Court should always keep the larger public interest in mind in order to decide whether it should interfere with the decision of the authority.

The case at hand is coming under one such category, which is apparent on the basis of factual matrix delineated above. Therefore, in exercise of power under Art.226 of the Constitution, in furtherance of public interest this Court examines the action taken by the authority while conducting the auction of State largesse.

9. In ***Raunaq International Ltd. v. I.V.R. Construction Ltd***., (1999) 1 SCC 492 : AIR 1999 SC 393, the apex Court held that the elements of public interest are- (1) public money would be spent for the purposes of contract; (2) the goods or services which are being commissioned would be for a public purpose, e.g., construction of roads, public building, etc.; (3) the public would be directly interested in timely fulfillment of the contract so that the public may receive service expeditiously; and (4) the public would also be interested in the quality of work.

10. In ***S. Ramanathan v. Union of India***, (2001) 2 SCC 118, the apex Court held that if statutory power is vested in an authority, requirements of law have to be complied with in exercising the power.

11. In ***Punjab Communications Ltd. v. Union of India***, (1999) 4 SCC 727: AIR 1999 SC 1801, the apex Court held that official decisions should not be infected with motives, e.g., fraud, dishonesty, malice, personal interest. Duty to act in good faith is inherent in the process.

12. In ***Consumer Action Group v. State of Tamil Nadu***, (2000) 7 SCC 425, the apex Court observed that the State may confer wide discretionary power upon an authority. Nevertheless, the power has to be exercised reasonably within the sphere of the statute and the said exercise of power must stand the test of judicial scrutiny.

The reason recorded must truly disclose the justifiability of exercising of such power. The power must be exercised for furtherance of the policy.

13. In ***Indian Banks' Association v. M/s Devkala Consultancy Service***, (2004) 11 SCC 1, the apex Court held that where a procedure is laid down for exercise of discretionary power by the statutory authority, the said power must be exercised in accordance with the prescribed procedure.

14. In ***Nandkishore Ganesh Joshi v. Commissioner, Municipal Corporation of Kalyan & Dombivali***, (2004) 11 SCC 417, the apex Court observed that a discretion conferred on a statutory authority must be exercised in public interest and judiciously. There is no place for any whim or caprice in exercise of discretionary power.

15. Taking into consideration the above quoted principles of law laid down by the apex Court and applying the same to the present context, this Court finds that pursuant to earlier tender call notice, the bid of opposite party no.4 was not accepted, as it was incomplete, even though he had quoted Rs.467/- per cum as additional charges and the source was settled in favour of the petitioner, who had quoted Rs.315/- per cum as additional charges. On being called upon, the petitioner also deposited the security money. Subsequently, opposite party no.4 filed W.P.(C) No.21744 of 2020 and this Court, vide order dated 04.09.2020, disposed of the said writ petition holding that the action of the opposite parties rejecting the bid of opposite party no.4 cannot be said to be unjust and illegal and it would not be appropriate to direct the opposite parties to settle the quarry in question in favour of opposite party no.4, even though he was the highest bidder. The said matter was carried to the apex Court by the very same opposite party no.4 by preferring Civil Appeal No.6990 of 2022 arising out of SLP (C) No.13876 of 2020 and the apex Court, vide order dated 27.09.2022, disposed of the same, the operative part of which has already been quoted above.

16. In compliance of the order dated 27.09.2022 passed by the apex Court in Civil Appeal No.6990 of 2022, opposite party no.3 issued a fresh tender call notice vide Annexure-5 dated 30.11.2022 for grant of "Nihal Prasad Morrum Quarry" on long term lease for the a period of five years, pursuant to which opposite party no.4 quoted additional charges of Rs.82.27 per cum,causing a vast difference of Rs.233.73 in comparison to the bid amount of Rs.315/- per cum quoted by the petitioner pursuant to earlier tender call notice dated 29.06.2020. If the bid of opposite party no.4 is accepted, it will cause great loss to the Government revenue. But, it was the specific case of opposite party no.4 before the apex Court that he had quoted Rs.467/- per cum as additional charges, whereas the petitioner had quoted Rs.315/- per cum and, as such, there being a difference between their quoted price, the opposite party-authority by accepting the bid of the petitioner has caused loss of Government revenue. The above being the specific stand of opposite party no.4

before the apex Court, how the selfsame opposite party no.4 quoted the additional charges of Rs.82.27 per cum, in response to the second tender call notice under Annexure-5 dated 30.11.2022. This clearly indicates, how the private parties, having hands in glove with the responsible officers of the Government, put the State exchequer to loss jeopardizing the public interest at large. Therefore, this Court, on 20.12.2022, passed the following orders calling upon the Tahasildar, Gondia to appear in person before this Court:-

> *"6. Having heard learned counsel for the parties and after going through the records, it appears that there is some hanky panky vis-à-vis the bidders and the officers concerned. The petitioner deposited Rs.11,55,000.00 by quoting Rs.315/- per cum as additional charge and now pursuant to fresh Tender Call Notice in compliance of the order of the apex Court, the price offered by opposite party no.4 as Rs.82.27, which is much below the price quoted by the petitioner. Since there was a hue and cry before the apex Court that there would be loss of crores of rupees to the Government Exchequer therefore, the apex Court, taking note of their contentions, directed for fresh auction. Now it appears that steps taken by the Tahasildar, Gondia are absolutely suspicious and, as such, he is going to settle the source in favour of opposite party no.4, who has offered much below price than the petitioner.*
>
> *7. Mr. P.P. Mohanty, learned Additional Government Advocate appearing for the State opposite parties seeks time to obtain instructions in the matter.*
>
> *8. Put up this mater on 12.01.2023. Instructions shall be obtained in the mean time.*
>
> *9. As an interim measure, there shall be stay operation of order dated 15.12.2022 under Annexure-6 and the Tender Call Notice No.4059 dated 30.11.2022 under Annexure-5 issued by opposite party no. 3-Tahasildar, Gondia and, as such, opposite party no.3 shall not settle the source in anybody's favour till 12.01.2023.*
>
> *This Court directs the Tahasildar, Gondia to appear in person before this Court on 12.01.2023 and explain under what circumstances he is going to settle the source at much below price, which is the subject matter of challenge before this Court.*
>
> *10. Issue urgent certified copy as per rules."*

In compliance of the above order, Mr. Bhajananda Sahoo, Tahasildar, Gondia appeared in person and filed an affidavit in Court stating therein that he has committed gross mistake by fixing the additional charge at Rs.70/- per cum, which is much below the previous bid amount, and for that he begged unconditional apology.

17. Mr. M. Kanungo, learned Senior Counsel appearing for opposite party no.4 contended that opposite party no.4 is the successful bidder. In the event, any order is passed by this Court, it will cause prejudice to opposite party no.4. It is further contended that if this Court feels inclined to set aside the tender, he is also willing to take the quarry at the additional charge of Rs.467/- per cum, which he had quoted in the earlier tender dated 29.06.2020.

18. At this point of time, Mr. S. Palit, learned Senior Counsel appearing for the petitioner contended that in the fresh tender call notice dated 30.11.2022 since the lease price, i.e., additional charge fixed by the Tahasildar, Gondia is abnormally

low, the petitioner has approached this Court. As such, the petitioner had quoted Rs.315/- per cum as additional charges in the earlier tender dated 29.06.2020, which was duly accepted and deposit of security money was made, which is still lying with the authority and, as such, the petitioner has a subsisting right to continue in the tender process. But opposite party no.4 challenged the bid price of the petitioner before this Court as well as the apex Court, and the fresh tender call notice under Annexure-5 dated 30.11.2022, having been issued in pursuance of the order dated 27.09.2022 of the apex Court, the Tahasildar, Gondia should not have fixed the additional charge below the additional charge quoted in the earlier tender call notice. Thereby, the Tahasildar, Gondia has acted unreasonably and arbitrarily in extending the benefit to opposite party no.4. Therefore, this Court, vide order dated 12.01.2023 called upon Mr. S. Palit, learned Senior Counsel appearing for the petitioner to take instruction as to whether or not the petitioner is agreeable to match the price of Rs.467/- per cum quoted by opposite party no.4 in the earlier tender, and the matter was posted to 17.01.2023.

19. In compliance of the order dated 12.01.2023,Mr. S. Palit, learned Senior Counsel appearing for the petitioner stated that the petitioner is willing to match the price of Rs.467/- per cum, which was quoted by opposite party no.4 in the earlier tender, so as to enable the petitioner to operate the quarry.

20. Mr. M. Kanungo, learned Senior Counsel appearing for opposite party no.4 stated that opposite party no.4 is willing to match the aforesaid price of Rs.467/- per cum as additional charges, but this Court is not inclined to allow opposite party no.4 to match the price because his application, pursuant to earlier tender, being defective and was rejected, even though he had quoted Rs.467/- per cum as additional charges. As a matter of fact, the petitioner, being the second highest bidder, was declared as successful bidder and was directed to deposit the security money. In response thereto, the petitioner had deposited the security money, which has not been refunded to him. Therefore, if the petitioner does not match with the price of Rs.467/- per cum, in that case only the consideration of bid of opposite party no.4 can be taken into consideration.

21. It is of relevance to note that the entire exercise has been done because of callousness of the Tahasildar, Gondia, He stated that he joined the post three months back. But fact remains, when the tender file was placed before him he must have studied what had happened to the source earlier and, thereafter, he should have accordingly proceeded with the tender, which was issued subsequently. Therefore, it is inferred that knowing this fact, opposite party no.3 has acted upon by fixing the additional charge at much below rate causing damage/loss to the augmentation of revenue of the State. Taking into consideration the law laid down by the apex Court in the decisions discussed above, it is apparent that the Tahasildar, Gondia, being the statutory authority, has acted unreasonably infected with motive of dishonesty, instead of acting in good faith, by exercising discretionary power arbitrarily and, as

such, no reason has been assigned disclosing the justifiability of exercise of such power without following due procedure and contrary to public interest and such discretionary power has been exercised at the whim and caprice of opposite party no.3-Tahasildar, Gondia. This Court is also of the view that opposite party no.3 with hand in glove with opposite party no.4 issued the tender call notice on 30.11.2022 by fixing the price, which a prudent man cannot accept. The conduct of opposite party no.4 is also not out of suspicion as it is the opposite party no.4, who carried the matter to the apex Court challenging the settlement of the sairat in favour of the petitioner at Rs.315/- per cum. While the opposite party no.4 had quoted the price at Rs.467/- per cum as per the earlier tender call notice, he quoted the same at Rs. 82.27 per cum only pursuant to the 2nd tender call notice. The opposite party No.4 should not have quoted the price at Rs. 82.27 per cum in view of his earlier challenge.

22. In view of such position, this Court directs the State-opposite parties to offer the source at the highest price of Rs.467/- per cum to the petitioner and call upon it to deposit the differential amount within ten days and on such deposit being made by the petitioner the source shall be settled in its favour and the petitioner shall be allowed to operate the same in accordance with law.

23. Needless to mention, for the callousness attitude of the Tahasildar, Gondia-opposite party no.3, since the State Government was going to face a huge loss of revenue, this Court directs opposite party no.1 to take immediate action against him in accordance with law and report compliance to this Court within a month hence.

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

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2023 (I) ILR – CUT - 399

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

W.P.(C) NO. 22187 OF 2010

HEMANTA KUMAR MOHAPATRA .....Petitioner

.V.

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

SERVICE LAW – Appointment – Waiting List – Whether mere enlisted in the waiting list create any right to the post? – Held, No.

(Para 7-12)

Case Laws Relied on and Referred to :-

1. (1991) 3 SCC 47 : Shankarsan Dash Vs. Union of India.
2. (1974) 3 SCC 220 : State of Haryana Vs. Subash Chander Marwaha.

3. (1986) 4 SCC 268 : Neelima Shangla Vs. State of Haryana.
4. (1985) 1 SCC 122 : Jatinder Kumar Vs. State of Punjab.
5. (2004) 2 SCC 681 : Bihar State Electricity Board Vs. Suresh Prasad.
6. (2010) 2 SCC 637 : Rakhi Ray Vs. High Court of Delhi.
7. 1994 Supp.(2) SCC 348 : State of Haryana Vs. Mahavir Prasad Sharma.
8. (1997) 10 SCC 264 :Vice Chancellor,University of Allahabad Vs. Dr. Anand Prakash Mishra.

For Petitioner : M/s K.K. Swain,P.N. Swain, P.N. Mohanty, S.C.D. Dash, P.K. Mohanty, R.P. Das, P.K. Mohanty P.K. Mohapatra.

For Opp. Parties : Mr. A.K. Mishra, Addl. Govt. Adv. [O.P. Nos. 1 to 3]

JUDGMENT Date of Hearing and Judgment: 17.01.2023

Dr. B.R.SARANGI, J.

1. The petitioner, by means of this writ petition, seeks to quash the order dated 02.12.2010 passed in O.A.No. 2972(C) of 2002 under Annexure-7,by which the Orissa Administrative Tribunal,Cuttack Bench,Cuttack has dismissed the original application filed by the petitioner being devoid of merit, and further seeks to quash the selection and appointment of opposite party no.4 and to issue direction to the opposite parties to appoint him as a Constable against S.E.B.C. category within a stipulated time.

2. The factual matrix of the case, in a nutshell, is that pursuant to an advertisement issued by the Superintendent of Police, Balasore on 04.09.2002 in the local daily "The Samay", the petitioner applied for the post of Constable by submitting necessary application together with all relevant documents, including caste certificate, on 10.09.2002, i.e., within 15.09.2002. The candidature of the petitioner was entertained and after scrutiny, the same having been found in order, he was issued with the admit card to appear at the selection test, i.e., physical, written and viva voce tests. On the strength of the aforesaid call letter, the petitioner appeared in the physical test on 23.09.2002 and after being selected in physical test, he was allowed to appear at the written test, in which he was also selected. Thereafter, he was called upon to appear in the viva voce test on 29.09.2002. On the basis of performance, result was published and the name of the petitioner did not find place in the select list and, as such, his name was made available in the wait list as Male/HGSEBC category, whereas opposite party no.4, who is a general category candidate and his name was found place in the select list under Male/HGSEBC category, was issued with appointment letter to continue as Constable. Though both the petitioner and opposite party no.4, while working as Home Guards, had applied for the post of Constable as Home Guard candidates and opposite party no.4, having appeared at the physical, written and viva voce tests asgeneral category candidate, was given appointment as Constable whereas the petitioner was kept in the wait list. Thus, it is contended that he should have been given appointment under the SEBC category.

2.1 Due to non-extension of the benefit of appointment in the post of Constable, the petitioner approached the Orissa Administrative Tribunal, Cuttack Bench, Cuttack by filing O.A.No.2972 of 2002 and the tribunal,after due adjudication, vide order dated 02.12.2010, dismissed the said O.A. The tribunal, while doing so,came to observe that there were 17 SEBC (male) candidates inclusive of the petitioner. The advertisement reveals that there were only eight vacancies and, as such, the petitioner has not brought any material on record to show that had opposite party no.4 not been selected, then he would have been selected and, therefore, the selection or non-selection of opposite party no.4 does not benefit the petitioner, because there is no material to show that he would have been selected, had the application of opposite party no.4 been rejected. Hence, this writ petition.

3. Mr. P.K. Mohapatra, learned counsel appearing on behalf of Mr. K.K. Swain, learned counsel for the petitioner vehemently contended that the tribunal has committed gross error apparent on the face of record by dismissing the original application filed by the petitioner. Therefore, this Court should interfere with the same and pass appropriate order by quashing the order dated 02.12.2010 in extending the benefit to opposite party no.4.

4. Mr. A.K. Mishra, learned Additional Government Advocate appearing for the State-opposite parties vehemently contended that the selection is of the year 2002, which was challenged before the tribunal and ultimately the tribunal, after considering all the materials available on record and by giving opportunity of hearing to all the parties, passed the order impugned by dismissing the original application. As such, while dismissing the original the tribunal observed that in the filled up form in appropriate column vide no.12, the petitioner had stated that he belonged to SEBC (Gola) category and, as such, copy of the OBC certificate granted in Misc. Case No.272 of 1998 was annexed to the application. The said certificate reveals that the petitioner belonged to 'Gola' category of backward class. As such, Government of Orissa in its office memorandum dated 29.01.2014 has notified that 'Gola' sub-caste belongs to SEBC category.The petitioner had enclosed the required certificate obtained from the authority that he belongs to 'Gola'sub-caste, a backward class and, as such, that backward class (Gola) has been notified as a SEBC category.Considering the documents,since opposite party no.4 has been selected and the petitioner has remained in the wait list and, as such, there were only eight vacancies as per the advertisement, even though a list of 17 candidates was prepared, the benefit was not extended to the petitioner. It is further contended that since the petitioner's name find place in the wait list, as he could not qualify, the tribunal is well justified in passing the order impugned, which does not require any interference of this Court.

5. This Court heard Mr. P.K. Mohapatra, learned counsel appearing on behalf of Mr. K.K. Swain, learned counsel for the petitioner and Mr. A.K. Mishra, learned Additional Government Advocate appearing for the State- opposite parties in hybrid

mode. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

6. On the basis of factual matrix, as discussed above, the case of the petitioner is that he would have been selected for the post of Constable as against the post held by opposite party no.4. But fact remains, the name of opposite party no.4 found place in the select list, whereas the petitioner's name found place in the wait list, as he could not come out successful and, as such, there were only eight vacancies available as against a list of 17 candidates prepared by the authority.

7. In ***Shankarsan Dash v. Union of India***, (1991) 3 SCC 47, a Constitution Bench of the apex Court had an occasion to examine whether a candidate seeking appointment to a civil post can be regarded to have acquired an indefeasible right to appointment against such post merely because his name appeared in the merit list of candidates for such post. Answering the question in the negative the Supreme Court observed:-

> *"It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied."*

Similar view has also been taken by the apex Court in ***State of Haryana v. Subash Chander Marwaha***, (1974) 3 SCC 220; ***Neelima Shangla v. State of Haryana***, (1986) 4 SCC 268; and ***Jatinder Kumar v. State of Punjab***, (1985) 1 SCC 122

8. The name of opposite party no.4, having been found in the select list, on the basis of vacancies available he was given appointment, whereas the name of the petitioner was found place in the wait list, which does not create a right in favour of the petitioner to be appointed, as because against only eight vacancies,17 candidates were available and, as such, the same were filled up by the candidates whose name found place in the select list.Thereby, the purpose of keeping the name of the petitioner in the wait list is well inferred.

9. In ***Bihar State Electricity Board v. Suresh Prasad***, (2004) 2 SCC 681, the apex Court held that in the absence of statutory rules to the contrary, the employer is not bound to prepare a waiting list in addition to the panel of selected candidates and to appoint the candidates on the waiting list in case the candidates in the panel did not join.

10. In ***Rakhi Ray v. High Court of Delhi***, (2010) 2 SCC 637, the apex Court held that a waiting list cannot be used as a reservoir to fill up vacancies which come into existence after issuance of notification/advertisement.

11. In ***State of Haryana v.Mahavir Prasad Sharma***, 1994 Supp.(2) SCC 348, the apex Court held that the State requisitioned the select committee to directly

recruit two candidates to the post of Chief Inspector.While selecting eleven candidates, the committee also kept four more candidates in the waiting list the duration of which was one year.

12. In ***Vice Chancellor, University of Allahabad v. Dr. Anand Prakash Mishra***, (1997) 10 SCC 264, the apex Court held that keeping the candidates in the waiting list did not create any right in their favour to the posts. The State could, for administrative exigencies, fill up the posts on ad hoc basis although the waiting list had elapsed by efflux of time of one year.

In view of the law laid down by the apex Court, as discussed above, it is made clear that since the name of the petitioner carries in the wait list, he does not have any right to claim for appointment, as the vacancies as per the advertisement have already been filled up by the candidates empanelled in the select list.

13. While entertaining this writ petition, this Court, vide order dated 17.05.2022, passed the following order:-

> *"1. Notice has already been served on opposite party no.4 through the Superintendent of Police, Balasore and a report to that effect has been submitted on 17th May, 2022. None appears for opposite party no.4.*
>
> *2. Mr. S.N. Das, learned ASC seeks and is granted four weeks time to file the affidavit indicating the merit list of the SEBC candidates as well as providing replies to the additional affidavit filed by the enclosing Annexure-8. reply thereto, if any, be filed by the petitioner before the next date.*
>
> *3. List on 10th August, 2022."*

14. In compliance of the aforesaid order, the State has filed an additional affidavit on 17.10.2022, paragraphs-4, 5 and 7 whereof read as under:-

> *"4. That, this Hon'ble Court after hearing the parties and after going through the additional affidavit filed by the petitioner vide its order dated 17.05.2022 was pleased to direct the authority concerned to file affidavit indicating the merit list of the SEBC candidates as well as providing replies to the additional affidavit filed by the petitioner.*
>
> *5. That, it is humbly submitted that the selected candidate namely Sananda Santra was absorbed as constable under Male Home Guard SEBC category and upon selection of such person there was no surviving post for appointment of any other candidates. The petitioner's name found place in the waiting list only and such pleas cannot be raised when there was no surviving post for the wait listed candidates.*
>
> *6. That, the averment made by the petitioner that Sananda Santra was under Male SEBC category is not correct. The selected candidate Sananda Santra was coming under "Male Home Guard SEBC category". In this regard, copy of the proceedings of the committee for the recruitment of constables in Balasore district, which contains the category-wise merit list (including SEBC Category); where the name of opposite party no.4 finds place at Male Home Guard SEBC Category is annexed herewith as Annexure-D/3 for kind reference of the Hon'ble Court."*

15. A perusal of the document, which has been annexed as Annexure-D/3 to the additional affidavit, would evident that proceedings of the committee for recruitment of Constables in Balasore district from 23.09.2002 to 29.09.2002 had been prepared and in the select list the name of opposite party no.4 was found place under Male/HGSEBC category, whereas the name of the petitioner found place against the wait list under Male/HGSEBC category. As such, there were only eight vacancies available in the SEBC category to be filled up, even though a list of 17 candidates was prepared, due to non-availability of vacancy the petitioner could not find a place in the merit list and, as such, opposite party no.4 having been qualified, he was selected and appointed as Constable and continuing in the post.

16. In the above view of the matter, this Court does not find any error apparent on the face of order dated 02.12.2010 passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 2972 (C) of 2002 under Annexure-7 so as to warrant interference with the same.

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

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2023 (I) ILR – CUT - 404

ARINDAM SINHA, J & SANJAY KUMAR MISHRA, J.

WP(C) NO.11244 OF 2016

MARWARI SOCIETY .....Petitioner

.V.

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

PROPERTY LAW – Lease – The lease deed was executed as, 'Lease of Land To Religious, Educational And Other Institutions' in favour of petitioner society – The Petitioner society celebrated Phoolon Ki Holi' and Srikrishna Rasalila Pradarshan in the premises – The opp. Party/ state issue show cause notice for cancellation of lease – Whether There is any embargo in law curtailing members of the society from observing religious function in leased premises – Held, No – In the circumstances, there is no way State can say that celebrating a religious function in the premises is amount to use of the said land other than the lease purpose. (Para 12-13)

Case Law Relied on and Referred to :-

1. 40 Calcutta Weekly Notes (CWN) 17: Maniruddin Vs. Chairman of Dacca.

For Petitioner : Mr. Gouri Mohan Rath, Mr. K.C. Kar, Mr. S.S. Padhy, Mr. S. Satpathy, Mr. S.Dwibedi.

For Opp. Parties : Mr. Y.S.P. Babu, AGA

JUDGMENT Date of Judgment : 16.12.2022

ARINDAM SINHA, J.

1. Mr. Rath, learned advocate appears on behalf of petitioner. He submits, his client is a society, explained by its name. It was granted long lease by deed dated 24th March, 2000 on premium of Rs.23,54,913/- for initial period of 90 years. The purpose was for his client to build a house or houses and use the same for its office building and charitable dispensary only. His client, in terms of purpose of the lease, constructed building and has been using the same for office and charitable dispensary only.

2. He draws attention to show-cause notice dated 28th March, 2016. Referred to paragraphs in the notice are extracted and reproduced below.

> *"AND WHEREAS, on the field enquiry conducted by the Addl. Land Officer and R.I. of this Department on 14.03.2016, it was found that* ***social function like "Phoolon ki Holi" was being organised in the building raised over the demised land and the said building is being rented out to outsiders temporarily to perform receptions, meetings, birth/death anniversaries, etc****. The photographs of 'Srikrishna Rasalila Pradarshan" published in "The Samaj" dtd. 15.03.2016 corroborates the fact that the said premises are not being used exclusively for the purpose for which the lease was granted.*
>
> *xx xx xx xx xx*
>
> *He is, therefore, on behalf of the lessee Society, called upon to show cause within 15 (fifteen) days from the date hereof, i.e., by 12.04.2016, as to why the said lease should not be determined under clause-4(i) of the lease deed and why the land should not be resumed and possession taken over by the Government. If no reply is received from him, on or before the stipulated date, it shall be presumed that he has nothing to say in the matter and action will be taken to determine the lease and resume the possession of the land."*
>
> *(emphasis supplied)*

His client replied to the show-cause by letter dated 31st March, 2016.Relied upon paragraphs are extracted and reproduced below.

> *"Regarding celebration of Phoolon ki Holi in the premises we have to explain here "Holi" is a prime festival for Marwari people/Marwari society. With due excuse we want to inform you that in the current year our BSF Jawans and BSF Officials/Executives cerebrated Phoolon ki Holi at India-Pakistan border (Wagha Border) with Pakistani BSF Jawans, Commandos, Executives and this message was/is highly appreciated by everybody including Central Govt., Office of the Hon'ble Prime-Ministers, office of the Hon'ble Presidents and different state officials of India. Such a celebration is only to share a happiest moment among the mankind. I think you must consider our views about celebration of Phoolon ki Holi. Similarly celebration of Sri Krishnan Rasalila Pradarshan, is also a temporary religious celebration of the Marwari community. By celebrating all those holy works we are providing good message to the society/public. Our intention is never intended for creation of funds by celebrating all those customary functions.*

Regarding utilisation of the building by allowing outsider to perform reception meeting, birth/death anniversary etc. We have to clarify before you that all those allegations are false allegation."

3. He submits, the lease was by a registered deed. Section 111 in Transfer of Property Act, 1882 provides for determination of lease by, inter alia, forfeiture. There is nothing to show from the show-cause or impugned determination notice dated 23rd April, 2016 that any express condition providing right of re-entry to the lessor, was broken by his client. His client has, therefore, moved Court for interference.

4. Mr. Babu, learned advocate, Additional Government Advocate appears on behalf of the State. He submits, purpose of the lease was for constructing and using the building as office and charitable dispensary only. On noticing that petitioner was otherwise using the premises, show-cause notice was duly issued. Causes shown in the reply were found not at all satisfactory and, therefore, impugned determination notice, duly issued.

5. He draws attention to disclosures in the counter. They are two photographs, a clipping from newspaper 'Samaj' published on 15th March, 2016 depicting a photograph of function 'Phoolon ki Holi' being observed in the premises on 14th March, 2016 and invitation for a function for 'Sacred Thread Ceremony' to be held at venue 'Marwari Mancha Mandap', Unit-6, 7:30 P.M. onwards on 15th April, 2016.On query from Court Mr. Babu submits, field inquiry report dated 14th March, 2016 was not annexed to the counter. Mr. Rath
submits, it was not shared with his client.

6. We have carefully gone through contents of the lease deed. We reproduce below relevant passages and covenants therefrom.

" xx xx xx the LESSOR hereby demises to the LESSEE ***for the purpose of building a house or houses and using the same for its office building and Charitable Dispensary only****. xx xx*

xx xx xx

2(xiv) That, he shall not without the consent in writing of the LESSOR ***use or permit the use of the said land for any purpose other than that for which it is leased*** *or transfer the same without such consent.*

xx xx xx

4(i) That, ***whenever any part of the rent hereby reserved shall be in arrear for six months after the due date or there shall be a breach of any of the convenants by the LESSEE herein contained the LESSOR may re-enter on the demised premises and determine this lease*** *which case the LESSOR may, by notice in writing require the ex-LESSEE to remove within a reasonable time any building which may have been commenced and not completed or the materials of which may have been collected on the lease land, if he fails to comply with such notice the LESSOR after giving further notice in writing specifying a time not less than three months from the date of the series of the notice within which such building or materials, shall be removed, any cause such removal to be affected and recover the cost from him."*

(emphasis supplied)

7. Basis of the show-cause notice appears to be allegation that upon field inquiry conducted, by Additional Land Officer (ALO) and Revenue Inspector (RI) of the Department, on 14th March, 2016, it was found that social function like 'Phoolon ki Holi' was being organized in the building. Further allegation is, said building was rented out to outsiders temporarily to perform reception meeting, birth/death anniversaries etc.The newspaper item disclosed in the counter is also part of the allegation. On basis thereof there was direction to show-cause within 15 days, as to why there should not be determination under clause 4(i). Petitioner, by its reply dated 31st March, 2016, admitted to having celebrated 'Phoolon ki Holi' but said that there was no otherwise utilization of the building by allowing outsiders to perform reception meeting, birth/death anniversaries etc.

8. Impugned determination notice is dated 23rd April, 2016. We reproduce below three paragraphs therefrom.

> *"And whereas, the lease was also given an opportunity of being heard on dtd. 19.04.2016 before the undersigned and on the said date Sri Keshab Chandra Kar, learned Advocate, appeared on their behalf before the undersigned in his office chamber and put forth their stand in the matter;*
>
> *And whereas,* ***the statements made and documents filed by the learned Counsel on behalf of the lessee*** *in support of the stand of the lessee in the matter* ***are also not found satisfactory.***
>
> *And whereas, the lessee organizations represented though their* ***learned Counsel has admitted the fact of otherwise use of the lease land without any prior permission of the Govt****. thereby violated the stipulations at Clause-2(xiv) of the lease deed;"*
>
> (emphasis supplied)

9. It appears, only basis for determination was unsatisfactory statements and documents filed by learned counsel on behalf of lessee, coupled with the learned counsel admitting otherwise use of leased land without any permission of the Government and thereby violating stipulation at clause 2(xiv) of the lease. Petitioner, being lessee, had urged by its reply to the show-cause and also before us that other than having the function 'Phoolon ki Holi', nothing else was done in the premises. In the circumstances, it cannot be accepted that petitioner would rely on documents to prove the negative. So far as admission made through learned counsel is concerned, it cannot be anything beyond petitioner admitting as a fact that 'Phoolon ki Holi'was celebrated in the premises. We take it that the celebration was on 14th March, 2016 as reported in newspaper 'Samaj', published on the next day and relied upon by State through disclosure in its counter. We do not have before us field inquiry report dated 14th March, 2016. Petitioner's submission has been it was not also shared with it.

10. There is, however, one more document in the counter. It appears to be an invitation for 'Sacred Thread Ceremony'.Venue mentioned in the invitation as 'Marwari Mancha Mandap', indicates the premises. The invitation was for the function to be held on 15th April, 2016. The field inquiry went before that, on 14th March, 2016. This document was neither mentioned in the show-cause notice nor in

impugned determination. We resist probing further as to how State got hold of the document or its genuineness, to use it against petitioner in its pleading dated 26th August, 2016.

11. There is nothing before us to show that the society, on having constructed the building, has not used it till the time of show-cause and, thereafter, as office and charitable dispensary. In addition they celebrated a festival that is dear to the members. State appears to have taken exception.No permission granted by petitioner to use said land for any other purpose was there, simply because petitioner says, it itself organized the function 'Phoolon ki Holi'. There is no evidence whatsoever that the building is or was being rented out tooutsiders temporarily to perform receptions, meetings, birth/death anniversaries.There is no evidence to show that thereby, conclusion on reason and prudence can be violation of clause 2(xiv).

12. Covenant clause 2(xiv) in the lease deed was relied upon by State in determining the lease. The clause stands reproduced above. It has two parts to it. First part of the clause says, lessee shall not, without consent in writing of the lessor, use said land for any purpose for which it is leased or transfer the same without such consent. Second part says, the lessee shall also not permit user for any purpose other than that for which it is leased. We have already seen that lessee was and is using the building, it had constructed, for stated purpose. As aforesaid, in addition they celebrated a festival that is dear to the members. Here, the obvious appears to have been lost sight of. The grant of lease was partly also with regard to ethnicity of the members.The deed is titled as, **'LEASE OF LAND TO RELIGIOUS, EDUCATIONAL & ORS. INSTITUTIONS'**. In the circumstances, there is no way State can say that celebrating a religious function in the premises on a day can amount to use by the lessee of the said land for any other purpose.The situation relates to a fundamental principle pronounced by a learned Single Judge of the Calcutta High Court in **Maniruddin v. Chairman of Dacca, reported in 40 Calcutta Weekly Notes (CWN) 17**. We fully agree with the view, extracted from the judgment and reproduced below.

> *"It is a fundamental principle of law that a natural person has the capacity to do all lawful things unless his capacity has been curtailed by some rule of law. It is equally a fundamental principle that in the case of a statutory corporation it is just the other way."*

13. The lease was granted to the society under aforesaid object of State, manifest from the heading of the deed. There is no embargo in law curtailing members of the society from observing religious function in leased premises, where it does have some interest in the land conveyed by the lease. We find action of the State in issuing impugned determination was arbitrary and illegal. We set aside and quash the same.

14. The writ petition is allowed and disposed of.

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2023 (I) ILR - CUT - 409

ARINDAM SINHA, J & MRUGANKA SEKHAR SAHOO, J.

W.P.(C) NO. 24101 OF 2022

M/s. BOC INDIA LTD.,SUNDARGARH ……...Petitioner

.V.

SHRI PARAMANANDA DAS & ORS. ……Opp. Parties

INDUSTRIAL DISPUTES ACT, 1947– Section 10(4) – Addition of parties to the reference – When permissible? – Indicated with reference to case laws.

Case Laws Relied on and Referred to :-

1.(2019) 15 SCC 273 : Globe Ground (India) Employees Union Vs. Lufthansa German Airlines

2.AIR 1964 SC 1746 : Hochtief Gammon Vs. Industrial Tribunal

For Petitioner : Ms. Anindita Pujari

For Opp. Parties: Mr. Tusar Ku. Mishra

JUDGMENT Date of Judgment: 24.01.2023

ARINDAM SINHA, J.

1. Ms. Pujari, learned advocate appears on behalf of petitioner (management). She submits, impugned is order dated 6th July, 2022 made by the labour Court rejecting her client's petition dated 10th March, 2022 for adding the contractor as party. She submits, the workmen were employed by the contractor. For purpose of effective adjudication on the reference, the contractor is a necessary and proper party.

2. Mr. Mishra, learned advocate appears on behalf of the workmen and relies on judgment of the Supreme Court in **Globe Ground (India) Employees Union v. Lufthansa German Airlines** reported in **(2019) 15 SCC 273**, paragraphs 18 and 19. In that context he also relies on sub-section (4) in section 10 of Industrial Disputes Act, 1947. Paragraph-19 is reproduced below.

> *"19.Further, having regard to limited scope of adjudication, to answer the reference, which iscircumscribed by Section 10(4) of the Industrial Disputes Act, 1947, we are of the view that the first respondent is neither necessary nor proper party, to answer the reference by the Industrial Court*."

3. On query from Court Ms. Pujari submits, grounds have been taken in the writ petition. We reproduce below ground-C.

> *"C. BECAUSE the Ld. Industrial Tribunal erred in not appreciating that in order to adjudicate the issue of existence/non-existence of employer-employeerelationship between the petitioner and the Opp. Parties it is essential that the contractor is made a party* ***as it is only***

> ***the contractor who can lead necessary evidence to establish the employment*** *relation, if any amongst the petitioner, the opposite parties and itself.* (emphasis supplied)

4. Section 11 provides for procedure and power of, inter alia the labour Court. Said Court has been provided to have same powers as vested in a civil Court under the Code of Civil Procedure, 1908, when trying a suit in respect of, inter alia, enforcing attendance of any person for examining him on oath and compelling production of documents.

5. We find in impugned order, reference to the first decision on adding parties to the reference, delivered by the Supreme Court in ***Hochtief Gammon v. Industrial Tribunal*** *reported in* ***AIR 1964 SC 1746***. Law declared on test to be applied is extracted from two sentences in paragraph-12 reproduced below.

> *" xxxxxx The test always must be, is the addition of the party necessary to make the adjudication itselfeffective and enforceable? In other words, the test may well be would the non-joinder of the party make thearbitration proceedings ineffective and unenforceable? It is in the light of this test that the implied power of the Tribunal to add parties must be held to be limited."*

It does appear from grounds taken in the writ petition that plea of the management to implead the contractor is for purpose of demonstrating in the reference that the workmen were not appointed by the management but by the contractor. Hence, the management wants the contractor to be added in the proceedings and be examined. In that regard we find from paragraph-4 in impugned order that when the matter was posted for further evidence, after closure of evidence from the workmen, the management filed the petition for addition of party.

6. Sub-section (4) in section 10 mandates confinement of the adjudication to points and matters specified and incidental thereto. Schedule to the reference is clear in specifying the points of adjudication to, inter alia, the termination of services of the workmen, whether legal or justified. For the purpose, clearly, the contractor is not necessary as a party, to be directed as ought to have been properly joined. Procedure and power of the labour Court will allow for the management to enforce attendance of the contractor by summons issued, for his examination as well as to compel production of documents in his custody. Accordingly petitioner did not pass muster on the test for exercise of the limited power of the labour Court, declared in **Hochtief Gammon** (supra).

7. **Lufthansa German Airlines** (supra) has no application because finding by the Supreme Court in that judgment was in view of the facts before it.

8. We find no illegality nor material irregularity in impugned order. Accordingly, no interference is warranted.

9. The writ petition is dismissed.

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2023 (I) ILR - CUT - 411

D. DASH, J & Dr. S.K. PANIGRAHI, J.

JCRLA NO. 37 OF 2012

LUSKU HEMBRAM .....Appellant

.V.

STATE OF ODISHA .....Respondent

CRIMINAL TRIAL – Appreciation of Evidence – The Appellant (accused) faced trial for commission of offences under section-302/201 of the Indian Penal Code – Conviction on the basis of circumstantial evidence i.e last seen theory – There is a long time gap between the deceased seen last with the accused and the recovery of the dead body of the deceased which has been made after lodging of the F.I.R. and initiation of the case and the passage is more than a week – Prosecution in the present case has not been able to prove the motive behind the commission of the crime – Whether the conviction sustained in the eye of law? – Held, No – We are clearly of the view that the prosecution has failed to prove each of the circumstances – Appeal allowed.

(Para 10-12)

Case Law Relied on and Referred to :-

1. (1973) 2 SCC 793 : Shivaji Sahabrao Bobade Vs. State of Maharashtra.

For Appellant : M/s. D. Nayak, Sr.Adv. & M. Dhir

For Respondent : Mr. S.K. Nayak, AGA.

JUDGMENT Date of Hearing: 07.12.2022 : Date of Judgment: 23.12.2022

D.DASH, J.

The Appellant, by filing this Appeal, from inside the jail, has called in question the judgment of conviction and order of sentence dated 20.10.2011 passed by the learned Sessions Judge, Balasore in Sessions Trial No.300 of 2010.

The Appellant (accused) has been convicted for commission of offences under section-302/201 of the Indian Penal Code (for short called as 'the IPC') and accordingly, he has been sentenced to undergo imprisonment for life for commission of offence under section-302 of the IPC and rigorous imprisonment for a period of 7 (seven) years for the offence under section-201 of the IPC with the stipulation that the substantive sentences would run concurrently.

2. **Prosecution Case:-**

On 21.08.2010, it was around 9.30 am, one Ananta Hembram, P.W.2 lodged an information at Raibania Police Station to the effect that on 13.08.2010, which was a Saturday, the accused had gone to a nearby jungle with his wife Singa Hembram for collection of firewood and when they were returning home as informed by Lusku Hembram, the accused, Singa (deceased) left the place and went somewhere else, for which the accused Lusku and his family members too were searching to trace her out. The Informant has stated to have heard these facts on 28.08.2010. He then heard from the villagers that when they repeatedly asked accused Lusku regarding the whereabouts of the deceased, the accused in presence of the villagers confessed to have caused the death of his wife, Singa in Bhadua Cashew Jungle and he further stated to have buried the dead body of the deceased in a place in that Jungle.

On 13.08.2010 around 10 am Singa had come with the accused and from near Hatigarh Bazar, she had gone to bring some firewood, so she having not been able to get those firewood had gone Bhadua Cashew Jungle and on the way Singa met the accused who then by means of a saree, which had been worn by the deceased and strangulated her to death and thereafter, having taken the dead body to a nearby place, it was concealed by the accused. The accused having done so had returned home and in the evening hours having gone there with a spade, he buried the dead body there. He also stated to have kept the spade concealed in a place nearby.

Above information having been received by the Officer-In-Charge of Raibania Police Station (OIC), P.W.6, immediately Raibania P.S. Case No.50 of 2010 was registered and the investigation commenced. Upon completion of investigation, charge-sheet was submitted placing the accused for trial for commission of offence under section-302/201 of the IPC.

The accused took the plea of denial and false implication.

3. Learned Sub-Divisional Judicial Magistrate (S.D.J.M.), Balasore on receipt of the police report having taken cognizance of the said offences, after observing the formalities, committed the case to the Court of Sessions for trial. That is how the trial commenced by framing charges against the accused persons for offence under section-302/201 of the IPC.

4. The prosecution in order to bring home the charges against the accused has examined, in total six(6) witnesses and proved the documents such as, the F.I.R., Ext.1/1, postmortem report, Ext.2, disclosure statement of the accused, Ext.3, seizure list showing seizure of the incriminating articles have also been proved as Exts. 4 & 5 and inquest report as Ext.6 and extract of the station diary entry, Ext.7. The spade recovered in course of investigation and seized has been produced in the

Court during trial with the packet containing the wearing apparels of the deceased and her other belongings which have been marked as Material Objects Nos.-I and II (M.O.-I and M.O.-II).

5. The Trial Court upon examination of the evidence adduced by the prosecution and their evaluation has found that the cumulative effect of the same, points unerringly at the guilt of the accused who is the responsible for causing the death of his wife. Having said so, the accused has been found guilty for commission of offence under section-302 of the IPC and sentenced as aforestated.

6. Learned Counsel for the Appellant(accused) submitted that the case here is based on circumstantial evidence and the circumstances relied upon by the prosecution have not been proved through clear, cogent and acceptable evidence. He further submitted that the last seen theory as projected by the prosecution through the witnesses examined in this behalf is of no help to the prosecution in saying that it is a circumstance which stands against the accused. He further submitted that the extrajudicial confession said to have been made by the accused has not been proved through the available evidence. It was also submitted that when the prosecution has projected the recovery of the dead body and spade pursuant to the disclosure statement of the accused said to have made before the Police and others while in custody, the evidence on this score is highly unbelievable. He submitted that the projected circumstances having not been proved beyond reasonable doubt, the question of holding the accused guilty for commission of offence under section-302/201 of the IPC on the basis of the same that those complete the chain in every respect excluding all such hypothesis other than the guilty of the accused does not arise. In view of all these above, he contended that the Trial Court's finding in holding the accused guilty for commission of offence under section-302/201 of the IPC cannot be sustained.

7. Learned Counsel for the State on the other hand supported the finding returned by the trial court. According to him, the trial court has upon detailed analysis of evidence on record has rightly come to the conclusion that these three circumstances i.e. last seen theory, the recovery of the dead body as also the spade pursuant to his statement given by the accused while in custody being taken with the extrajudicial confession, complete the chain in every respect which excludes all the hypothesis other than the guilt of the accused. He, therefore, contended that the judgment of conviction and order of sentence impugned in this Appeal are not liable to be interfered with.

8. Keeping in view the submissions made, we have carefully read the judgment passed by the trial court. We have also perused the evidence of the prosecution witnesses and the documents which have been admitted in evidence and marked Exts.1 to 7.

9. The principles of law relating to the appreciation of circumstantial evidence are well settled. The case being based on circumstantial evidence; the following conditions must be fulfilled before a case against an accused can be fully established:-

> (1) the circumstances from which the conclusion is to be drawn should be fully established.
>
> It be noted here that the Apex Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by the Apex Court in case of ***Shivaji Sahabrao Bobade Vrs. State of Maharashtra; (1973) 2 SCC 793*** where the following observations have been made which are important:-
>
> Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and must be" is long and divides vague conjectures from sure conclusions.
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
>
> (3) the circumstances should be of a conclusive nature and tendency,
>
> (4) they should exclude every possible hypothesis except the one to be proved, and
>
> (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

These above five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence".

10. Keeping in view the settled principles, let's now proceed to analyze the evidence as to the incriminating circumstances relied upon by the trial Court.

(a) **Last Seen Theory:-** The accused is the son of the brother-in-law of P.W.2, who is the Informant. He has stated in his evidence that accused had disclosed before him that the deceased left the accused waiting in a rickshaw and went away and did not returned. He has also stated that the accused had been to the Police Station and reported about the missing of his wife.

P.W.4, who is the brother of the deceased, has prosecuted a different version than that of P.W.2. It is his evidence that during his absence, the accused and the deceased having informed his father, P.W.5, went to the forest to collect firewood and they did not return. He has also stated that when father of the deceased inquired regarding the whereabouts of the deceased from the accused, he again replied that on the previous day, the deceased had left him in the market, went somewhere else and had not returned. The father of the deceased, P.W.5 has again given a version which

is in variance with what have been stated by the P.W.4. It is stated that on a Friday, accused took his wife to the forest to bring firewood and did not say anything about informing him prior to the leaving of the house. When he went to the house of the accused on the next day, P.W.5 informed that the deceased left and went away somewhere from the market on the previous day. The evidence of these witnesses being taken together, there remains a long time gap between the deceased seen last with the accused and the recovery of the dead body of the deceased which has been made after lodging of the F.I.R. and initiation of the case and the passage is more than a week or so. Therefore, with all the above evidence on record, it cannot be held that the last seen theory stand as a strong circumstances against the accused unerringly pointing at his guilt as he is not offering any acceptable explanation.

11. Coming to the extrajudicial confession of the accused, it be kept in mind that there is no bar in law for fastening guilt upon the accused on the basis of the extrajudicial confession. But the rider remains that it has to be proved to be free and voluntary and it also be proved that the person before whom, the accused had so disclosed, on him he had all the reason to repose full faith and confidence. This fact that the accused had voluntarily made the confession by saying his role with clarity and free from ambiguity has to be proved through clear, cogent and acceptable evidence beyond reasonable doubt.

P.W.1 in his evidence has stated that he was informed by one Budhiram Tudu, who has not been examined from the side of the prosecution that the accused had confessed his guilt and that pursuant to the information; he reached at the Police Station. He has stated that when arrived at the Police Station, he had seen the accused and the police officials to be present.

P.W.2, who is the Informant, has stated that his signature was taken by the police on a report without being aware on its content, which he hints at the F.I.R., Ext.1. He has further stated that the accused had been to the Police Station to give a missing report of his wife. The evidence of P.W.2 in cross-examination is not, he had not stated before the Investigating Officer that the accused had confessed to have murdered his wife and concealed the dead body. Lastly, he has said that the accused had not confessed before him and after his signature was taken in the F.I.R., Police had not also recorded his statement. When it is stated that death has taken place on account of strangulation, the Medical Officer who had conducted postmortem examination has not found any such indication or marked any such features, which of course may not be taken a miss on account of the fact that the dead body was then is a highly decomposed state. At this stage, turning attention to the evidence of the brother of the deceased i.e. P.W.4, it is seen that he has stated that seven days after the occurrence, the villagers caught the accused and then accused confessed before them to have murdered the deceased. The fact remains that none of these villagers have even been examined from the side of the prosecution. Moreover, the way, the villagers are said to have approached the accused and

wanted to know from him regarding the whereabouts of the deceased itself asserted by P.W.4, does not exclude the possibility of coercion and threat from their side upon the accused in extracting the confession on repeated asking which we cannot say to be voluntary. P.W.4 when states that the villagers had not only informed him but also the police, none of the villagers have been named anywhere in the F.I.R. nor by this P.W.4 in his evidence. The evidence of P.W. 4 is also to the effect that accused confessed to have committed the crime before one Ledha who too has not come to the witness box. He has further gone to say that accused has admitted his guilt only after he was assaulted by the villagers and lastly he has stated that all other villagers also had access to the forest for collecting firewood. Father of the deceased, P.W.5 has stated that he had told the villagers to decide the case and only after that, the accused being asked by the villagers confessed to have committed the crime before them. This P.W.5 had not informed the police that he went to the house of the accused and was informed that deceased was missing since previous day and asked them her whereabouts. P.W.5 has stated to have gone to the market to make inquiry from the rickshaw pullers, who had informed him that a lady had come to enquire to take his Rickshaw. P.W.5 has stated that one Budhiram Tudu had informed one of his co-villagers over telephone, who in turn informed this P.W.5 about the confession and thereafter he had gone to the Police Station. This P.W.5 has also stated that he had been to the forest where the dead body was recovered which directly contradicts the evidence of P.W.6, the Investigating Officer, who has remained silent. With such evidence on record, we are not in a position to accept that the prosecution has proved this fact that the accused had made extrajudicial confession that he was the author of the crime.

12. Next with regard the disclosure statement said to have been made by the accused in giving recovery of the dead body; let us first of all approach the evidence of P.W.1. He says that he was requested by the police officials to accompany them to the forest where on the disclosure statement made by the accused, one spade was recovered and then the dead body was recovered from the place where it had been kept concealed. During cross-examination, this P.W.1 however has stated that this spade was recovered by a villager and then brought before the police. It is also stated that after recovery of the dead body and other items, his signature was not taken by the police officials either on the disclosure statement or any other contemporaneous documents. P.W.4 says to have dug out the dead body himself and identified the deceased by looking at her face and from her clothes. He has further stated that the spade was brought by accused himself which directly contradicts the evidence of P.Ws.1 and 6 who have stated that the spade was brought out by a villager. The Investigating officer, P.W.6 has stated that he had recorded disclosure statement of the accused, however where such statement was recorded and in presence of which witnesses, he is not coming forward to say. It is the evidence of that P.W.6 that after he had recorded disclosure statement, he had not noted the said important fact in the case diary, which he was maintaining in course of investigation indicating all the

steps and activities carried out in at light which throw doubt on his testimony on that score. He has further stated to have not read over and explained the contents of the same to the accused. In his evidence at paragraph-9, that accused had not said anything specific about the place of concealment of the spade and dead body and the two villagers cited as the witnesses to the disclosure statement have neither been named nor examined. Lastly, it is the evidence of P.W.6 that the spade was recovered by a villager named Atmaram, who has again not been examined from the side of the prosecution. This P.W.6 states that P.W.5 was not present when the dead body was recovered which directly contradicts the version of P.W.5.

With above evidence on record, we find that prosecution in the present case has not been able to prove the motive behind the commission of the crime. Although it is the settled position of law that always motive is of no such significance in establishing the guilt of an accused, yet in a case which is based on circumstantial evidence, the same plays vital role. P.W.4 who is the brother of the deceased has rather stated that there was no quarrel between the accused and the deceased. P.W.6 who is the Investigating Officer has also stated that there was no ill-feeling between the husband (accused) and the wife (deceased). In view of such state of affairs in the evidence, we are clearly of the view that the prosecution here has failed to prove each of the circumstances as projected against the accused by leading, clear, cogent and acceptable evidence in unerringly pointing at the guilt of the accused. Therefore, we are unable to concur with the conclusion arrived at by the trial court that the case against the accused has been proved through the circumstantial evidence beyond reasonable. In that view of the matter, the judgment of conviction and order of sentence returned by the trial court against the accused cannot be sustained.

13. In the wake of aforesaid, the Appeal stands allowed. The judgment of conviction and order of sentence dated 20.10.2011 passed by the learned Sessions Judge, Balasore in Sessions Trial No.300 of 2010 are hereby set aside. The Appellant (accused) being in jail custody, it is directed that he be set at liberty forthwith being his detention is not required in connection with any other case.

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2023 (I) ILR - CUT - 417

D. DASH, J.

R.S.A. NO. 38 OF 2019

JHUMURI NAYAK (SINCE DEAD) BY HER LRS & ORS. .....Appellants

.V.

BHABAGRAHI BEHERA .....Respondent

PROPERTY LAW – Whether suit for permanent injunction simpliciter without the prayer for the declaration of title and possession is maintainable? – Held, No – This Court is of the considered view that the suit for permanent injunction as instituted simpliciter is not maintainable. (Para12-13)

Case Law Relied on and Referred to :-

1. AIR 2008 SC 2033 : Anathula Sudhakar Vs. P. Buchu Reddy (Dead).

For Appellants : M/s.G. Mukherjee, Sr.Adv, P.K. Rout, K.K. Gaya, S. Sahoo.

For Respondent : M/s.S.P. Swain, B.D. Biswal, P. Patnaik, B.K.Rath.

JUDGMENT Date of Hearing:06.12.2022:Date of Judgment :23.12.2022

D.DASH, J.

These Appellants, in this Appeal under Section-100 of the Code of Civil Procedure 1908 (for short,'the Code') assail the judgment and decree dated 17.12.2018 & 26.12.2018, respectively passed by the learned District Judge, Jajpur in RFA No. 16 of 2017.

By the same, the Appeal filed by the predecessor of these Appellants being aggrieved Defendant in Title Suit No.174 of 1983 of the Court of learned Civil Judge (Junior Division), Jajpur under Section 96 of the Code has been dismissed.

The Respondent as the Plaintiff had filed the suit for permanent injunction as against the original Appellants (Defendant) so as to restrain him from interfering with the peaceful possession of the suit land by the Plaintiffs. The suit having been decreed the Defendant aggrieved by the same had carried the Appeal under Section-96 of the Code which too has been dismissed. The original Appellant having died during pendency of First Appeal, his legal representatives are pursued the Appeal and they now have filed this Second Appeal.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Suit.

3. Plaintiffs case is that one Uma Bewa was the original owner of the suit land and she has sold the suit land to Bai Behera, the father of the Plaintiff by registered sale-deed dated 24.12.1958 for consideration of Rs.600/- with a condition that if she would repay the consideration amount within a period of five (5) years to the Plaintiff, she would be entitled to repurchase the suit land. It is stated that pursuant to the execution of said registered sale-deed, possession of the suit land had been delivered to that Bai Behera. Since Uma did not exercise her right to repurchase the suit property within the stipulated time period term of five years or even thereafter during her lifetime, the said right stood extinguished. Bai Behera thus possessed the

suit openly, peacefully and uninterruptedly to the knowledge of Uma Bewa and Nityananda Naik, the original Defendant. It is further stated that Bai Behera having possessed the suit land openly, peacefully and continuously without any interruption had perfected the title over the suit land by way of adverse of possession and the Defendant had no manner of right, title, interest and possession over the suit land. Since the Defendant then created disturbance in the possession of the suit land by the Plaintiff over the land in question, the suit was filed.

4. The Defendant in his written statement while denying the plaint averments has stated that Uma was an illiterate and pardanashin lady and taking advantage of that Bai Behera had created the deed dated 12.11.1983 by practising fraud. Uma in face had mortgaged the suit land for a loan of Rs.600/- in order to clear up her debt, for her maintenance and to meet the expenses for a pilgrimage with a condition that on repayment of the principal with interest @ 9% per annum within five years, she would get back the property. The amount being repaid in the year 1962, the deed in question was not returned on some pretext or other. She later on has executed a deed of gift in favour of the Defendant and delivered possession of the said land. The Defendant claims to be in possession of the said land since then having so mutated the land, has been paying the rent. It is further stated that only after the suit, the Defendant could know that the Plaintiff fraudulently obtained Sarti Kabala on 24.12.1958 from Uma, who was old, illiterate and pardanashin widow and had no understanding of the contents of the documents. Said document is said to be obtained by fraud and thus invalid one. It is stated that Bai had never derived any right over the property under that deed.

5. The Trial Court on the above rival pleadings framed six (6) issues. Upon examination of evidence and their evaluation, it held the transaction to be a out and out sale with a condition to repurchase. The Plaintiff has been found to be having the title and possession over the suit land. The suit having been decreed, the Defendant carried the First Appeal, which too has been dismissed. The First Appellate Court addressing the important contention raised as to maintainability of the suit for permanent injunction simpliciter without seeking any declaration of right, title and interest has held the same in favour of the Plaintiff. It has further held the deed, Ext.1 to be a sale-deed and then having gone to say that the Defendant has not established his case that it had been fraudulently obtained, the result of the suit as returned by the Trial Court has been confirmed.

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

> (i) Whether on the rival case of the parties giving rise to involvement of complicated question of title as also competing claim in respect of the suit property covered under the deed which is being differently projected by the parties, the Courts below have erred in law by decreeing the suit for permanent injunction simpliciter without the prayer of the declaration of the title and possession?

(ii) Whether the Courts below are right in construing Ext.1 as out and out deed of sale by ignoring the evidence on record as to the surrounding circumstances and the settled law in the field for construction of the document when one side projects it to be out and out sale and other claims it to be a mortgage by conditional sale?

7. Learned Senior Counsel for the Appellants submitted that when as per the rival case of the parties, there is involvement of complicated question of title as also competing claim in respect of the suit property covered under the deed, which is differently stated by the parties; the Courts below ought to have held that the suit as framed for the relief of injunction simpliciter is not maintainable. He further submitted that the First Appellate Court on the basis of evidence on record is not right in holding at the end of paragraph-9 of the judgment that Ext.1 is a sale deed, by which the title and possession of the suit land has been duly transferred to the Plaintiff.

8. Learned Counsel for the Respondent whiling supporting the findings of the First Appellate Court submitted that when the Courts below have come to clear finding with regard to the title and, there was no cloud on the title of the Plaintiff and the title only incidentally or ancilliarily stands for consideration in the suit, there is no need to seeking declaration of title and the suit is thus maintainable and the Courts below are right in passing the decree for permanent injunction.He further submitted that the First Appellate Court on detail discussion of the evidence on record in the backdrop of the pleadings did not commit no mistake in holding Ext.1 to be a sale-deed and that is not liable to be inferred with.

9. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also gone through the plaint and written statement and perused evidence including the important document, Ext.1, which is the basis of the claim of the Plaintiff.

10. Since, the substantial question as at (i) of law touches the very root of the matter, this Court feels it proper to answer the same first in addressing the rival contentions.

Reverting to the pleadings in the plaint, it is seen that the Plaintiff has asserted that Uma Behera, the original owner in possession of the suit land had sold the same by registered sale-deed dated 24.12.1958 for consideration of Rs.600/-. It has been stated that there was a condition in the said deed that if Uma would reply the consideration amount within five years to the Plaintiff, she would be entitled to repurchase the suit land. It has been further pleaded that pursuant to the said deed, there was a settled possession of the suit land in favour of Bai Behera and as Uma did not exercise the right to repurchase within time stipulated or even her lifetime; her right to repurchase stood extinguished. Then in the alternative, a claim has also been advanced that by such long possession of the suit land in open and peaceful manner without any interruption from any quarter, there has been perfection of title over the suit land by way of adverse possession.

11. The Defendant has attacked this deed in saying that by that there had been no transfer of title in respect of suit land as it has been categorically pleaded that Uma was an old illiterate pardanashin lady and taking advantage of that as also the relationship, Bai Behera had obtained the said deed when it was in fact a deed of mortgage in securing the payment of loan of Rs.600/- with the condition that on repayment of principal and the interest within five years, that Uma would get back the property. It is seen that the deed in question, Ext.1 has been the nomenclatured as "ପାଞ୍ଚ ବର୍ଷର ସର୍ତ୍ତ କବଲ୍ଲା" (Five years Conditional Deed). It has been pleaded in the written statement that although Uma subsequently had paid amount of Rs.600/- with interest to the Plaintiff in the year 1962 and had asked Bai Behera to return the original sale-deed, Bai Behera did not do so on various pretext and while Uma continued to be in possession of the suit land. Then she is said to have gifted away the suit land and other lands by registered deed of gift and the land has been mutated in the name of the Defendant who is paying rent and possessing the same.

12. The instant suit is for permanent injunction simpliciter without any other prayer relating to declaration etc. In case of ***Anathula Sudhakar Vrs. P. Buchu Reddy (Dead)***; AIR 2008 SC 2033 in summarizing the position with regard to the suit permanent injunction simpliciter relating to immovable property, the Hon'ble Apex Court has held as under:-

> (a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.;
>
> (b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.;
>
> (c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title either specific, or implied.Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.; and
>
> (d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be

driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."

13. Keeping in mind the principles as set out; when the afore discussed facts and circumstances as emerge from the rival pleadings are viewed; this Court is not in a position to subscribe to the view taken by the First Appellate Court that there was no need for seeking declaration of right, title and interest by the Plaintiff as there was no cloud on the title. The First Appellate Court in the facts and circumstances of the case is also not right in saying that the title here is incidentally or co-laterally stands for consideration. Therefore, this Court is of the considered view that the suit for permanent injunction as instituted simpliciter is not maintainable and the Courts below ought to have held the said suit with the relief claimed as not maintainable.

The first substantial question being answered as above, there arises no further need to find out the answer to the next substantial question of law since that answer is enough to dispose of this Appeal.

14. Resultantly, the Appeal stands allowed. The judgments and decrees passed by the Courts below are set aside and the Plaintiff's suit thus stands dismissed. There shall, however, be no order as to cost.

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2023 (I) ILR - CUT - 422

D. DASH, J.

S.A. NO. 262 OF 1998

NISAMANI DANDASENA .....Appellant

.V.

PURUSOTTAM DANDASENA (SINCE DEAD) THROUGH HIS LR & ORS. .....Respondents

ORISSA CONSOLIDATION OF HOLDINGS AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Jurisdiction of the Civil Court – Whether the Civil court has the jurisdiction to examine the legality and propriety of final record of right published during the consolidation operation? – Held, Yes – When the Authority under the statute have not acted in conformity with the fundamental principles of judicial procedure and the Civil Court will certainly have the jurisdiction to interfere with the same. (Para 12-13)

Case Laws Relied on and Referred to :-

1. 65(1988) CLT 440 : Gulzar Khan Vs. Commissioner Consolidation & Ors.
2. AIR 1975 Orissa 219 : Mangulu Jal Vs. Bhagaban Ray.

For Appellant : M/s. Manoj Misra,Sr.Adv, B.K.Misra, P.K. Das, B. Misra.

For Respondents : M/s. S.R.Patnaik,D.Pradhan, P. Pattnaik,N.K.Senapati.

JUDGMENT Date of Hearing :20.10.2022 : Date of Judgment: 23.12.2022

D.DASH, J.

These Appellant, in filing this Appeal under Section-100 of the Code of Civil Procedure 1908 (for short, 'the Code'), has assailed the judgment and decree dated 16.05.1998 and 25.06.1998 respectively passed by the learned Civil Judge (Senior Division), Sonepur in Title Appeal No.05 of 1994.

By the same, the Appeal filed by the Respondent (Plaintiff) challenging the judgment and decree dated 13.12.1993 and 06.01.1994 passed by the learned Munsif, Rampur in Title Suit No.68/68 of 1991-92, under section-96 of the Code has been allowed and thereby, the suit of the Plaintiff has been decreed by declaring his right, title and interest over the suit land with confirmation of possession.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Suit.

3. The Plaintiff's case is that the suit land as described in the Schedule of the plaint which included consolidable and non consolidable plots described as per the record published in the consolidation operation is owned by him and as such he is the recorded tenant of the same. It is stated that in the consolidation operation, the record of right in respect of the suit land has been published and it has attained finality being not so challenged before any forum as available within the scheme and framework of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act,1972 (hereinafter called as the 'OCH&PFL Act').

It is further stated that the Consolidation Authority while recording the suit land in the name of the Plaintiff have made certain notes as to the possession of the suit land in the said consolidation record of right which is without any jurisdiction and wholly erroneous. The Defendants by taking advantage of such note of possession created disturbances in the peaceful possession of the Plaintiff over the suit land and house, which drove the Plaintiff to file the suit.

4. The Defendants while traversing the plaint averments have pleaded that the suit land except the land under Sabik Plot No.1507 where the ancestral properties of the parties and those originally belong to Sankirtan Dandasena. Said Sankirtan Dandasena who is the common ancestor of the parties had two wives. Sribachha is

the son of Sankirtan through first wife and the Kandarpa is the son of Sankirtan through the second wife. Plaintiff's father is Sribachha whereas the Defendant is the son of Kandarpa. The Defendant No.1 is the son and the Defendant Nos. 2 and 3 are the daughters of Kandarpa.

It is stated that prior to the 4th settlement operation, the ancestral properties of the parties were partitioned between two branches that is Sribachha and Kandarpa. Accordingly, the record of right were separately prepared in their names in respect of the land which had fallen in their respective shares. As regards land under Sabik Plot No.1507; it is stated that the same has been declared as Rakhit in the 4th settlement operation. Except that land, other land and houses are said to be in possession of the Defendant's father and after him with the Defendants. Accordingly, it is stated that the Sabik Plot No.1589, 1504, 1505, 1506 and 1508, under Holding Nos. 29 and 28 correspond to the suit Plot No.1003/1087 of the consolidation record of right and those are in possession of the Defendants and so also the land under Sabik Plot No.1343 corresponding to suit plot No.523 of the consolidation record of right. It is also stated that land under Sabik Plot No.1507 corresponding to suit Plot No.1002 both stand recorded as Rakhit; those are under exclusive possession of the Defendants for last 40 years. Hence, it is said that the Plaintiffs have no right, title, interest and possession over the suit land and house. It is alleged that the plaintiffs having resorted as to fraudulent means has somehow managed to obtain the consolidation record of right in his name, but the possession noting has been rightly made. It is stated that the consolidation record of right of the suit land in favour of the Plaintiff is without any basis and jurisdiction.

5. On the above rival pleadings, the Trial Court having framed eight(8) issues has first of all rightly taken up issue no.1 for decision as that refers to the claim of the Plaintiff having right, title and interest over the suit land. On going through the evidence both oral and documentary, especially, Exts. A, B, C, D and G and analyzing the same, the answer of this issue has been rendered against the Plaintiff. Other issues being taken up together for decision, the Trial Court has held the preparation of the consolidation record of right as totally without any basis and as such illegal. Therefore, it is said that the Consolidation Authority has exceeded in their jurisdiction in recording the suit land in that way.These issues thus were answered against the plaintiff and the suit stood dismissed.

6. The Plaintiffs being unsuccessful before the Trial Court having carried the First Appeal has however been unsuccessful in that forum. The sole ground on which the Trial Court's judgment and decree have been set at naught is that the Civil Court has no jurisdiction to sit over to examine the legality and propriety of final record of right published during the consolidation operation. Therefore, it has been held that since the Plaintiff is the recorded owner of the suit land as per consolidation record of right, the Defendants have nothing to do. It has then been said that the Consolidation Authority had no jurisdiction to record the note of

forcible possession in respect of the land in the record of right and thus these notings in favour of the Defendants is illegal. Having said so, the Plaintiff's suit has been decreed by declaring their right, title and interest over the suit confirming the possession. Hence, the present Second Appeal at the instance of the Defendants.

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

> (a) Whether the impugned judgment of the learned Lower Appellate Court is perverse for non-consideration of Ext.A, B, C & D?

8. Mr. Manoj Misra, learned Senior Counsel for the Appellant submitted that the Plaintiffs claim of title over the suit land is solely based on consolidation record of right; when it is the evidence of the Plaintiff that he does not know the basis on which the record of right was prepared in his name in the consolidation operation in respect of the suit land and house site and he is also not giving any sort of explanation or denying the fact that there was a partition between his father and the father of the Defendants and these suit lands were in the share of the father of the Defendants and had been recorded as such in the 4th settlement which is the positive case of the Defendants. He further submitted that the Plaintiff as would reveal from the document, Ext.G, which is the order passed by the Consolidation officer in respect of the land of the parties in Dunguripali mouza (suit land is in Chingerkata mouza) had mentioned that the suit land given in the schedule therein belong to the father of the Defendants and these facts having been totally overlooked by the Consolidation Authorities, they have not acted in conformity with the sound judicial procedure, violating the fundamental legal principles in ignoring the positive admission of the Plaintiff which has remained totally unexplained; they had no jurisdiction to record the suit land straightway in the name of the Plaintiff which appears to be whimsical and arbitrary. He further submitted that it being the admitted case that there had been partition between Sribachha and Kandarpa, the Consolidation Authority without finding that the suit land in question had fallen in the share of Sribachha should not have gone to record the suit land in the name of the plaintiff. He submitted that position of law that the Consolidation Authority has the power to decide the right, title and interest of the parties in respect of the land covered under the notification does not clothe them with the power to record any such land according to their whims and caprice in an arbitrary manner without even noting the basis for the same, particularly when they are going to make a sharp departure from the recording of the said land as it was before the operation as standing prior to that and staring at their face. He submitted that with such evidence on record the First Appellate Court should not have simply answered that the consolidation record of right is correct in every respect and basing upon the same it ought not to have gone to decree the suit. He thus submitted that the judgment and decree passed by the First Appellate Court cannot be sustained.

9. Mr. S.R. Pattnaik, learned Counsel for the Respondents (Plaintiffs) submitted in favour of the finding returned by the First Appellate Court in decreeing the suit. According to him, the view taken by the First Appellate Court that the Civil Court cannot sit as the Court of Appeal against the order that the Consolidation Authority, who have prepared the record of right is wholly correct. He therefore, submitted that the First Appellate Court has rightly held that the Consolidation Authority had no jurisdiction to record the note of forcibly possession of the parties in respect of land covered under the record of right. He also submitted that the Defendants have not made out a case establishing those few limited contingencies under which the jurisdiction of the Civil Court is exercisable to for the tinker with the consolidation record of right.

10. Keeping in view the submission made, I have carefully read the judgments passed by the Courts below. I have also perused the plaint and written statement and have gone through the evidence both oral and documentary.

11. The Plaintiff's case is very simple that he has the right, title and interest over the suit land, which has been recorded in the final consolidation record of right in stating further that Kandarpa nor Defendant had ever possessed the suit land and therefore, such noting as to the possession of the suit land by Kandarpa in the said consolidation record of right is without jurisdiction.

At the risk of repeatation, the Defendant's case be stated with details. They say that the suit land except Sabik Plot No.1507 were the ancestral properties of the parties and in a partition, it had fallen in the share of their father Kandarpa, who continued to possess the said land and accordingly, during the 4th settlement operation, the record of right of the suit land had been prepared in the name of Kandarpa in recognition of the partition between the Kandarpa and his brother Sribachha. It is also stated that Sabik Plot No.1343 corresponding to suit Plot No.523 and Sabik Plot No.1508 and 1505 corresponding to such Plot No.1003/1087 were also in possession of Kandarpa but by mistake during 4th settlement operation, the same were recorded in the name of the Plaintiff when the fact remains that the Defendants after Kandarpa are continuing to possess the same. They also state that the Plaintiff was never in possession of the suit land.

The suit property as described in the schedule of the plaint is the Consolidation Khata No.154, Chaka No.339, Chaka No.1002, Ac.10120 decimals, Plot No.1003/1087, Ac.0.913 decimals and none consolidable plot no.523 measuring Ac.0.005 decimals.

When the Plaintiff's claims his right, title, interest and possession over the suit land on the basis of consolidation record of right; the Defendants also assert their right, title, interest and possession over the suit land in saying that major part of it was the allotted share of his father in the partition between him and the father of the Plaintiff.

12. In case of ***Gulzar Khan Vrs. Commissioner Consolidation & Others;*** 65(1988) CLT 440, the Full Bench of this Court at paragraph-23 have taken note of five principles enumerated in case of ***Mangulu Jal Vrs. Bhagaban Ray***; AIR 1975 Orissa 219 (Full Bench) and having indicated all those five principles; in paragraph-24, the followings have been said:-

> "24. We have already said that Civil Court has got jurisdiction to interfere in two cases. In such a case also the Civil Court cannot take fresh evidence to determine which person was in possession on the particular date and as such is entitled to settlement. The Civil Court can only examine if the Collector's order is unfair,arbitrary or capricious. Such a conclusion can be reached if on the materials placed before the Collector a reasonable man could not have reached the same conclusion. However unsatisfactory the Collector's conclusion may be, it cannot be set aside merely because a different view could be taken by the Civil Court on the materials before the Collector. Similarly, the correctness of the Collector's view cannot be tested in the light of evidence adduced before the Civil Court."

13. Bearing the above in mind in order to answer the substantial questions of law, this Court is called upon to examine the evidence on record in the backdrop of the rival pleadings; to say as to if a case has been made out to debunk the consolidation record of right and refuse the claim of the Plaintiff on the basis of the same as has been advanced in the suit.

The Consolidation record of right has been admitted in evidence and marked Ext.1. Pursuant to the same, rent having been paid, few rent receipts have been proved from the side of the Plaintiff as Ext.2 series. The plaintiff's here has not been proved the record of right of the suit land, which was before the Consolidation Authority, when the consolidation operation began i.e. previous settlement record of right which being taken as the basic land records, the Consolidation Authorities began their journey in the Consolidation Operation. The base record before them was the said settlement record of right. The Plaintiff also does not prove any rent receipts relating to the suit land prior to the publication of the consolidation record of right in support of his prior possession. The Defendants have proved Ext.A, the certified copy of the holding No.29 of 4th settlement operation standing in the name of their father Kandarpa as well as Ext.B for the holding No.28 of the 4th settlement standing in the name of their father-Kandarpa. Exts.C and D are the settlement records of right of holding No.122 and 123 which stand in favour of the Plaintiff and Ext.E is the certified copy of the consolidation record of right of holding No.154 which stands recorded in the name of Plaintiff with note of possession in favour of Kandarpa in respect of the suit land. The Consolidation Chaka plot No.1002, 1003/1087 and 523 under holding No.154 of village Chingerkata is Ext.F. The Defendants have also proved the certified copy of the order passed by the Consolidation Officer, Dunguripalli in Case No.02 of 1983 of village, Chigerkata as referred to earlier. The Plaintiff during his cross-examination at paragraph-4 has admitted what the Defendant No.1 examined as D.W.1 has deposed that the suit land

originally belong to Sankirtan, who had two wives; Plaintiff's father is the son of Sankirtan through first wife; Defendants father is the son of Sankirtan through second wife. When such is the relationship between the parties, it reveals from Exts. A and B, that the land under holding Nos. 28 and 29 had been recorded in the name of Kandarpa towards his share and the Plaintiff had been allotted with Plot Nos. 122 and 123 vide Exts. C and D. Thus, it is clear that there was partition between the Kandarpa and Sribachha prior to the 4th settlement operation.This being the record position when the consolidation operation commenced and the parties had accepted those records till then, which was staring at the face of the Consolidation Authority, in making a total departure to the record of right of the 4th settlement operation, they should have the strong and compelling reason. Merely because the Consolidation Authority have the power to rule upon right, title and interest in respect of the land covered under the notification and prepare the record of right, they cannot do so wholly without any basis and arbitrarily at their whims like confirming the title of the land record in the name of one in favour of another. Thus, for the aforesaid, the Authority under the statute here have not acted in conformity with the fundamental principles of judicial procedure and the Civil Court will certainly have the jurisdiction to interfere with the same, in that event, finding the order to be unfair, capricious and arbitrary. Here it is found that the preparation of the land recorded by the Consolidation Authority in respect of the entire land is not founded on any base showing the connection of the suit land and its concern with the Plaintiff, that too in discarding the records in favour of the Defendants. The Defendants having been found to be having their right, title and interest in respect of Sabik Plot No.1003/1087 as the recording of the said land by the Consolidation Authority in the record of right in favour of the Plaintiff is without any basis whatsoever by the Trial Court was absolutely correct in holding that the right, title and interest of the Defendant over those plots of land has not been extinguished by virtue of the publication of the consolidation record of right. More so, when the Plaintiff has not come forward with the case that he has been allotted such land in exchange of land with the Defendants during the consolidation operation.

All the aforesaid, provide answer to the substantial question of law that leads to set aside the judgment and decree passed by the First Appellate Court and restore those which had been passed by the Trial Court in dismissing the suit filed by the Plaintiff.

14. In the result, the Appeal stands allowed. However, in the peculiar facts and circumstances, there shall be no order as to cost is passed.

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2023 (I) ILR – CUT - 429

BISWANATH RATH, J.

W.P.(C) NO. 14551 OF 2005

RABI PADHAN : (SINCE DEAD THROUGH HIS LEGAL HEIRS) & ORS. .....Petitioners

.V.

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

ODISHA LAND REFORMS ACT, 1960 – Section 23 (A) – Whether a non-tribal can create a title over the property of a tribal by way of adverse possession ? – Held, No – A non-tribal can neither prescribe nor acquire title by way of adverse possession over the property belonging to a tribal, as the same is specifically prohibited by a special law promulgated by the State Legislature. (Para 9)

Case Laws Relied on and Referred to :-

1. 64(1987) CLT : Dama Meher Vs. Champeswar Bentkar & Ors.
2. 1990 (I) OLR 581 : Nilambar Satpathy Vs. Prema Ganda & Ors.
3. AIR 2004 SC 3782: Amarendra Pratap Singh Vs.Tej Bahadur Prajapati & Ors.

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

For Opp. Parties : Mr. S. Ghose, AGA.

JUDGMENT Date of Hearing & Judgment: 14.12.2022

BISWANATH RATH,J.

1. Heard the submission of proxy counsel appearing on behalf of Mr. B. Routray, learned Senior Advocate appearing on behalf of the Petitioner. Learned State Counsel is also involved in the hearing process. In spite of service of notice, nobody appears on behalf of the contesting private Opposite Parties.

2. This Writ Petition involves a challenge to the impugned orders at Anexures-4, 5 & 6 as well passed in exercise of power under the provisions of the OLR Act by the Opposite Party Nos.3, 2 & 1 respectively more particularly in a proceeding initiated under the provisions of Section 23(A) of the OLR Act.

3. Undisputedly the Petitioners are non-tribe private persons and private Opposite Parties are tribal people.

4. In advancing his submission on reiteration of the factual aspect involved herein the learned counsel appearing for the Petitioner raised two questions for determination of this Court. One, looking to the nature of claim and the objections

being raised by the present Petitioners therein, if a proceeding U/s.23(A) of the OLR Act remains maintainable? Secondly, whether the concurrent finding of fact establishing the Petitioners' long possession over a tribal property creates right in favour of the Petitioners to hold on the property by way of adverse possession?

5. Taking this Court to the discussions by the original authority at the threshold of the proceeding U/s.23(A) of the OLR Act vide OLR Case No.11/87 and reading through the discussions at page 20 of the brief continuing till 22 page, further reading together with Khatian and the Yadast as appearing at Annexures-1 & 2 and also reading through the observation made therein and the date, month and year mentioned, an attempt is made by the learned counsel for Petitioners to establish that the Petitioners have long possession even prior to initiation of the proceeding U/s.23(A) of the OLR Act in the year 1987. It is under the factual disclosures and through the source of documents at Annexures-1 & 2 the Petitioners attempted to satisfy their case by answering both the questions indicated hereinabove in their favour. To satisfy the case of the Petitioners, the learned Counsel while reading through the provision at Section 23(A) of the OLR Act, also relies on two decisions of this Court i.e. in the case of ***Dama Meher Vs. Champeswar Bentkar & Ors. as reported in 64(1987) CLT 516*** and in the case of ***Nilambar Satpathy Vs. Prema Ganda & Ors***. as reported in ***1990 (I) OLR 581***. Learned counsel for the Petitioner attempted to satisfy this Court that both the decisions have direct application to the case at hand and thus requested this Court for allowing this writ petition in reversal of the impugned orders vide Annexures-4, 5 & 6.

6. Learned State Counsel taking this Court to the disclosures through the impugned orders involved herein attempted to block the writ petition on the premises that there is involvement of concurrent finding of fact by all the three forums on a factual aspect as well as legal aspect involved herein. For the limited role of the High Court in exercise of power under Article 227 of the Constitution of India, there appears, it is claimed that there is no scope for interfering in the impugned order. Further also there is settled position of law in the meantime thereby holding there is no possibility of declaration of title in favour of a non-tribe or non-caste even for their long possession over the tribe or caste property by way of adverse possession. Learned State Counsel also argues in his attempt to object the Writ Petition on the premises that in the event this Court entertains the Writ Petition, the purport of the OLR Act particularly the provision at Section 22 & 23 of the Act created for protection of the interest of the Tribe & caste people of the Society will be affected and the situation will be disastrous, further the effect of the Act will also be taken away.

It is, in the above background of the matter, an attempt is made by the learned State Counsel to block the entertainability of the Writ Petition and thus a request is made for dismissal of the writ petition.

7. Considering the rival contentions of the parties and keeping in view the questions framed hereinabove, this Court first enters into the fact on the claim of the Petitioners for their long possession. Reading through the impugned orders and the inputs through Annexures-1 & 2 there remains no doubt that the Petitioners herein being non-tribe are in long possession over the disputed property in question, which facts have also been taken care of by all the three forums. In the given scenario the question here requires to be decided is; if there is possibility of declaration of title of a non-tribe or non-caste even in spite of their long possession and since the property involved undisputedly belongs to scheduled tribe person, this Court here takes into account the protection granted to such person in the provisions at Section 22 & 23 of the OLR Act, which reads as follows:-

> **"22. Restriction on alienation of land by Scheduled Tribes –**
>
> (1) Any transfer of a holding or part thereof by a raiyat, belonging to a Scheduled Tribe shall be void except where it is in favour of –
>
> (a) a person belonging to a Scheduled Tribe or
>
> (b) a person not belonging to a Scheduled Tribe when such transfer is made with the previous permission in writing of the Revenue Officer : Provided that in case of a transfer by sale the Revenue Officer shall not grant such permission unless he is satisfied that a purchaser belonging to a Scheduled Tribe willing to pay the market price for the land is not available, and in case of a gift unless he is satisfied about the bona fides thereof.
>
> (2) The State Government may having regard to the law and custom applicable to any area prior to the date of commencement of this Act by notification direct that the restrictions provided in subsection (1) shall not apply to lands situated in such area or belonging to any particular tribe throughout the State or in any part of it.
>
> (3) Except with the written permission of the Revenue Officer, no such holding shall be sold in execution of a decree to any person not belonging to a Scheduled Tribe.
>
> (4) Not withstanding anything contained in any other law for the time being in force where any document required to be registered under the provisions of clause (a) to clause (e) of sub-section (1) of section 17 of the Registration Act, 1908 purports to effect transfer of a holding or part thereof by a raiyat belonging to a Scheduled Tribe in favour of a person not belonging to a Scheduled Tribe, no registering officer appointed under that Act shall register any such document, unless such document is accompanied by the written permission of the Revenue Officer for such transfer.
>
> (5) The provisions contained in sub-sections (1) to (4) shall apply, mutatis mutandis, to the transfer of a holding or part thereof of a raiyat belonging to the Scheduled Caste.
>
> (6) Nothing in this section shall apply –
>
> (a) to any sale in execution of a money decree passed, or to any transfer by way of mortgage executed, in favour of any scheduled bank or in favour of any bank to which the Orissa Co-operative Societies Act, 1962 applies; and
>
> (b) to any transfer by a member of a Scheduled Tribe within a Scheduled Area.
>
> **23. Effect of transfer in contravention of Section 22** – (1) In the case of any transfer in contravention of the provisions of sub-section (1) of section 22 the Revenue Officer on

his own information or on, the application of any person interested in the land may issue notice in the prescribed manner calling upon the transferor and transferee to show cause why the transfer should not be declared invalid.

(2) After holding such inquiry as the Revenue Officer deems fit and after hearing the persons interested, he may declare such transfer to be invalid and impose on the transferee a penalty of an amount not exceeding two hundred rupees per acre of the land so transferred for each year or any part thereof during which the possession is continued in pursuance of the transfer which has been declared to be invalid and may also order such portion of the penalty as he deems fit, to be paid to the transferor or his heir.

(3) On a declaration being made under sub-section (2) the Revenue Officer suo motu or on the application of any person interested cause restoration of the property to the transferor or his heirs and for the purpose may take such steps as may be necessary for compliance with the said order or preventing any breach of peace ; Provided that if the Revenue Officer is of the opinion that the restoration of the property is not reasonably practicable, he shall record his reasons therefor and shall, subject to the control of the Government, settle the said property with another member of a Scheduled Tribe or in the absence of any such member, with any other person in accordance with the provisions contained in the Orissa Government Land Settlement Act, 1962. Explanation - Restoration of the property means actual delivery of possession of the property to the transferor or his heir.

(4) Where any transfer is declared under this section to be invalid and the transferee or any other person in possession of the property has been evicted therefrom, the transferee shall not be entitled to the refund of any amount paid by- him to the transferor by away of consideration for the transfer."

8. This Court here finds, there is clear attraction of a provision at Section 23-A of the OLR Act.

9. It is, at this stage of the matter, this Court also reading through the aforesaid provision finds, the mechanism through the OLR Act has been created involving the aforesaid provision to give protection to the scheduled tribe and scheduled caste persons from being dislocated from their properties in any manner. It is, at this stage of the matter, this Court finds, this position has been examined again and again and finally the Hon'ble Apex Court in the case of ***Amarendra Pratap Singh Vrs. Tej Bahadur Prajapati & Ors. as reported in AIR 2004 SC 3782*** has made a threadbare discussion involving a case of one of the party a non-tribe therein claiming right through adverse possession for his long possession over the property. This Court finds, the Hon'ble Apex Court while keeping in view possibility of right created in favour of the non-tribe person by way of adverse possession, if any, taking into account the protection of right of tribes under paragraph no.7-D of the Regulations read with Article 65 & Section 27 of the Limitation Act, 1963, has come to clearly observe that a non-tribal can neither prescribe nor acquire title by way of adverse possession over the property belonging to a tribal, as the same is specifically prohibited by a special law promulgated by the State Legislature or the Governor in exercise of power conferred in that regard by the Constitution of India. It is further held by the Hon'ble Apex Court that a general law cannot defeat the provision of a

Special law to the extent to which they are in conflict; else an effort has to be made at reconciling the two provisions by homogenous reading. The Hon'ble Apex Court has also further held that a wrongful possession of a non-tribe even involving a sale transaction has not ripened into acquisition of title by adverse possession. This Court finds, the judgments of all the three forums are well covered by the judgment of the Hon'ble apex Court in the case of ***Amarendra Pratap Singh*** (supra). It is for the application of the decision of the Hon'ble apex Court to the case at hand, this Court does not like to relay on the judgments of the Orissa High Court relied on by the Petitioners. Question No.2 framed hereinabove is answered against the Petitioners. Further there also involves a concurrent finding of fact by all the three forums thereby limiting the scope of interference in such orders in exercise of power under Article 227 of the Constitution of India. In the ultimate this Court finds no scope to interfere in the impugned order.

10. The Writ Petition stands dismissed. However, there is no order as to the costs.

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2023 (I) ILR-CUT- 433

BISWANATH RATH, J.

W.P.(C) NO. 19169 OF 2009

GANGADHAR PRUSTY .....Petitioner

.V.

UNION OF INDIA & ORS. .....Opp.Parties

SERVICE LAW – Scale of Pay – The Petitioner while continuing as A.S.I was provisionally empanelled for promotion to the rank of Sub Inspector–The petitioner subsequently reverted back to the substantive post – Whether the petitioner is entitled to pay protection of Higher Post? – Held, Yes – Even though there was no difficulty in bringing back the petitioner to the post he originally hold, but it has been settled that at least the protection of scale of pay of an employee in higher post should be granted even he had hold the same on temporary basis.

(Para 4-6)

Case Laws Relied on and Referred to :

1.1990(1)SLR 799 (LPA No.66 of 1983 decided on 30.11.1989) : State of Haryana (Secretary, P.W.D., Public Health),Chandigarh & Anr. Vs. Shri Karam Singh, Peon
2. 1970 SLR (decided in 29.04.1969 Sp. Appeal Nos. 995 and 996 of 1968) : State of U.P. & Anr. Vs. Virendra Nath Srivastava.
3. AIR 2005 SC 2404 : Bhadei Rai Vs. Union of India & Ors.
4. AIR 2005 SC 2531 : Badri Prasad and Ors. Vs. Union of India & Ors.

For Petitioner : M/s. S.K.Pal
For Opp.Parties : Mr. D.R.Bhokta

JUDGMENT Date of Hearing and Judgment :15.12.2022

BISWANATH RATH, J.

This is a writ petition involves the following prayer :

> "Petitioner, therefore pray that the Hon'ble Court be pleased to admit the writ application and after hearing the petitioner's counsel to issue a writ/writs in nature certiorari by quashing Annexure-3 and further be pleased to issue a writ/writs of mandamus directing the Opp. Parties to fix the pension of the petitioner as SIPF and to pay the differential amount of money which is due to the petitioner which has not been paid, within all time fixed by this Honourable.
>
> And the petitioner as in duty bound shall ever pray."

2. Taking this Court to the development through Annexure-1, learned counsel for the petitioner submits that in a development on 07.09.2006 petitioner who was continuing as A.S.I was provisionally empanelled for promotion to the rank of Sub-Inspector in the scale of pay Rs.5500/- to Rs.9000/- undoubtly for a period of three months. It is alleged that the employer involving a monopoly tactic used to give one day break and bringing a new offer of appointment on expiry of 89 days. For the petitioner holding the post of S.I.P.F. reverted with a gap of one day, issued another order vide Annexure-2 again provisionally empanelled in the rank of S.I.P.F. again in the scale of Rs.5500/-9000/-. It is taking this Court to Annexure-3, a reversion order involved herein petitioner alleged that there may not be any dispute that petitioner could be reverted to the substantive post, it is claimed that for petitioner allowed to continue in higher post on issuing two promotion orders vide Annexures-1 and 2 respectively, he was entitled to pay protection at least. It is further alleged, for the reduction in the pay from Rs.5500/-9000 to Rs. 4000/-6000/- petitioner alleges there is substantial decrees in the pay of the petitioner resulting also decrease in the retirement and pensionary benefit of the petitioner. It is in the circumstance, learned counsel for the petitioner relies on series of judgments of the Hon'ble Apex Court in the case of ***State of Haryana through the Secretary, P.W.D., (Public Health) Chandigarh and another Vs. Shri Karam Singh, Peon*** reported in *1990(1)SLR 799 (LPA No.66 of 1983 decided on 30.11.1989)*, in the case of ***State of U.P. and another Vs. Virendra Nath Srivastava***, 1970 SLR (*decided in 29.04.1969 Sp. Appeal Nos. 995 and 996 of 1968*), in the case of ***Bhadei Rai Vs. Union of India and others***, *AIR 2005 SC 2404* and in the case of ***Badri Prasad and others Vs. Union of India and others***, *AIR 2005 SC 2531*. Petitioner takes also help of all the above judgments.

3. Mr. Bhokta, learned counsel for the contesting opposite parties-Railway Department taking this Court to the averments in paraghraph-12 and 13 of the Writ Petition submits that there is requirement of reversion of the petitioner to the

substantive post of A.S.I. to see him regularize in a way to facilitate him with proper retrial dues and pensionary benefits, if any. In view of the response of the railway through paragraphs-12 and 13 Mr.Bhokta, learned counsel attempted to justify the action of the Railway authority.

4. Considering the rival contentions of the parties this Court finds, through Annexures-1 and 2 that petitioner was provisionally empanelled as a matter of promotion to the rank of Sub-Inspector taking him from substantive post of A.S.I. Two such consequential orders have been passed vide Annexures-1 and 2. Both the orders clearly disclosed that the petitioner was already in the entitlement of scale of pay of Rs.5500/- Rs.9000/- vide Annexure-1, which was also allowed to continue vide Annexure-2. It is here taking into consideration of the impugned order at Annexure-3, this Court finds, even though there was no difficulty in bringing back the petitioner to the post he was originally holding, but there has been illegal reduction in the scale of pay by reducing petitioner's scale to Rs.4500/- 6000/-. This Court takes into account the judgment of Hon'ble Apex Court in the case of ***Bhadei Rai Vs. Union of India and others***, *AIR 2005 SC 2404*. In the above judgment the Hon'ble apex Court in paragraphs-10 and 11 observes as follows:-

> "10. In the case of the present appellant, the aforesaid directions squarely apply. The appellant had to undergo a screening test in the year 1995 and in the result declared in 1997, the appellant had qualified. A long period of twenty years has been spent by the appellant on a higher post of Rigger in Group 'C' post. In such circumstances, he is legitimately entitled to the relief of pay protection and consideration of his case for regular appointment to Group 'C' post on the basis of his long service in Group 'C' post.
>
> 11. Relying, therefore, on the decision of this Court in the case of Inder Pal Yadav [(2005) 11 SCC 301] the present appeal is partly allowed by modifying the orders of the Central Administrative Tribunal and of the High Court. It is directed that the appellant's pay which he was last drawing on the date of his repatriation from Group 'C' post to Group 'D' post, shall be protected. It is further directed that the appellant shall be considered for promotion to Group 'C' post in his turn with others, with due regard to the fact of his having passed the screening test and his work and performance for long twenty years on the post of Rigger in Group 'C'."

Reading the aforesaid, this Court finds the legal position in the above aspect has been settled in at least granting the protection of scale of pay of an employee in higher post, even it has been held in temporary basis.

Considering the applicability of the decision, this Court finds the decision has a support to the case of the petitioner.

5. Similar view is also taken in another decision of the Hon'ble Apex Court in the case of ***Badri Prasad and others Vs. Union of India and others***, *AIR 2005 SC 2531*. The Hon'ble Apex Court through paragraphs-14 to 16 observed as follows*:*

> "**14**. The practice adopted by the Railways of taking work from employees in Group 'D' post on higher Group 'C' post for unduly long period legitimately raises hopes and claims for higher posts by those working in such higher posts. As the Railways is

utilising for long periods the services of employees in Group 'D' post for higher post in Group 'C' carrying higher responsibilities, benefit of pay protection, age relaxation and counting of their service on the higher post towards requisite minimum prescribed period of service, if any, for promotion to the higher post must be granted to them as their legitimate claim.

15. As held by the High Court the appellants cannot be granted relief of regularising their services on the post of Storeman/Clerk merely on the basis of their ad hoc promotion from open line to higher post in the project or construction side. The appellants are, however, entitled to claim age relaxation and advantage of experience for the long period spent by them on higher Group 'C' post.

16. Without disturbing, therefore, orders of the Tribunal and the High Court the appellants are held entitled to the following additional reliefs. The pay last drawn by them in Group 'C' post shall be protected even after their repatriation to Group 'D' post in their parent department. They shall be considered in their turn for promotion to Group 'C' post. The period of service spent by them on ad hoc basis in Group 'C' post shall be given due weightage and counted towards length of requisite service, if any, prescribed for higher post in Group 'C'. If there is any bar of age that shall be relaxed in the case of the appellants."

6. Reading the aforesaid, this Court finds there is reiteration of the view already given in the case of ***Bhadei Rai Vs. Union of India and others*** *(supra).* Both the judgments appear to be passed by Hon'ble Apex Court on the same date and also by same Bench. It is for the support of law, this Court finds even in spite of reversion, petitioner's scale should have been fixed on reversion post vide Annexre-3 at Rs.5500/- 6000/-. This Court accordingly allowing the writ petition issue a writ of mandamus to the Railway Authority for recalculating the petitioner's salary after his reversion to the post of ASI vide Anenxure-3 and accordingly also re-fix the pensionary benefits. Arrear, if any, be also calculated and released in favour of the petitioner by completing the entire exercise within a period of six weeks. Failure of release of financial benefit within six weeks of the communication of this judgment, petitioner will be entitled to interest from the date of entitlement but @ 6%.

7. In the result the writ petition succeeds. No order as to cost.

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2023 (I) ILR-CUT- 436

BISWANATH RATH, J.

W.P.(C) NO. 22263 OF 2010

AJAYA KUMAR PANI & ORS. .....Petitioners

.V.

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

LIMITATION ACT, 1963 – Sections 16, 17(1)(c) – Whether provision of Section 17(1)(c) is applicable to statutory Authority ? – Held, No – It is only applicable to suits and not to the proceedings undertaken by the authorities under Statute or Tribunal under any Statute. (Para 12)

Case Laws Relied on and Referred to :

1. (2015) 3 SCC 695 : Jt. Collector Ranga Reddy Vs. D. Narsing Rao.
2. (1994) 1 SCC 1 : S.P.Chengalvaraya Naidu (Dead) by LRs. Vs. Jagannath (dead) by LRs. & Ors.
3. 1995 Supp. (3) SCC 249 : State of Orissa & Ors. Vs. Brundaban Sharma & Anr.
4. (1995) 2 SCC 493 : Birla Cement Works Vs. G.M., Western Railways & Anr.

For Petitioners : M/s. G. Mukherji,Sr. Adv.,P.Mukherji, S. Patra & A.Ch.Panda.

For Opp.Parties : Mr. S.Mishra, Addl. Standing Counsel

JUDGMENT Date of Hearing : 10.01.2023 : Date of Judgment : 27.01.2023

BISWANATH RATH, J.

1. This writ petition involves a challenge to the order passed by the appellate authority as well as the revisional authority vide Annexures-8 & 9 herein.

2. Factual background as narrated and disclosed in the course of hearing appears to be, this is 3rd round of litigation by the Petitioners. Petitioners claiming to be the children of Smt. Basanta Kumari Devi the original lessee, are enjoying a lease of Ac.1.23 decimals of land under Khata No.79, Plot Nos.45, 47 & 48 in village Jamuhata in Keonjhar district being granted by the Tahasildar, Keonjhar on 19.11.1986 involving Encroachment Case No.1 of 1985-86 purely for agricultural purpose. Order passed in the Encroachment Case No.1 of 1985-86 is enclosed as Annexure-1. It is claimed that on the basis of the above order as well as the report of the Revenue Supervisor dated 16.08.1986 settlement was made in favour of the Petitioners. It is claimed that settlement was made after issuing of proclamation and invitation of objections. In a further development Rayati Patta was issued in favour of the mother of the Petitioners. Petitioners have enclosed the report of the Revenue Supervisor as well as Rayati Patta as Annexures-2 & 3 respectively. Petitioners have also enclosed the rent receipt in proof of collection of rent in respect of the disputed property. It is alleged that after lapse of 14 years an appeal vide Lease Appeal No.1 of 2000 was filed before the Court of the Sub-Collector, Keonjhar challenging the order of the Tahasildar, Keonjhar dated 19.11.1986 vide Annexure-1, also intending to cancel the lease involved. Accordingly notices were issued fixing the date of hearing in the matter of condonation of delay and admission of the matter to 12.10.2000. Petitioners themselves have enclosed the memorandum of appeal and the delay condonation application as Annexures-5 & 5/A respectively, which, however, clearly disclosing appeal to have been preferred in 1997. Further

verification in the delay condonation application was made on … day of August, 1997. In paragraph 5 it is alleged that without service of notice on the lessee the delay was condoned and the appeal was also admitted thereby. Further without sufficiency of notice, the appeal was also allowed by the order dated 27.04.2001. For the attempt of the State authorities to evict the Petitioners on the basis of the appeal order, the lessee was constrained to move T.S. No.79 of 2001 on the file of the Civil Judge (Sr. Divn.), Keonjhar for declaring the order dated 27.04.2001 null and void. The suit was decreed by the judgment dated 9.05.2003 thereby declaring the order in Lease Appeal No.1 of 2000 as null & void and further directing for reopening of the Lease Appeal No.1 of 2000 for fresh hearing, but after providing opportunity of hearing to the lessee. Petitioners have filed copy of the judgment in T.S. No.79 of 2001 at Annexure-7. It is here claimed that after disposal of the suit finding the lessee died in the meantime i.e. on 5.06.2003 a prayer for substitution of the legal heirs of the deceased lessee was made and notices were accordingly issued to the legal heirs to appear in the proceeding on 14.12.2004 for hearing on the question of substitution. It is alleged that substitution was allowed without even any application for setting aside of abatement and condonation of delay. Petitioners being the legal heirs on their appearance in the proceeding on 29.11.2007 through their Advocate requested for supply of a copy of the appeal memorandum. Copy of which was also supplied to the legal heirs as appearing at Annexures-5 & 5/A to the writ petition. Appeal again involved an *ex parte* order of eviction on 11.08.2008. Based on a notice being issued by the Tahasildar to the Petitioners to vacate the lease hold property by 10.09.2009, Petitioners were even unable to move an application for stay before the revisional authority, for the Additional District Magistrate, Keonjhar-Opposite Party No.2 remaining busy in administrative matters, the Petitioners were constrained to file W.P.(C) No.13368 of 2008 in the High Court of Orissa for quashing of the order dated 11.08.2008 along with a stay application. W.P.(C) No.13368 of 2008 got disposed of by the High Court thereby quashing the order dated 11.08.2008 and remanding the matter to the appellate authority for fresh adjudication of the appeal. After remand order of this Court Lease Appeal No.1 of 2000 was freshly disposed of by the order dated 26.06.2009 vide Annexure-8 thereby holding that there is no illegality or impropriety in the said order dated 27.04.2001. For a statutory remedy of revision available U/s.12(2) of the OPLE Act the Petitioners challenged the order at Annexure-8 through OPLE Revision No.3 of 2009 alongwith an application for stay. It is claimed through paragraph no.16 that OPLE Revision No.3 of 2009 was posted to 19.08.2009 for hearing on admission and on which date the matter could not be taken up. The case was next posted to 31.08.2009. On 31.08.2009 hearing on admission of the revision was made in the involvement of the Government pleader. It is alleged that even though the revision was admitted, there was no stay order passed by the revisional authority. It is further alleged that for the revisional authority not granting any interim protection, Petitioners were again constrained to move this High Court in W.P.(C) No.11087 of

2010 thereby seeking a direction to the revisional authority to dispose of the revision as expeditiously as possible and also praying therein for stay of operation of the order dated 26.06.2009 till disposal of the revision. The Hon'ble High Court, however, while disposing of the writ petition directed the revision to be disposed of within a period of three months. The OPLE Revision No.3 of 2009 was finally disposed of on 25.11.2010, however on affirmation of the appeal order, resulting filing of the present writ petition.

3. Mr. Mukherjee, learned Sr.Advocate appearing on behalf of the Petitioners in the above background of the matter bringing in the entire narration made hereinabove, attacked the orders at Annexures-8 & 9 on the ground that reopening of the lease case on the basis of the allegation that the lease was obtained on misrepresentation of fact and nondisclosure of the issue that husband of Smt. Basanta Kumari Devi was a Primary School Teacher and was not a landless person and thus the applicant in the *lis* played fraud with the public authority, remains incorrect and baseless. Mr. Mukherjee, learned Sr. Advocate appearing on behalf of the Petitioners taking this Court to the inquiry report of the Revenue Supervisor at Annexure-2 contented that the Revenue Supervisor adopted a fair procedure in the inquiry with the involvement of all concerned and thereafter submitted his report after taking evidence from local people. It is also contended that after the submission of such report the Tahasildar himself also visited the spot and found, mother of these Petitioners was the real encroacher and the encroachment was unobjectionable. It is also contended that before finalizing the lease aspect there was issuance of proclamation thereby inviting objection before settlement of land in favour of the mother of the Petitioners and the public authority did not receive any objection. Mr. Mukherjee, learned Sr.Advocate appearing on behalf of the Petitioners also contended that once a party attempts to reopen an issue already settled on the premises of playing fraud by the beneficiary, responsibility lies on such party for not only making pleadings on fraud but also need to prove such allegation. It is specifically argued by Mr. Mukherjee, learned Sr.Advocate appearing on behalf of the Petitioners that neither there is any allegation of fraud pleaded nor proved. There is even no action against the person playing fraud. Mr. Mukherjee, learned Sr. Advocate appearing on behalf of the Petitioners further also on the ground of institution of appeal after 14 years contended that such long delay should not have been condoned ordinarily. Mr. Mukherjee, learned Sr. Advocate appearing on behalf of the Petitioners also contended that once the appeal period is 30 days and even assuming that there involves an allegation of fraud, there may be entertaining of such appeal at least within one year of detection of such fraud following the provisions at Section 17 of the Limitation Act. It is further submitted that for the fraud having been detected in August, 1997, the appeal should have been filed before 13.08.1998. Mr. Mukherjee, learned Senior Advocate for the appeal brought in 2000 contended that there was gross delay in filing the appeal on 25.09.2000. Mr. Mukherjee, learned Sr.Advocate appearing on behalf of the Petitioners also takes

advantage of some development through OLR Case No.102 of 2000 vide Annexure-4 thereby allowing conversion of lease hold land to homestead land, while also taking advantage of acceptance of rent by the public authority after grant of such lease.

4. Mr. Mukherji, learned Senior Advocate appearing on behalf of the Petitioners giving much stress on the report of the Revenue Supervisor vide Annexure-2 at page 23 of the brief and his observation on the husband of the mother of the Petitioners contended that it is not a case that strength or capability of the mother of the Petitioners was not considered at all. Mr. Mukherjee, learned Senior Advocate appearing on behalf of the Petitioners for the clear observation of the Revenue Supervisor that mother of the Petitioners has categorically reported that husband was merely a primary school teacher, objected the stand of the administration in cancelling the lease on the premises of the ability of the husband and submitted that action of the authority in this context is not justified. Further taking this Court to the delay aspect reading through the appeal provision in the O.P.L.E Act Mr. Mukherji, learned Senior Advocate submitted that even assuming that there is detection of fraud on 6.02.1997 and approval of filing appeal was obtained on 13.08.1997, filing of lease appeal on 25.09.2000, but the appeal ought to have suffered on the ground of limitation. On reiteration of his earlier submission Mr. Mukherji, learned Senior Advocate again taking this Court to the provision at Section 17 of the Limitation Act submitted that in case of detection of fraud the appeal would have been submitted within one year of detection and/or the sanction and therefore contended that there is no explanation on delay in filing the appeal for the period from 13.08.1998 i.e. the date of sanction till 25.09.2000 i.e. the date of filing of appeal. It is thus contended that condonation of delay in this context becomes bad. Further taking this Court to the decision in the case of ***Jt. Collector Ranga Reddy Vs. D. Narsing Rao*** as reported in (2015) 3 SCC 695 Mr. Mukherji, learned Senior Advocate contended that action of the appellate authority in condoning the delay and entertaining the appeal after so much years is also hit by the legal position settled through the above judgments.

It is, in the above background, Mr. Mukherjee, learned Sr. Advocate appearing on behalf of the Petitioners requested this Court for setting aside of the impugned orders at Annexures-8 & 9.

5. Mr. Sonak Mishra, learned State Counsel for Opposite Parties the public authorities in his attempt to support the impugned orders, while keeping in view the ground of attack to the impugned orders at Annexures-8 & 9 also taking this Court to the memorandum of appeal as well as the document vide Annexures-5 & 5/A submitted that Annexure-5/A clearly discloses that affidavit and verification in the delay condonation application attached to the memorandum of appeal were brought in the month of August, 1997 as clearly disclosed from page 39. Looking to the claim of the Petitioners in paragraph 21 Mr. Mishra, learned State Counsel contended that fraud was detected in 1997 thereby giving rise to bring appeal. On

the allegation that there is no pleading either on fraud or on misrepresentation of fact Mr. Mishra, learned State Counsel taking this Court to the pleadings made in the memorandum of appeal at Annexure-5 more particularly the pleadings in paragraph nos.6 & 7, contended that there is clear pleading to the effect that the husband of the mother of the Petitioners was serving as a Primary School Teacher and his annual income at the relevant point of time was Rs.10,632.10/- as revealed from the pay particulars received from the B.D.O, Banaspal and the report of the Revenue Supervisor was submitted in absence of details of particulars of land of the husband of the mother of the Petitioners and thus there is clear pleading on fraud and/or suppression of material facts. Mr. Mishra, learned State Counsel thus contended that there was a fit case to be reopened and examined. Mr. Mishra, learned State Counsel also contended that in the verification process it has been detected that Baidhar Pani the husband of the lessee i.e. the mother of the Petitioners was already in possession of a piece of Government land. Mr. Mishra, learned State Counsel thus contended that there is no delay in filing such appeal. There is also clear averment on the fact that lessee was playing fraud and had obtained lease in clear suppression of material facts. Mr. Mishra, learned State Counsel further also contested the proceeding on the premises that there is plea of fraud and parties therein have not only scope to challenge such action, but have also scope to establish their case in the appeal proceeding and as the aggrieved party could unable to disestablish the allegation of playing fraud being the foundation to challenge the appeal order, there is no infirmity in the appeal order and as a consequence there is no infirmity in the revision order also. Mr. Mishra, learned State Counsel thus opposed to the entertainability of the writ petition and sought for dismissal of the writ petition. Mr. Mishra, learned State Counsel apart from the above submission also took this Court to three decisions of the Hon'ble Court to support the stand of the State herein.

6. Mr. Mishra, learned State Counsel filing a written notes of submission along with memo of citations attempted to reiterate the stand of the competent authority that even though there involves a plan of Town Planning Authority, the Tahasildar settled the land without verifying the town plan, which already speaks regarding the observation on illegality committed by the Presiding Officer in deciding the Encroachment Case No.1/1985-86. Further there is also clear observation of the Sub-Collector, Keonjhar in its order dated 26.06.2009 thereby making it clear that husband of the deceased lessee was not only a Government Teacher, but his annual income also remains Rs.10,632.10/-, which exceeded the maximum limit at that point of time, however, it appears, for being considered as a landless person, there was a limit of annual income to the tune of Rs.6,400/- per annum at the relevant point of time. In the process Mr. Mishra, learned State Counsel submitted that there has been definite suppression of material facts by the leaseholder with regard to the income of the husband and properties, if any, and thus submitted that decision in taking out the lease is justified, a reasonable one and a bona fide one. Further taking this Court to the decision of the Hon'ble apex Court in the case of ***S.P.***

Chengalvaraya Naidu (Dead) by Lrs. Vs. Jagannath (dead) by Lrs. & Ors. as reported in (1994) 1 SCC 1 Mr. Mishra, learned State Counsel contended that for there is established fraud, it vitiates all actions involved therein. Taking this Court to another decision in the case of ***State of Orissa & Ors. Vs. Brundaban Sharma & Anr.*** as reported in 1995 Supp. (3) SCC 249, Mr. Mishra, learned State Counsel contended that once there is allegation of fraud, there is scope for considering the limitation leniently. On the allegation of Mr. Mukherji, learned Senior Advocate that appeal is hit by Section 17(I) of the Limitation Act, Mr. Mishra, learned State Counsel taking this Court to the decision in the case of ***Birla Cement Works Vs. G.M., Western Railways & Anr.*** as reported in (1995) 2 SCC 493 contended that for the decision of the Hon'ble apex Court, Section 17(I) of the Limitation Act has application only to the suits and not to the authorities created under the statute. It is, in the above background of the matter, Mr. Mishra, learned State Counsel claimed that since the impugned order is justified one, there is no scope for interfering in the same and thus prays for dismissal of the writ petition.

7. In the above background, this Court here proceeds as follows:-

For the own submission of Mr. Mukherjee, learned Sr. Advocate appearing on behalf of the Petitioners that fraud has been detected by August, 1997 as clearly claimed in paragraph No.21 of the brief, this Court finds, there is no substance in the allegation of the Petitioners on entertainment of appeal after 14 years. Further keeping in view the statement of Mr. Mukherjee, learned Sr. Advocate appearing on behalf of the Petitioners that fraud has been detected by August, 1997 as clearly borne in paragraph no.21 of the writ petition, it appears, there is definite delay. Considering that there is reopening of the appeal on the ground of fraud this Court is of the view that claim of Mr. Mukherjee, learned Sr. Advocate appearing on behalf of the Petitioners that the appeal suffers on account of no pleading on fraud loses its force. This Court keeping in view the counter submission of Mr. Mishra, learned State Counsel that there is specific pleading on fraud and misrepresentation of facts and looking to the averments made in paragraph nos. 3 to 7 of the memorandum of appeal vide Annexure-5, finds the following pleadings made in paragraph nos. 3,4,5,6 & 7 :-

> "3. That pending disposal of the above noted encroachment cases, again on report of the R.I, Sadar-II, Keonjhar, another Encroachment case bearing No.1/85-86 was instituted in the Court of the Tahasildar, Keonjhar for the same land against Smt. Basanta Kumari Devi D/o. Sri Natha Kar. On the report of Revenue Supervisor dated 16.08.1986 (Annexure-II) the Tahasildar, Keonjhar vide his order dated 19.11.1986 in the Encroachment Case No.1/85-86 settled the above noted case land in favour of the encroacher Smt. Basanta Kumari Devi.
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> 4. That on verification of R.O.R. it is found that the case land was recorded in Abadagogya Anabadi Khata with kissam Sarad-III in the current settlement. A note of possession was recorded in the name of Baidhar Pani S/o Madhusudan Pani of village-Jamuhata in the remarks column against the above noted plots.

> 5. That it is revealed from the Encroachment Case No.1/83-84 and 1/85-86 that Sri Baidhar Pani originally belongs to village-Balarampur under Anandapur Tahasil and he was serving as a Primary School Teacher. Basanta Kumari Devi, the encroacher in the encroachment No.1/85-86 is the wife of Sri Baidhar Pani.
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> 6. That the husband of the encroacher was serving as a Primary School Teacher and his annual income from service source was Rs.10,632.10 as per the pay particulars received from B.D.O, Banaspal (Annexur-III).
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> 7. That it has come to the notice of the State Govt. that the Tahasildar, Keonjhar has not enquired properly into the eligibility criteria of the encroacher and without receiving the land particulars of Sri Baidhar Pani from the Tahasildar, Anandpur and service particulars from B.D.O, Banaspal has settled the case land in favour of Smt. Basanta Kumari Devi D/o Sri Natha Kar of village Jamuhata on the basis of wrong report from the field staff. Basanta Kumari Devi is wife of Sri Baidhar Pani and in consideration of the income of Sri Pani from service source and in the absence of his detailed land particulars and other grounds she was not entitled for settlement of the encroach land as per the provision of the Orissa Prevention of Land Encroachment Act, 1972.
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> Being aggrieved by the aforesaid order of the learned Tahasildar, Keonjhar in Encroachment Case No.1/85-86 the appellant begs to prefer this appeal on the following grounds alongwith others."

This Court here finds, allegation that the appeal did not involve any pleading on fraud and misrepresentation of facts, falls flat. Further even as of now neither the lessee nor her children denied the allegation that the husband of the lessee was a good earner and was also in occupation of a piece of land as an encroacher. Husband's salary per annum at that point of time had also taken out the eligibility of the family to the entitlement of a piece of land on lease basis on the premises of their landlessness.

8. There is civil court decree in T.S. No.79/2001 preferred by the mother of the Petitioners where the mother of the Petitioners though could set aside the earlier order in appeal, however, also got a direction for reopening of the appeal. The appeal was directed to be disposed of in the involvement of the Petitioners. Civil Court judgment reveals as follows:-

> "The suit be and the same is decreed on contest against the Defendants with costs. It is hereby declared that the order dtd.27.4.2001 passed by the Defendant No.4 in Lease Appeal No.1/2000 and the notice dated.14.8.2001 (Ext.1) issued by Defendant No.2 to the plaintiff are illegal, inoperative and null and void. Defendant No.4 is directed to dispose of the Lease Appeal No.1/2000 afresh in accordance with law after due notice to the plaintiff and affording her opportunity of being heard. Consequentially the notice (Ext.1) is non-est in law and as such the defendant No.2 is directed not to take any re-course for vacation of the possession of the suit land by the plaintiff.
>
> Pleaders' fees at contested scale."

This order of the Civil Court since accepted by the mother of the Petitioners and she, accordingly, participated in the fresh disposal of the appeal is now estopped in challenging the maintainability of such appeal. Acceptance of Civil Court

judgment itself amounting to condonation of delay. There is again reopening of the appeal by virtue of order of this Court in W.P.(C) No.13368 of 2008.

9. This Court here finds, Petitioners have moved twice this Court. First through W.P.(C) No.13368 of 2008. It appears, through paragraph no.3 therein Petitioner had already taken the ground of delay in filing the Lease Appeal No.1 of 2000 and as a consequence Petitioner has also taken the ground of delay in paragraph No.13 therein. This writ petition was disposed of on 15.09.2008 in setting set aside the *ex parte* order in the appeal therein and thereby remanding the matter to the appellate authority for deciding the appeal afresh. Petitioners appeared in the appeal and contested the matter. In the second round of litigation bringing a writ petition vide W.P.(C) No.11087 of 2010 the Petitioner here also in paragraph No.3 took the ground of delay. Through paragraph no.8 Petitioner agitated the condonation of delay. Petitioners even though agitated such grounds twice, but remained satisfied with the two orders of this Court undisputedly also in the involvement of the ground of delay raised by the Petitioners.

10. In the circumstance, this Court finds, Petitioners are estopped from raising the ground of delay even. To add to above in paragraph no.21 Petitioners themselves in their attempt to challenge the condonation of delay in filing the appeal contended that the alleged fraud was detected before August, 1997 and sanction of the competent authority was also obtained in the same month, thus the appeal should have been brought at least within one year of such detection at least by 13.08.1998 and that too for the appeal being filed on 25.09.2000 there is no explanation for the delay between 13.08.1998 to 25.09.2000. Petitioners here also took support of the memorandum of appeal submitted by him and filed vide Annexure-5. The condonation of delay application is also filed at Annmexure-5/A. Looking to the year of appeal as mentioned in Annexure-5 more particularly at page 33 of the brief, this Court finds, there appears to be; the appeal was initially brought in 1997 and in the delay condonation application vide Annexure-5/A starts from page 37 at page 39 verification in such application appears to have been done on ..th day of August, 1997. Annexure-6 is the appeal order. Petitioner himself since filed copy of the memorandum of appeal and the condonation of delay vide Annexures-5 & 5/A it is possible that the appeal was in fact brought in 1997 and there might be re-numbering of the appeal in 2000. From the documents enclosed by the Petitioners themselves and for the observation made hereinabove, this Court finds strength in the claim of the State Counsel through the document. Further even assuming that there is delay in filing appeal in 2000, however, taking into consideration the decision vide (2015)3 SCC 695 this Court finds, the case cited by Mr. Mukherji, learned Sr. Advocate appearing on behalf of the Petitioners indicated hereinabove involves a challenge to the action of the year 2004 to the discovery in 1991 but however involving an issue of five decades back. Hon'ble apex Court even though appreciated the detection aspect in the year 1991, however for the litigation brought in 2004 after 13 years of

such detection, declined to entertain the SLP. In the case at hand admittedly the detection was made in 1997 and the memorandum of appeal at Annexure-5 shows, the appeal was brought in 1997. As per the own document of the Petitioners however the appeal was decided by the order vide Annexure-6 appears to be registered in 2001. This Court here even though finds, principle decided through the above judgment does not apply to the case at hand and that there is possibly two years delay, however looking to the decision in the case of ***S.P. Chengalvaraya Naidu (dead) by Lrs.*** *(supra)* finds, the Hon'ble apex Court through paragraph Nos.4 & 5 has taken the following view:-

> "**4.** The High Court reversed the findings of the trial court on the following reasonings:
>
> "Let us assume for the purpose of argument that this document, Ex. B-15, was of the latter category and the plaintiff, the benamidar, had completely divested himself of all rights of every description. Even so, it cannot be held that his failure to disclose the execution of Ex. B-15 would amount to collateral or extrinsic fraud. The utmost that can be said in favour of the defendants is that a plaintiff who had no title (at the time when the suit was filed) to the properties, has falsely asserted title and one of the questions that would arise either expressly or by necessary implication is whether the plaintiff had a subsisting title to the properties. It was up to the defendants, to plead and establish by gathering all the necessary materials, oral and documentary, that the plaintiff had no title to the suit properties. It is their duty to obtain an encumbrance certificate and find out whether the plaintiff had still a subsisting title at the time of the suit. The plaintiff did not prevent the defendants, did not use any contrivance, nor any trick nor any deceit by which the defendants were prevented from raising proper pleas and adducing the necessary evidence. The parties were fighting at arm's length and it is the duty of each to traverse or question the allegations made by the other and to adduce all available evidence regarding the basis of the plaintiff's claim or the defence of the defendants and the truth or falsehood concerning the same. A party litigant cannot be indifferent, and negligent in his duty to place the materials in support of his contention and afterwards seek to show that the case of his opponent was false. The position would be entirely different if a party litigant could establish that in a prior litigation his opponent prevented him by an independent, collateral wrongful act such as keeping his witnesses in wrongful or secret confinement, stealing his documents to prevent him from adducing any evidence, conducting his case by tricks and misrepresentation resulting in his misleading of the Court. Here, nothing of the kind had happened and the contesting defendants could have easily produced a certified registration copy of Ex. B-15 and non-suited the plaintiff; and, it is absurd for them to take advantage of or make a point of their own acts of omission or negligence or carelessness in the conduct of their own defence."
>
> The High Court further held as under:
>
> "From this decision it follows that except proceedings for probate and other proceedings where a duty is cast upon a party litigant to disclose all the facts, in all other cases, there is no legal duty cast upon the plaintiff to come to Court with a true case and prove it by true evidence. It would cut at the root of the fundamental principle of law of finality of litigation enunciated in the maxim 'interest reipublicae ut sit finis litium' if it should be held that a judgment obtained by a plaintiff in a false case, false to his knowledge, could be set aside on the ground of fraud, in a subsequent litigation."
>
> Finally, the High Court held as under:
>
> "The principle of this decision governs the instant case. At the worst the plaintiff is guilty of fraud in having falsely alleged, at the time when he filed the suit for partition, he had

subsisting interest in the property though he had already executed Ex. B-15. Even so, that would not amount to extrinsic fraud because that is a matter which could well have been traversed and established to be false by the appellant by adducing the necessary evidence. The preliminary decree in the partition suit necessarily involves an adjudication though impliedly that the plaintiff has a subsisting interest in the property."

5. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loandodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

For the involvement of fraud played by one of the party in paragraph no.6 the Hon'ble apex Court held as follows:-

"**6.** The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Ex. B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the court. We do not agree with the observations of the High Court that the appellantsdefendants could have easily produced the certified registered copy of Ex. B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."

Similarly through the decision in the case of ***State of Orissa & Ors.*** *(supra)* the Hon'ble apex Court in paragraph no.16 again finding that there involves fraud and suppression of material facts, came to hold as follows:-

"**16.** It is, therefore, settled law that when the revisional power was conferred to effectuate a purpose, it is to be exercised in a reasonable manner which inheres the concept of its exercise within a reasonable time. Absence of limitation is an assurance to exercise the power with caution or circumspection to effectuate the purpose of the Act, or to prevent miscarriage of justice or violation of the provisions of the Act or misuse or abuse of the power by the lower

> authorities or fraud or suppression. Length of time depends on the factual scenario in a given case. Take a case that patta was obtained fraudulently in collusion with the officers and it comes to the notice of the authorities after a long lapse of time. Does it lie in the mouth of the party to the fraud to plead limitation to get away with the order? Does lapse of time an excuse to refrain from exercising the revisional power to unravel fraud and to set it right? The answers would be no."

11. For the background narrated hereinabove and the decision taken note hereinabove settling the legal position that mere delay cannot take away the challenge of the party, in the event there is involvement of fraud, this Court in paragraph no.7 has already come to observe that there is clear pleading of fraud. Not only that there is also establishment of such allegation by the contesting authority.

12. Coming to reliance of the provision at Section 17(I) of the Limitation Act in the context filing of appeal at least within one year from the date of detection of fraud, this Court finds, considering similar situation involving statutory authorities the Hon'ble apex Court in the case of ***Birla Cement Works*** *(supra)* in paragraph no.3 came to observe as follows:-

> "**3.** Section 17(1)(*c*) of the Limitation Act, 1963 would apply only to a suit instituted or an application made in that behalf in the civil suit. The Tribunal is the creature of the statute. Therefore, it is not a civil court nor the Limitation Act has application, even though it may be held that the petitioner discovered the mistake committed in paying 'overcharges' and the limitation is not saved by operation of Section 17(1)(*c*) of the Limitation Act."

This decision clarifies the position of applicability of Section 16 & 17 of the Limitation Act only to suits and not to the proceedings undertaken by the authorities under Statute and or Tribunal under any Statute.

13. In the circumstance, this Court finds, there is no illegality in condonation of delay, if any. Further the orders passed by the Appellate Authority as well as the Revisional authority are also legal and justified requiring no interference in both the orders vide Annexures-8 & 9. In the result, this Court declines to interfere in the impugned order and set aside the same.

14. The Writ Petition stands dismissed. There is, however, no order as to costs.

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2023 (I) ILR-CUT- 447

S. K. SAHOO, J.

CRLA NO. 327 OF 2016

RAJEEV RANJAN .....Appellant

.V.

REPUBLIC OF INDIA .....Respondent

(A) PREVENTION OF CORRUPTION ACT, 1988 – Section 19 – Offences punishable under section 7, 13(2) read with section 13(1)(d) of the Act – The sanction order, which is very much essential under section 19 of the P.C. Act was passed by an authority who is not competent under law – Effect of – Held, the Sanction order is a defective one which was mechanically prepared without any application of mind – It would not be legally justified to hold the appellant guilty of the offences charged. (Para 14-15)

(B) EVIDENCE OF HOSTILE WITNESS – Legal implications – Discussed with case laws. (Para 11-A)

Case Laws Relied on and Referred to :

1. A.I.R. 1979 S.C. 1498 : Suraj Mal Vs. The State.
2. (2021) 84 O.C.R. 561 : Sanatan Dash Vs. State of Odisha (Vig).
3. A.I.R. 1979 S.C. 1455 : Man Singh Vs. Delhi Administration.
4. (2022) 86 O.C.R.(SC) 345 : K. Shanthamma Vs. State of Telangana.
5. (2009) 43 OCR (SC) 48 : C.M. Girish Babu Vs. CBI.
6. (2017) 68 O.C.R.510 : Sidhartha Kumar Nath Vs. State of Orissa (Vig).
7. (2014) 58 OCR (SC) 175 : B.Jayaraj Vs. State of A.P.
8. A.I.R. 2002 S.C. 486 : Punjabrao Vs. State of Maharashtra.
9. (2011) 50 OCR 591 : Debananda Das Vs. State of Orissa.
10. (2003) 26 OCR 274 : Niranjan Bharati -Vs. State of Orissa.
11. (2009) 44 OCR (SC) 425 : State of Maharastra Vs.Dnyaneshwar Laxman Rao Wankhede.
12. (2018) 70 O.C.R. 733 : Shyam Sundar Prusty Vs. State of Orissa.
13. A.I.R. 1979 S.C. 677 : Mohd. Iqbal Ahmed Vs. State of Andhra Pradesh.
14. (2021) 82 O.C.R.(SC) 67 : N.Vijay Kumar Vs. State of Tamil Nadu.
15. (2015) 16 S.C.C. 350 : Khaleel Ahmed Vs. State of Karnataka.
16. 2022 SCC OnLine SC 821 : Malti Sahu Vs. Rahul.
17. A.I.R.1996 S.C.2766 : State of U.P. Vs. Ramesh Prasad Mishra.
18. A.I.R.2000 S.C.210 : Koli Lakhmanbhai Chanabhai Vs. State of Gujarat.
19. (2013) 14 S.C.C. 434 : Rohtash Kumar Vs. State of Haryana.
20. (2011) 1 Crimes 157 (SC) : Himanshu Vs. State of NCT of Delhi.
21. (2016) 64 OCR (SC) 364 : V.Sejappa Vs. The State.
22. (2017) 68 O.C.R.795 : Satyananda Pani Vs. State of Orissa (Vig).
23. (2016) 3 SCC 108 : Krishan Chander Vs. State of Delhi.
24. (2015) 10 S.C.C.152 : P.Satyanarayana Murthy Vs. District Inspector of Police.
25. (2004) 3 S.C.C.753) : T.Shankar Prasad Vs. State of Andhra Pradesh.

For Appellant : Mr. Smruti Ranjan Mohapatra

For Respondent : Mr. Sarthak Nayak, Special Public Prosecutor(C.B.I)

JUDGMENT Date of Judgment : 09.11.2022

S.K. SAHOO, J.

The appellant Rajeev Ranjan faced trial in the Court of learned Special Judge (C.B.I.), Court No. IV, Bhubaneswar in T.R. Case No. 16 of 2012 for offences

punishable under section 7 and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereafter "1988 Act") on the accusation that on 09.03.2012 he being a public servant functioning as Tax Assistant, Ward No.4, Income Tax Office, Ayakar Bhawan, Rourkela demanded Rs.8,000/- (rupees eight thousand only) from the complainant Manoranjan Mishra (P.W.11) in the office of Income Tax, Udit Nagar, Rourkela for processing the refund claim of the income tax assessee Smt. Sudaramani Singh (P.W.5) for the year 2010-11 (Assessment Year 2011-12) and accepted the said amount of Rs. 8,000/- on 12.03.2012 as gratification other than legal remuneration for the above purpose.

The learned trial Court vide impugned judgment and order dated 18.06.2016 found the appellant guilty of the offences charged and sentenced him to undergo rigorous imprisonment for six months and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo rigorous imprisonment for one month for the offence under section 7 of the 1988 Act and to undergo rigorous imprisonment for one year and to pay a fine of Rs.10,000/- (rupees ten thousand), in default, to undergo rigorous imprisonment for two months for the offence under section 13(2) read with section 13(1)(d) of the 1988 Act with a direction that both the sentences shall run concurrently.

2. P.W.11 lodged the written report before the Superintendent of Police, C.B.I., Bhubaneswar through D.S.P., C.B.I., Rourkela on 10.03.2012 stating therein that he submitted the I.T. return for the year 2011-12 of P.W.5 Smt. Sundarmani Singh, who was closely known to him at Income Tax Office, Ward No.4, Rourkela and a sum of Rs.17,862/- was claimed in that return as refund claim. On 09.03.2012 at about 3.00 p.m., he met the appellant in his office in Ward No.4 and asked about the refund claim. The appellant told him that on payment of Rs.8,000/- (rupees eight thousand) to him, he would process the file and send it to the Income Tax Officer. When P.W.11 asked the appellant as to why he would give so much of money, the appellant told him that unless such amount is paid, refund would not be given. The appellant then asked P.W.11 to give Rs.8,000/- (rupees eight thousand) to him on 12.03.2012 in the morning hours. P.W.11 stated in his report to take suitable action against the appellant for making such illegal demand.

The written report was received from P.W.11 at Rourkela C.B.I. Unit Office and forwarded to the office of Superintendent of Police, C.B.I., Bhubaneswar where on 11.03.2012 Mr. M.S. Khan, Superintendent of Police in-charge, C.B.I. registered R.C. No.2(A) of 2012 treating the written report as F.I.R. (Ext.24) for commission of offence under section 7 of 1988 Act against the appellant and entrusted the case to P.W.13 Sachidananda Ratha, Inspector of police, C.B.I.,Bhubaneswar for investigation.

P.W.13 decided to lay a trap on the appellant and requested D.S.P., C.B.I., Rourkela to arrange official witnesses to act as witnesses during trap. P.W.13

instructed P.W.11 to report him at C.B.I. Office, Rourkela on 12.03.2012 at about 10 a.m. with the money which he was intending to give to the appellant.As per arrangement, the trap party members assembled at C.B.I. Unit Office, Rourkela on 12.03.2012 at 10 a.m. P.W.6 Manas Kumar Pati and P.W.10 Brundaban Pradhan, the Inspectors of Vigilance, SAIL, Rourkela Steel Plant were also reported for the purpose of witnessing the trap proceeding. P.W.11 also reported at time as per previous instruction with an amount of Rs.8,000/- (rupees eight thousand) in the form of five numbers of Rs.1,000/- Government Currency notes (for short "GC notes") and six numbers of Rs.500/- GC notes which were to be used as trap money. P.W.11 was introduced to the trap party members by P.W.13. The written report of P.W.11 which was treated as F.I.R. was shown to the witnesses P.W.6 and P.W.10 who went through the same and put some questions to P.W.11 and was satisfied regarding the genuineness of the report. Solution of sodium carbonate and water was prepared in a clean glass tumbler which was colourless. The GC notes were treated with phenolphthalein powder. P.W.10 was asked to handle the said GC notes and then dip fingers of both the hands in the prepared solution which turned pink. The hand wash of P.W.10 was preserved in a clean glass bottle (M.O.I) and properly sealed, labeled and marked as 'D' and the trap party members signed the same. The tainted GC notes of Rs.8,000/- were kept in the left hand side shirt pocket of P.W.11 and instruction was given to him to handover the money to the appellant only on his demand. A pre-trap memorandum (Ext.12) was prepared at the spot in which all the witnesses signed. It was decided that P.W.11 along with P.W.6 would proceed to the Income Tax Office in a motor cycle followed by other team members. P.W.6 was instructed to act as overhearing witness and give signal to the trap party members after acceptance of tainted money by the appellant by brushing his hairs with fingers.

It is the further prosecution case that the trap party members left the C.B.I. office at 10.50 a.m. and reached near Ayakar Bhavan, Udit Nagar, Rourkela at 11.15 a.m. and by that time, P.W.11 along with P.W.6 had already reached there. P.W.11 called the appellant over mobile phone and on getting his call, the appellant told him to wait outside. By that time, rest of trap party members had taken their positions in a scattered manner in the Ayakar Bhavan premises nearer to the place where P.W.11 was standing. After few minutes, the appellant came out of the office building and came near P.W.11. P.W.11 asked the appellant about the refund claim of P.W.5 Sudaramani Singh. The appellant enquired from P.W.11 as to whether he has brought the amount as was told to him on 09.03.2012. P.W.11 replied in the affirmative and the appellant stretched his right hand towards P.W.11 and the latter took out the tainted GC notes of Rs.8,000/- (rupees eight thousand) from his left side shirt pocket and handed it over to the appellant, who accepted it by his right hand, counted the same by both hands and then kept the same in his left hand side pant pocket. The appellant told P.W.11 that he would process the matter soon and saying so, he went inside his office. P.W.11 gave pre-arranged signal to the trap team

members and on getting such signal, Investigating Officer (P.W.13) rushed towards the Income Tax Office building along with the team members including P.W.11 and both the witnesses. The appellant entered the office building and went inside the office room of I.T.O., Ward No.4 and the trap team members also went inside the said room by following him. After entering into the office room of the I.T.O., P.W.13 introduced himself as well as other members of the trap team to the appellant and asked for his identity. Then the appellant identified himself as Rajeev Ranjan, Tax Assistant, Income Tax,Ward No.4, Income Tax Office, Rourkela. When P.W.13 challenged appellant as to why he demanded and accepted the bribe from P.W.11, the appellant fumbled and told that he had not demanded the amount, but accepted the same when given by P.W.11 on his own. Being further questioned, the appellant admitted that the IT Return of Sundaramani Singh (P.W.5) was submitted by P.W.11 on 08.09.2011 and the same was pending for processing. Hand washes of both the hands of the appellant were taken in sodium carbonate solution separately which was prepared then and there and the colour of the solution changed to pink which were collected in clean glass tumblers vide M.O.II and M.O.III. On being asked, the appellant took out the tainted GC notes from his left side front pant pocket and kept the same on the table. On being instructed by P.W.13, P.W.10 compared the numbers of the GC notes with the numbers mentioned in the pre-trap memorandum and on comparison, the same tallied. Then those GC notes were kept in an envelope vide M.O.IV and duly sealed and signed by the trap party members. The inner side of the left hand side front pant pocket of the appellant was washed in freshly prepared solution of sodium carbonate with water, upon which colour of the said solution turned to pink and the said pink colour solution was preserved separately in a clean and dry bottle vide M.O.V with proper seal and signed by the trap party members.

The appellant was arrested for demanding and accepting illegal gratification from the complainant (P.W.11) and arrest memo was prepared. Post-trap memorandum (Ext.15) was also prepared wherein P.W.13 and others put their signatures. The rough sketch map (Ext.14) of the place of occurrence was prepared and the refund claim income tax return of P.W.5 for the assessment Year 2011-12 was seized as per seizure list (Ext.16) on being produced by the appellant. The refund claim income tax return of P.W.5 was given in the zima of K.C. Barik (P.W.8), the I.T.O. as per zimanama Ext.20. Other relevant documents were seized from the Income Tax Office, Rourkela in presence of witnesses. The residential house of the appellant was searched and search list (Ext.18) was prepared. The appellant was forwarded to the Court.As per the instruction of S.P.,C.B.I., Bhubaneswar, P.W.13 handed over the charge of investigation to Sri S.B. Mishra (P.W.14)who received C.F.S.L. Report, sanction order from the Asst. Commissioner of Income Tax, seized some documents and on completion of investigation, he submitted the charge sheet against the appellant on 11.07.2012 under section 7 and section 13(2) read with section 13(1)(d) of 1988 Act.

3. The defence plea of the appellant is one of denial and in his statement recorded under section 313 of Cr.P.C., he stated that prior to the alleged occurrence, one Bibek Dasgupta (hereafter "B.D. Gupta") had taken Rs.10,000/- (rupees ten thousand) as loan from him and as the said loan amount was not repaid to him, there was misunderstanding and ill-feeling between him and B.D. Gupta. At the instance of B.D. Gupta, P.W.5, the assessee of ward No.1, resident of Chhend, filed IT return personally showing her address as Koel Nagar, C/o. B.D. Gupta. P.W.11 was a land broker and he was set up by B.D. Gupta to file a false F.I.R. against him. Further, it is pleaded that P.W.11 called him on 12.03.2012 over phone to take back a part of the loan refund amount stating that the same had been sent by B.D. Gupta and accordingly, he came out of the office and P.W.11 handover the tainted money stating that the same had been sent by B.D. Gupta towards part repayment of the loan amount. It is further pleaded that neither the appellant had ever demanded any amount to process the file of P.W.5 nor had accepted the amount knowing it as illegal gratification and no work of the assessee (P.W.5) was pending with him at that time as he had already handed over the income tax return file of P.W.5 to the I.T.O. and that the accusation labelled against him are false and fabricated.

Prosecution witnesses:

4. In order to prove its case, the prosecution examined fourteen witnesses.

P.W.1 Amulya Kumar Patjoshi was the Branch Manager, Panposh Branch, Rourkela from May 2008 to May 2012, who stated that he had issued Form-16A (Ext.1) regarding the annual tax payable in respect of income of P.W.5 for the financial year 2010-11 on 30.04.2011 and P.W.5 was allotted agent code bearing No.0114259C and P.W.5 had total income of Rs.1,78,620.99 (rupees one lakh seventy eight thousand six hundred twenty and ninety nine paise) and total tax of Rs.17,862/- (rupees seventeen thousand eight hundred sixty two) was deducted towards income tax.

P.W.2 Madhusudan Nayak was the Office Superintendent in the Office of Joint Commissioner of Income Tax, Rourkela from July 2006 to April 2013 and also a seizure witness. He stated that the appellant was posted as Tax Assistant in the Office of the Additional Commissioner of Income Tax, Rourkela Range, Rourkela as per the order vide Ext.6 and he was allotted the duty for Ward No.4, Rourkela vide order Ext.7 for processing the income tax returns.

P.W.3 Asutosh Pradhan was the Asst. Commissioner in the Office of Commissioner of Income Tax, Sambalpur and he was the sanctioning authority who accorded sanction for the prosecution of the appellant vide sanction order Ext.8.

P.W.4 Paresh Kumar Das was working as Tax Assistant, Office of Income Tax Officer, Ward No.4, Rourkela. He stated that his duty at that time was to receive the returns filed by the assessees and to make entries in the I.T. Return Register and

the duty of the appellant was to receive the returns and process the same. He further stated that the return vide Ext.9 was received by the appellant and the entry relating to the return (Ext.9) was made in the register (Ext.10) at sl. no.2217 at page 142 on 08.09.2011 by him (P.W.4). He further stated that it takes about two to three months for processing the matter relating to return of refund and till 12.03.2012 no refund was paid in respect of income tax return vide Ext.9.

P.W.5 Smt. Sundaramani Singh was working as L.I.C. agent since October 2004 and she was also an income tax assessee. She stated that she had got no source of income except her income as L.I.C. agent and P.W.11 told her on 09.03.2012 that unless she gave Rs.8,000/- (rupees eight thousand) to the appellant, who was working as a staff in the Income Tax Office, she would not get income tax refund. She further stated that she told P.W.11 that she would not give any money and if P.W.11 wanted, he could file a complaint and thereafter she had not told him anything else to P.W.11.

P.W.6 Manas Kumar Pati was working as Inspector, Vigilance, RSP, Rourkela and he was a member of the trap party who stated about the pre-trap preparation report. He stated that he accompanied P.W.11 to the office of the appellant by motorcycle and P.W.11 contacted the appellant over phone who asked P.W.11 to wait for sometime as he was coming out of his office. He further stated that when the appellant came out of the office, P.W.11 wished him and asked him about the position/status of the matter regarding income tax refund of P.W.5 and the appellant asked P.W.11 as to whether he had brought as per the previous discussion and P.W.11 nodded his head. He further stated that the appellant showed his right hand and P.W.11 brought out the tainted GC Notes in question from his left side shirt pocket and handed over the same to the appellant and the appellant took the GC Notes by his right hand, counted the same by both the hands and kept the same in his left side pant pocket and the appellant told P.W.11 that he would process the matter as soon as possible and went inside his office. He further stated about the hand wash of the appellant and his pant pocket wash changing its colour when taken in solution to pink so also preparation of the post-trap memorandum and seizure of one Nokia mobile telephone set with two SIM cards under seizure list Ext.13. He further stated about the seizure of the original income tax return document of P.W.5 for the assessment year 2011-12 on production by the appellant in the said office as per seizure list Ext.16.

P.W.7 Dinesh Kumar Pradhan was the Nodal Officer, Bharti Airtel Limited, Bhubaneswar, who proved the call details of the mobile No.9556756160 as per Ext.19.

P.W.8 Krushna Chandra Barik was working as Income Tax Officer, Ward No.4, Rourkela. He stated that on 12.03.2012 at the time of trap of the appellant by the C.B.I. team, he was present in the office room of the Joint Commissioner of

Income Tax, Rourkela and at about 1 p.m., he was called by the C.B.I. Officer to his office room and one document pertaining to the income tax return of P.W.5 for the assessment year 2011-12 was given in his zima by the C.B.I. Inspector as per zimanama (Ext.20). He further stated that the C.B.I. Inspector asked him the reason as to why refund was not made in favour of the concerned income tax assessee to which he replied that the appellant had not placed the said matter before him after processing and it was the duty of the appellant as Tax Assistant to process the file in connection with refund of income tax.

P.W.9 AVK Naidu was the Legal, Regulatory and Nodal Head for Idea Cellular Limited, Bhubaneswar for the State of Odisha. He stated that on the requisition of the C.B.I., Bhubaneswar, he had given the call details in respect of mobile no.9090905372 belonging to the services of Idea Cellular Limited for the date 12.03.2012 in the C.D.R. dated 03.05.2012 and the said call was made from mobile phone no.9090905372 to mobile phone no.9556756160 and the duration of the said call was for 33 seconds.

P.W.10 Brundaban Pradhan was the Vigilance Inspector, Rourkela Steel Plant, Rourkela and he was a member of the trap party who was present at the time of preparation of the trap. He stated about the acceptance of tainted GC note by the appellant from P.W.11 in the Income Tax Office building and keeping the same in his left side pant pocket. He further stated about the hand wash of the appellant and his pant pocket wash changing its colour when taken in solution. He further stated that the appellant was arrested at about 12.30 p.m. and the original income tax return document of P.W.5 was handed over by the appellant to P.W.13 which was seized vide seizure list Ext.16. He further stated about the preparation of the post-trap memorandum (Ext.15) and seizure of one mobile under seizure list Ext.13.

P.W.11 Manoranjan Mishra is the complainant in the case and he has stated in detail relating to demand of bribe by the appellant, lodging of written report vide Ext.24 by him, preparation for the trap, demand and acceptance of bribe money by the appellant and assurance given by the appellant to do the work. He was declared hostile by the prosecution.

P.W.12 Binod Bhagaban Ramteke was the Senior Scientific Officer in C.F.S.L., New Delhi from February 2005 to October 2011 who proved the chemical examination report marked as Ext.25.

P.W.13 Sachidananda Rath was the Inspector of Police, C.B.I., Bhubaneswar who laid the trap and he is also the Investigating Officer. He stated that as per the instruction of the Superintendent of Police, C.B.I., Bhubaneswar, he handed over the investigation of the case to Sri S.B. Mishra (P.W.14), Inspector, C.B.I., Rourkela Unit for further investigation on 14.03.2012.

P.W.14 Subhransu Bhusan Mishra was the Inspector of Police, C.B.I., Rourkela Unit who took over investigation of the case from P.W.13 as per instruction of the Superintendent of Police, C.B.I., Bhubaneswar and on completion of investigation, he submitted charge sheet against the appellant.

Documents exihibited by prosecution:

5. The prosecution exhibited twenty six documents. Ext.1 is the Form No.16-A regarding Annual Tax Payable, Ext.2 is the seizure list dated 12.03.2012, Ext.3 is the attendance register starting from 01.12.2011 to 12.03.2012, Ext.4 is the seizure list dated 18.04.2012, Ext.5 is the transfer order No.11/2008 dated 30.04.2008, Ext.6 is the office order dated 08.06.2011 of Joint Commissioner, Ext.7 is the office order, Ext.8 is the sanction order, Ext.9 is the certified copy of IT Return of P.W.5, Ext.10 is the IT Return Register for the assessment year 2011-12, Ext.11 is the authorization letter, Ext.12 is the pre-trap memorandum, Ext.13 is the search memo, Ext.14 is the spot map, Ext.15 is the post trap memorandum (five pages), Ext.16 is the seizure list, Exts.17 and 18 are the search lists, Ext.19 is the call details of the mobile phone, Ext.20 is the zimanama, Ext.21 is the seizure list dated 12.04.2012, Ext.22 is the letter dated 16.04.2012, Ext.23 is the call details report, Ext.24 is the F.I.R., Ext.25 is the Chemical Examination Report and Ext.26 is the seizure list.

Material Objects proved by prosecution:

6. Six material objects were proved by the prosecution. M.O.I is the solution of sodium carbonate with water bottle (Mark-D), M.O.II is the one solution of sodium carbonate with water bottle (Mark-R), M.O.III is the another solution of sodium carbonate with water bottle (Mark-L), M.O.IV is the envelope containing tainted money (sealed), M.O.V is the pant pocket wash (Mark-P) and M.O.VI is the envelope containing the pant of the appellant.

No witness was examined on behalf of the defence.

7. The learned trial Court formulated the following points for determination:-

> (i) Whether on 09.03.2012 in the office room of Income Tax Office, Udit Nagar, Rourkela, the accused being a public servant functioning as Tax Assistant, Ward No.4, Income Tax Office, Ayakar Bhavan, Rourkela, had demanded Rs.8,000/- (rupees eight thousand) from the complainant for processing the refund claim of the income tax assessee Smt. Sundaramani Singh for the financial year 2010-11 (Assessment Year 2011-12) and accepted the said amount of Rs.8,000/- on 12.03.2012 as gratification other than legal remuneration for the above purpose, as alleged?
>
> (ii) Whether on the aforesaid date and place the accused being a public servant functioning in the above capacity, by corrupt and illegal means and/or by otherwise abusing his official position as such public servant, obtained for himself pecuniary advantage to the tune of Rs.8,000/- (rupees eight thousand) from the complainant for processing the income tax refund claim of Smt. Sundaramani Singh for the financial year 2010-11 (Assessment Year 2011-12), as alleged?

8. The learned trial Court after assessing the evidence on record has been pleased to hold that nothing substantial has been brought out during cross-examination of P.W.12 to show that the tests conducted by him, are not full proof or not reliable and his evidence corroborates the oral evidence of prosecution witnesses regarding the trap in question. It was further held that the prosecution has clearly proved that the appellant had voluntarily and consciously accepted the tainted currency notes from the complainant. It was further held that the evidence on record not only proved the demand of bribe money but also the acceptance of bribe money. It was further held that it is legally justified to draw a presumption under section 20 of the 1988 Act. The non-examination of B.D. Gupta by the prosecution, does not in any way affect its case as he was not a material witness for the prosecution. The defence has signally failed to prove its plea in the standard of preponderance of probability regarding refund of any loan amount by B.D. Gupta to the appellant that too through the complainant on the relevant date. It was further held that the appellant had demanded and accepted bribe of Rs.8000/- (rupees eight thousand) from the complainant on 12.03.2012 for sending the application for payment of income tax refund claim amount of P.W.5. The evidence of P.Ws.6, 10, 11 and 13 has substantially remained unshaken. The documentary evidence on record, such as F.I.R., pre-trap memorandum, post-trap memorandum, seizure lists, C.E. report and hand wash and pant pocket wash of the appellant turning to pink colour lend sufficient corroboration to their version. The plea of the appellant that he received the money sent by B.D. Gupta towards refund of loan amount though the complainant is unbelievable and not acceptable. The oral as well as documentary and circumstantial evidence clearly proved beyond reasonable doubt that the appellant demanded and accepted illegal gratification of Rs.8000/- (rupees eight thousand) from the complainant (P.W.11) for sending the application for payment of income tax refund claim amount of P.W.5 by abusing his official position as a public servant and accordingly, found the appellant guilty of the offences charged.

9. Mr. S.R. Mohapatra, learned counsel for the appellant contended that the demand of illegal gratification is sine qua non for constituting offence under the 1988 Act and in the present case, the prosecution has miserably failed to prove the demand of illegal gratification made by the appellant to the complainant (P.W.11) to process the file. The defence plea taken has rather been proved by preponderance of probability regarding acceptance of money by the appellant towards part repayment of loan amount sent by B.D. Gupta (house owner of P.W.5) through P.W.11 (complainant) and the said amount is other than as a motive or reward referred to under section 7 of the P.C. Act. The appellant need not to prove his case beyond a reasonable doubt and he could rebut it either through cross-examination of the witnesses or by adducing reliable evidence and he can succeed in proving his case by way of preponderance of probabilities. He further contended that in a case of bribery, mere recovery of money divorced from the circumstances under which it is paid is not sufficient to convict the appellant particularly when the evidence of

P.W.11 is not reliable and trustworthy in view of his inconsistent statements. He further contended that since there was no work of the complainant/decoy (P.W.11) pending with the appellant, the version of the complainant with regard to demand of illegal gratification is not believable. He further submitted that filing of Ext.9 personally by P.W.11 on 08.09.2011 and thereby meeting the appellant on 09.03.2012 and prior to 12.03.2012 is a doubtful feature. The sanction order vide Ext.8 is a defective one and P.W.3 had no authority to accord sanction for prosecution of the appellant. Ad finem, it is argued that it is a fit case where benefit of doubt should be extended in favour of the appellant. He placed reliance in the cases of ***Suraj Mal -Vrs.- The State reported in A.I.R. 1979 S.C. 1498, Sanatan Dash -Vrs.- State of Odisha (Vig.) reported in (2021) 84 Orissa Criminal Reports 561, Man Singh -Vrs.- Delhi Administration reported in A.I.R. 1979 S.C. 1455, K. Shanthamma -Vrs.- State of Telangana reported in (2022) 86 Orissa Criminal Reports (SC) 345, C.M. Girish Babu -Vrs.- CBI reported in (2009) 43 Orissa Criminal Reports (SC) 48, Sidhartha Kumar Nath -Vrs.- State of Orissa (Vig.) reported in (2017) 68 Orissa Criminal Reports 510, B. Jayaraj -Vrs.- State of A.P. reported in (2014) 58 Orissa Criminal Reports (SC) 175, Punjabrao -Vrs.- State of Maharashtra reported in A.I.R. 2002 S.C. 486, Debananda Das -Vrs.- State of Orissa reported in (2011) 50 Orissa Criminal Reports 591, Niranjan Bharati -Vrs.- State of Orissa reported in (2003) 26 Orissa Criminal Reports 274, State of Maharastra -Vrs.- Dnyaneshwar Laxman Rao Wankhede reported in (2009) 44 Orissa Criminal Reports (SC) 425, Shyam Sundar Prusty -Vrs.- State of Orissa reported in (2018) 70 Orissa Criminal Reports 733, Mohd. Iqbal Ahmed -Vrs.- State of Andhra Pradesh reported in A.I.R. 1979 S.C. 677, N. Vijay Kumar -Vrs.- State of Tamil Nadu reported in (2021) 82 Orissa Criminal Reports (SC) 67 and Khaleel Ahmed -Vrs.- State of Karnataka reported in (2015) 16 S.C.C. 350.***

Mr. Sarthak Nayak, learned Special Public Prosecutor, C.B.I. on the other hand supported the impugned judgment and contended that even though the decoy has been declared hostile by the prosecution for not supporting its case fully, but the evidence of other witnesses particularly the circumstances established by the prosecution are sufficient to hold the appellant guilty of the offences charged. According to Mr. Nayak, in the case in hand, the appellant has not disputed the acceptance and recovery of money in question and when the defence plea regarding acceptance of part repayment of the loan dues sent by B.D. Gupta through the decoy (P.W.11) on the date of trap is not acceptable, it otherwise proves the acceptance of bribe money on demand made by the appellant for processing the refund claim in I.T. return of P.W.5. He placed reliance in the cases of ***Malti Sahu -Vrs.- Rahul reported in 2022 SCC OnLine SC 821, State of U.P. -Vrs.- Ramesh Prasad Mishra reported in A.I.R. 1996 S.C. 2766, Koli Lakhmanbhai Chanabhai -Vrs.- State of Gujarat reported in A.I.R. 2000 S.C. 210, Rohtash Kumar -Vrs.- State of Haryana reported in (2013) 14 S.C.C. 434 and Himanshu -Vrs.- State of NCT of Delhi reported in (2011) 1 Crimes 157 (SC).***

Gravamen of offence under sections 7 and 13(1)(d)(i) & (ii) of 1988 Act:

10. Law is well settled that mere receipt of money by the accused is not sufficient to fasten his guilt, in the absence of any evidence with regard to demand and acceptance of the same as illegal gratification. In order to constitute an offence under section 7 of 1988 Act, proof of demand is a sine qua non. ***(Ref:V. Sejappa -Vrs.- The State reported in (2016) 64 Orissa Criminal Reports (SC) 364, B. Jayaraj (supra), K. Shanthamma (supra), Sidhartha Kumar Nath (supra), N. Vijay Kumar (supra)).*** The burden rests on the accused to displace the statutory presumption raised under section 20 of the 1988 Act by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in section 7 of the 1988 Act. While invoking the provision of section 20 of the 1988 Act, the Court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. For arriving at the conclusion as to whether all the ingredients of the offence i.e. demand, acceptance and recovery of illegal gratification have been satisfied or not, the Court must take into consideration the facts and circumstances brought on the record in its entirety. The standard of burden of proof on the accused vis-à-vis the standard of burden of proof on the prosecution would differ. The proof of demand of illegal gratification is the gravamen of the offence under sections 7 and 13(1)(d)(i) and (ii) of 1988 Act and in absence thereof, unmistakably the charge therefore, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person of accused of the offence under sections 7 or 13 of the Act would not entail his conviction thereunder. The evidence of the complainant should be corroborated in material particulars and the complainant cannot be placed on any better footing than that of an accomplice and corroboration in material particulars connecting the accused with the crime has to be insisted upon. ***(Ref: Satyananda Pani -Vrs.- State of Orissa (Vig.) reported in (2017) 68 Orissa Criminal Reports 795, Debananda Das (supra), Punjabrao (supra), Shyam Sundar Prusty (supra), N.Vijay Kumar (supra), Dnyaneshwar Laxman Rao Wankhede (supra)).***

In case of ***Krishan Chander -Vrs.- State of Delhi reported in (2016) 3 Supreme Court Cases 108,*** it is held that the demand for the bribe money is sine qua non to convict the accused for the offences punishable under sections 7 and 13(1)(d) read with section 13(2) of the 1988 Act. In case of ***P. Satyanarayana Murthy -Vrs.- District Inspector of Police reported in (2015) 10 Supreme Court Cases 152,*** it is held that the proof of demand has been held to be an indispensable essentiality and of permeating mandate for offences under sections 7 and 13 of the Act. Qua section

20 of the Act, which permits a presumption as envisaged therein, it has been held that while it is extendable only to an offence under section 7 and not to those under section 13(1)(d)(i) & (ii) of the Act, it is contingent as well on the proof of acceptance of illegal gratification for doing or forbearing to do any official act. Such proof of acceptance of illegal gratification, it was emphasized, could follow only if there was proof of demand. Axiomatically, it was held that in absence of proof of demand, such legal presumption under section 20 of 1988 Act would also not arise. In the case of ***C.M. Girish Babu*** (supra), it is held that it is well settled that the presumption to be drawn under section 20 of 1988 Act is not an inviolable one. The accused charged with the offence could rebut it either through the cross-examination of the witnesses cited against him or by adducing reliable evidence. If the accused fails to disprove the presumption, the same would stick and then it can be held by the Court that the prosecution has proved that the accused received the amount towards gratification. It is equally well settled that the burden of proof placed upon the accused person against whom the presumption is made under section 20 of 1988 Act is not akin to that of burden placed on the prosecution to prove the case beyond a reasonable doubt. In the case of ***Khaleel Ahmed*** (supra), it is held that the presumption raised under section 20 for the offence under section 7 is concerned, it is the settled law that the presumption raised under section 20 is a rebuttable presumption, and that the burden placed on the accused for rebutting the presumption is one of preponderance of probabilities.

11. Adverting to the contentions raised by the learned counsel for the respective parties, since the appellant has not disputed the 'acceptance' and 'recovery' of the money in question, let me now carefully examine the evidence on record relating to the 'demand' aspect.

Demand prior to the date of trap:

11-A. P.W.11, the decoy and the complainant of the case when was asked by the learned Public Prosecutor about the appellant, has specifically stated that he did not know the accused who was present in the dock.

In the chief examination, P.W.11 has stated that he submitted the income tax return file vide Ext.9 of P.W.5 on 08.09.2011 to one Rajeev Ranjan at Income Tax Office, Ward No.IV at Rourkela. He further stated that on 09.03.2012 when he visited the said office and approached Rajeev Ranjan regarding progress made for refund of income tax in favour of P.W.5, the latter told him that the said work would be done after payment of Rs.8,000/- (rupees eight thousand) within three days. He further stated that as he was not willing to pay the amount to Rajeev Ranjan, on 10.03.2012 he met D.S.P., C.B.I. Sri Kabi and told him about the matter and Sri Kabi asked him to give a written report and accordingly, he submitted the F.I.R. (Ext.24). He further stated about the preparation for the trap on 12.03.2012 at C.B.I. Office, Rourkela and after the same was over, he along with the vigilance staff

proceeded to the Income Tax Office and he contacted Rajeev Ranjan over telephone, who came out of the office building and asked him whether he had brought the money to which he answered in the affirmative. He further stated that he handed over the tainted GC notes of Rs.8,000/- to Rajeev Ranjan who told him that the work would be done. Rajeev Ranjan counted the GC notes in question, went inside his office and then he gave pre-arranged signal to the rest members of the CBI team, who came and caught hold of Rajeev Ranjan.

P.W.11 was declared hostile by the prosecution under section 154 of the Evidence Act and with the permission of the Court, leading questions were put to him by the learned Public Prosecutor in which he not only denied to have been examined by the I.O., but also denied to have stated regarding giving any statement made in connection with pre-trap demonstration and that the tainted money of Rs.8,000/- was recovered in his presence from the possession of the appellant and that the hand wash of the appellant taken with sodium carbonate solution changed its colour to pink. He denied the suggestion given by the Public Prosecutor that he had been gained over by the appellant and purposefully failed to identify the appellant in the dock. The learned Public Prosecutor did not try to put any specific question to P.W.11 as to whether the person who demanded the alleged bribe to him and whose name he told to be Rajeev Ranjan was the same person present in the dock or somebody else. Thus, there is no substantive evidence that prior to the date of trap, it is the appellant who had demanded Rs.8,000/- from P.W.11.

In the cross-examination by the defence, P.W.11 has stated that neither he has submitted his own income tax return ever nor of any person and he had no knowledge or idea about submission of income tax return. He further stated that he did not know about the income tax return of P.W.5 and the financial year and assessment year in respect of which the income tax return of P.W.5 was required to be submitted and he did not know about the gross income or net income of P.W.5 of any particular year or specifically for the assessment year 2011-12. He further stated that he could not say the amount of income tax paid by P.W.5 for the assessment year 2011-12 and the amount of money to which P.W.5 was entitled towards income tax refund. He further stated that he could not read English language.

P.W.5 has stated in her chief examination that she had given the authorisation letter (Ext.11) in favour of P.W.11 authorising him to file her income tax return. She not only proved her signature but also signature of P.W.11 on Ext.11. However, in the cross-examination, she stated that she did not have much acquaintance with P.W.11 and that she had given the income tax return vide Ext.9 to B.D. Gupta for filing who was looking after the same and she had also given Ext.11 to B.D. Gupta and that she did not know as to who prepared Ext.11. Therefore, the evidence of P.W.5 that she had issued the authorisation letter (Ext.11) in favour of P.W.11 is not consistent. Even P.W.11 has also stated that B.D. Gupta typed Ext.11 by taking the help of somebody near the Court premises at Udit Nagar of Rourkela

and he had not submitted Ext.11 at Income Tax Office and B.D. Gupta took Ext.11 from him after obtaining his signature. Though P.W.14, the I.O. has stated that he had received the authorisation letter Ext.11 from P.W.11, but evidence of P.W.11 is completely silent about it. Such a vital document was produced only at the time of submission of charge sheet on 11.07.2012. The defence has suggested to P.W.14 that as Ext.11 was not in existence prior to 11.07.2012, it was not sent earlier.

Though P.W.5 stated that P.W.11 told her that unless she gave Rs.8,000/- to the appellant, she would not get income tax refund, but it has been proved through the I.O. (P.W.14) that in her statement under section 161 Cr.P.C. recorded on 04.04.2012, P.W.5 had not stated that the P.W.11 had disclosed before her that the appellant had demanded bribe of Rs.8,000/- on 09.03.2012 and that unless the said payment was given to the appellant, she would not get the income tax refund.

In view of the materials on record and particularly the evidence given by P.W.11 in the cross-examination, his evidence in the chief examination that he had submitted income tax return file of P.W.5 to one Rajeev Ranjan is very difficult to be accepted. Ext.9 nowhere discloses that it was submitted by P.W.11 and even P.W.4, the Tax Assistant attached to the Office of I.T.O., Ward no.4, Rourkela who was senior to the appellant has stated that the return vide Ext.9 was personally filed by P.W.5 in which she had furnished her address as C/o.- B.D. Gupta. Thus, the evidence of P.W.11 regarding approaching Rajeev Ranjan for refund of income tax of P.W.5, which led the latter to make a demand of Rs.8,000/- (rupees eight thousand) is very difficult to be accepted.

Law is well settled that the evidence of a hostile witness can also be acted upon to the extent to which it supports the prosecution version and the evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base an order of conviction upon his testimony if corroborated by other reliable evidence. It is for the Judge of the fact to consider in each case whether as a result of the cross-examination made by the Prosecutor with the leave of the Court after the witness was declared hostile and also in view of contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the said witness, accept in the light of other evidence on record, that part of his testimony which he found to be of creditworthy and act upon it. The portion of the evidence which is consistent with the case of the prosecution or defence, and are admissible in law can be used either by the prosecution or by the defence. (***Ref: Kili Lakhmanbhai Chanabhai –Vrs.- State of Gujarat (supra), T. Shankar Prasad –Vrs.- State of Andhra Pradesh : (2004) 3 Supreme Court Cases 753)***. In the case of ***Malti Sahu*** (supra), it is held that as per the settled position of law, even the evidence of a hostile witness can be considered to the extent, it supports the case of the prosecution. In the case of ***Ramesh Prasad Mishra*** (supra),

it is held that it is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. In the case of ***Rohtash Kumar*** (supra), it is held that it is a settled legal proposition that evidence of a prosecution witness cannot be rejected in toto, merely because the prosecution chose to treat him as hostile and cross examined him. The evidence of such witnesses cannot be treated as effaced, or washed off the record altogether. The same can be accepted to the extent that their version is found to be dependable, upon a careful scrutiny thereof. In the case of ***Himanshu*** (supra), it is held that the evidence of a hostile witness remains the admissible evidence and it is open to the Court to rely upon the dependable part of that evidence which is found to be acceptable and duly corroborated by some other reliable evidence available on record.

In view of the prevaricating and inconsistent statement given by P.W.11 at different stages, it is very difficult to accept him as a truthful and reliable witness and his evidence becomes unworthy of credence. In the case of ***Suraj Mal*** (supra), it is held that where witnesses make two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances, no conviction can be based on the evidence of such witnesses. Since the prosecution relies only upon the version of P.W.11 regarding the demand aspect of Rs.8,000/- (rupees eight thousand) prior to the date of trap, it cannot be said that the same has been proved beyond all reasonable doubt.

Demand on the date of trap:

11-B. Coming to the demand stated to have been made by the appellant on the date of trap, the evidence of two witnesses i.e. the decoy (P.W.11) and the overhearing witness (P.W.6) are very relevant for the purpose.

P.W.11 has stated that when Rajeev Ranjan came out of the office building on receipt of his phone call and asked him if he had brought the money, he answered in the affirmative and handed over the tainted GC notes of Rs.8,000/- (rupees eight thousand) to him and Rajeev Ranjan told him that his work would be done and he should leave that place. However, in the cross-examination, he stated that as per instruction of B.D. Gupta, he called Rajeev Ranjan over telephone and handed over the money. He specifically stated that he had no discussion with anybody thereafter and came back from that place.

P.W.6 stated that when the appellant came out of the office, P.W.11 asked him about the status of income tax refund matter of P.W.5 and then the appellant asked P.W.11 whether he had brought as per the previous discussion made on 9th. Then the appellant received the money and told P.W.11 that he would process the matter as soon as possible.

Thus, there is difference in evidence as to what was the exact conversation between P.W.11 and the appellant outside the office. When as per the evidence of the T.L.O. (P.W.13), it was decided at the pre-trap proceeding that after reaching the Income Tax Office, P.W.11 would proceed to the office of the appellant inside the office and P.W.6 would follow him closely, it is not known why P.W.11 called the appellant outside over phone and handed over the tainted money to him outside and who had given instruction to him to do that and when, after they left C.B.I. Office, Rourkela. It is very difficult to accept that P.W.11 on his own deviated from the planning, changed the place and the manner in which he had to hand over the tainted money to the appellant. P.W.13, the T.L.O. has stated that there was no specific instruction given by him to P.W.11 to contact the appellant over telephone and to ask him to come out of his office. P.W.10 who was also a member of trap party has stated that P.W.11 was not asked to contact the appellant by any particular mobile telephone number and the telephone number of the appellant was not supplied to them. There is nothing on record that the mobile phone number of the appellant was available with P.W.11.

P.W.11 has not stated that it was P.W.6 who accompanied him to the office of the appellant in a motor cycle and overheard the conversation between himself and the appellant and saw the transaction.

In view of the available materials on records, it is very difficult to hold that the prosecution has successfully established that on the date of trap also, there was demand made by the appellant to P.W.11.

Whether any work was left with the appellant to make demand :

12. P.W.4 Paresh Das was also a Tax Assistant who was working with the appellant in the Office of I.T.O., Ward No.4, Rourkela. He has stated that after receiving the I.T. returns on any particular day, the concerned Tax Assistant makes a bundle of the same and hands over the same to the I.T.O. on the same day. He further stated that the I.T. return in question vide Ext.9 was also handed over to the I.T.O. Sri K.C. Barik (P.W.8) on the same day. He further stated that the I.T.O. decides regarding refund and the amount of the same to be refunded to the concerned assessee.

In the case of ***Sanatan Dash*** (supra), it is held that section 138 of the Indian Evidence Act, 1872 clearly states that the re-examination shall be directed to the explanation of the matters referred to in the cross-examination. Therefore, if any ambiguity is cropped up during cross-examination of a witness or a witness stated completely contrary to what he has deposed in the chief-examination, it is nonetheless the duty of the prosecution to make a prayer before the learned trial Court for re-examination of such witness and to explain the matters. The object is to give an opportunity to reconcile the discrepancies, if any, between the statement made in the examination-in-chief and cross-examination or to explain any statement

inadvertently made in cross-examination or to remove any ambiguity in the deposition or suspicion cast on the evidence by crossexamination. When P.W.4 stated in the cross-examination that Ext.9 was handed over to P.W.8 on the same day, the learned Public Prosecutor should have prayed for re-examination of P.W.8 in view of the provision under section 138 of the Evidence Act, which has not been done.

P.W.8 has stated that there was no fixed time for processing the matter relating to income tax return in the year 2012 and that P.W.5 had not complained before him regarding any delay in refund of the income tax to her. Though P.W.8 has stated that it was the duty of the appellant as Tax Assistant to process the file in connection with refund of income tax and when the C.B.I. officer asked him the reason as to why refund had not been made in favour of P.W.5, he told that the appellant had not placed the said matter before him after processing, but such statement of P.W.8 is contrary to the evidence of P.W.4 who has stated that Ext.9 was handed over to the P.W.8 on the same day after its receipt. The seal of office of I.T.O., Ward - 4, Rourkela – 12, Ayakar Bhawan, Rourkela dated 08.09.2011 is very prominent on Ext.9 which was its receipt date. P.W.4 has stated that Ext.9/1 is the endorsement and signature of P.W.8 whose signature and handwriting appeared in all the eleven pages of the said return. As Ext.9 was seized under seizure list Ext.16 on the date of trap (12.03.2012) itself and if it had not been placed before P.W.8 after processing by the appellant as stated by him, then how his signature appeared on Ext.9. Merely because Ext.16 indicates that it was produced by the appellant, it cannot be said that it was in his possession. P.W.8 was not in his office when the seizure was effected at 12.50 p.m. and he was present in the office room of the Joint Commissioner of Income Tax, Rourkela and was called by C.B.I. Officer at 1 p.m. as stated by P.W.8 himself. Therefore, mere production of Ext.9 by the appellant for seizure in the absence of P.W.8 cannot be a ground to hold that the appellant had deliberately not processed Ext.9 and kept it with him to get the bribe amount from P.W.11.

In the case of ***Niranjan Bharati*** (supra), it is held that there is no evidence as to on which date the demand was raised by the appellant for payment of bribe and by the time trap was laid, there was any work pending with the appellant and therefore, there could not have been any occasion for the appellant to demand as alleged.

Therefore, when the appellant as Tax Assistant had no role in the refund of income tax to the assessee except processing the same to the I.T.O. Sri K.C. Barik (P.W.8), which he had already done as per the evidence of P.W.4, I am of the humble view that there is substantial force in the contention of the learned counsel for the appellant that no work was pending with the appellant for which there was no occasion on his part to raise any demand of bribe.

Defence plea:

13. At this stage, the defence plea is required to be considered carefully. P.W.5 has stated that she was staying in the house of B.D. Gupta, who had taken a loan of Rs.10,000/-(rupees ten thousand)from Rajeev Ranjan and there was misunderstanding between them as the loan amount was not repaid by B.D. Gupta. P.W.11 has stated that he called Rajeev Ranjan over telephone as per instruction of B.D. Gupta and the latter told him to give money to the person who would come in response to the telephone call and accordingly, he gave money to the said person. P.W.11 specifically stated that B.D. Gupta accompanied him to C.B.I. Office, Rourkela when he had gone there to lodge the F.I.R. and he and B.D. Gupta discussed the matter and as per the instruction of B.D. Gupta, he lodged the F.I.R. Therefore, in view of the previous dispute between the appellant and B.D. Gupta, there was every probability that the allegation of demand as made in Ext.24 was not the version of the complainant (P.W.11) but it was lodged as per the instruction of B.D. Gupta.

It is not in dispute that an accused is not supposed to establish his defence plea by proving it beyond reasonable doubt like the prosecution but by preponderance of probability. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstance upon which the accused relies. The burden can be discharged by an accused adducing cogent and reliable evidence which must appear to be believable or by bringing out answers from the prosecution witnesses or showing circumstances which might lead the Court to draw a different inference. The prosecution cannot derive any advantage from the falsity or other infirmities of the defence version, so long as it does not discharge its initial burden of proving its case beyond all reasonable doubt. If the defence version is incorrect, it does not mean that the prosecution version is necessarily correct. The prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. A false plea set up by the defence can at best be considered as an additional circumstance against the accused provided that the other evidence on record unfailingly point towards his guilt. In the case of ***Man Singh*** (supra), while dealing with a case of illegal gratification under section 5(1)(d) and 5(2) of the Prevention of Corruption Act, 1947, Hon'ble Supreme Court held that the accused is not required to prove his defence by strict standard of proof of reasonable doubt but it is sufficient if he offers an explanation or defence which is probable and once this is done, presumption under section 4 of the Prevention of Corruption Act, 1947 stands rebutted.

The learned trial Court seems to have not considered the defence plea of the appellant on the touchstone of preponderance of probability and held that the defence failed to prove regarding refund of loan amount by B.D. Gupta to the

appellant through P.W.11 on the relevant date. However, in view of the specific defence plea taken by the appellant and the supporting evidence adduced by P.W.5 and P.W.11, it cannot be said that such plea has not been proved by preponderance of probability or it is an out and out false plea set up by the defence. In my humble view, the appellant has discharged the burden of proof placed on him based on preponderance of probability and in that view of the matter, the presumption raised under section 20 of 1988 Act has been successfully rebutted.

Whether P.W.3 is the competent authority to accord sanction for prosecution of appellant and Ext.8 is a valid one:

14. The Office Superintendent in the office of the Joint Commissioner of Income Tax, Rourkela was examined as P.W.2 and he has categorically stated in his cross-examination that the Commissioner of Income Tax, Odisha, Bhubaneswar is the appointing and removal authority of Tax Assistant. P.W.3 was the Assistant Commissioner of Income Tax, Sambalpur who has accorded sanction for prosecution vide Ext.8 and he has stated in his cross-examination that he had not filed any document to show that he was the removal authority of the appellant. P.W.8 has stated that the Chief Commissioner is the appointing and removal authority for the Tax Assistant.

In the case of ***Mohd. Iqbal Ahmed*** (supra), it is held that it is incumbent on the prosecution to prove that a valid sanction has been granted by the Sanctioning Authority after it was satisfied that a case for sanction has been made out constituting the offence. This should be done in two ways; either (i) by producing the original sanction which itself contains the facts constituting the offence and the grounds of satisfaction and (ii) by adducing evidence aliunde to show that the facts placed before the Sanctioning Authority and the satisfaction arrived at by it. It is well settled that any case instituted without a proper sanction must fail because this being a manifest defect in the prosecution, the entire proceedings are rendered void ab initio. In the first place, there is no question of the presumption being available to the Sanctioning Authority under section 4 of the Prevention of Corruption Act, 1947 because at that stage the occasion for drawing a presumption never arises since there is no case in the Court. Secondly, the presumption does not arise automatically but only on proof of certain circumstances, that is to say, where it is proved by evidence in the Court that the money said to have been paid to the accused was actually recovered from his possession. It is only then that the Court may presume the amount received would be deemed to be an illegal gratification.

P.W.3, the Assistant Commissioner of Income Tax has stated in his cross-examination that the sanction order Ext.8 does not disclose the mode of receiving documents by him. Ext.8 is also silent regarding the names of the witnesses whose statements were perused by him. The pre-rap memorandum, post-trap memorandum and seizure list have not been mentioned in Ext.8. In cross-examination, he further

stated that Ext.8 is silent regarding any such inquiry by him and it also did not mention that he was satisfied that there was a prima facie case made out against the appellant under sections 7 and 13(1)(d) of the P.C. Act. There was a draft sanction order and accordingly, he passed the sanction order and the draft prepared by him has not been submitted in this case.

In view of the such evidence, there is force in the submission of the learned counsel for the appellant that P.W.3 is not the competent authority to accord sanction for launching prosecution against the appellant, which is very much essential under section 19 of the P.C. Act and that the sanction order (Ext.8) is a defective one which was mechanically prepared without any application of mind.

Conclusion:

15. In view of the foregoing discussion, when the prosecution has not successfully established the demand aspect of bribe by the appellant beyond all reasonable doubt, the defence plea put forth by the appellant has been established by preponderance of probability and there is defect in the sanction order (Ext.8), it would not be legally justified to hold the appellant guilty of the offences charged.

Accordingly, the criminal appeal succeeds and is allowed. The impugned judgment and order of conviction of the appellant under section 7 and section 13(2) read with section 13(1)(d) of the 1988 Act and the sentence passed thereunder is hereby set aside and the appellant is acquitted of all the charges. The appellant is on bail by virtue of the order of this Court. He is discharged from liability of his bail bond. The personal bond and the surety bond stand cancelled.

Trial Court records with a copy of this judgment be sent down to the concerned Court forthwith for information.

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2023 (I) ILR-CUT- 467

S.K. SAHOO, J.

BLAPL NO. 10542 OF 2021

SATISH SINGH .....Petitioner

.V.

STATE OF ORISSA .....Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 r/w section 37 of the N.D.P.S. Act – Offence under section 20(b)(ii)(C) of the N.D.P.S. Act – Application for Bail – Mandatory conditions/aspects required to be satisfied while deciding an application for Bail – Indicated with case laws. (Para 6.7)

Case Laws Relied on and Referred to :

1. (2000) 9 S.C.C.549 : Supdt. Narcotics Control Bureau, Chennai Vs. R.Paulsamy.
2. (2009) 42 O.C.R.(SC) 697 : Union of India Vs. Rattan Mallik@Habul.
3. (2007) 7 S.C.C.798 : Union of India Vs. Shiv Shanker Kesari.
4. (2009) 1 S.C.C.482 : Ratan Kumar Vishwas Vs. State of Uttar Pradesh.
5. (2018) 69 O.C.R.688 : Asim Kumar Das & Anr. Vs. State of Orissa.
6. (2005) 4 S.C.C.350 : State of H.P. Vs. Pawan Kumar.
7. (2018) 69 O.C.R.725 : Raju Kumar Kushwa Vs. State of Orissa.

For Petitioner : Mr. Shyam Manohar.

For Opp.Party : Mrs.Susamarani Sahoo, Addl. Standing Counsel.

ORDER Date of Argument : 03.02.2023 : Date of Order:08.02.2023

S.K. SAHOO, J.

This is the 3rd successive bail application of the petitioner Satish Singh who is in judicial custody since 07.03.2021 in connection with Mathili P.S. Case No. 42 of 2021 corresponding to Special G.R. Case No.36 of 2021 pending in the Court of Sessions Judge-cum-Special Judge, Malkangiri for the offence under section 20(b)(ii)(C) of the N.D.P.S. Act.

2. The prosecution case, in short, is that on 07.03.2021 at 6.30 p.m., Krutibas Behera, the S.I. of Police of Salimi Outpost under Mathili police station in the district of Malkangiri submitted a written report before the I.I.C., Mathili police station that on 06.03.2021 at about 11.30 p.m., while he was performing night patrolling and MV checking duty on NH-326 near Govindapalli bus stand, at about 12.35 a.m. one Maruti Suzuki vehicle and Toyota Corolla vehicle back to back came in high speed from Malkangiri side. On suspicion, the informant stopped both the vehicles and in Maruti Suzuki vehicle bearing registration No.HR-22-4972, four persons were found sitting including the driver and in the Toyota Corolla vehicle bearing registration No.HR-12-J-1000, four persons were also there including the driver. When the informant asked them to show the documents of the vehicles, they denied of having the same. As suspicion arose, the informant conducted verification of the vehicles and noticed that the Maruti Suzuki vehicle was containing two nos. of plastic sacks packed with something, which were loaded in the backside dickey and in the Toyota Corolla vehicle, three nos. of plastic sacks packed with something were loaded in the backside dickey. From the pungent smell coming out from the plastic sacks, the informant suspected that it was ganja and accordingly, he asked the drivers and other occupants of both the vehicles about the loaded plastic sacks of the vehicles, but they fumbled initially to give any answer and thereafter, they confessed that ganja has been kept in the plastic sacks. The occupants including the drivers of both the vehicles disclosed their names and addresses. The petitioner Satish Singh was found moving in Toyota Corolla vehicle. The accused persons also disclosed that they have procured ganja from Chitrakonda Swabhiman area and were transporting the same in the two vehicles. In presence of independent witnesses, the

plastic sacks were opened and from the colour, smell, shape of the articles found inside the plastic sacks and from his own departmental experience, the informant was confirmed that it was ganja. The accused persons failed to produce any licence or authority for possession of huge quantity of ganja kept in the five plastic sacks. During personal search of the petitioner, one mobile phone, aadhar card, original voter identity card, one pan card, driving licence, Axis Bank Debit card, Axis Visa Credit card etc. were found and those were seized. On weighment, the gross weight of the ganja came to be 138 kg. 300 grams and samples in duplicate were collected from each of the plastic sacks and the sample packets and bulk quantity of ganja were separately seized and sealed and the seizure list was prepared and the accused persons with the seized articles were taken to Mathili police station where first information report was lodged.

3. The first bail application of the petitioner in BLAPL No. 2562 of 2021 was disposed of as withdrawn as per order dated 06.11.2021. The second bail application of the petitioner in BLAPL No.10163 of 2021 was also disposed of as withdrawn on 09.09.2022. After withdrawal of the second bail application, the petitioner has not moved the learned trial Court again for bail, but he has annexed the rejection order dated 08.03.2021 with the present bail application, which was also annexed to the second bail application i.e. BLAPL No.10163 of 2021. In this third bail application, it has also not been mentioned that the petitioner approached this Court in BLAPL No.10163 of 2021 and thus, there is suppression of the fact.

4. Mr. Shyam Manohar, learned counsel appearing for the petitioner contended that the similarly situated co-accused persons, namely, Raghu and Ram Chandra Mali have been released on bail by a Coordinate Bench of this Court in BLAPL No. 2430 of 2021 and BLAPL No. 2571 of 2021 respectively. He further submitted that in view of non-compliance of the mandatory provisions under sections 42 and 50 of the N.D.P.S. Act and release of the similarly situated co-accused persons on bail, the bail application of the petitioner may be favourably considered.

Mrs. Susamarani Sahoo, learned Addl. Standing Counsel for the State, on the other hand, opposed the prayer for bail and contended that since commercial quantity of ganja has been seized from the possession of the petitioner while he along with others were transporting the same in two vehicles, in view of the bar under section 37 of the N.D.P.S. Act, the petitioner is not entitled to be released on bail. She further submitted that petitioner is a man from the State of Haryana and once he is released on bail, it would be difficult to ensure his attendance at the time of trial in case he absconds.

5. On perusal of the bail order passed in the case of the co-accused Raghu in BLAPL No. 2430 of 2021, which was disposed of on 14.10.2022, it appears that similar contentions were raised by the same counsel relating to non-compliance of the mandatory provisions under sections 42 and 50 of the N.D.P.S. Act and the

learned Single Judge after taking note of the citations placed by the learned counsel for both the parties, came to hold that the petitioner cannot take a ground that there was non-compliance of section 42 of the N.D.P.S. Act as on a bare reading of the F.I.R., it appears that the police party had intimated the fact to their superior officer over phone and therefore, non-compliance of section 42 involves factual aspect and hence, the same is a matter of trial. However, so far as section 50 of the N.D.P.S. Act is concerned, the learned Single Judge has been pleased to hold that upon careful scrutiny of the provision in section 50 of the N.D.P.S. Act and further keeping in view the analysis of law made by the Hon'ble Supreme Court and applying the same to the facts of the present case and considering the mandatory nature of the provision, on careful scrutiny of the F.I.R. as well as records produced, the Court was of the considered opinion that no opportunity as has been provided under section 50 of the N.D.P.S. Act was ever given to the petitioner in that case and therefore, on the basis of the materials available on record, the Court was constrained to hold that the provision prima facie contained in section 50 of the N.D.P.S. Act has not been complied with in the case though the Court further held that such finding is subject to a detail evidence to be laid during trial. Learned Single Judge further held that the bar contained in section 37 of the N.D.P.S. Act would not be strictly applicable to the facts of the case. It was further held that if prima facie from record/F.I.R., it can be established that sections 42 and 50 of the N.D.P.S. Act, which are mandatory in nature, have not been complied with, the Court considering the bail application can always use the same as ground to enlarge the petitioner on bail and in such event, the power contained in section 37 of the N.D.P.S. Act would not be attracted to the facts of the case. Accordingly, the learned Single Judge granted bail to the said co-accused with certain conditions.

In the bail application of the co-accused Rama Chandra Mali bearing BLAPL No.2571 of 2021, the learned Single Judge only considering that the petitioner is in judicial custody for one and half years and the trial is not likely to be commenced in the near future, directed him to be released on bail with certain terms and conditions.

6. Section 37 of the N.D.P.S. Act opens with a non-obstante clause. Non-obstante clause must be given its due importance. The powers of the High Court to grant bail under section 439 Cr.P.C. are subject to the limitations contained in section 37 of the N.D.P.S. Act. Once the Public Prosecutor opposes the application for bail to a person accused of the enumerated offences under section 37 of the N.D.P.S. Act, in case, the Court proposes to grant bail to such a person, two mandatory conditions are required to be satisfied in addition to the normal requirements under the provisions of the Cr.P.C. or any other enactment. The Court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence and that he is not likely to commit any offence while on bail. The satisfaction of the Court about the existence of the said twin conditions is

for a limited purpose and is confined to the question of releasing the accused on bail. The expression "reasonable grounds" used in section 37(1)(b)(ii) of the N.D.P.S. Act connotes substantial probable causes which in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of such satisfaction. Whether the grounds are reasonable or not depend on the circumstances in a given situation. The Court while dealing with an application for bail is not called upon to record a finding of 'not guilty' but to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. Additionally, the Court has to record a finding that while on bail, the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion.

In the case of **Supdt. Narcotics Control Bureau, Chennai -Vrs.- R. Paulsamy reported in (2000) 9 Supreme Court Cases 549**, the Hon'ble Supreme Court held as follows:-

> "6. In the light of Section 37 of the Act, no accused can be released on bail when the application is opposed by the Public Prosecutor unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence while on bail. It is unfortunate that matters which could be established only in offence regarding compliance with Sections 52 and 57 have been pre-judged by the learned Single Judge at the stage of consideration for bail. The minimum which learned Single Judge should have taken into account was the factual presumption in law position that official acts have been regularly performed. Such presumption can be rebutted only during evidence and not merely saying that no document has been produced before the learned Single Judge during bail stage regarding the compliance with the formalities mentioned in those two sections."

In case of **Union of India -Vrs.- Rattan Mallik @ Habul reported in (2009) 42 Orissa Criminal Reports (SC) 697**, the Hon'ble Supreme Court held as follows:-

> "13. It is plain from a bare reading of the nonobstante clause in the Section 37 of the N.D.P.S. Act and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the N.D.P.S. Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by clause (b) of sub-section (1) of Section 37 of the N.D.P.S. Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that 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" has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn, points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. (Vide **Union of India -Vrs.- Shiv Shanker Kesari : (2007) 7 Supreme Court Cases 798**). Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the N.D.P.S. Act.

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the N.D.P.S. Act, the Court is not called upon to record a finding of "not guilty". At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the N.D.P.S. Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail."

In the aforesaid case of Rattan Mallick (supra), Allahabad High Court granted bail to the appellant convicted under sections 27-A and 29 of the N.D.P.S. Act and sentenced to undergo rigorous imprisonment for ten years on each count and to pay a fine of rupees one lakh on each count with default stipulation, on the ground of his incarceration for three years and further holding that there was no chance of his appeal being heard within a period of seven years. The Hon'ble Supreme Court held that those circumstances may be relevant for grant of bail in the matters arising out of conviction under the Penal Code, 1860, etc. but are not sufficient to satisfy the mandatory requirements as stipulated in clause (b) of sub-section (1) of section 37 of the N.D.P.S. Act. The Hon'ble Supreme Court further held that the provisions of the N.D.P.S. Act and more particularly section 37 of the N.D.P.S. Act were not brought to the notice of the learned Judge and therefore, the impugned order having been passed ignoring the mandatory requirements of section 37 of the N.D.P.S. Act was held to be not sustainable.

In case of **Ratan Kumar Vishwas -Vrs.- State of Uttar Pradesh reported in (2009) 1 Supreme Court Cases 482**, where the judgment of Allahabad High Court dismissing the application filed by the appellant for suspension of sentence and grant of bail was challenged, it is held as follows:-

"18. To deal with the menace of dangerous drugs flooding the market, Parliament has provided that a person accused of offence under the Act should not be released on bail during trial unless the mandatory conditions provided under section 37 that there are reasonable grounds for holding that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail are satisfied. So far as the first condition is concerned, apparently the accused has been found guilty and has been convicted.

x x x x x x x x x

20. The High Court has dealt with the factual position in great detail to conclude that the parameters of section 37 are not fulfilled to warrant grant of bail by suspension of sentence. We find no reason to interfere in the matter."

In the case of **Asim Kumar Das and another -Vrs.- State of Orissa reported in (2018) 69 Orissa Criminal Reports 688**, this Court has held as follows :-

"On perusal of the case records, it prima facie appears that the petitioners were present in the car when it was stopped. It further appears that even though the driver of the car escaped but the petitioners were detained while they were trying to escape from the car. The witnesses have stated how the option was given to the accused persons before search and seizure and

how the vehicle was searched and ganja packet was seized from the car. Though non-compliance of section 50 of the N.D.P.S. Act was highlighted but whether in the facts and circumstances of the case, such compliance are necessary or not and if so, whether materials available on record indicate such compliance are to be adjudicated by the learned trial Court at the appropriate stage of trial. It would not be proper to give any finding in that respect at this stage. Any finding regarding compliance or non-compliance of the mandatory provisions of the N.D.P.S. Act at the stage of bail is to be avoided as it requires complete analysis of oral and documentary evidence which can be better appreciated by the trial Court at the appropriate stage. However, on perusal of the case records, it indicates that the documents relating to the unwillingness of the petitioners to be searched in presence of Executive Magistrate or Gazetted Officer are available on record in which the signatures of the petitioners are also appearing. Therefore, the contention of the learned counsel for the petitioners in that respect is not acceptable."

In the case of **State of H.P. -Vrs.- Pawan Kumar reported in (2005) 4 Supreme Court Cases 350**, the Hon'ble Supreme Court held as follows:-

"11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a *thaila*, a *jhola*, a *gathri*, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required, They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word 'person' occurring in Section 50 of the Act.

x x x x x x x x

14....that the provisions of Section 50 will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which (the accused) may be carrying.

x x x x x x x x x

"27...In view of the discussion made earlier, Section 50 of the Act can have no application on the facts and circumstances of the present case as opium was allegedly recovered from the bag which was being carried by the accused."

7. Law is well settled that at the stage of consideration of bail application of an accused in custody, the following aspects are to be taken into account:-

(i) Prima facie satisfaction of the Court in support of the accusations;

(ii) Nature of accusation;

(iii) Evidence in support of accusations;

(iv) Gravity of the offence;

(v) Punishment provided for the offence;

(vi) Danger of the accused absconding or fleeing if released on bail;

(vii) Character/criminal history of the accused;

(viii) Behaviour of the accused;

(ix) Means, position and standing of the accused in the society;

(x) Likelihood of the offence being repeated;

(xi) Reasonable apprehension of the witnesses being tampered with;

(xii) Danger, of course, of justice being thwarted by grant of bail;

(xiii) Balance between the rights of the accused and the larger interest of the Society/State;

(xiv) Any other factor relevant and peculiar to the accused;

(xv) While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, but if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused.

8. Even though two of the co-accused persons have been granted bail by this Court, but law is well settled that parity cannot be the sole ground for grant of bail but it is one of the grounds for consideration of question of bail. A Judge is not bound to grant bail to an accused on the ground of parity even where the order granting bail to an identically placed co-accused contains no cogent reasons or if the same has been passed in flagrant violation of well settled principle of law and the Judge ignores to take into consideration the relevant facts essential for granting bail. Such an order can never form the basis of claim of parity. It will be open to the Judge to reject the bail application of the applicant before him as no Judge is obliged to pass orders against his conscience merely to maintain consistency. The grant of bail is not a mechanical act. (Ref:- **Raju Kumar Kushwa -Vrs.- State of Orissa reported in (2018) 69 Orissa Criminal Reports 725**).

In the case of co-accused Ram Chandra Mali in BLAPL No.2571 of 2021, the mandatory provision under section 37 of the N.D.P.S. Act has not been taken into account while granting him bail. In the case of Raghu in BLAPL No. 2430 of 2021, bail has been granted on the ground of non-compliance of the provision under section 50 of the N.D.P.S. Act at the time of search and seizure, which is in flagrant violation of well settled principle of law as laid down by the Hon'ble Supreme Court in the case of **Pawan Kumar** (supra) that such compliance is not necessary in a case of this nature where contraband ganja of commercial quantity was found in plastic sacks in the vehicle. Thus, I am of the humble view that such bail orders cannot form the basis of claim of parity for the petitioner.

9. In view of the foregoing discussions, since the petitioner was found in the offending Toyota Corolla vehicle in which commercial quantity of ganja was being transported and the learned counsel for the appellant has failed to satisfy the rigours of section 37 of the N.D.P.S. Act, I am not inclined to release the petitioner on bail. The status report of the learned trial Court dated 28.11.2022 indicates that out of sixteen charge sheet witness, one witness has been examined. In view of the period of detention of the petitioner in judicial custody, the learned trial Court shall do well to expedite the trial. Accordingly, the BLAPL stands dismissed.

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2023 (I) ILR-CUT- 475

K.R. MOHAPATRA, J.

OJC NO. 688 OF 1985

PARSURAM CHOUDHURY & ORS. .....Petitioners

.V.

DAMA GOUDA & ORS. .....Opp.Parties

ODISHA LAND REFORMS ACT, 1960 – Section 36-A – There is no material on record as to Opposite Party No.1 was ever inducted as a tenant – There is also no material on record to the effect that he was paying rent in the shape of 'rajbhag', 'sanja' or otherwise to the Original Land Owner or his legal heirs at any point of time – Whether mere possession of a person over a piece of agricultural land can confer him the status of tenant/raiyat, unless the ingredients enumerated under Section 36-A of the Act are satisfied ? – Held, No – Since the Opposite Party No.1 does not succeed in his petition under Section 36-A of the Act, question of realization of rajbhag does not arise at all. (Para 11-15)

Case Law Relied on and Referred to :

1. 2011 (Supp.-II) OLR 669 : Kamala Jena Vs. Binapani Chand & Ors.

For Petitioners : Mr. Saktidhar Das, Sr. Adv. & Mr.Haripada Mohanty.

For Opp.Parties : Mr. Dillip Kumar Mishra, A.G.A. (For Opp. Party Nos.2 to 4)

None : [For Opp. Party Nos.1(a) to 1(h)]

JUDGMENT Date of Hearing &Judgment :10.01.2023

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. The Petitioners in this writ petition seek to assail the order dated 31st December, 1984 (Annexure-5) passed by learned Additional District Magistrate (L.R.), Ganjam, Chatrapur in O.L.R. RC. Nos.7 and 8 of 1984, reversing the order dated 14th December, 1983 (Annexure-4) passed by the Officer on Special Duty, Land Reforms, Berhampur in O.L.R. Appeal Nos.24 and 25 of 1983 by which, order dated 25th February, 1983 (Annexure-3) passed by the Revenue Officer-cum-Additional Tahasildar, Berhampur in O.L.R. Case No.372 of 1974 under Section 36-A and No. 52/81 under Section 15 of the Odisha Land Reforms Act, 1960 (for short 'the Act'), was set aside.

3. The case has a chequered carrier. The parties are litigating since, 1971. In the meantime, the recorded tenant, namely, Bharata Choudhury has died and his legal heirs are the Petitioners in this writ petition. A dispute arose in the year, 1971

between Bharat Choudhury and his sons, namely, Parsuram Choudhury and Bhaskar Choudhury. Opposite Party No.1-Dama Gouda along with others, were appointed as arbitrators to resolve the dispute. Accordingly, a settlement was made partitioning the property between Bharata and his sons. As Parsuram and Bhaskar did not allow Bharata to cultivate his land and created disturbance threatening dire consequence, Bharata took the help of Dama and put him in possession to cultivate the land in question. That became the basis to file an application by Bharata under Section 36-A of the Act to declare the land non-resumable and determine the compensation. The said case was filed on 12th September, 1974 and registered as OLR Case No.372 of 1974. Bharata, Parsuram and Hadi Devi Choudhury (w/o-Bharat) appeared through Advocate and filed their objection on 18th November, 1974. However, an *ex parte* order was passed on 8th July, 1975 declaring Dama Gouda as a tenant. Bharata Choudhury and three others filed an application on 16th September, 1975 to set aside the *ex parte* order, which was dismissed on 16th August, 1975. Challenging both the orders, *viz*. 8th July, 1975 and 16th August, 1975, Parsuram Choudhury and others preferred OLR Appeals vide OLR Appeal Nos.40 and 64 of 1975. The said appeals were dismissed by a common order dated 31st August, 1976. Being aggrieved, Bhaskar Choudhury and three others filed two revision cases in Revision Case No.01/80(234/76) and 02/80(238/76) before the Additional District Magistrate, Ganjam. The said revision cases were allowed and the matter was remitted back to the Revenue Officer-cum-Additional Tahasildar, Berhampur to dispose of the OLR Cases after hearing both the parties and making proper enquiry. However, assailing the order of remand, Dama Gouda filed OJC No.1256 of 1981 before this Court, which was dismissed vide order dated 11th August, 1981 directing to dispose of the OLR Cases expeditiously. At that juncture, Parsuram Choudhury filed an application under Section 15 of the Act in OLR Case No.52 of 1981 against Dama Gouda for a direction to deliver vacant possession to him and for recovery of *rajbhag* (rent). Both, the applications i.e. OLR Case Nos.372 of 1974 and 52 of 1981 were heard and disposed of by a common judgment dated 25th February, 1983 declaring Dama Gouda as tenant under the Petitioners by allowing the application filed by Dama Gouda and dismissing the application filed by Parsuram Choudhury. Assailing the same, the Petitioners preferred OLR Appeal Nos.24 and 25 of 1983. The said appeals were allowed on merit vide order dated 25th February, 1983 under Annexure-3. Assailing the same, Dama Gouda-Opposite Party No.1 filed O.L.R. RC Nos.7 and 8 of 1984, which were allowed by the Additional District Magistrate (LR), Ganjam, Chatrapur vide order dated 31st December, 1984 under Annexure-5. The Petitioners being aggrieved, filed OJC No.688 of 1985, which was dismissed by this Court vide order dated 6th August, 1995. Assailing the same, Parsuram Choudhury filed SLP (C) No.17282 of 1985. While granting leave vide order dated 28th August, 1996, Hon'ble Supreme Court has passed the following order:

"Leave granted.

We find that the Additional District Magistrate in the order dated 31st December, 1984 (A/5) passed in revision proceeded on the basis that the status of the revision petitioner (respondent No.1) as a tenant over the suit lands under Bharat Choudhury and after him under his sons Parsuram (Petitioner) and Bhaskar is an admitted fact, to allowed the revision of respondent No.1. This is in-consistent with the specific case set up in the petition filed by the appellant-Pursuram under section 15 of the Orissa Land Reforms Act wherein he has expressly stated that respondent No.1 was merely a servant who was permitted by the receiver to cultivate the lands temporarily. There is no admission of the status of respondent No.1 as a tenant therein. The basis on which the Additional District Magistrate proceeded to allow the revision of respondent No.1 is, therefore, non-existent. However, the High Court dismissed the petition of the appellant filed under Article 227 of the Constitution of India in limine without giving any reasons. The High Court's order must, therefore, be set aside requiring the High Court to decide the matter afresh after hearing both sides on all the points involved.

Consequently, the appeal is allowed. The matter is remitted to the High Court for a fresh decision of the appellant in accordance with law. No costs."

Accordingly, the matter is remitted back for hearing on merit.

4. Mr. Das, learned Senior Advocate appearing for the Petitioners made a lengthy argument by filing his written note of submissions.

5. Amongst other grounds, Mr. Das, learned Senior Advocate for the Petitioners raised two contentions, which are necessary for consideration of this case. He argues that there is no material on record to come to a conclusion that Dama Gouda-Opposite Party No.1 was inducted as a tenant under the Petitioners. There is no material on record to show that he was paying *rajbhag* (rent) to Bharata Choudhury or his legal heirs. It is also submitted that due to dispute between the Bharata Choudhury and his sons, assistance of Dama Gouda was solicited by Bharata Choudhury. In course of his argument, he also submitted that being not satisfied with the partition effected by arbitrators including Dama Gouda, Pursuram Choudhury had filed T.S. No.70 of 1971 before learned Subordinate Judge, Berhampur, Ganjam. Pursuant to an application filed under Order XL Rule 1 C.P.C., a receiver was appointed. Said Dama Gouda, who was then in possession of the land in question, filed an application before the receiver categorically stating that he was cultivating the land on behalf of Bharata Choudhury for the said agricultural season (1971) and had raised crop. Hence, he prayed to handover the crops to him or to allow him to give vacant possession after depositing the *rajbhag*. Thus, it is his submission that since in the year, 1971, Dama Gouda himself had admitted that he was cultivating the land for that agricultural year only. Hence, he cannot be said to be a *raiyat* under Bharata Choudhury or his legal heirs. This material aspect was not taken into consideration by the Revenue Officer, Berhampur, who allowed the application declaring Dama Gouda as *raiyat*. He further submitted that application under Section 15 of the Act in OLR Case No.52 of 1981 was filed in an abundant

caution. Such application *ipso facto* cannot be a ground to declare Dama Gouda as a *raiyat*, unless he satisfied the ingredients of the order under Section 36-A of the Act.

6. In support of his case, Mr. Das, learned Senior Advocate relied upon a decision in the case of ***Kamala Jena –v- Binapani Chand and others***, reported in 2011 (Supp.-II) OLR 669. In the said case, this Court has categorically held that mere cultivating possession of a person over a land without any proof that such possession was under the system known as '*Bhag', 'Sanja', 'Kata'* or such similar expression under any other system, on payment of rent, cannot confer the status of a *raiyat* on the occupier. Learned appellate Court discussing the material on record in details, rejected the claim of Dama Gouda. However, learned revisional Court, basing on a resolution of a local committee and the statement of so-called committee members, which has never seen the light of the day, allowed the revision filed by said Dama Gouda.

7. It is his categorical submission that Dama Gouda, who had examined as P.W.3 on 19th August, 1982, categorically stated that a *muchilika* was executed in between him and Bharata Choudhury inducting him into the suit lands for cultivation, but he had lost the said *muchilika*. Had that *muchilika* been produced in Court, it would have thrown some light on the manner of possession of Dama Gouda over the suit land. It is his submission that Dama Gouda was inducted to help Bharata Choudhury for cultivation, as there was a quarrel between Bharat and his sons. But that itself does not confer the right of tenancy on said Dama Gouda, unless the ingredients, as aforesaid are satisfied. He, therefore, prays for setting aside the impugned order under Annexure-5 and to dismiss the petition filed by Dama Gouda under Section 36-A of the Act.

8. Mr. Mishra, learned Additional Government Advocate submits that since it is a dispute of landlord and tenancy, the State has a little role to play, except acting as a statutory authority. He however, submits that order may be passed taking into consideration the rival contentions of the parties.

9. None appears for the contesting Opposite Party Nos.1(1) to 1(h). On last occasion, i.e., on 5th December, 2022, none had also appeared on behalf of the contesting opposite Parties. However, to provide another opportunity to the contesting Opposite Parties, the matter was adjourned to be listed today for hearing.

10. Taking into consideration the submission of Mr. Das, learned Senior Advocate and on perusal of the record, it is apparent that there is no material on record, as to when Dama Gouda-Opposite Party No.1 was ever inducted as a tenant, as claimed. There is also no material on record to the effect that he was paying rent in the shape of '*rajbhag', 'sanja'* or otherwise to Bharata Choudhury or his legal heirs at any point of time.

11. Law is well-settled that mere possession of a person over a piece of agricultural land cannot confer him the status of tenant/*raiyat*, unless the ingredients enumerated under Section 36-A of the Act are satisfied. It is also the specific case of Dama Gouda-Opposite Party No.1 that there was a *muchilika* executed between him and Bharata, but the said *muchilika* was lost. When Dama Gouda came to the Court with a specific stand that by virtue of a document, he was inducted as a tenant, burden is on him to establish the same, in absence of which adverse inference should be drawn against him. But, it appears that no endeavour, whatsoever, either by Dama Gouda to produce the document or the Revenue Officer was made to find out the truth with regard to induction of Dama Gouda as a *raiyat*, as alleged. It is the specific case of Bharata Choudhury that he had taken help of Dama Gouda for cultivation of land, as there was a dispute between him and his sons which gets support from the application filed by Dama Gouda before the receiver appointed in T.S. No.70 of 1971 to the effect that he had cultivated the land in question for agricultural year, 1971-72 only and he had made a prayer before the receiver to allow him to harvest the crop or to vacate the land by depositing the *rajbhag*. That itself clearly shows that he was in cultivating possession over the suit land for one year only.

12. Dama Gouda was none other than an arbitrator to the dispute between Bharata Choudhury and his sons and the arbitrator partitioned the property. Thus, it cannot be ruled out that taking advantage of his position, Dama Gouda has filed an application under Section 36-A of the Act to be declared as a tenant/*raiyat* and to declare the land non-resumable on payment of compensation.

13. Witnesses examined on behalf of the Dama Gouda only deposed that he was in cultivating possession over the suit land for last seven to eight years, when they deposed before the Court. Being in cultivating possession for a certain period, cannot confer the right of tenancy on a person, as held in the case of ***Kamala Jena*** (supra). The burden is on the Applicant to prove that he was in cultivating possession over the land on payment of '*Bhag', 'Sanja', 'Kata'* or such similar expression under any other system of payment of rent to the land owner. Neither the Revenue Officer, Berhampur nor the Additional District Magistrate, Ganjam, Chatrapur had made any endeavour to delve into the aforesaid requirement while adjudicating the matter. On the other hand, learned appellate Court has dealt with the matter in detail discussing the pros and cons of the case of the parties and passed the order.

14. Further, an issue that arises for consideration, is as to whether by filing an application under Section 15 of the Act, Pursuram has admitted the tenancy of Dama or not. True it is that, Section 15 of the Act provides for realization of *rajbhag*/rent from tenant. But that does not by itself can be construed as an admission of tenancy unless the person, who filed an application under Section 36-A of the Act proves to the hilt that he was a tenant under the landlord. Admittedly, there was a dispute

between Bharata Choudhury and his sons in one part and Dama Gouda on the other with regard to the tenancy over the land. Thus, it was incumbent on the applicant under Section 36-A of the Act to prove that he (Dama) was a tenant, which he miserably failed.

15. In that view of the matter, this Court is of the considered opinion that both the Revenue Officer, Berhmapur as well as the Additional District Magistrate (LR), Ganjam, Chatrapur have committed error in allowing the application under Section 36-A of the Act. Accordingly, this Court upholding the order passed in O.L.R. RC. Nos.7 and 8 of 1984, sets aside the impugned orders under Annexure-3 and 5.

16. Since the Opposite Party No.1 does not succeed in his petition under Section 36-A of the Act, question of realization of *rajbhag* does not arise at all.

17. Accordingly, this Court directs that the Petitioners are not entitled to any *rajbhag*.

18. The writ petition is accordingly allowed to the extent, as aforesaid.

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2023 (I) ILR-CUT- 480

K.R. MOHAPATRA, J.

CMP NO. 565 OF 2021

SUSAMA ROUT & ORS. .....Petitioners

.V.

GOURANGA CHARAN SAMAL & ORS. .....Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order VIII Rule 6-A r/w Rule 9 – Whether the written statement along with counter-claim can be filed/accepted after closure of the evidence from both sides and even after the suit was posted for argument? – Held, No. (Para 17)

Case Laws Relied on and Referred to :

1. (2007) 10 SCC 82 :Sumtibai and Ors Vs. Paras Finance Co. Regd. Partnership Firm Beawer (Raj.) through Mankanwar (Smt) W/o Parasmal Chordia (Dead) & Ors.
2. AIR 1998 Rajasthan 98 : Ramgopal & Anr Vs. Khiv Raj & Ors.
3. (2020) 2 SCC 394 : Ashok Kumar Kalra Vs. Wing CDR. Surendra Agnihotri & Ors.

For Petitioners : Mr. Gautam Mishra, Sr. Adv.
Mr.Anupam Dash,& Mr. Dinesh Kumar Patra.

For Opp. Parties : M/s. Sukanta Kumar Nayak & S.S.K. Nayak

JUDGMENT Date of Judgment :17.01.2023

K.R. MOHAPATRA,J.

1. This matter is taken up through hybrid mode.

2. Order dated 28th September, 2021 (Annexure-4) passed in C.S. No. 44 of 2017 is under challenge in this CMP, whereby learned Civil Judge (Junior Division), Bhadrak refused to accept the written statement along with counter-claim filed by Defendant Nos.1(Ka) to 1(Ga)-Petitioners.

3. Opposite Party Nos.1 to 3 as Plaintiffs have filed C.S. No. 44 of 2017 claiming right of way over 'Ga' schedule property of the plaint. They also prayed for permanent injunction to restrain the Defendants from interfering with their right of way over 'Ga' schedule property and for cost.

4. Briefly stated the case of the Plaintiffs is that 'Ka' schedule property of the plaint belongs to them (Plaintiffs) and 'Kha'schedule property belongs to Defendants. 'Ga' schedule property is being used as a passage by the Plaintiffs from time immemorial. Pursuant to an agreement dated 27th March, 2016 executed between the parties to the suit, the Defendants allowed the Plaintiffs to use eastern portion of vacant land as a road. In lieu of the same, the Plaintiffs also left a space of 3 feet width over 'Ka' schedule property in Plot Nos.1283 and 1284 for use of Defendants and for maintenance of their house. Since the Defendants tried to obstruct the open space in 'Ga' schedule property, the suit has been filed for the aforesaid relief. The Defendants filed a joint written statement admitting about the agreement. It was also pleaded, *inter alia* that within few days of execution of the agreement, the Defendants shifted the Tulasi Chounra as agreed upon. They also left an open space to the western portion ('Ga' schedule) of their house as agreed upon. However, the Plaintiffs did not allow the Defendants to use 3 Kadis width of land as per the terms of the agreement. Hence, dissension arose between the parties. Since the Plaintiffs did not respect the terms of the agreement, as per the advice of the gentlemen, the situation prior to the agreement was restored. It was also stated therein that the Plaintiffs didn't have any right over 'Ga' schedule property for their access, as alleged. They were temporarily using 'Ga' schedule property as their access. Hence, he prayed for dismissal of the suit.

5. After closure of the evidence, when the suit was posted for hearing on argument, the Defendant No.1 died. Thus, the present Petitioners were substituted in his place. After being substituted, the Petitioners, namely, Defendant Nos.1(Ka) to 1(Ga) filed a written statement along with counter-claim.The Plaintiffs-Opposite Party Nos.1 to 3 filed their objection refuting acceptance of the written statement and counter-claim. Learned trial Court vide its order dated 28th September, 2021 (Annexure-4) refused to admit the counter-claim holding it to be not maintainable. Hence, this CMP has been filed.

6. Mr. Mishra, learned Senior Advocate submitted that each of the defendants to a suit has a right to file its written statement.This is in accordance with the principles of natural justice. Since the Defendant Nos.1(Ka) to 1(Ga) were impleaded as parties to the suit after the death of Defendant No.1, they have a right to file their written statement. In support of his case, he relied upon the case of ***Sumtibai and others –v- Paras Finance Co. Regd. Partnership Firm Beawer (Raj.) through Mankanwar (Smt) W/o Parasmal Chordia (Dead) and others***, reported in (2007) 10 SCC 82 in which it is held as under:

> *"8. Every party in a case has a right to file a written statement. This is in accordance with natural justice. The Civil Procedure Code is really the rules of natural justice which are set out in great and elaborate detail. Its purpose is to enable both parties to get a hearing. The appellants in the present case have already been made parties in the suit, but it would be strange if they are not allowed to take a defence. In our opinion, Order 22 Rule 4(2) CPC cannot be construed in the manner suggested by learned counsel for the respondent."*

7. Referring to para-6 of ***Sumtibai*** (supra), Mr. Mishra, learned Senior Advocate submits that learned counsel for the Respondent therein had taken a stand that a person who was made party on substitution can only take such plea, which is appropriate to his character as legal representative of the deceased. Such a plea was not accepted by the Hon'ble Supreme Court. He further submits that the cause of action for filing of the written statement along with counter-claim arose when the Plaintiffs on 19th April, 2021 tried to put fence obstructing 3 feet width road as described in 'Ga' schedule property, i.e. over Plot Nos.1283 and 1284 ('Ka' schedule). Since the cause of action arose after framing of issues, there should be no legal bar under the Civil Procedure Code to file a written statement along with counter-claim by the substituted Defendants. In support of his case, Mr. Mishra, learned Senior Advocate relied upon the case of ***Ashwini Kumar Naik –v- Gobardhan Naik***, reported in 2011 SCC Online Ori 236 in which it is held as under:

> ***"7.*** *The following observations in the aforesaid decisions are relevant. "The purpose of the provision enabling filing of a counter claim is to avoid multiplicity of judicial proceedings & save upon the Court's time as also to exclude the inconvenience to the parties by enabling claims & counter claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading could be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the Court, the Court would be justified in exercising its discretion not in favour of permitting a belated counter-claim". Therefore, the Court held that generally speaking the counter claim not contained in the original written statement may be refused to be taken on record, especially when the issues were framed & more so when the trial was commenced. This proposition as it appears is not absolute & without exception.*
>
> ***8.*** *In the instant case, it is not in dispute that the suit between the parties was decreed on compromise without trial, but the compromise decree was set aside in appeal at the instance of the Defendant-Opp. Party & the matter was remanded to the Trial Court for hearing &*

disposal. Whereafter, the Opp. Party sought to amend his written statement by incorporating the counter claim seeking relief of declaration of right, title & interest & recovery of possession, as because basing on the compromise decree passed earlier the suit land had been mutated in the name of the Plaintiff-Petitioner.

9. *In the circumstances, in my considered opinion, the general proposition laid down in the aforesaid decisions of the Apex Court will have no application to the instant case. Permitting the counter claim of the Opp. Party by way of amendment of the written statement (sic) will not have the effect of prolongation of the trial or complicating otherwise smooth flow of proceedings forcing a retreat on the steps already taken by the Court. On the contrary, it would help avoid multiplicity of judicial proceedings, facilitating all disputes between the parties being decided finally. In the aforesaid circumstances, I find no illegality in the order of the Trial Court allowing amendment of written statement introducing the counter claim. The Writ Petition is, therefore, dismissed. No costs."*

8. It is his further case that the substituted Defendants can file additional written statement appropriate to their character. Since the cause of action for filing of the written statement arose after closure of the evidence, when the Plaintiffs made an attempt to obstruct the open space over Plot Nos.1283 and 1284, they filed the additional written statement. Due to subsequent events as set out in the written statement, it was imperative on the part of the Petitioners (substituted Defendants) also to file a counter-claim. Learned trial Court without discussing the contentions raised by the parties and without assigning any valid reason jumped to a conclusion by not accepting the written statement with counter-claim holding it to be not maintainable.He, therefore, prays for setting aside the impugned order under Annexure-4.

9. Mr. Nayak, learned counsel for the Plaintiffs-Opposite Party Nos.1 to 3 refuting the same contended that on receiving summons in the suit, all the Defendants appeared and filed their written statement jointly on 29th June, 2017. In sub-para (Gha) of their written statement, the Defendants have categorically stated that the Plaintiffs deviated the compromise agreement and put fence over Plot Nos.1283 and 1284 by obstructing the Defendants from using the said plots. Thus, the Defendants were constrained to revert back to the position as it was before the agreement was executed. As such, there is no fresh cause of action to file a written statement by the substituted Defendant Nos.1(Ka) to 1(Ga), as alleged. After closure of the evidence from both sides when the suit was posted for hearing on argument, the Defendant No.1 died and his legal heirs, namely, the Petitioners, filed written statement along with counter-claim to which the Plaintiffs-Opposite Party Nos.1 to 3 objected. After hearing the matter in detail from both the sides, the impugned order has been passed holding the written statement along with counter-claim to be not maintainable.The written statement along with counter-claim sought to be filed by the Petitioners contains the pleadings contrary to the joint written statement filed by the Defendants earlier. In support of his case, he relied upon the case of ***Ramgopal and another –v- Khiv Raj and others***, AIR 1998 Rajasthan 98 in which it is held as under:

> *"7. In my opinion, the contention of the learned counsel appearing for the petitioners is devoid of any force. It is settled law that the legal representatives are stepped into the shoes of the deceased-plaintiff or defendant, as the case may be, and they must adopt the position occupied by his predecessor plaintiff or defendant. The legal representatives, therefore, must proceed with the litigation from the stage where death of defendant or plaintiff had taken place. They are legally bound by the pleading of his predecessors-in-interest in whose place they have been substituted. Hence, the legal representatives substituted under Order 22, Rule 4, C.P.C. cannot set up a new case. The petitioners are bound by the proceedings taken so far against the deceased-defendant. They cannot be allowed to file the written statement, the right of which was closed as soon as the ex parte order was passed against the deceased-defendant-Govind Ram."*

He further submitted that since the Defendants who jointly filed written statement did not prefer to file any counter-claim, the substituted legal heirs of the deceased Defendant No.1 cannot maintain a counter-claim, that too after closure of the evidence from both sides.

10. Distinguishing the applicability of law laid down in *Sumtibai's* (supra) case, Mr. Nayak, learned counsel submits that the case of *Sumtibai* arises out of a suit for specific performance of contract. Kapurchand along with his son as co-owners had entered into an agreement to sell the disputed property with the Plaintiffs therein, but the Plaintiffs only impleaded Kapurchand as a Defendant. During pendency of the suit, said Kapurchand died and his wife and sons applied to be brought on record as legal representatives. After they were impleaded, they filed an application under Order 1 Rule 10 C.P.C. praying, *inter alia*, that they should be permitted to take plea as would be available to them being not bound by the written statement filed by the deceased defendant therein. Considering that they were parties to the agreement in question, the Hon'ble Supreme Court held that they have independent right to file written statement as they had a right to defend the suit in their individual capacity. In the suit at hand, the status of the Petitioners is completely different and they are only legal representatives of the deceased Defendant No.1. Hence, they should not be allowed to take a different stand which the Defendants did not raise in their pleadings. As such, learned trial Court has committed no error in not accepting the written statement as well as counter-claim as not maintainable.

11. Heard learned counsel for the parties at length. Perused the materials as well as case law placed before this Court.

12. Order VIII Rule 6-A C.P.C. deals with counter-claim. Likewise, Order VIII Rule 9 C.P.C. deals with subsequent pleadings. Rule 6-A of Order VIII C.P.C. makes it clear that by way of a counter-claim, the Defendant may set-off any right or claim in respect of a cause of action accruing to the said Defendant against the Plaintiff either before or after filing of the suit but before the Defendant has delivered his defence or before the time limited for delivery of his defence has expired. In the case of ***Ashok Kumar Kalra -vs.- Wing CDR. Surendra Agnihotri and others,*** reported in (2020) 2 SCC 394, the Hon'ble Supreme Court laid down the guidelines to entertain a counter-claim, which is as under:

*"**18.** As discussed by us in the preceding paragraphs, the whole purpose of the procedural law is to ensure that the legal process is made more effective in the process of delivering substantial justice. Particularly, the purpose of introducing Rule 6-A in Order 8 CPC is to avoid multiplicity of proceedings by driving the parties to file separate suit and see that the dispute between the parties is decided finally. If the provision is interpreted in such a way, to allow delayed filing of the counterclaim, the provision itself becomes redundant and the purpose for which the amendment is made will be defeated and ultimately it leads to flagrant miscarriage of justice. At the same time, there cannot be a rigid and hyper-technical approach that the provision stipulates that the counterclaim has to be filed along with the written statement and beyond that, the court has no power. The courts, taking into consideration the reasons stated in support of the counterclaim, should adopt a balanced approach keeping in mind the object behind the amendment and to subserve the ends of justice. There cannot be any hard and fast rule to say that in a particular time the counterclaim has to be filed, by curtailing the discretion conferred on the courts. The trial court has to exercise the discretion judiciously and come to a definite conclusion that by allowing the counterclaim, no prejudice is caused to the opposite party, process is not unduly delayed and the same is in the best interest of justice and as per the objects sought to be achieved through the amendment. But however, we are of the considered opinion that the defendant cannot be permitted to file counterclaim after the issues are framed and after the suit has proceeded substantially. It would defeat the cause of justice and be detrimental to the principle of speedy justice as enshrined in the objects and reasons for the particular amendment to CPC."*

It is further held *inter alia* that**:**

***"21.** We sum up our findings, that Order 8 Rule 6-A CPC does not put an embargo on filing the counterclaim after filing the written statement, rather the restriction is only with respect to the accrual of the cause of action. Having said so, this does not give absolute right to the defendant to file the counterclaim with substantive delay, even if the limitation period prescribed has not elapsed. The court has to take into consideration the outer limit for filing the counterclaim, which is pegged till the issues are framed. The court in such cases have the discretion to entertain filing of the counterclaim, after taking into consideration and evaluating inclusive factors provided below which are only illustrative, though not exhaustive:*

(i) Period of delay.

(ii) Prescribed limitation period for the cause of action pleaded.

(iii) Reason for the delay.

(iv) Defendant's assertion of his right.

(v) Similarity of cause of action between the main suit and the counterclaim.

(vi) Cost of fresh litigation.

(vii) Injustice and abuse of process.

(viii) Prejudice to the opposite party.

(ix) And facts and circumstances of each case.

(x) In any case, not after framing of the issues."

It is thus clear that a counter-claim may be accepted at any stage of the suit but not after framing of the issues. Thus, keeping in mind the position of law, as aforesaid, the contentions of the parties have to be assessed.

13. Admittedly, the trial of the suit had already commenced by the time the written statement along with counter-claim was filed by the Petitioners. In view of the ratio decided in *Sumtibai* (supra), Defendant has a right to file a written statement appropriate to its character. In the case in hand, the Defendant No.1 along with other Defendants had already filed a written statement in the suit.Thus, the written statement,if any,filed by the substituted legal heirs of the deceased Defendant No.1, namely, the Petitioners,will be subsequent pleadings, which is commonly called as additional written statement. An additional written statement may be presented with leave of the Court, if in the facts and circumstances of the case, the Court feels it necessary for just adjudication of the suit. Since the Petitioners have stepped into the shoes of the deceased Defendant No.1, they cannot take any plea contrary to the pleadings already filed by him. As submitted by Mr. Mishra, learned Senior Advocate, an occasion to file additional written statement along with counter-claim arose as the Plaintiffs on 19th April, 2021 obstructed three feet width road by putting fence, which they had already agreed to part with for access of the Defendants to their residential house.

14. Mr. Nayak, learned counsel for the Plaintiffs-Opposite Parties, however, objected to the same submitting that no cause of action as alleged, in the additional written statement had ever arisen**,** as the Defendants in their joint written statement have taken a categorical stand that since the Plaintiffs did not adhere to the terms and conditions of the agreement dated 27th March, 2016 and left three feet width road, the Defendants reverted back to their original position. Thus, no fresh cause of action has arisen to file any additional written statement by the Defendant Nos.1(Ka) to 1(Ga).

15. On perusal of the pleadings of joint written statement (Annexure-2) filed by the Defendants including the deceased Defendant No.1, it transpires from paragraph-13 (Gha) that as the Plaintiffs did not leave three feet width land for use of Defendants, dissension arose between the parties.The Plaintiffs also allegedly did not adhere to the request of village gentries to respect the terms and conditions of the agreement, as a result of which the village gentries advised the Defendants to revert back to the original position. Thus, the allegation of obstruction in the written statement filed by Defendant Nos.1(Ka) to 1(Ga) was already existing much prior to that i.e. in the joint written statement filed by the Defendants. As such, it is apparent that no fresh cause of action arose to file a separate/additional written statement by the Petitioners (substituted Defendants).

16. As laid down in ***Ashok Kumar Kalra*** (supra), the Court has the discretionary power to consider the acceptance of such counter-claim, but it cannot be accepted after framing of the issues. However, ***Hon'ble Justice Santangoudar*** in ***Ashok Kumar Kalra*** (supra) opined that though the normal way is that counter-claim filed after the issues are framed should not be accepted, but under exceptional circumstances, a counter-claim may be permitted to be filed after the issues have been framed but prior to commencement of recording of the Plaintiff's evidence.

17. In the instant case, written statement along with counter-claim was filed by the Petitioners after closure of the evidence from both sides when the suit was posted for argument. Thus, in any event, written statement along with counter-claim filed by the Petitioner could not have been accepted at that stage of the suit.

18. The ratio in ***Sumtibai*** (supra) is not applicable to this case, as the Defendants therein had independent right to file written statement in their individual capacity as they were also parties to the agreement of which specific performance was sought for in the suit. Further, the case of ***Ashwini Kumar Naik*** (supra) has also no application to the case, as this Court accepting the proposition of law to the effect that no counter-claim can be accepted after framing of issues, confirmed the order of learned trial Court in accepting the counter-claim in the facts and circumstances of that case.

18.1 The principle to test the case of the Petitioners would be that whether the Defendant No.1, had he been alive, could have filed a written statement along with counter-claim. The answer would be obviously 'no'.

19. It is strenuously urged by Mr. Mishra,learned Senior Advocate that the impugned order is an unreasoned and cryptic one. Hence, the same is liable to be set aside.

20. It is very difficult to accept such submission inasmuch as learned trial Court although not spelt out in too many words but has observed that since the suit is at the stage of argument, the written statement along with counter-claim cannot be accepted. I find no infirmity in such finding.

21. In view of the above, the CMP sans merit and is accordingly dismissed. As the suit is at the stage of argument, learned trial Court should make an endeavour to dispose of the suit at an early date giving opportunity of hearing to the parties concerned.

22. In the circumstances, there shall no order as to costs.

23. The interim order dated 30th October, 2021 passed in I.A. No.582 of 2021 stands vacated.

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2023 (I) ILR – CUT - 487

B.P. ROUTRAY, J.

RSA NO. 312 OF 2015

SMT. KARNAM ANNAPURNA & ORS. .....Appellants

.V.

COLLECTOR, GAJAPATI & ANR. .....Respondents

ADVERSE POSSESSION – Whether the state should be permitted to perfect its title by way of Adverse possession – Held, No – The State cannot be permitted to perfect its title over the land by invoking the doctrine of adverse possession to grab the property of its own citizen.

(Para 11,12)

Case Laws Relied on and Referred to :-

1. (2011) 10 SCC 404 : State of Haryana Vs. Mukesh Kumar & Ors.
2. (2020) 2 SCC 569 : Vidya Devi Vs. State of Himachal Pradesh & Ors.

For Appellants : Mr. D.K. Mohapatra
For Respondents: Mr. S. Mishra, A.G.A

JUDGMENT Date of Judgment: 10.10.2022

B.P. ROUTRAY, J.

1. The unsuccessful Plaintiffs are the Appellants before this Court. They challenge the concurrent refusal to grant relief to them by both the courts below.

2. The original Plaintiff, namely, Sri Karanam Taudu filed C.S. No.04/2005 before the learned Civil Judge (Sr. Divn.), Parlakhemundi with the prayer as follows:

> "(a) To pass a decree in favour of the Plaintiff and against the Defendants declaring that, the Plaintiff is entitled to remaining portion of Khata No.486, Plot No.8304 after deducting 3½ cents of lands gifted by the Plaintiff to the Defendant No.2,
>
> alternatively
>
> the Defendants be directed to pay the compensation as per rule to the Plaintiff,
>
> (b) To grant cost of the suit and to grant such other reliefs as deemed fit, in the interest of justice."

3. Present Appellants were substituted upon death of the original Plaintiff as his LRs.

4. The case of the Plaintiff is that he was the right, title owner of the lands in Sabik Patta No.407, Survey No.333/8 measuring Ac.0.25 decimals under Kasinagar Khaspa (mouza) and he gifted Ac.0.03½ decimals of land out of the same in favour of the Forest Department for construction of staff quarters by executing Registered Gift Deed No.161 dated 14.2.1963. Thereafter Public Works Department acquired Ac.0.10 decimals out of the same plot for construction of the road upon payment of compensation. But the Forest Department illegally occupied the entire remaining lands beyond the extent of Ac.0.03½ decimals (three and half decimals) gifted to them and constructed another quarters over the same. The Plaintiff therefore has approached the learned civil court with the prayer as afore-stated.

5. The Respondents-State authorities filed their WS stating that Forest Department have got their right over the entire suit property including those three

and half decimals by way of adverse possession and in the last major settlement operation, the entire patch of suit land has been recorded in favour of Forest Department in Plot No.8304, Khata No.486 of mouza-Kasinagar measuring area Ac.0.115 decimals. It is their case that the land beyond three and half decimals is under possession of Forest Department since 1963, i.e. the date of execution of the Gift Deed in respect of three and half decimals. They have constructed quarters over the same and a well is also situating over the suit land. Their possession over the suit land is continuous, intentional and peaceful and within the full knowledge of the Plaintiff. So they have perfected their right against the Plaintiff by way of adverse possession and moreover, the final ROR has now been published on 31.8.2000 in their favour and the Plaintiff also did not raise his objection to the same.

6. Both the trial court as well as first appellate court by accepting the plea of adverse possession in favour of Forest Department refused to grant relief to the Plaintiff and dismissed the suit as well as the first appeal.

7. It reveals from the impugned judgment of the trial court dated 27.03.2006 that Issue Nos.4, 5 and 6 are in respect of acquisition of title by the Respondents (Defendants) by way of adverse possession and entitlement of the Plaintiff for compensation. Learned trial court under Issue Nos.4 and 5 has concluded that the Defendants acquired title over the suit land by way of adverse possession and therefore the Plaintiff lost his title over the same. Under Issue No.6, the learned trial court held that the Plaintiff is not entitled for any compensation in absence of specification of the quantum thereof stated by him. Further under Issue No.7, which is regarding limitation in filing the suit, the learned trial court concluded that the suit being filed on 5.1.2005 and the settlement ROR being published on 31.8.2000, the suit is barred by limitation as a suit for recovery of possession would have been maintainable within three years from 1963.

8. Learned District Judge, Gajapati, who is the first appellate court confirmed all such findings of the learned trial court in RFA No.08/2012 and dismissed the appeal.

9. This Court by order dated 06.04.2018 framed the substantial question, which is as follows:-

> "Whether the Courts below erred in law by declaring the adverse possession of the Forest Department of Government of Odisha over the suit land of the Plaintiffs even if they have gifted only Ac.0.3½ decimals of land out of the said land to the State ?"

10. The title and ownership of the original Plaintiff over the suit land is admitted by the Defendants. Further the State-Defendants (Forest Department) admit their possession over the suit land. They admit that they are in occupation of remaining portion of the patch of land beyond three and half decimals gifted to them by the Plaintiff. In view of such admission of the Defendants, the only

pertinent question remains for decision is whether the State can perfect its title against his subject by way of adverse possession ?

11. The Supreme Court in the case of ***State of Haryana vs. Mukesh Kumar and others, (2011) 10 SCC 404*** while explaining the doctrine of adverse possession has held that no Government Department should be permitted to perfect their title by way of adverse possession. The relevant observations are reproduced below.

> "3. xx xx A very vital question which arises for consideration in this petition is whether the State, which is in charge of protection of life, liberty and property for the people can be permitted to grab the land and property of its own citizens under the banner of the plea of adverse possession ?
>
> xxx xxx xxx
>
> 22. In a democracy, governed by the rule of law, the task of protecting the life and property of the citizens is entrusted to the Police Department of the Government. In the instant case, the suit has been filed through the Superintendent of Police, Gurgaon, seeking the right of ownership by adverse possession.
>
> 23. The revenue records of the State revealed that the disputed property stood in the name of the defendants. It is unfortunate that the Superintendent of Police, a senior official of the Indian Police Service, made repeated attempts to grab the property of the true owner by filing repeated appeals before different forums claiming right of ownership by way of adverse possession.
>
> 24. The citizens may lose faith in the entire police administration of the country that those responsible for the safety and security of their life and property are on a spree of grabbing the properties from the true owners in a clandestine manner.
>
> xxx xxx xxx
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> 42. Reverting to the facts of this case, if the Police Department of the State with all its might is bent upon taking possession of any land or building in a clandestine manner, then, perhaps no one would be able to effectively prevent them.
>
> 43. It is our bounden duty and obligation to ascertain the intention of Parliament while interpreting the law. Law and justice, more often than not, happily coincide, only rarely we find serious conflict. The archaic law of adverse possession is one such. A serious relook is absolutely imperative in the larger interest of the people.
>
> xxx xxx xxx
>
> 45. If the protectors of law become the grabbers of the property (land and building), then, people will be left with no protection and there would be a total anarchy in the entire country. It is indeed a very disturbing and dangerous trend. In our considered view, it must be arrested without further loss of time in the larger public interest. No government department, public undertaking, and much less the Police Department should be permitted to perfect the title of the land or building by invoking the provisions of adverse possession and grab the property of its own citizens in the manner that has been done in this case."

In the afore-stated case, the State of Haryana filed a civil suit through the Superintendent of Police, Gurgaon seeking relief of declaration to the effect that it has acquired the right of ownership by way of adverse possession over the land of the private Defendants. The State lost his case in every forum starting from trial

court and ultimately, the Supreme Court while dismissing the appeal imposed cost of Rs.50,000/- to be paid by the State-Plaintiff.

12. Again in another recent case, i.e. ***Vidya Devi vs. State of Himachal Pradesh and others, (2020) 2 SCC 569***, the Supreme Court in a case relating to the prayer of Vidya Devi for acquisition of her land, forcibly expropriated in 1967, directed for payment of adequate compensation. The Supreme Court further observed as follows:-

> "**12.11**. We are surprised by the plea taken by the State before the High Court, that since it has been in continuous possession of the land for over 42 years, it would tantamount to "adverse" possession. The State being a welfare State, cannot be permitted to take the plea of adverse possession, which allows a trespasser i.e. a person guilty of a tort, or even a crime, to gain legal title over such property for over 12 years. The State cannot be permitted to perfect its title over the land by invoking the doctrine of adverse possession to grab the property of its own citizens, as has been done in the present case.
>
> **12.12**. The contention advanced by the State of delay and laches of the appellant in moving the Court is also liable to be rejected. Delay and laches cannot be raised in a case of continuing cause of action, or if the circumstances shock the judicial conscience of the Court. Condonation of delay is a matter of judicial discretion, which must be exercised judiciously and reasonably in the facts and circumstances of a case. It will depend upon the breach of fundamental rights, and the remedy claimed, and when and how the delay arose. There is no period of limitation prescribed for the courts to exercise their constitutional jurisdiction to do substantial justice."

13. In the instant case, as stated earlier, the unauthorized occupation of the suit land by the State Forest Department since 1963 is admitted. At the same time, the true ownership of original Plaintiff and his title over the suit land is not disputed. In view of these admitted facts, the answer to the substantial question would obviously be in favour of the Plaintiffs.The Defendants, who are the State Forest Department,cannot be allowed to retain or continue with possession nor can be permitted to perfect their title by way of adverse possession. For this purpose, publication of final ROR in their favour would be immaterial because the ROR neither creates nor extinguishes title of the party.

14. So far as limitation is concerned, the finding of the learned trial court is mistaken and based on misconception. The learned trial court proceeded to decide as if the suit by the Plaintiff is for recovery of possession. But the fact remains that the Plaintiff has never prayed for recovery of possession nor has pleaded in that way. The suit was for declaration of right, title and interest and the learned trial court has misconceived the same to treat the relief as recovery of possession and wrongly applied the limitation aspect from 1963. This is a declaratory suit for right, title and interest over the property with alternate prayer for compensation. If the plea of adverse possession of the State Defendants is negated then nothing remains in favour of the Defendants to deny the Plaintiff for declaration of right over the property. It is well-known that adverse possession, as admitted by the Defendants in the instant case, is a continuous cause of action and therefore period of three years

under Article 58 of the Limitation Act for declaration would not be a bar to entertain the suit.

15. In the instant case, the Plaintiff is a poor forest dweller and on the other side mighty Forest Department is there. The Plaintiff by showing his magnanimity donated a portion of his land to Forest Department for construction of quarters for their staff. The Forest Department on their part showed their mighty teeth to grab remaining portion of the plot as a reward to the Plaintiff in return to his noble feelings towards the Department. As seen from the pleadings, both the parties have admitted about construction of another quarters on the suit land as well as use of the same by digging a well therein. In such circumstances, it would be apposite in the interest of justice to direct the Defendants for payment of adequate compensation to the Plaintiffs. The learned trial court haphazardly rejected the alternate prayer of the Plaintiff saying that he has not specified the amount of compensation. Learned District Judge has also failed to appreciate the fact that the land of a private citizen has been illegally grabbed by the State Forest Department. The compensation amount can be assessed in terms of the principles followed in the land acquisition proceeding.

16. In the result, the appeal is allowed and the alternate prayer of the Plaintiff is granted. The Defendants (present Respondents) are directed to pay compensation to the plaintiffs (present Appellants) equivalent to the amount twice the present bench mark value of the suit schedule 'A' land after deducting three and half decimals there-from as gifted in favour of the Forest Department, within a period of six months from today.

17. The decree be drawn accordingly.

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2023 (I) ILR – CUT - 492

B.P. ROUTRAY, J.

FAO NO. 480 OF 2012

SMT. RENUKA SETHI & ORS. .....Appellants

.V.

BABU SAHU & ANR. .....Respondents

COMPENSATION – Effective date and time of the insurance coverage – Determination of – As per the cover note the policy has been issued on 25th January, 2000 at 2 pm and accident took place on 25th January, 2000 at 4pm – The policy issued in respect of said cover note has been stated to be effective from 27th January, 2000 – Held, When the accident

took place at 4pm, i.e. 2 hours after the cover note was issued and premium received, undoubtedly the liability of the insurer cannot be absolved –The insurer/Respondent is directed to pay the compensation amount. (Para11-13)

Case Laws Relied on and Referred to :-

1. 2011 (I) OLR (SC) 103: Oriental Insurance Co. Ltd. Vs. Dharam Chand @ Ors.
2. (1976) 1 SCC 289 : Pratap Narain Singh Deo Vs. Srinivas Sabata.

For Appellants : Mr. Kalpataru Panigrahi
For Respondents : Mr. Jayasankar Mishra

JUDGMENT Date of Judgment: 01.02.2023

B.P. ROUTRAY, J.

1. The matter is taken up through hybrid mode.

2. Heard Mr. K. Panigrahi, learned counsel for the claimant – Appellants and Mr. J. Mishra, learned counsel for insurer –Respondent No.2.

3. Present appeal by the claimants is directed against impugned judgment dated 17th February, 2012 of learned Commissioner for Employee's Compensation, Berhampur, Ganjam passed in W.C. Case No.50 of 2001, wherein compensation to the tune of Rs.1,22,310/- has been granted on account of death of deceased Purushottam Sethi arising out of and in course of his employment as coolie in the truck bearing registration number OR 16 2078.

4. The Commissioner has directed the owner to pay the compensation amount by exempting the insurer from the liability. This is challenged by the claimants. Mr. Panigrahi, learned counsel for the claimants submits that when the validity of the insurance policy is not disputed and the cover note was issued on 25th January, 2000 at 2 pm, the insurance company cannot wash its hands from the liability.

5. The sole dispute remains in the present appeal that, as to from which date and time the insurance coverage would be treated effective in respect of the vehicle in question. As per the cover note produced on record (Cover Note No.706757), it has been issued on 25th January, 2000 at 2 pm and the accident took place on 25th January, 2000 at 4pm. Learned counsel for the insurance company does not dispute issuance of the cover note on 25th January, 2000 at 2 pm and no dispute is also raised with regard to the timing of the accident, i.e. at 4pm on 25th January, 2000. Admittedly, the corresponding policy issued in respect of said cover note has been stated to be effective from 27th January, 2000.

6. Mr. Panigrahi while submitting his case relies on a decision of the Supreme Court rendered in the case of ***Oriental Insurance Co. Ltd. v. Dharam Chand @ Others, 2011 (I) OLR (SC) 103*** to substantiate his contention that the effectiveness

of the policy should be deemed to have commenced from the time of issuance of the cover note.

7. On the contrary, Mr. Mishra, learned counsel for the insurance company relies on a decision of the Madras High Court dated 3rd March, 2022 rendered in CMA No.3291 of 2017 and CMP No.20764 of 2017 to contend that the policy coverage would operate only from the date and time mentioned in the policy and not prior to that.

8. In the case of ***Dharam Chand*** (supra), the Supreme Court have stated that from the time the premium amount was received, the insurance coverage must be deemed to have commenced from that time.

9. The case of Madras High Court as cited by Mr. Mishra for the insurance company, the same is found distinguishable on the present facts of the case since in that case no cover note was issued and the accident took place two days prior to issuance of the insurance policy.

10. In terms of Section 64-VB of the Insurance Act, the risk on the part of the insurer commences on receipt of payment of premium from the insured.

11. In the case at hand, the insurance policy bearing No. 034302/ 31/021/11/07201/1999 was issued mentioning the effective date from 00:00 hours on 27th January, 2000 to 26th January, 2001. But the cover note as stated above has been issued on 25th January, 2000 at 2 pm and it is clearly mentioned in the cover note that premium of Rs.3012/- in respect of the vehicle in question have been paid and received. Therefore, in terms of Section 64-VB of the Insurance Act and the observation given by the Supreme Court in the case of ***Dharam Chand*** (supra), it is held in the present facts of the case that, the insurance coverage commenced from 2 pm on 25th January, 2000 as mentioned in the cover note. When the accident took place at 4pm, i.e. 2 hours after the cover note was issued and premium received, undoubtedly the liability of the insurer cannot be absolved.

12. Mr. Panigrahi further contends that the Commissioner has committed further error by not granting interest on the compensation amount and observed that the interest would be payable only on default of payment of compensation within the specified time. The law is well settled in the case of ***Pratap Narain Singh Deo v. Srinivas Sabata, (1976) 1 SCC 289*** that the interest on the compensation amount is payable from the date of accident. As such, this court is of the opinion that the claimants are entitled for interest on the compensation amount @ 12% per annum from the date of accident.

13. In the result the appeal is allowed and the insurer – Respondent No.2 is directed to pay the compensation amount of Rs.1,22,310/- on behalf of the owner as directed by the Commissioner along with interest @ 12% per annum from the date of accident, and shall deposit the entire amount within a period of two months from

today, which shall be disbursed in favour of the claimant – Appellants on such terms and proportion to be decided by the learned Commissioner.

14. The copies of cover note and insurance policy as produced in course of hearing are kept on record.

15. An urgent certified copy of this order be issued as per rules.

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2023 (I) ILR-CUT- 495

Dr. S.K. PANIGRAHI, J.

W.P.(C) NOs.12301 OF 2021, 5790 OF 2021
AND 15912 OF 2022

KALPANA DASH .....Petitioner

.V.

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

W.P.(C) NO. 5790 OF 2021
Dr. SASMITA MOHANTY .....Petitioner

.V.

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

W.P.(C) NO.15912 OF 2022
KALPANA DASH .....Petitioner

.V.

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

(A) SERVICE LAW – Determination of inter-se seniority – Explained with case laws. (Para-31-36)

(B) SERVICE LAW – Seniority – Determination of – Duty of State being a model employer – Indicated with suggestions. (Para-37)

Case Laws Relied on and Referred to :

1. SLP(Civil) No(s).6572 OF 2014 : Sudhir Kumar Atrey Vs. Union of India.
2. (1998) 5 SCC 457 : Prem Kumar Verma Vs. Union of India.
3. 1994 AIR 1722 : Ram Janam Singh Vs. State of U.P. and Anr.
4. 1990 AIR 1607 : Direct Recruit Class II Engineering Officers' Association Vs. State of Maharashtra & Ors.

For Petitioner : Mr. Satyabrata Mohanty(1),T.K.Kamila.
Mr. Sameer Kumar Das

For Opp.Parties : Mr. Saswat Das, AGA, Md. G. Madani (for O.P.5)
Mr. J.K. Lenka. (for O.P.6)
Mr. Subash Ch. Puspalaka, Mr. A.K. Tarai,
Mr. T. Priyadarshini,Mr. K. Choudhury (for O.Ps.4,5,6 & 9)

JUDGMENT Date of Hearing : 25.08.2022 :Date of Judgment : 09.01.2023

Dr. S.K.PANIGRAHI, J.

1. Since similar questions of law or facts are involved in all the above writ petitions, all the matters were heard together. However, this Court feels it appropriate to decide each case on their respective merits and hence, the questions of fact and law are dealt distinctly in each of these Writ Petitions mentioned above. For the sake of clarity, it is pertinent to mention here that the writ petitions - W.P.(C) No.12301 of 2021 and W.P.(C) No.15912 of 2022 have been filed by the same petitioner (Kalpana Das). W.P.(C) No.5790 of 2021 has been clubbed to the present matter owing to the fact that it shares the same cause of action as that of W.P.(C) No.12301 of 2021.

I. Facts of the Case:
(In W.P.(C) No.12301 of 2021)

2. Shorn of unnecessary details, the substratum of matter presented before this Court is that the Petitioner who is serving as approved Principal-in-Charge-cum-Secretary of Panchayat Women's Higher Secondary School, S. Rampur, in the district of Subarnapur since 2011 has constrained to file this Writ Petition challenging the legality of the OSWAS No. HE-NCET-1-MISC 0148-2020/ 27964 dated 31.08.2020 issued by the Higher Education Department, Government of Odisha, particularly the clause-2(iii) of the said Guidelines. He also prays for quashing of the same on the ground that no inter-se seniority can be fixed on the basis of date of birth of the employees instead of their valid date of joining inasmuch as the same is without jurisdiction.

3. As per the provisions of the Odisha Education Act, 1969 and the Rules framed thereunder, in every private educational institution, the Governing Body is the employer irrespective of the fact whether the institution is aided or unaided. For unaided institution, the Governing Body has to appoint its staffs from its own selection as per the prescribed yardstick of the State Government. Whereas in aided institution though the power of appointment is vested with the Management, the selection of the teaching post has been taken away and vested with the State Selection Board under the provisions of Odisha Education (State Selection Board for the State) Rules, 1992. However there is exception to such procedure in the event of failure of State Selection Board to sponsor a candidate against any vacancy of an aided institution, the same can be filled up by the Governing Body from its own selection on ad hoc basis with the prior approval of the State Government.

4. Admittedly, the college in question is an aided educational institution within the meaning of Section-3 (b) of the Orissa Education Act, 1969. On opening of the institution, the then Governing Body of the College invited applications for filling up different teaching and non-teaching post including the post of lecturer in Odia. Accordingly, the Petitioner who is having the requisite qualification offered her candidature for the post of lecturer in Odia. Thereafter, the Governing body after following the due process of selection appointed the Petitioner as Lecturer in Odia (1st Post) in the College vide appointment order dated 21.01.1994. The Petitioner joined the post on 24.01.1994 which was duly accepted by the then Governing Body of the college. Whereas one Madhumita Mishra (Opposite Party No.6) Lecturer in Education, was appointed by the Governing Body of the College and joined on 24.01.1994. Date of birth of the Opposite Party No.6 is 03.05.1969 and the date of birth of the Petitioner is 05.07.1969.

5. After the college became aided as per the Grant in-aid Order 2017, vide Government Notification No.27578/HE, dated 22.10.2017, the appointments of different eligible staff including the Petitioner and Opposite Party No.6 have been approved by the Opposite Party No.4 vide office order No.3560 dated 23.03.2019. It can be seen from the approval order issued by the Opposite Party No.4/ Director, Higher Secondary Education, Odisha, Bhubaneswar where the name of the Petitioner found place at Serial No.1 and her date of joining has been mentioned as 24.01.1994, whereas the name of the Opposite Party No.6 has been found place at Serial No.2 and her date of joining in the college has been mentioned as 24.01.1994, but in respect of age, the petitioner is junior to the Opposite Party No.6, and in the meantime both the Petitioner as well as the Opposite Party No.6 have been granted the benefits of new Grant-in-aid as per the Grant-in-aid Order 2017 with effect from 01.01.2018 vide office order No.3560 dtd.23.03.2019 issued by the Opposite Party No.4. Though the petitioner and the Opposite Party No.6 joined on 24.01.1994 in the college, however, the Opposite Party No.6 did not accept the post of Principal-in-Charge due to her health problem. The Opposite Party No.6 also filed an Affidavit to that effect which was duly accepted by the Governing Body vide Resolution dated 27.06.2011.

6. The State Government has fixed the criteria for appointment of Principal in the Aided College in different circulars/guidelines. It has been settled that the senior most approved Lecturer of the College is to function as Principalin-charge-cum Secretary. The seniority of the person has been fixed as per their date of joining. Accordingly, in view of the direction of the Opposite Party No.5 as well as the decision taken in the Governing Body, the Sub-Collector, Sonepur recommended the name of the present Petitioner for the post of Principal-in-charge-cum-Secretary of the college as the petitioner is the senior most approved teaching staff of the college vide letter No.2419 dated 29.06.2011. Thereafter, the Opposite Party No.3 who is the prescribed authority has been pleased to approve the post of the petitioner as

Principal-in-charge-cum-Secretary of the College vide office order No.28752 dated 15.07.2011.Accordingly, the Petitioner has been taken the charge of Principal-in-charge-cum-Secretary of the college from the then Secretary of the G.B. and since then the Petitioner has been performing her duty as Principal-in-charge-cum-Secretary in addition to her post as lecturer in Odia in the college smoothly without any interruption.

7. From the aforesaid facts on record the Petitioner being the senior most approved lecturer of the institution is rightly allowed to function as Principal-in-Charge of the College. However, surprisingly, while the Petitioner was so continuing, the Department of Higher Education, Government of Odisha has issued order No. HE-NCET-1-MISC-0148-2020/27964 dated 31.08.2020 prescribing guideline for fixation of seniority of Teachers of nongovernment colleges for the purpose of appointment of Principal and Head of the Department. The aforesaid order dated 31.08.2020 of the State Government supersedes the earlier circulars and guidelines with regard to the appointment of Principal in aided colleges so also for determination of inter-se seniority. At the same time, the guideline has been prescribed to determine the inter-se seniority of the Teachers of aided colleges in seven categories of Teachers. The categories of Teachers as provided in Government letter dated 31.08.2020 reads thus:

> *"1. Seniority of Teachers will be determined in descending order as follows:*
>
> *Category-A: Teachers recruited by SSB prior to the 1994 and Teachers in receipt of Grant-in-Aid at par with UGC Scale of pay.*
>
> *Category-B: Teachers in receipt of Grant in-Aid under GIA Order, 1994.*
>
> *Category-C: Teachers in receipt of Grant- in-Aid in shape of block grant under GIA Order, 2004.*
>
> *Category-D: Teachers in receipt of Grant in-Aid in shape of block grant under GIA Order, 2008 (revised under GIA Order, 2017)*
>
> *Category-E: Teachers in receipt of Grant in-Aid in shape of block grant under GIA Order, 2009 (revised under GIA Order, 2017)*
>
> *Category-F: Teachers in receipt of Grant in-Aid in shape of block grant under GIA Order, 2014 (revised under GIA Order, 2018)*
>
> *Category-G: Teachers recruited by SSB after 2014."*

8. Category-D of the Government order dated 31.08.2020 deals with the inter-se seniority of Lecturers of the institutions receiving block grant under GIA Order, 2008 which has been revised under GIA Order, 2017. Para-2(iii) of the aforesaid letter dated 31.08.2020 reads as follows:

> ***"For category 'C' to 'F', inter-se seniority within the respective category shall be determined basing on the date of birth."***

II. Facts and prayer in W.P.(C) No.15912 of 2022

9. In this Writ Petition, the Petitioner (Kalpana Dash) challenges the legality of the order/letter No.3001 dated 17.03.2022 issued by the Opposite Party No.2/Director, Higher Secondary Education, Odisha, Bhubaneswar allowing the Opposite Party No. 5 (Madhumita Mishra), Lecturer in Education of the College to continue as Principal-in-Charge-cum-Secretary of the said College under Annexure-12 despite the fact that she is ineligible for such post in view of submission of her unwillingness and also the consequential order No.1965 dated 22.03.2022 issued by the Opposite Party No.3/Sub-Collector, Sonepur under Annexure-13. The Petitioner further prays for a direction from this Court to the State/Opposite Parties to allow her to continue as Principal-in-charge-cum-Secretary of the institution in question. As the Opposite Party No.5 has lost her right to function or continue as Principal-in-Charge of the institution due to her unwillingness submitted by way of affidavit, as it has been stipulated in the Government decision dated 23.03.2015 and 06.07.2017 that once a person shown her inability by way of writing to continue as Principal/Principal-in-charge, she cannot hold the post in future and for all time to come.

III. Submission on behalf of the Petitioner
(in W.P.(C) No.12301 of 2021)

10. Learned counsel for the Petitioner submits that such a stipulation fixing the inter-se seniority of lecturers on the basis of their date of birth is something unknown to the service law. It is worthwhile to mention here that when persons were selected from a common merit list their interse seniority always decided on the basis of the position in the merit list not on the basis of date of joining. On the other hand, when there was no merit list or two persons appointed from different merit list then their inter-se seniority is determined on the basis of their date of joining into service. Only when both the employees joined on one date then only their date of birth will determine the inter-se seniority. Since the Petitioner and Opposite Party No.6 joined service from two different selection lists and joined on two different dates the criteria for determination of their seniority should be date of joining not the date of birth. Accordingly, the Petitioner was adjudged as senior to the Opposite Party No.6 and allowed to function as Principal in-charge since 2011. But by virtue of this Government order dated 31.08.2020 now the person joined later to the Petitioner is declared senior only because she was born earlier which is something unknown to law and hence the order dated 31.08.2020 is liable to be quashed.

IV. **Submissions on behalf of the Petitioner**:
(in W.P.(C) No.15912 of 2022)

11. Learned counsel for the Petitioner submitted that the Petitioner prayed for quashing of the order of approval of the Opposite Party No.5 as Principal-in-charge-cum-Secretary of the Institution in question under Annexure-12 and 13 on the

ground that it is in clear violation of the Government resolution No.6890 dated 23.03.2015 and the consequential order No.7914 dated 06.03.2017 under Annexure-6. In the aforesaid Government Resolution under Annexure-5 it has been clearly provided that once a person submitted his/her unwillingness to hold the post of Principal-in-charge-cum-Secretary, he/she cannot hold such post in future.

12. In view of the aforesaid clear position of law as laid down under Annexures-5 and 6 by the Government, the orders under Annexures-12 and 13 and the claim of the Opposite Party No.5 to function as Principal-in-Charge is unacceptable, as she has submitted her unwillingness through an affidavit under Annexure-3 followed with the Staff Council Resolution dated 27.06.2011 under Annexure-4. In such view of the matter, he submitted that the Opposite Party Nos.1 and 2 may be directed to allow the Petitioner to function as Principal-in-charge-cum- Secretary of the College by restoring the order of her approval dated 15.07.2021 under Annexure-7.

V. Submissions on behalf of Opposite Party No.5/ Sub-Collector, Sonepur: (in W.P.(C) No.12301 of 2021)

13. Learned counsel for the Opposite Party No.5 submitted that the Petitioner has no cause of action to file the aforesaid Writ Petition. He further submitted that the plea of the Petitioner that no inter-se-seniority can be fixed on the basis of date of birth of the employees rather based on their valid date of joining challenging the Government Order No HENCET-1-MISC-0148-2020/ 27964 dated 31.08.2020 at Clause 2(iii) is not maintainable, as the Petitioner has not cited any rule of law nor any valid grounds to challenge the same.

14. It was further submitted that the Petitioner Kalpana Dash has joined in Panchayat Women's Higher Secondary School as lecturer in Odia on 24.01.1994. Madhusmita Mishra the Opposite Party No. 6 has also joined as Lecturer-in-Education on 24.01.1994. Both were appointed by the Secretary Panchayat Women's College, Rampur vide order No. 33/PWC dated 21.01.1994 and Order No.50 dated 24.01.1994 under Annexure-B/5 & C/5 respectively.

15. He also submitted that the Opposite Party No.6 did not accept the post of Principal-in-charge of Panchayat Women's College, Rampur due to her health problem and also filed an affidavit to that effect which was accepted by the Governing Body vide resolution dated 27.06.2011.

16. He further submitted that the plea of the Petitioner is that the State Government has fixed the criteria for appointment of Principal in Aided College in different circular and guidelines and it has been settled that the senior most approved Lecturer is to function as Principal-in-chargecum-Secretary and the seniority of the person has been fixed as per their date of the joining is wrong as vide OSWAS No.HE-NCET-1-MISC-0148 -2020 27964 Dt. 31.08.2020 at point No. 1 and 2(iii), Government of Odisha Higher Education Department guidelines for fixation of

seniority of teacher in Non-Govt. aided College for the purpose of appointment of Principal and HODs, it is stated that for category C to F inter-se- seniority within the category shall be determined based on the date of the birth. Hence, the plea of the Petitioner that she is the senior most approved lecturer of the college to function as Principal-incharge-cum-Secretary and the seniority of the person has been fixed as per their date of the joining is false.

17. Further, the Sub-Collector, Sonepur recommended vide letter No.2419 dated 29.06.11 the name of the present Petitioner for the post of Principal-in-charge-cum-Secretary of the college as the senior most teaching approved staff of the college is an eye wash as the senior most staff of the College Madhusmita Mishra submitted affidavit stating that due to her health problem, she is unwilling to take charge of Principal and she has no objection if Kalpana Dash Lecturer of Odia becomes the Principal. This was resolved in the Staff Council meeting held on 27.06.2011. Basing on this resolution and Letter No.38/PWC dated 28.06.2011 the Sub-Collector, Sonepur recommended the name of Kalpana Dash, the Petitioner for the post of Principal-cum-Secretaryof the College vide Letter No.2419 dated 29.06.2011 and subsequently vide order No.28752 dated 15.07.11 the name of the Petitioner has been approved as Principal-cum- Secretary of the Panchayat Junior Women's College, Rampur by order of D.H.E., Odisha, Bhubaneswar.

18. It was further submitted that both the Petitioner and the Opposite Party No.6 joined in the institution on 24.01.1994 as Lecturer in Odia and Lecture in Education respectively and not on two different dates as claimed by the Petitioner. The Petitioner was never adjudged senior to the Opposite Party No.6 to function as Principal-in-charge since 2011 as the Sub-Collector, Sonepur recommended the name of Kalpana Dash for approval as Principal-in-charge vide letter No.2419 dated 29.06.2011 based on the resolution of the Staff Council Meeting dated 27.06.2011 and letter No.28/PWC dated 28.06.2011 of Principal Panchayat Women's College S. Rampur.

19. He further submitted that the impugned Government Order bearing No. HE-NCET-1-MISC-0148-2020/27964 dated 31.08.2020 to be quashed is baseless so also the prayer of the petitioner to restore the seniority of her over the Opposite Party No. 6 and others who have joined later to her and allow her to continue as Principal-in-charge-cum-Secretary as being the senior most teaching staff is in contradiction to the guideline issued by Higher Education Department, Government of Odisha vide No.OSWAS No. HE-NCET-1-MISC-0148-2020/ 27964 dated 31.08.2020.

20. In view of the above submissions, he submitted that the prayer made in the Writ Petition is devoid of merit and liable to be rejected.

VI. Submissions on behalf of the Opposite Party No.6:

21. Learned counsel for the Opposite Party No.6 the prayer of the petitioner is not maintainable at behest of the Petitioner against the impugned guideline for

fixation of Seniority dated 31.08.2020, as the aforesaid guideline was issued by the Department of Higher Education, is meant for appointment of Principal and HODs in Aided Degree Colleges. The Department of Higher Education, Government of Odisha is the only authority for the degree colleges and, hence, such an order/guideline dated 31.08.2020 is also meant for only Degree Colleges. The College has already been defined under Section-3(d) of the Orissa Education Act, 1969, which reads as follows:

> *"3. Definitions*
>
> *(d) College means an educational institution imparting instructions in higher general education leading to any degree conferred by any of the Universities established under the Odisha Universities Act, Act 5 of 1989."*

22. The present institution in question i.e. Panchayat Women's Higher Secondary School, At./Po.-S.Rampur, Dist. Subampur is a Junior College Higher Secondary School imparting education to only +2 Stream students as defined under Section-3(j) and 3(j-1) of the said Orissa Education Act, 1969. For better appreciation of the case definition of Section-3(j) and 3(j-1) of Orissa Education Act, 1969 are quoted as hereunder :

> *"3(j) **Higher Secondary School** means an educational institution imparting instructions in Higher Secondary courses as defined in the Odisha Higher Secondary Education Act, 19 of 1982 and may have Standards or Classes VIII, IX and X attached;*
>
> *3(j-1) Junior College means an educational institution imparting instructions in Higher Secondary Courses as defined in the Odisha Higher Secondary Act, 1982."*

23. By operation of law pursuant to the Government Resolution dated 24.05.2016 administration of the all junior colleges/Higher Secondary Schools of the State has been taken away from the administrative control from the Department of Higher Education and vested with the School and Mass Education Department. The Director Higher Secondary Education, Odisha has been introduced the powers and functions as the Heads of the Department of all the Junior Colleges/Higher Secondary Schools of the State as per notification dated 24.05.2016. Therefore, after such notification dated 24.05.2016, the Department of Higher Education, Odisha will have no authority on the Junior Colleges/Higher Secondary Schools. Further, School and Mass Education Department has not taken any decision/resolution adopting the order dated 31.08.2020 issued by the Higher Education Department. In the premises, the guideline/order dated 31.08.2020 of the Department of Higher Education/Junior Colleges, with regard to appointment of Principal has no application to the Higher Secondary School (petitioner's institution). Therefore, the Petitioner cannot question the legality and propriety of such an order/guideline dated 31.08.2020 in the present Writ Petition as it never affect her in any manner whatsoever. Therefore, the Writ Petition is devoid of merit and not maintainable against the Government order/guideline dated 31.08.2020.

24. He further submitted that the Petitioner has challenged the Clause-2(iii) of guideline dated 31.08.2020 and fixation of seniority over the Petitioner and claimed seniority on the basis of valid date of joining. Admittedly, both the Petitioner and Opposite Party No.6 joined on 24.01.1994 and the Opposite Party No.6 (Madhumita Mishra) being senior in age than the Petitioner is entitled to seniority over the Petitioner in view of Clause-2(iii) of the guideline as the college in question in respect of grant-in-aid in the shape of block grant order under 2008 grant-in-aid with effect from 20.01.2009 vide order dated 18.06.2011 and revised grant in aid with effect from 01.01.2018 vide order dated 23.03.2019. As the Opposite Party No.6 is senior to the Petitioner, she is entitled to remain as in-charge Principal of the college, but by making and filing false affidavit, the Petitioner shown unwillingness of the Opposite Party No.6 and managed to remain in-charge Principal of the college. In this connection the Opposite Party No.6 made several representations to the State Opp. parties but to no response.

25. He further submitted that because of dispute regarding inter-se-seniority in respect of teachers of aided Colleges, the Government in order to streamline the matter and supersession of all previous circulars, guidelines issued in the past has formulated the guideline/principle for determining the seniority of College teachers while considering appointment of Principal and Head of the Department in non-Govt. Aided Colleges. Therefore, the guideline dated 31.8.2020 is perfectly valid in law and there is no ambiguity and the said guideline is in conformity with Odisha Education Act and Rules made thereunder. The petitioner has failed to point out in which provision of the Act and Rules, the Government violated while framing the guidelines. The guideline is in conformity with the Odisha Education Act and rules framed thereunder. Even if the guideline dated 31.08.2020 is applicable to Higher Secondary School, as there is no ambiguity regarding fixation of seniority in the said guidelines.

26. He further submitted that in similar circumstances in the case of ***Kabita Mohapatra Vrs. State of Odisha and others*** in W.P. (C) No.18405 of 2021, this Court has passed the order dated 02.08.2021 as follows:

> *"1. Undisputedly the Teacher involved herein is not a teacher under the Higher Education Department. For this reason the petitioner has no locus standi to challenge the circular involving Government of Odisha in Higher Education department since applies to teachers under Higher Education department.*
>
> *2. The writ petition is not maintainable.*
>
> *3. If the petitioner has any grievance in relation to his seniority, he may approach in an independent writ application and with involvement of proper parties.*
>
> *4. With this observation the writ petition is disposed of. However keeping the issue open to be adjudicated in appropriate proceeding.*
>
> *Urgent certified copy be issued on proper application."*

27. The Hon'ble Supreme Court, in the case of ***D.P. Dash Vrs.Union of India*** has held that determination of seniority of the officers who are joined on same day, the age is the only valid and fair basis and as such their seniority should be decided on the basis of the age of the candidates.

28. In view of the facts mentioned above, the Opposite Party. No.6 is senior than the Petitioner and as such the Petitioner has no legal right to claim the in-charge of Principal and also seniority over the Opposite Party No.6. The impugned guidelines dated 31.08.2020 is perfectly valid and was made in consonance with Education Act. In the circumstances, the Writ Petition may be dismissed.

29. He further submitted that the Sub-Collector who is the president of the Governing Body as per the order dated 16.03.2021 communicated on 31.03.2021, while considering the representation of the Opposite Party No.6 (Madhumita Mishra) Lecturer in Education for appointment of the Principal-cum-Secretary of the Panchayat Women's Higher Secondary School mentioned that as per the settled law, the Governing Body is the competent authority to decide the inter-se-seniority of the teaching staff and the petitioner accepted the said order passed by the President of the Governing body of the college. Hence, she is estopped for raising the said issue.

VII. COURT'S REASONING AND ANALYSIS

30. The primary issue in the matters of **W.P.(C) No.12301 of 2021** and **W.P.(C) No. 5790 of 2021** is whether the inter-se seniority should be considered from the date of joining or date of birth. This Court has already covered this issue in the case of ***Kamala Kanta Das v. State of Odisha & Ors***. (WPC 230 of 2022).

31. Plainly, the principal mandate of the rule is that seniority is determined on the basis of date of appointment ("shall be fixed from the date of their appointment"). The State has contended that the said guidelines neither creates nor does it take away any of the vested rights of the petitioners. Accordingly, there should be no reason for the petitioner to be aggrieved by the above said guidelines. However, lack of attached vested rights does not allow the State to deviate from the principal mandate upheld by the Supreme Court. Hon'ble Supreme Court in the case of **Sudhir Kumar Atrey vs Union Of India**[1] held that.

> *"We are also of the view that in the matter of adjudging seniority of the candidates selected in one and the same selection, placement in the order of merit can be adopted as a principle for determination of seniority but where the selections are held separately by different recruiting authorities, the principle of initial date of appointment/continuous officiation may be the valid principle to be considered for adjudging inter se seniority of the officers in the absence of any rule or guidelines in determining seniority to the contrary."*

32. Similarly, in another instance, the Supreme Court in the case of **Prem Kumar Verma v. Union of India**[2], held that

1. SLP(Civil) No(s).6572 OF 2014, 2. (1998) 5 SCC 457

> *"the principal mandate of the rule is that seniority is determined on the basis of date of appointment. Proviso (2) lists out two rules. The first is that those selected and appointed through a prior selection would rank senior to those selected and appointed through a later selection process.....The second limb of the second proviso clarifies that when merit based, or seniority based promotions are resorted to, the applicable norm would be seniority in the feeder cadre, to forestall any debate about the rule of merit (in the selection) being the guiding principle". Further, the court observed that "the advertisements were issued one after the other, and more importantly, that this was the first selection and recruitment to a newly created cadre, the delay which occurred on account of administrative exigencies (and also the completion of procedure, such as verification of antecedents) the seniority of the promotees given on the basis of their dates of appointment, is justified by Rule 27 in this case", and hence, dismissed the appeals."*

33. Moreover, in **Ram Janam Singh v. State of U.P. and Anr**[3], it was iterated that the date of entry into a service is the safest rule to follow while determining the inter se seniority between one officer or the other or between one group of officers and the other recruited from the different sources. It was observed that this is consistent with the requirement of Articles 14 and 16 of the Constitution. It was, however, observed that if the circumstances so require, a group of persons can be treated a class separate from the rest for any preferential or beneficial treatment while fixing their seniority, but, normally such classification should be by statutory rule or rules framed under Article 309.

34. The Constitution Bench of Supreme Court in **Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra & Ors.**[4] stated the legal position with regard to inter se seniority of direct recruits and promotes. While doing so, inter alia, it was stated that once an incumbent is appointed to a post according to rules, his seniority has to be counted from the date of his appointment.

35. In regards to the issue of "date of birth", the State has contended that in the category of teachers receiving block grant and working in category-III colleges. The date of appointment varies from the date of admissibility of the post in many cases. It will be highly difficult on the part of the department to assess the eligibility date by scrutinizing each and every individual post of such colleges. Hence, they have adopted a common device to fix the date of birth of the employees of the college for determination of seniority inter-se. However, this approach of the State seems extremely fallacious. Difficulty in following a certain rigorous procedure does not allow a State department to deviate from principal mandate established by the Supreme Court. Moreover, the date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from the different sources.

36. From the above, the legal position with regard to determination of seniority in service can be summarized as follows:

3. 1994 AIR 1722, 4. 1990 AIR 1607.

> (i) The effective date of selection has to be understood in the context of the service rules under which the appointment is made. It may mean the date on which the process of selection starts with the issuance of advertisement or the factum of preparation of the select list, as the case may be.
>
> (ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from the different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.

37. Additionally, it is the opinion of this Court that the question of seniority is the most common litigation amongst the employees but a model employer like the state need to minimize such litigations by giving consistent, fair and transparent deal with its employees. It may further be underlined that the state should desist from undertaking *ad hoc* exercise instead of giving regular appointment of principals. When a State indulges in *ad hocism*, it not only invites litigation with its own employees, but also creates causes and generates litigations among its employees, which results in bitterness among the employees and is bound to affect the organizational efficiency of the institution concerned and it leads to animosity, jealousy and anguish among the employees. Thus, *ad hocism* creates litigations not only between the employer and the employees, but also between those, who receive the benefits of *ad hocism*, and those, who feel aggrieved for not being given the benefit of such *ad hocism.* This is not a hall mark of a sound personnel policy. It is bound to have serious repercussions on the educational institutions and the students studying there. This spoil system of *ad hocism* must come to an end as it is retrograded and antithesis of Article-14 of the Constitution. In the above circumstances, this Court feels appropriate to suggest the State to appoint permanent Principals instead of principal-in-charge by following a proper seniority principle.

38. In **W.P.(C) No.15912 of 2022**, the Petitioner prayed for quashing of the order of approval of the Opposite Party No.5 as Principal-in-charge-cum-Secretary of the Institution in question on the ground that it is in clear violation of the Government resolution No.6890 dated 23.03.2015 and the consequential order No.7914 dated 06.03.2017. In the aforesaid Government Resolution it has been clearly provided that once a person submitted his/her unwillingness to hold the post of Principal-in-charge-cum-Secretary, he/she cannot hold such post in future.

39. The Opposite Party No.5 has submitted her unwillingness through an affidavit under Annexure-3 followed with the Staff Council Resolution dated 27.06.2011 under Annexure-4. In view of the same, the petitioner has rightfully contended that appointment of Opposite Party No.5 as Principal-in-Charge is violative of the Government resolution No.6890 dated 23.03.2015 and the consequential order No.7914 dated 06.03.2017.

40. Considering the facts and circumstances of the cases and the precedents cited hereinabove, this Court is of the opinion that clause-2(iii) of OSWAS No.HE-NCET-1-MISC 0148-2020/27964 dated 31.08.2020 issued by the Higher Education Department, Government of Odisha is illegal and not in accordance with the principles of service jurisprudence. In the light of the above discussions, all the Writ Petitions are disposed of. No order as to cost.

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2023 (I) ILR – CUT - 507

Dr. S.K. PANIGRAHI, J.

W.P.(C) NO. 38227 OF 2021

BOBBY ISLAM ……...Petitioner

.V.

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

(A) ODISHA STATE AWARDS FOR FILMS RULES, 2010 – Rule 3 (b) – Violation of the Rule 3 (b) – Effect of – Held,the impugned award list shall be trashed and a fresh list of nomination shall be published keeping in rules that govern the procedure.

(B) DUTY OF JURY – Explained. (Para 38-39)

For Petitioner : Ms. B.S. Sahoo
For Opp. Parties: Mr. S.N. Das,ASC

JUDGMENT Date of Hearing & Judgment:11.01.2023

Dr. S.K. PANIGRAHI, J.

1. This matter is taken up through hybrid arrangement.

2. Heard learned counsel for the petitioner and learned counsel for the State.

3. In this Writ Petition, the petitioner has challenged the final selection list of 31st Odisha State Film Awards, 2019; published in the respective website by the Secretary, Odia Language Literature and Culture Department, Government of Odisha, Bhubaneswar ("Opposite Party No.1") and Director, Odia Language Literature and Culture Department, Government of Odisha, Bhubaneswar ("Opposite Party No. 2") pursuant to the decision of the Jury Committee constituted by the Opposite Party No.2 on the ground that the same is illegal and in violation of the provisions of Odisha State Awards for Films Rules, 2010.

I. FACTUAL MATRIX OF THE CASE:

4. The brief storyline of the case is that in the year 1973, the Government of Odisha decided to give awards on various categories of Odia Films for supporting and promoting the production of high quality Odia Films. Accordingly, Odisha State Film Awards Rules, 1973 was framed by the Opposite Party No.1and awards in various categories were announced. Henceforth, Odisha State Films Awards have been consistently announced and accorded to the luminaries of Odia Films in various categories.

5. An advertisement/notice was floated on the website of the Department of Odia Culture inviting applications for 31st Odisha State Film Awards, 2019 against 27 categories and 8th Odisha State Tele Awards, 2019 against 20 categories by 20.02.2021. The relevant terms and conditions for entry of the aforesaid awards are mentioned hereunder:

> *"i. Clause-1- The Films and telefilms are required to be made between 01.01.2019 to 31.12.2019. The tele-series must be broad casted between 01.01.2019 to 31.12.2019 and telecast certificate must be attached with the application.*
>
> *ii. Clause-2- The original films/serials/telefilms made in only Odia Language or Odia Tribal language be nominated for awards.*
>
> *iii. Clause-6- All matter regarding award will be followed by Odisha State Film Awards Rules-2010 and Odisha State Tele Awards Rules-2013."*

6. The petitioner is a reputed film Director and doing films basing upon original story, tradition and culture. Pursuant to the aforesaid advertisement, on 17.01.2021, the petitioner had submitted his application for consideration in Odisha State Film Awards-2019 for his feature film "CHHABIRANI",released on 19.09.2019, for 25 categories. "CHHABIRANI" is based on a true story which occurred in 1980. The petitioner expected his film to be selected in some categories of the 31st Odisha State Film Award-2019 as his film satisfied all the required formalities.

7. However, on 05.11.2021, when the final selection list of 31st Odisha State Film Award-2019 was declared based on the recommendation of a Jury Committee was constituted by the Government of Odisha consisting of a Chairman (O.P. No.3) and other 5 members (O.P. No. 4 to 8) for scrutinizing the films for 31st Odisha State Film Award, 2019. The petitioner was shocked to find that his film was not found mention in any of the categories.

8. After verifying the award list given in 27 categories, the petitioner allegedly found various irregularities in the awards announced in 27 categories which are in blatant violation of Odisha State Film Award Rules, 2010. He alleged that many of the films that featured in the final award list are remakes of some films made in other languages which should not have qualified the cut for the awards in the first place.

9. Thereafter, the petitioner gave a representation through email to various authorities including Hon'ble Chief Minister, Odisha, Minister of Tourism and Culture, Director of Odia Language, Literature and Culture Department on 10.11.2021. Finally, the petitioner constrained to approach this Court registering his grievance.

II. **PETITIONER'S SUBMISSIONS**:

10. Learned counsel for the Petitioner has earnestly submitted that the impugned award list published by the Opposite Parties is fraught with irregularities which are blatantly unlawful and arbitrary for it is contrary to the concerned rules and guidelines which guide the selection of the awards.

11. It was submitted that the Clause-2 of the terms and conditions mentioned in the aforesaid advertisement clearly envisages that the original films/ serials/ telefilms made only in Odia Language or Odia Tribal language will be considered for awards. Also, Clause-3(b) of the Odisha State Film Award Rules, 2010 stipulates that the dubbed/ revised/ copied/ remake version of films are ineligible for entry. In the impugned selection, film "KHUSI" of Taranga Cine Production, which has been selected for awards in 5 categories, is a remake of a Korean film "HOPE" and the film "GOLMAL LOVE" is also plagiarized from a Punjabi film "CARRY ON JATTA".

12. It was also submitted that Clause-12 (b) of the Odisha State Award for Films Rules, 2010 prescribes the procedure for selection. Sub-Clause-(iii) stipulates that any person directly or indirectly associated with film entered in the festival shall not be eligible to serve as a Jury. In the instant case, Adikanda Rout ("Opposite Party No.7"), the Editor of film magazine "Chalachchitra Jagata" acted as a Jury Member in the selection Committee which is contrary to the Rules. The film magazine featured the advertisement(s) of the films that find place in the award list. His position as a jury member can be influential in the impugned films winning the awards in the concerned list. This setup reeks of bias and violation of principles of natural justice.

13. "Nimki" is a full length feature film released in the theatres.Surprisingly, it finds place in the final selection list of 8th Odisha State Tele Awards, 2019 in category of best script which is not only contrary to the Odisha State Film Award Rules as well as Odisha State Tele Awards Rules, 2013 which reeks of irregularity and malafide.

14. It was alleged that the awards given to films "KHUSI" and "GOLMAL LOVE" of Tarang Cine production is also violation of provisions of Copyright Act as the same are heavily plagiarized.

15. It was vehemently submitted that many cine critics and luminaries of the odia cine industry have raised serious objection on the above malafide action of the

State authorities/Opposite Party Nos.1 and 2. Despite the same, no action was taken which is symptomatic of illegal and arbitrary attitude of the opposite parties, based on malafide and undue favouritism giving go by to all the provisions of law.

16. The petitioner, therefore, seeks quashing of the final selection list of 31st Odisha State Film Award, 2019 as the same is violation of the provisions of the advertisement and Rules governing the field.

III. OPPOSITE PARTIES' SUBMISSIONS:

17. Per *contra*, learned counsel for the Opp. party submitted that the writ petition is thoroughly misconceived and the same is not maintainable in the eye of law and therefore the same is liable to be dismissed.

18. It was submitted that the film "Chabirani" was viewed by the jury comprising the following as Members:

i. Sri Surendra Sahu, Cinematographer as Chairman
ii. Sri Goura Pattnaik, Lyricist as Member
iii. Sri Jitendra Mishra, Producer as Member
iv. Sri Pranab Pattnaik, eminent singer as Member
v. Smt. Tripura Mishra, Actress as Member
vi. Sri Adikanda Rout, Cine Journalist as Member

19. It is further submitted that the jury have been duly appointed by the Government and their work has not been interfered with by any quarters whatsoever. Level playing field has been given to all the applicants including the general public to apply in the categories in which they feel their performance can fetch an award. It has been the prerogative of the jury all throughout and their decision has been respected since the members of the jury are people of eminence who are well known in the world of Odia films. Thus, the challenge to their wisdom and judgment is fraught with illogical reasoning and therefore the contention the petitioner is contested strongly.

20. On the non-selection of the petitioner's film "CHHABIRANI",it was submitted that the content of the petitioner's film is stated to have contained sexually explicit acts and other disturbing scenes which could have created a furor, if granted the award. It could have spoilt the social harmony of the society as the on-reel perpetrators of the story of the film belonged to a particular caste/community.

21. It was argued that the kind of violence, rape, murder and political mafiaism shown in the film are in no way part of Odia tradition and culture. It was also alleged that the second half of the film was a blatant copy of a superhit Hindi movie of the 90's, namely "ANDHA KANOON". The grisly rape and murder was shown in a manner, is unfit for family viewing.

22. Next, it was submitted that no rules have been violated in the selection of the awardees and the rules framed by the Government vide Resolution No.2956/TC dated 28.3.2011. Thus, the contention of the petitioner is strongly denied as he has not stated the specifics of his contentions.

23. It was also submitted that the jury didn't know about the allegations of the petitioner against the film "KHUSI" and "GOLMAL LOVE". In the course of the re-evaluation, ordered by this Court, the jury took note of the fact that the nominations were supported by affidavits that the films were original. On the other hand, the petitioner did not submit any material to substantiate his claims.

24. It was further submitted that the jury have been satisfied with the content of the presentation and were not influenced by extraneous considerations. Thus, to level the allegation of plagiarism is in poor taste and is without any basis. The Applicants for entry of Films 'KHUSI' and 'GOLMAL LOVE' to Odisha State Film Awards, 2019 had clearly mentioned in the entry forms that these two films are not dubbed version or an adaptation or remake of film made in another language.

25. Moreover, it was argued that no award has been given to the impugned films in the categories of story, screenplay or direction where plagiarized content could've raised questions of integrity. Individual artists of both the films in five other categories have been adjudged superior to others in their respective fields and cannot be denied of their merits. The Jury committee sincerely felt that no other artist could have been considered better than the selected one in each category.

26. It was submitted that the Members of the jury have been appointed vide Notification No.5569, dated 08.09.2021 of the Odia Language, Literature and Culture Department, Govt. of Odisha pursuant to the Rule 12 (i) and (ii) of the Odisha State Awards for Films Rules, 2010. Hence, it is strongly argued that the allegations levelled by the petitioner are not correct and hence, it is strongly denied.

IV. REASONING OF THE COURT:

27. Having heard the learned Advocates appearing for both the sides and having gone through the material on record, it appears that before dealing with the issue of alleged irregularities in the cine award list raised in the petition, relevant provisions of law is required to be taken into consideration:-

28. The Orissa State Awards for the Films Rules, 2010 vide Rule 3(b) renders the following films illegible for consideration for the concerned awards:

> *"3.* ***The following films shall be ineligible for entry****:*
>
> *(a) Remake of a film that has already won a State Award in a particular category*
>
> ***(b) Dubbed/revised/copied/remake version of a film.***

(c) Films that relates to threat to national integrity, sovereignty and religious harmony as per certification of Central Board of Film Certification.

(d) Performance of an artist where his/her voice and dialogue are dubbed by some other artiste for awards from S. 3, 4, 5, 14, 15, 16, and 17 of the schedule-1."

29. In such view of the matter, the grievance of the petitioner regarding the violation of Rule 3(b) has been considered by this Court. The impugned films are kept in the nomination list of 31st Odisha State Film Award, 2019 for the category of Best Actor – Saroj Parida and Best Actress- Kabya Kiran for the movie "KHUSI".

30. I have personally watched both the films for better understanding of the allegations. After ocular verification of the films, it appears that the two films, i.e., "KHUSI" & "GOLMAL LOVE" are heavily inspired from the alleged non odia films at least. Considering a comparison of the impugned films with the plot and scenes in the Korean film 'HOPE' and Punjabi film "CARRY ON JATTA", it is clear that from the plethora of facts, circumstances and stated overlap that the impugned motion films are uncredited remakes of the aforementioned non-Odia films. These films have been manipulated slightly in order evade the scanner of an uncanny resemblance. Otherwise, the films are scene-by-scene copies of the impugned non-Odia films. The content of the impugned films cannot be called 'original' in respect to Orissa Film Award Rules from any angle of judgement.

31. A quick look at the Procedure for Selection as envisaged in the Odisha State Awards for Films Rules, 2019 as extracted hereunder:

"Procedure for Selection:

(i) The awards shall be decided by a Jury to be constituted by the State Government for each year.

(ii) The Jury shall be composed of a Chairman and not more than 6 members distinguished in the field of Cinema, performing and other allied arts and humanities.

(iii) Any person directly or indirectly associated with film entered in the festival shall not be eligible to serve on the Jury.

(iv) The Jury will determine their own work procedure.

(v) The Chairman of the Jury may seek advice of the experts in specialized areas whenever necessary.

(vi) The quorum for the meeting of the Jury shall be 50 per cent of the members of the Jury and the Chairman.

(vii) In case of difference of opinion, the opinion of the Majority of the members of the Jury including the Chairman shall be deemed to be the recommendation of the Jury. In the event of equality of votes, the Chairman shall have a casting vote.

(viii) The Jury shall have the discretion to recommend that any one or more awards may not be given for a particular year if they are of the opinion that entries for that or these awards are not of the required standard.

(ix) The Jury constituted under this Rules may also make recommendation for the Jayadev Award and provision of this Rules shall mutates mutandis apply to the recommendation of the Jury."

32. Learned counsel for the petitioner has submitted that as per Clause-12(3) of the said Rules any person directly or indirectly associated with film entered in the festival shall not be eligible to serve on the jury against an apprehension of bias. In the present case, the allegation is made against Adikand Rout, a Cine Journalist whose magazine features advertisements of some movies which found mention in the award list. In fact, the editor of the said magazine is part of Jury is not fatal insofar as the allegation of advertisement of film posters inside the magazine. In such view of the matter, the grievance of the petitioner is misplaced. There is no reasonable ground for this Court to believe that the Adikand Rout was likely to be biased. A magazine may feature a lot of advertisements, related or related, to the cinema industry. Just because a magazine features advertisements of some movies that go on to win awards doesn't mean the personnel behind the magazine would promote the films in their official capacity. It is difficult to prove the state of mind of a person.Therefore, what this Court has to see is whether there is reasonable ground for believing that this gives rise to a biased view.

33. This Court agrees with the learned counsel for the Opp. Parties that a mere suspicion of bias is not sufficient. There must be a reasonable likelihood of bias. Moreover, the petitioner has not submitted any line of reasoning behind his contention which does not help his case either.

34. The allegations of copyright are not central to the main issue of contention in this case and ergo, I have not found it necessary to venture into this allegation.

V. CONCLUSION:

35. As such, the impugned award list is fraught with blatant irregularities which strike at the heart of state directives of law. The Opposite Parties have been negligent in letting these irregularities be scot-free. The manner in which the impugned films were considered and declared the winners of the prestigious Odia State Cine Awards is a matter of great embarrassment and concern for the Odia cinema and artiste community.

36. All kinds of art in the world are fundamentally fueled by inspiration. It keeps ingenious minds active. Many people are inspired by the creations or ideas of others. However, such obvious copying of concepts, as in this case, gives a terrible perception of the art community as a whole. There seems to be a running trend of reproducing an already existing works to mint quick money. This thirst of quick fame and money might be beneficial for an individual but it throws the integrity of the art to the wolves. The audience should also not to be taken for granted. After watching a movie, the crowd searches the internet to validate their concerns because they are essentially convinced that no film produced in Odia can be original. This is

even more worrisome because it represents a significant decline in audience appreciation and sensitivity for the arts. This perception can spell disaster for the Odia cine industry.

37. Plagiarism in the film business is made to go unpunished and unregulated by the heedlessness and lack of standards against such practices. In fact, due to lack of regulation and significant costs of litigation, the majority of dissatisfied creators choose not to pursue legal action. A strict system of checks and balances must be implemented in order to support and encourage the triumph of originality in the odia cine tradition. Even the film business should develop a self regulatory framework to deal with plagiarism, educate people about it, and punish guilty creators.

38. Here, I would also like to opine that the 'duty of judgement' is a sacred one; be it a judge of law or the jury of the cine awards. A candidate at the helm of affairs should demonstrate courtesy, open-mindedness, courage, understanding, compassion, humility, and common sense. These traits ought to be consistently displayed by the Jury.

39. The Jury should be mindful that their duty is the application of standards of highest quality to the matters of consideration, that the state is an institution of law and not of men. The jury should fulfil their duty with a due regard to the integrity of the system of the law and integrity of arts, remembering that he/she is not a depositary of arbitrary power, but a judge with the responsibility to uphold the integrity of themselves as well as the institution. The irregularities as seen in this case could easily have been avoided had the jury been a little more vigilant and mindful of their position of great responsibility. The jury members are great stalwarts of Odia cinema and nothing but the highest standards of integrity and vision is expected of them. I firmly believe that the jury would be impartial and truthful in their approach and strive to represent a vision of evolutionary creativity that is espoused in the industry.

40. In light of the aforesaid discussion and having regard to the present position of law, I have no hesitation in coming to the conclusion that the writ petitioner shall be granted relief by way of a writ and the present Writ Petition is allowed.

41. The impugned award list shall be trashed and a fresh list of nomination shall be published keeping in rules that govern the procedure. The impugned movies i.e. "KHUSI" and "GOLMAL LOVE" shall not be considered for any award category in the fresh list.

42. In such view of the matter, this Court directs that the 31st Odisha State Film Award, 2019 shall be declared within one month from today.

43. Accordingly, this Writ Petition is disposed of.

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2023 (I) ILR – CUT - 515

R.K. PATTANAIK, J.

CRLMC NO. 938 OF 2022

SMT. SNIGDHA MAHANTI & ORS. .....Petitioners

.V.

STATE OF ODISHA & ANR. .....Opp. Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 156(3),197 – Whether sanction is required at the pre-cognizance stage, while directing police investigation on a complaint? – Held, Yes.

Case Laws Relied on and Referred to :-

1. 2015 (3) Supreme 152 : Mrs. Priyanka Srivastava & Anr. Vs. State of U.P. & Ors.
2. (2008) 5 SCC 668 : Maksud Saiyed Vs. State of Gujarat & Ors.
3. 2013 (8) Supreme 168 : Anil Kumar & Ors. Vs. M.K. Aiyappa & Anr.
4. AIR 1992 SC 604 : State of Haryana & Ors. Vs. Ch. Bhajan Lal & Ors.

For Petitioners : Mr. Goutam Kumar Acharya, Sr. Adv., Mr. S.K. Patra.
For Opp. Parties: Mr. P.K. Rout, AGA,Mr.Arijeet Mishra.

JUDGMENT Date of Judgment : 30.01.2023

R.K. PATTANAIK, J.

1. The petitioners have approached this Court by invoking its inherent jurisdiction under Section 482 Cr.P.C. for quashing of the criminal proceeding in connection with Capital P.S. Case No.72 dated 3rd February, 2022 corresponding to C.T. Case No.730 of 2022 pending in the file of learned S.D.J.M., Bhubaneswar on the grounds inter alia that the same is not tenable in law.

2. In the instant case, opposite party No.2 filed a complaint in 1CC Case No.4474 of 2021 consequent upon which the learned court below directed registration of a case for investigation by an order under Section 156(3) Cr.P.C. whereupon initially Chandrasekharpur P.S. Case No.462 dated 9th November, 2021 was registered and thereafter, with the change in jurisdiction, vide Capital P.S. Case No.72 dated 3rd February, 2022. It has been alleged in the said complaint that the petitioners by using their high position and influence managed to forge official documents and utilized the same in order to victimize opposite party No.2 by hatching conspiracy in initiating a criminal prosecution and departmental action without any justifiable reason so as to harass and cause injury to him.

3. Heard Mr. Acharya, learned Senior Advocate, Mr. Rout, learned AGA and Mr. Mishra, learned counsel for opposite party No.2.

4. As per the pleading, the petitioner No.1 is the Senior Audit Officer under AG (Audit-1), Odisha, Bhubaneswar; petitioner No.2 posted as the Deputy Director in

the office of DG of Audit (Central Receipt), New Delhi and petitioner No.3 is posted at Thiruvananthapuram in Kerala as the DAG (AMG-I) in the office of the Principal Accountant General (Audit-1) against whom the complaint was filed by opposite party No.2, who at the relevant point of time was working as the Secretary to AG (Audit-1), Odisha, Bhubaneswar.

5. According to the petitioners, while they were posted in the State in 2019, an anonymous letter (Annexure-3) was received by the AG (Audit-1), Odisha on 25th September, 2019 which was forwarded by the sender in forged names and signature of twelve serving and retired officers in order to malign their professional career and personal character and it was during the time when opposite party No.2 was working as the Secretary and more precisely between 31st October, 2018 and 26th November, 2019 and again on 25th October, 2019 yet another filthy and derogatory letter (Annexure-4) directed against petitioner No.2 as well as other officers including petitioner No.3 was received. It is further submitted that on receiving repeated anonymous letters, petitioner No.1 under the instruction of AG (Audit-1) lodged an FIR (Annexure-5) as a result of which Capital P.S. Case No.426 dated 19th November, 2019 was registered against unknown persons and during its investigation, the local police seized various official records but could not collect sample handwriting of opposite party No.2, who was the prime suspect for the alleged mischief and ultimately, on the latter's joining, as he was on leave, it was obtained on 5th December, 2019 and for the purpose of verification by an expert, the same was sent to the SFSL, Bhubaneswar and with a view to initiate a domestic enquiry, the AG, Odisha sent the sample handwriting of opposite party No.2 and the handwriting of the anonymous letters and envelopes to a registered forensic laboratory, namely, SIFS, New Delhi for examination and received its report on 18th December, 2019 (Annexure-6) certifying that the handwritings matched later to which he was placed under suspension with effect from 6th January, 2020 by the orders of the AG (Audit-1), Odisha, Bhubaneswar on the direction of the Appointing Authority, namely, C & AG of India, New Delhi. It is also submitted that during the intervening period, petitioner No.2 lodged a complaint against opposite party No.2 before designated Internal Complaint Committee for the alleged acts of sexual harassment which was taken up and proceeded with and the matter is still pending with the competent authority and that apart, the brother of opposite party No.2 since threatened the officers of the AG, Odisha in order to influence them, the matter was reported and accordingly Capital P.S. Case No.294 of 2020 was registered and in that case, he was arrested. It is pleaded that opposite party No.2 challenged the order of suspension in OA No.179 of 2021 before the Central Administrative Tribunal, Cuttack Bench, Cuttack which is also subjudice. As against the aforesaid background, according to the petitioners, opposite party No.2 filed the complaint and as a result, police investigation was directed by the learned court below by order dated 7th October, 2021 (Annexure-1) which is under challenge.

6. Mr. Acharya, learned Senior Advocate submits that the learned court below despite the fact that opposite party No.2 had not lodged any report with the allegations made in the complaint failed to apply its judicial mind and in a mechanical manner directed registration of the case which is not tenable in law and such direction under Annexure-1 does not fulfill the legal requirements and that apart, the court below without considering the facts alleged in the complaint straightaway proceeded to order police investigation under Section 156(3) Cr.P.C. in absence of any sanction order which is the mandate of law. The petitioners being the officials of the AG (Audit-1), as according to Mr.Acharya, learned Senior Advocate, did whatever necessary in the given fact situation and by the orders of the Authority and it was during and in course of discharging duty and functions assigned to them and hence, before any decision was taken by the learned court below for police investigation, sanction should have been asked for and insisted upon which has not been resorted to and therefore, not only the order dated 7th October, 2021 under Section 156(3) Cr.P.C. passed by the learned court below but also the entire of the criminal proceeding is liable to be quashed more so when the filing of the complaint is clearly a counterblast to the criminal action initiated for the alleged mischief. While advancing such an argument, Mr. Acharya, learned Senior Advocate cited the following decisions, such as, **Mrs. Priyanka Srivastava and Another Vrs. State of U.P. and Others 2015 (3) Supreme 152 and Maksud Saiyed Vrs. State of Gujarat and Others (2008) 5 SCC 668** on the powers of the Magistrate exercisable under Section 156(3) Cr.P.C., **Anil Kumar and Others Vrs. M.K. Aiyappa and Another 2013 (8) Supreme 168** which is with regard to the need of a sanction even at pre-cognizance stage while directing police investigation on receiving a complaint. It is submitted that neither there was application of judicial mind by the learned court below while directing investigation by an order under Section 156(3) Cr.P.C. nor considering the nature of allegations in the complaint against the backdrop of a mischief being committed by opposite party No.2 and he having been subjected to criminal action and departmental enquiry and the fact that the petitioners were part of such process and participated in discharge of official functions, without sanction the complaint after being entertained, police investigation was directed is not at all sustainable in law .

7. Mr. Rout, learned AGA submits that the complaint was received and with the orders of the learned court below Capital P.S. Case No.72 was registered and such direction has been at the pre cognizance stage and in terms of Section 156(3) Cr.P.C. and hence, it cannot be said that the same was without jurisdiction. Mr. Mishra, learned counsel for opposite party No.2 would submit that there was no error or illegality committed by the learned court below while directing the local police to investigate since the complaint revealed commission of cognizable offences by the petitioners. It is further submitted that by Mr. Mishra that the petitioners having been alleged of criminal conspiracy in order to harass opposite party No.2 and in that regard managed the official records which demanded a

detailed and thorough investigation, rightly, therefore, the court below passed the order dated 7th October, 2021. It is also submitted that sanction for prosecution of the petitioners is not required since the offences committed cannot be part of one's official duty and function and that apart, there was no need of it at the pre-cognizance stage. It is informed to the Court that in Capital P.S. Case No.426 of 2019, a final report (Annexure-A/1) was submitted and accepted in the meantime, by order dated 19th August, 2022 of the learned S.D.J.M., Bhubaneswar, the proceeding was dropped and in so far as the present case is concerned, opposite party No.2 has filed CRLMP No.814 of 2022 for a direction and in order to ensure free and fair investigation, wherein, it has been revealed by an affidavit (Annexure-A/2) filed by the IO that the investigation has commenced but at its inception and he said to have requested the Senior DAG, AG, Odisha, Bhubaneswar to provide certain documents. According to Mr. Mishra, learned counsel for opposite party No.2, no such bar lies to entertain a complaint under Section 200 Cr.P.C. without prior lodging of the FIR and the Magistrate is having the competence to receive it and direct police investigation in terms of Section 156(3) Cr.P.C. without any restriction and the ratio decided in **Priyanka Srivastava** (supra) is inapplicable to the facts of the present case. It is lastly submitted that the criminal proceeding against the petitioners should not be quashed as no case is made out, inasmuch as, in order to exercise any such power under Section 482 Cr.P.C., the guidelines set out by the Apex Court in the case of **State of Haryana and Others Vrs. Ch. Bhajan Lal and Others AIR 1992 SC 604** shall have to be followed.

8. In the case at hand, the learned court below by order dated 7th October, 2021 directed police investigation on receiving complaint from opposite party No.2 registered as 1CC Case No. 4474 of 2021. The very initiation of the criminal proceeding with the complaint entertained and direction under Section 156(3) Cr.P.C. has been questioned by the petitioners on the grounds narrated herein before. When a complaint is received, a Magistrate has two options open, one is by proceeding with it and receiving evidence from the complainant and taking cognizance of the offence and the other is to direct registration of a case for police investigation, the former is by invoking Section 200 Cr.P.C. and subsequent provisions, whereas, the latter is by virtue of Section 156(3) Cr.P.C. and it is at two different stages. So to say, at pre-cognizance stage such an order under Section 156(3) Cr.P.C. is passed where it is said that the Magistrate has decided not to take cognizance of but to direct police investigation but once decided to proceed with the complaint recording the initial statement of the complainant invoking Section 200 Cr.P.C. and if necessary to conduct enquiry in terms of Section 202 Cr.P.C., such action is stated to have been taken at post-cognizance stage. The challenge herein is that in the facts and circumstance of the case, the criminal proceeding against the petitioners is not maintainable all the more when there is no sanction in place before the police investigation was directed.

9. In **Priyanka Srivastava** (supra), the Supreme Court held that a decision for police investigation in terms of Section 156(3) Cr.P.C. is not an empty formality and there has to have judicial application of mind and the Magistrate for the said purpose should ensure that the complainant has taken recourse to Section 154(1) and (3)Cr.P.C. and an application under Section 156(3) Cr.P.C. must be supported by an affidavit by sharing the details for having recourse to Section 154(1) and (3)Cr.P.C. and he also is required to verify the veracity of the affidavit filed for the purpose and a direction for police investigation. The said decision was against the background of facts where a dispute had arisen with regard to loan by the borrowers and taking action under provisions SARFAESI Act in respect thereof and therein, it was held that details of the steps taken by the complainant and whether he had resorted to Section 154(1) and (3) Cr.P.C. or not supported by an affidavit are required to be divulged or else it could result in unnecessary harassment to the officials and also referred to the decision in **Anil Kumar** (supra) which is with regard to the need of sanction before prosecuting a public servant even at the stage of an order for police investigation under Section 156(3) Cr. P.C. While dealing with a case under the Prevention of Corruption Act on receiving a complaint, the Apex Court in **Anil Kumar** ibid held and observed that not only the Special Judge was required to examine the complaint, documents but he should also reflect in the order as to what weighed and persuaded him for a direction under Section 156(3) Cr.P.C. though a detailed expression of his views is neither required nor warranted and a valid sanction order is needed as well while expanding the meaning of the word 'cognizance' for having a wider connotation not merely being confined to the stage of taking cognizance of the offence. The role and responsibility of a Magistrate before ordering police investigation under Section 156(3) Cr.P.C. and the principles which apply have been discussed in **Maksud Saiyed** (supra). The reading of the aforesaid decisions makes it understand that a Court receiving a complaint must have to be careful and cautious while dealing with it and directing police investigation especially involving the public servants.

10. In the instant case, opposite party No.2 filed a complaint supported by an affidavit receiving which the learned court below directed police investigation. On a perusal of the complaint (Annexure-1), it is made to appear that opposite party No.2 moved the learned court below with a prayer to direct police investigation. It is revealed therein that opposite party No.2 had not approached the local police and even applied for sanction which he did not receive from the C & AG of India within the stipulated time and hence, approached the court below. It is stated therein that since opposite party No.2 was running from pillar to post and as the petitioners are highly influential, he had to seek the indulgence of the court for a direction to the local police to enquire into and investigate the mischief of the petitioners and the criminal conspiracy hatched by them to harass and prosecute him.

11. In **Priyanka Srivastava** (supra), the Apex Court highlighted upon the role of the courts and the need of applying judicial mind before directing police

investigation in terms of Section 156(3) Cr.P.C. In the aforesaid case, referring to the decision of **Anil Kumar** (supra), it has also been held that the subjective satisfaction of the court would have to be reached before any such direction for police investigation is issued and furthermore, a valid sanction would be necessary while dealing with a complaint against the public servants. While posed with a question regarding sanction whether required at the pre-cognizance stage, the Supreme Court in **Anil Kumar** ibid held and observed that it shall apply at a stage before directing police investigation under Section 156(3) Cr.P.C. while entertaining a complaint under Section 200 Cr.P.C. The aforesaid decision was with reference to a complaint received by the Special court and therein order under Section 156(3) Cr.P.C was passed involving offences under the Prevention of Corruption Act and therein taking into account Section 19 of the said Act where previous sanction is necessary for prosecution, the Apex Court held and concluded that such a criminal action cannot be sustained which has also been quoted with approval in Priyanka Srivastava case. So as to say, that the expression 'cognizance' which appear in Section 197 Cr.P.C. was expanded by the Apex Court in **Anil Kumar** (supra) to include the pre-cognizance stage. For the said purpose, it is apt to reproduce the relevant excerpt of the decision in **Anil Kumar** (supra), wherein, the question of sanction at the stage of ordering investigation under Section 156(3) Cr.P.C. was discussed and dealt with which runs as follows:

> "9. We will now examine whether the order directing investigation under Section 156(3) Cr.P.C. would amount to taking cognizance of the offence, since a contention was raised that the expression "cognizance" appearing in Section 19(1) of the PC Act will have to be construed as post-cognizance stage, not pre-cognizance stage and, therefore, the requirement of sanction does not arise prior to taking cognizance of the offences punishable under the provisions of the PC Act. The expression "cognizance" which appears in Section 197 Cr.P.C. came up for consideration before a three-Judge Bench of this Court in State of Uttar Pradesh v. Paras Nath Singh (2009) 6 SCC 372, and this Court expressed the following view:
>
> "6. ...And the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the Code, either on receipt of a complaint, or upon a police report or upon information received from any person other than a police officer, or upon his knowledge that such offence has been committed. So far as public servants are concerned, the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression, 'no court shall take cognizance of such offence except with the previous sanction'. Use of the words 'no' and 'shall' makes it abundantly clear that the bar on the exercise of power of the court to take cognizance of any offence is absolute and complete. The very cognizance is barred. That is, the complaint cannot be taken notice of. According to Black's Law Dictionary the word 'cognizance' means 'jurisdiction' or 'the exercise of jurisdiction' or 'power to try and determine causes'. In common parlance, it means taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed during discharge of his official duty.

xxx xxx xxx
xxx xxx xxx"

In State of West Bengal and Another v. Mohd. Khalid and Others (1995) 1 SCC 684, this Court has observed as follows:

"It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a prima facie case is made out."

10. The meaning of the said expression was also considered by this Court in Subramanium Swamy case (supra). The judgments referred to herein above clearly indicate that the word "cognizance" has a wider connotation and not merely confined to the stage of taking cognizance of the offence. When a Special Judge refers a complaint for investigation under Section 156(3) Cr.P.C., obviously, he has not taken cognizance of the offence and, therefore, it is a pre-cognizance stage and cannot be equated with post-cognizance stage. When a Special Judge takes cognizance of the offence on a complaint presented under Section 200 Cr.P.C. and the next step to be taken is to follow up under Section 202 Cr.P.C. Consequently, a Special Judge referring the case for investigation under Section 156(3) is at pre cognizance stage.

11. A Special Judge is deemed to be a Magistrate under Section 5(4) of the PC Act and, therefore, clothed with all the magisterial powers provided under the Code of Criminal Procedure. When a private complaint is filed before the Magistrate, he has two options. He may take cognizance of the offence under Section 190 Cr.P.C. or proceed further in enquiry or trial. A Magistrate, who is otherwise competent to take cognizance, without taking cognizance under Section 190, may direct an investigation under Section 156(3) Cr.P.C. The Magistrate, who is empowered under Section 190 to take cognizance, alone has the power to refer a private complaint for police investigation under Section 156(3) Cr.P.C.

12. We may now examine whether, in the above mentioned legal situation, the requirement of sanction is a pre-condition for ordering investigation under Section 156(3) Cr.P.C., even at a pre-cognizance stage. Section 2(c) of the PC Act deals with the definition of the expression "public servant" and provides under Clauses (viii) and (xii) as under:

"(viii) any person who holds an office by virtue of which he is authorized or required to perform any public duty.

(xii) any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the Central Government or any State Government, or local or other public authority." The relevant provision for sanction is given in Section 19(1) of the PC Act, which reads as under:

"19. Previous sanction necessary for prosecution.-(1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction-

a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

c) in the case of any other person, of the authority competent to remove him from his office." Section 19(3) of the PC Act also has some relevance; the operative portion of the same is extracted hereunder:

"Section 19(3) – Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

a) no finding, sentence or order passed by a special judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of absence of, or any error, omission or irregularity in the sanctionrequired under sub-section (1), unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby;

b) xxx xxx xxx

c) xxx xxx xxx"

13. Learned senior counsel appearing for the appellants raised the contention that the requirement of sanction is only procedural in nature and hence, directory or else Section 19(3) would be rendered otiose. We find it difficult to accept that contention. Sub-section (3) of Section 19 has an object to achieve, which applies in circumstances where a Special Judge has already rendered a finding, sentence or order. In such an event, it shall not be reversed or altered by a court in appeal,confirmation or revision on the ground of absence of sanction. That does not mean that the requirement to obtain sanction is not a mandatory requirement. Once it is noticed that there was no previous sanction, as already indicated in various judgments referred to hereinabove, the Magistrate cannot order investigation against a public servant while invoking powers under Section 156(3) Cr.P.C. The above legal position, as already indicated, has been clearly spelt out in Paras Nath Singh and Subramanium Swamy cases (supra)."

12. In **Maksud Saiyed** (supra), the Apex Court considered the responsibility which is required to be discharged while entertaining a complaint and issuing direction under Section 156(3) Cr.P.C. with a sound of caution and observed that summoning of an accused is a serious business and emphasized the application of judicial mind by a Magistrate. In so far as the present case is concerned, the petitioners are the senior officials and the complainant, namely, opposite party No.2 was alleged of being responsible for the mischief referred to in Annexures-3 & 4 which was enquired into leading to the disciplinary action against the latter. The necessary steps were taken by the petitioners subsequent to the alleged mischief and with the orders of the Authority concerned, FIR was lodged and furthermore, a departmental proceeding was initiated against opposite party No.2 after receipt of forensic report obtained from a registered laboratory. In what manner, the petitioners' manipulated record so as to fix opposite party No.2 is not discernable from Annexure1. To say that a criminal conspiracy was hatched by the petitioners without more and that too under the circumstances narrated in Annexure-1 would be a mere surmise and conjecture. The petitioners, being the public servants against one of whom derogatory sexual remarks were made involving her with other male colleagues by means of anonymous letters and a fake Circular in the name of the office of the Accountant General (G & SSA), Odisha, Bhubaneswar, did bring it to the notice of the Authority concerned and thereafter, proceeded in the matter in lodging the FIR and finally when opposite party No.2 was suspected to be the mischief monger, the departmental action was taken by placing him under

suspension. That being so, it would be quite unusual and absurd to allege the petitioners to have conspired against opposite party No.2, who has been taken to task after he was earmarked for the alleged mischief post-receipt of the forensic report. The circumstances under which opposite party No.2 moved the learned court below for a police investigation in terms of Section 156(3) Cr.P.C. was required to be duly examined especially when the allegations revolved around the mischief reported to the local police vide Capital P.S. Case No.426 dated 9th November, 2019 which is clearly revealed in Annexure-1. As it appears, the learned court below did not apply its judicial mind and in a mechanical manner directed police investigation entertaining request of opposite party No.2 being aware of the background facts. The role of a court has been discussed in **Priyanka Srivastava** and **Maksud Saiyed** (supra) before ordering police investigation and also the need of a sanction under Section 197 Cr.P.C. vis-à-vis the public servants involved even at pre cognizance stage. The complaint so received by the learned court below under Annexure-1 merely indicates that the petitioners without any just reason entangled opposite party No.2 for the alleged mischief which was based on a laboratory report not consistent with the opinion of the SFSL, Bhubaneswar to the effect that the sample handwriting did not match with the handwriting appearing on the anonymous papers. There may have been an unpleasant situation after the alleged letters received and action taken against opposite party No.2 and that action was based on a forensic report which possibly did not find favour with the opinion of the SFSL, Bhubaneswar by itself would not be sufficient to alleged criminal conspiracy against the petitioners, who said to have acted on the directions of the Authority. Considering the ratio in **Anil Kumar** (supra), there is no escape from the conclusion that the learned court below ought to have considered the aspect of sanction even at the stage of ordering police investigation before exercising powers in terms of Section 156(3) Cr.P.C. The contention of Mr. Mishra, learned counsel for the opposite party No.2 does not stand to any reason considering the facts and circumstances of the case while defending the criminal action vis-à vis the petitioners which according to the Court is unjustified and untenable in law.

13. Accordingly, it is ordered.

14. In the result, the CRLMC stands allowed. As a necessary corollary, the criminal proceeding in connection with C.T. Case No.730 of 2022 arising out of Capital P.S. Case No.72 dated 3rd February, 2022 pending in the file of learned S.D.J.M., Bhubaneswar is hereby quashed.

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2023 (I) ILR – CUT - 524

SASHIKANTA MISHRA, J.

CRLA NO. 143 OF 2004

SHYAMASUNDAR NAYAK .....Appellant

.V.

STATE OF ORISSA(G.A.DEPTT.) .....Respondent

PREVENTION OF CORRUPTION ACT, 1988 – Sections 7 & 13(2), 13(1)(d) r/w Section 20 – Whether mere recovery of the tainted money is sufficient to convict the accused, when the substantive evidence in the case is not reliable – Held, No – It is incumbent upon the prosecution to prove that there was voluntary acceptance of illegal gratification – In the instant case, prosecution has neither establish prior or instant demand of gratification by the accused or acceptance of the same at the spot – Appeal is allowed. (Para12-14)

Case Law Relied on and Referred to :-
1. (2011) 6 SCC 45:State of Kerala Vs. C.P. Rao.

For Appellant : M/s. S.K. Mund, A.K. Dei,D.P. Das, J.K. Panda, S.K. Joshi, S. Panigrahi, P.K. Ray, A.K. Lenka, D.K. Panda.

For Respondent : Mr. M.S. Rizvi,ASC for Vigilance Department.

JUDGMENT Date of Judgment:08.12.2022

SASHIKANTA MISHRA, J.

1. The appellant challenges the judgment dated 27.04.2004 passed by learned Special Judge (Vigilance), Bhubaneswar in T.R. Case No.51 of 1992, whereby he was convicted for the offence under Sections 7 & 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act (in short 'PC Act') and was sentenced to undergo R.I. for one year and to pay a fine of Rs.1,000/-, in default, to undergo R.I. for one month for each of the offences with both the sentences being directed to run concurrently.

2. The prosecution case, briefly stated, is that one Santosh Kumar Jena (complainant), who is an Ex- Army personnel, registered his name in the District Zilla Sainik Board, Cuttack seeking employment. As he remained unemployed for quite some time, he approached the present appellant-accused, who was then the dealing clerk in the Zilla Sainik Board, Cuttack, and requested him to sponsor his name for a suitable service. The accused allegedly demanded Rs.500/- by giving out that the concerned officer would take Rs.300/- and the balance would be kept by him. At that time, the complainant paid Rs.100/- to the accused. On 08.05.1991 when he again met the accused at the Sainik Board, he demanded the

balance amount of Rs. 400/- as bribe to sponsor his name for appointment as a Hostel Superintendent in the Sainik School. When the complainant expressed his inability, the accused asked him to pay Rs.100/- by 09.05.1991. Instead of paying, the complainant submitted a complaint before the S.P., Vigilance, Cuttack on the same day. Basing on his complaint, it was decided to lay a trap and accordingly, all preparations were made. On the next day, the complainant met the accused near a tea stall at Badambadi, where, on demand he paid Rs.100/- and at that time the trap party members rushed to the spot and caught him red handed. After observing all the required formalities, the accused was arrested and forwarded to the Court. Upon completion of investigation, charge sheet was submitted under the aforementioned sections and the accused was put to trial.

3. The accused took the plea of denial and stated that on the date of trap, the complainant having seen him near a tea stall at Badambadi had invited him for tea and when he gave Rs.100/- to the tea stall owner,the latter expressed that he had no change for which the complainant gave Rs.100/- to the accused who stated that he had the necessary change. At that time, he was caught by Vigilance Police.

4. To prove its case, the prosecution examined 10 witnesses including the complainant as P.W.-1, the overhearing witness as P.W.-3, the tea stall owner as P.W.-9 and the trap laying officer as well as the I.O. as P.W.-10. In course of trial, the complainant (P.W.-1) deposed about the alleged demand being made by the accused and of the payment made by him pursuant thereto. The overhearing witness, P.W.-3, however, turned hostile and was cross-examined by the prosecution. The tea stall owner, P.W.-9 gave a version in line with the defence plea for which he was also declared hostile and cross-examined by the prosecution. Learned Special Judge scanned the evidence of the aforementioned witnesses and also that of the other witnesses to hold that the accused had demanded Rs.100/- from the complainant to sponsor his name for the post of Hostel Superintendent. In arriving at such finding, learned Special Judge was guided by the provision under Section 20 of the P.C. Act which empowers the Court to raise a presumption regarding acceptance of illegal gratification. Learned Special Judge disbelieved the defence version and held the case of prosecution as proved beyond reasonable doubt. Accordingly, the accused was convicted and sentenced as aforesaid by the impugned judgment.

5. Heard Ms. Anima Kumari Dei,learned counsel for the appellant and Mr. M.S. Rizvi, learned Standing Counsel for vigilance.

6. Assailing the impugned judgment of conviction, Ms. A.K. Dei has raised the following grounds:

> (i) In the absence of corroboration by the overhearing witness, the version of the complainant regarding demand of bribe by the accused cannot be said to have been proved.

(ii) The defence gave a reasonable explanation for the tainted money being found from his pocket but the same was not considered at all by the trial court.

(iii) Since neither demand nor acceptance as required by the statute was proved beyond reasonable doubt, learned Special Judge committed gross illegality in raising the presumption under Section 20 of the Act.

7. Per contra, Mr. M.S. Rizvi, learned Standing Counsel for Vigilance contends that on the face of direct evidence of the complainant himself and the evidence of the other witnesses (trap party members) as also the fact of recovery of tainted money from the shirt pocket of the accused it was fully justified for the trial court to raise the presumption under Section 20 of the Act. He further submits that the defence plea as raised is entirely unbelievable. Thus, according to Mr. Rizvi, the impugned judgment does not warrant any interference whatsoever.

8. Having considered the rival contentions as above, it would be proper for this Court to examine the evidence on record to be satisfied as to if the impugned judgment warrants any interference.

9. The prosecution case, as already stated, hinges around the allegation made by the complainant that the accused demanded Rs.500/- from him as bribe for sponsoring his name for appointment against the post of Hostel Superintendent of Sainik School. Out of such amount, Rs.100/- was paid on the date of demand. The exact date on which the said amount was demanded and paid is not forthcoming either from the FIR or from the evidence of the complainant (P.W.-1) himself. Be that as it may, it is the further case of prosecution that on 08.05.1991, when the complainant met the accused and requested to sponsor his name, the latter demanded the balance amount and when the complainant expressed his inability, the accused asked him to pay at least Rs.100/- on 09.05.1991. On the next day, a trap was laid and the accused was caught red handed while allegedly accepting bribe of Rs.100/- paid by the complainant.

10. This being the prosecution case, it was for it to prove that there was demand- both prior and instant - as well as acceptance of illegal gratification by the accused. Prosecution heavily relies upon the evidence of the complainant (P.W.-1), who deposed in the court more or less whatever he had stated in the complaint (Ext.-1). As regards the demand and acceptance of bribe at the spot, the complainant stated as under:

"4. A few minutes before 5 P.M. all of us left the Vigilance office for Badambadi. I came to Badambadi on my own scooter and the other members of the raiding party came by Government Jeep. I met the accused near the gate of Badambadi L.I.C. Colony close to tea stall. Being asked by the accused I told that I had come prepared with a sum of Rs.100/-. On his demand I brought out the tainted currency note from my pocket and gave it to him. The accused accepted the currency note from me and kept it in his chest pocket. Immediately thereafter the other members of the raiding party, who had taken positions nearby rushed to the accused and caught hold of him. Two Vigilance Inspectors caught hold of both the hands of the accused. Lingaraj Mohanty, a clerk in the Cuttack

Collectorate was also present nearby to witness acceptance of money by the accused. The Vigilance officers took the accused to the Govt. jeep, in which the Executive Magistrate was sitting. Thereafter the Vigilance Officers took the accused to the Vigilance office in Govt. Jeep and I followed them on my own scooter."

According to the complainant, one Lingaraj Mohanty, a Clerk in the Cuttack Collectorate was also present nearby to witness acceptance of money by the accused. In other words, the said Lingaraj Mohanty was the overhearing witness, who was examined as P.W.-3. Being so examined, P.W.-3 did not whisper a word regarding the any demand being made by the accused to the complainant at the spot. His statement is as follows:

"2. Then we all proceeded in Govt. vehicle to the residence of the accused situated at Badambadi. The vehicle stopped near the gate near the colony. Again says the vehicle was parked at the short distance of the gate. Myself and complainant stayed near the gate. The other trap party people remained at a short distance. In the meantime after one hour the accused came on a cycle. Seeking the accused the complainant went near him, had some talk and both of them proceeded towards outside of the gate and took tea in a tea stall. After which the complainant inserted one hundred rupee note inside the pocket of the accused, after which I gave the signal and trap party arrived. The vigilance officers caught hold of the accused and took him in the vehicle to the Vigilance office. In the vigilance Magistrate asked the accused if he had taken money from complainant and the accused relied to have received the money from a complainant who gave it forcibly."

Thus, there is absolutely nothing in his version to support the allegation that the accused had demanded any money much less Rs.100/- from the complainant. Prosecution declared him hostile and cross- examined him at length but nothing substantial was brought out thereby to discredit his sworn testimony. Significantly, in cross-examination by the defence, P.W.-3 admitted that from the vigilance office, he went in the Jeep with the vigilance staff while the complainant went on his scooter. Thus,the version of the complainant, P.W.-1 is not corroborated at all by P.W.-3. Another significant aspect that is apparent from the record is what the complainant stated in his cross-examination in paragraph-11 that he was asked by vigilance to prepare another detailed report as his original report did not fully reflect all his grievances. Thus, this is a clear case where the complaint itself was prepared after due deliberation and most probably with inputs from the Vigilance Police. This, by itself, takes away the sanctity of the FIR that was acted upon.

11. Notwithstanding the aforementioned lacunae in the evidence adduced by the prosecution, the version of P.W.-9, who was the other person present nearby, i.e. the tea stall owner (P.W.-9) has to be considered. As regards the entire transaction, he had the following to say.

"I know the accused in dock, who is known as Naik Babu, who is an employee of Sainik Board, Cuttack. In the year 1991, he was staying in one of the quarters of old L.I.C. flats of quarters. In the year 1991 at about 4.30 or 5 P.M. the accused in dock along with a bearded man came to my stall to take tea, and each of them took a glass of tea. The bearded man offered me a one hundred rupee note towards the cost of the tea and I told him that I had no change asked the accused whether he had any change. The accused replied that he

had the required change. Then the bearded man handed over the one hundred rupee note to the accused. While the accused was still holding the money in his hand within no time, immediately vigilance people came, caught hold of the hands of the accused and took him with them. I was to get Rs.3/- towards the cost of the tea, which I did not get."

No doubt, he was declared hostile and cross-examined at length but nothing came out from his mouth to disbelieve or discredit his sworn testimony. If the version of P.W.-9 is compared with the defence plea, as reflected in his answer to question no.3, it would appear to be more plausible and a reasonable explanation for recovery of the tainted hundred rupee note from the shirt pocket of the accused. It is well settled that the defence is required to submit only a reasonable explanation and not prove its case beyond reasonable doubts. If the evidence as discussed above, is considered as a whole, the defence plea appears more plausible than the prosecution story, more so when the basic ingredients of demand and acceptance are not proved.

12. Before examining the justifyability of raising of the presumption under Section 20 by the trial court it would be proper to keep in mind the settled position of law that mere recovery of the tainted money divorced from the circumstances in which it is paid, is not sufficient to convict the accused, when the substantive evidence in the case is not reliable. Reference in this regard may be had to the decision of the Apex Court in the case of **State of Kerala vs. C.P. Rao**, reported in (2011) 6 SCC 45.

13. Keeping the above principle in mind it is to be seen as to how far the evidence on record could have formed the basis for the trial court to raise presumption under Section 20. Section 20 of the Act as it stood then, reads as follows:

*"**20. Presumption where public servant accepts any undue advantage** - Where, in any trial of an offence punishable under section 7 or under section 11, it is proved that a public servant accused of an offence has accepted or obtained or attempted to obtain for himself, or for any other person, any undue advantage from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or attempted to obtain that undue advantage, as a motive or reward under section 7 for performing or to cause performance of a public duty improperly or dishonestly either by himself or by another public servant or, as the case may be, any undue advantage without consideration or for a consideration which he knows to be inadequate under section 11."*

14. A bare reading of the provision makes it clear that firstly it does not apply to an offence under Section 13(1)(d) and in so far as Section 7 is concerned, it is incumbent upon the prosecution to prove that there was voluntary acceptance by the accused of illegal gratification. In the instant case, prosecution has neither been to establish prior or instant demand of gratification by the accused not acceptance of the same by him at the spot. Reading of the impugned judgment reveals that the learned trial court brushed aside the fact that there was no corroboration whatsoever of the evidence of complainant relating to prior and instant demand by the accused.

The defence explanation was also brushed aside and on the available evidence, an inference was drawn which was given the colour of presumption under Section-20. Be it noted here that a fact can be proved by both direct and circumstantial evidence. Drawing inference on the basis of evidence is not akin to raising presumption permitted by the statute. What learned Special Judge appears to have done is, in the absence of corroboration an inference has been drawn basing on the version of the complainant and the other members of the trap party. This is obviously not conscionable in the eye of law for which the finding of the learned Special Judge is rendered susceptible to interference. This Court is therefore, of the considered view that the impugned judgment of conviction cannot be sustained.

15. For the forgoing reasons therefore, the appeal is allowed. The impugned judgment of conviction and sentence is hereby set aside. The accused being on bail, his bail bonds be discharged. Before parting, this Court places on record its appreciation for the assistance rendered by Ms. Anima Kumari Dei, learned counsel for the appellant as well as Mr. M.S. Rizvi, learned Addl. Standing Counsel for the Vigilance.

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2023 (I) ILR -CUT - 529

SASHIKANTA MISHRA, J.

CRLREV NO. 899 OF 2018

SUSHAMA BARIK .....Petitioner

.V.

STATE OF ODISHA (VIGILANCE) .....Opp. Party

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Sections 397 & 401– Vigilance P.S. Case was registerd against the Petitioner under Sections 13(2) read with Section 13(1)(d) of the P.C. Act and Sections 468/471/420/120-B of IPC – The petitioner being the Registering Authority allowed execution of the sale deed and intentionally omitted to verify the actual identity of the seller by not asking for the voter identity card and thereby allowed a fake person to execute the sale deed in the name of the actual owner and the land in question was purchased by her mother – Whether the petitioner should be discharged from charges – Held, No – The above facts creates a strong suspicion that the petitioner was involved in the whole transaction knowingly and deliberately. (Para 12)

(B) WORDS & PHRASES – Distinction between 'simple suspicion' and 'grave suspicion' indicated with case laws. (Para 8)

Case Laws Relied on and Referred to :-

1. (1977) Crl LJ 1606 :State of Bihar Vs. Ramesh Singh.
2. (2002) 2 SCC 135 :Dilawar Balu Kurane Vs. State of Maharashtra.
3. 2022 (II) ILR-CUT-226 : Santanu @ Priyabrata Senapati Vs. State of Orissa.

For Petitioner : Mr. Lalit Kumar Mishra.

For Opp. Party: Mr. Sangram Das,Standing Counsel for Vigilance.

JUDGMENT Date of Judgment:23.12.2022

SASHIKANTA MISHRA, J.

1. The petitioner in the present Revision seeks to challenge the order dated 02.08.2018 passed by learned Additional Special Judge, Vigilance, Cuttack in TR No. 36 of 2010, whereby the application filed by her for discharge under Section 239 of Cr.P.C was rejected.

2. The facts of the case, briefly stated, are as follows:

The Deputy Superintendent of Police, Vigilance, Angul lodged FIR before the S.P., Vigilance, Cuttack Division stating that the petitioner, who was working as a Revenue Officer in the office of Sub- Collector, Talcher allowed registration of a sale deed in respect of a plot of land in favour of her mother Nirmala Barik alias Sunamani Barik executed by a person impersonating as Syed Mohd. Isaq, the title-holder of the plot. At the relevant time, the petitioner was in-charge of the office of Sub-Registrar, Talcher. Her mother, Sunamani Barik purportedly purchased a plot of land being Plot number 410/1508 under Khata No. 127 measuring an area of Ac.0.40 decimals in Mouza Handidhua at a cost of Rs.45,000/- from Syed Mohd. Isaq on 18.12.2004 vide RSD No. 2210/2004. The photographs of the seller and the purchaser were affixed to the said document. The sale deed was registered by the petitioner in the capacity of Sub- Registrar, Talcher and she signed on the document on 18.12.2004 as the Registering Officer, Talcher. On enquiry, it came to light that the land stands in the name of Syed Mohd. Isaq but actually he was absent from his village for about 20 years and his whereabouts were not known. The photograph purporting to be his and affixed to the document did not belong to him but was of one Bismilla Khan of Talcher. As such, it was, prima facie, proved that the said Bismilla Khan had forged the signature of Syed Mohd. Isaq as also his photograph and executed the sale deed fraudulently. The petitioner being the Registering Authority, while allowing execution of the sale deed intentionally omitted to verify the actual identity of the seller by not asking for the voter identity card and thereby allowed a fake person to execute the sale deed in the name of the actual owner. Moreover, the land in question was purchased by her mother, which shows that the sale transaction was done in connivance of the petitioner with the said Bismilla Khan, her mother and the witnesses. Such report led to registration of Vigilance P.S. Case No. 24 dated 30.6.2006 under Sections 13(2) read with Section

13(1)(d) of the P.C. Act and Sections 468/471/420/120-B of IPC. Upon completion of investigation and receipt of sanction for prosecution, charge-sheet was submitted against the accused persons including the petitioner under the aforementioned sections.

3. After appearance, the petitioner filed an application with prayer to discharge her from the case on the ground that there are no materials against her on record to frame charge. It was further claimed that as per the provision under Section 52 of the Registration Act, there was no scope for the petitioner to know about the alleged forgery of the signature of the vendor or for her mother, the vendee, about the impersonation. However, learned Court below did not accept the contentions raised by the petitioner and held that there are sufficient materials to presume that the accused persons had committed the offence and therefore, rejected the petition for discharge. The said order is impugned in the present revision.

4. Heard Sri L.K. Mishra, learned counsel for the petitioner and Sri Sangram Das, learned Standing Counsel appearing for the Vigilance.

5. Shri LK Mishra has assailed the impugned order on the following grounds:

> (i) Since the prosecution has not traced the whereabouts of the original owner of the land so far, it cannot be said that there was any impersonation.
>
> (ii) Learned court below failed to consider that the petitioner had initiated an undervaluation proceeding against the Vendee under the provisions of Odisha Stamp Rules and realized Rs.23,650/- and Rs.4300/- as deficit stamp duty and registration fees respectively much before initiation of the vigilance proceeding.
>
> (iii) As per procedure envisaged under Section 52 of the Registration Act, the registering officer cannot be made liable for things done in his official capacity and in any case the requirements of the statute were complied with in the instant case and therefore, there was no scope for the petitioner to suspect any foul play.
>
> (iv) Learned Court below failed to appreciate that the petitioner had been cheated by the principal accused namely, Banshidhar Nayak.
>
> (v) There has been no pecuniary loss caused to the Government by the said transaction.
>
> (vi) The petitioner has been implicated only on suspicion but not any material showing alleged culpability.
>
> (vi) The petitioner was absolved in the departmental proceeding initiated against the same charges.

6. Per contra, Sri Sangram Das contends that this is not just a case of simple suspicion but a case of grave suspicion inasmuch as there are materials on record to show that the petitioner misused her official position to allow registration of the sale deed in favor of her mother. That apart, several incriminating materials were seized from the possession of the petitioner which shows her involvement in the alleged occurrence.

7. Before proceeding to examine the merits of the contentions noted above, it would be apposite to refer briefly to the settled position of law relating to discharge.

8. The Apex Court made a distinction between 'simple suspicion' and 'grave suspicion' in the case of ***State of Bihar vs. Ramesh Singh***, reported in (1977) Crl LJ 1606 and ***Dilawar Balu Kurane vs. State of Maharashtra***, reported in (2002) 2 SCC 135. The position that emanates from the decisions quoted above is, where the materials placed before the Court discloses grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under Section 227 of the Cr.P.C. and for such purpose, he has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before him without making a roving enquiry into the pros and cons of the matter. This Court also had the occasion of relying on the above cited judgments in a similar case being ***Santanu @ Priyabrata Senapati vs. State of Orissa***, reported in 2022 (II) ILR-CUT-226. In the said case this Court held as follows:

> *10. From the above narration it is evident that only a grave suspicion can justify framing of charge against an accused. To further explain, suspicion per se may be entirely in the realm of speculation or imagination and may also be without any basis, whereas grave suspicion is something which arises on the basis of some acceptable material or evidence. Only because there is no other explanation for the alleged occurrence, the needle of suspicion should point at the accused cannot be a reasonable basis to proceed with the trial against him. But to do so, there must be some nexus or link between him and the occurrence which is ex facie available to be seen or inferred from the materials placed before the Court. Only then will the statutory requirement of "sufficient ground" as per Section 227 Cr.P.C. be said to have been satisfied.*

9. Coming to the facts of the present case, it is borne out from the record that the petitioner was acting as the Registering Officer in the office of Sub- Registrar, Talcher and had allowed registration of the sale deed executed by Syed Mohd. Isaq in favor of her mother, Sunamani Barik. It was revealed from investigation that the vendor has been absent from his known address for several years and his whereabouts are not known. One Bismilla Khan is said to have impersonated the vendor by affixing his photograph and signature on the sale deed as the vendor. As the Registering Officer it was the duty of the petitioner to examine whether the requirements of a valid registration were fulfilled or not. The petitioner claims to have found that the vendor was duly identified by witnesses and also fixed his photograph only on the sale deed. Therefore, it could be a plausible argument that there was no reason for the petitioner to entertain any doubt as regards the identity of the so-called vendor, his photograph or his signature. It could also be a plausible argument that the petitioner having herself initiated a case of

undervaluation and realized the deficit fees and duty much prior to the vigilance proceeding must be held to have adequately shown her bonafides.

10. Ordinarily, the Registering Officer, if found to have followed the procedure laid down in Section 52 of the Registration Act can be treated to have acted in good faith and therefore, would be entitled to protection due to a public servant. It would be profitable at this stage to refer to the relevant provision of Section 52 of the Registration Act, 1908, which is quoted hereinbelow.

> *"**52. Duties of registering officers when document presented**.—(1) (a) The day, hour and place of presentation, 1 [the photographs and finger prints affixed under section 32A,] and the signature of every person presenting a document for registration, shall be endorsed on every such document at the time of presenting it;*
>
> *(b) a receipt for such document shall be given by the registering officer to the person presenting the same; and*
>
> *(c) subject to the, provisions contained in section 62, every document admitted to registration shall without unnecessary delay be copied in the book appropriated therefore according to the order of its admission.*
>
> *(2) All such books shall be authenticated at such intervals and in such manner as is from time to time prescribed by the Inspector-General."*

Undoubtedly, the Registering Officer stands protected of any action taken by him/her in registering a document in official capacity. But in the instant case, the beneficiary of the sale transaction and the sale deed is none other than her own mother. Therefore, simply by invoking the provision under Section 52 of the Registration Act, the possible culpability of the petitioner cannot be thrown away.

11. There is of course no law that bars registration of a document by the authority only because the vendor or vendee happens to be his/her close relation. But the moment any foul play comes to surface, a natural and reasonable doubt arises as to the bonafides of the said authority. To such extent, lodging of the FIR cannot be faulted with. There is no material to directly show that the petitioner was aware of the fraud played by the impersonator and the other witnesses. So, to such extent only, the suspicion, as referred above would have to be treated as a simple suspicion, which is not sufficient to frame charge.

12. However, it is borne out from the materials on record that the sale-deed in question, agreement dated 29.05.2004 and affidavit dated 31.05.2004 were seized from the residence and office of the petitioner. This is a very significant fact, the effect of which cannot be overlooked. Moreover, this by itself is capable of changing the nature of suspicion from simple to grave. In other words, when the above fact is considered along with the other materials on record, it creates a strong suspicion that the petitioner was involved in the whole transaction knowingly and deliberately. Mere initiation of an undervaluation proceeding cannot water down such suspicion even a bit, for the possibility of the same having been done deliberately only to show bonafides cannot altogether be ruled out.

13. It has been argued that the petitioner was absolved in the departmental proceeding initiated on the same charge. This is firstly, not entirely correct because the petitioner appears to have been visited with the penalty of 'censure' for her misconduct and therefore, it would not be correct to equate the same with exoneration from the charge; and secondly, findings in the departmental proceeding are not binding on the criminal proceeding as the nature of proof required to establish the guilt in both are different.

14. Thus, it is seen that the materials on record are such as raise a strong/grave suspicion that the petitioner may have committed the alleged offence, which is adequate to frame charge against her. The grounds raised by the petitioner can always be considered during trial but not at this stage. This court therefore, finds no reason to interfere with the impugned order.

15. In the result, the revision is found to be without any merit and is therefore, dismissed.

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2023 (I) ILR-CUT- 534

A.K. MOHAPATRA, J.

W.P.(C) NO.11105 OF 2021

ROSHAN KERKETTA .....Petitioner

.V.

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

SERVICE LAW – Appointment – Orissa Civil Service (Rehabilitation Assistance) Rule, 1990 – The father of the Petitioner died on 30.06.2013 – The Petitioner applied for appointment under R.A rules 1990 in the year 2014 – The Authority rejected the claim following OCS (RA) Rules, 2020 – Whether the impugned order of rejection is sustainable ? – Held, No – The norms prevailing on the date of consideration of the application should be the basis for consideration of claim for compassionate appointment – The impugned order is unsustainable in the eyes of law and is hereby quashed. (Para 22-23)

Case Laws Relied on and Referred to :

1. (2015) 7 SCC 412 : Canara Bank & Anr. Vs. M. Mahesh Kumar.
2. (2020) 2 SCC 729 : Indian Bank and Ors. Vs. Promila & Anr.
3. (2010) 11 SCC 661: State Bank of India & Anr. Vs. Raj Kumar.
4. (2014) 13 SCC 583 : MGB Gramin Bank Vs. Chakrawarti Singh.

5. (2019) 5 SCC 600 : S.B.I. Vs. Sheo Shankar Tiwari.
6. (2019) 6 SCC 253 : State of Himanchal Pradesh Vs. Sashi Kumar.
7. (2020) 7 SCC 617 : N.C. Santosh Vs. State of Karnataka.
8. Civil Appeal No. 8564/2015 :State of Madhya Pradesh Vs. Amit Shrivas : Anup Ku. Senapati Vs. State of Odisha.
9. AIR 2022 SC 2836 : Malaya Nanda Sethy Vs. State of Odisha & Ors.

For Petitioner : Mr. Gyana Ranjan Sethi.
For Opp.Parties: Mr. T.K. Pattnaik, Addl. Standing Counsel.

JUDGMENT Date of Hearing : 07.12.2022 : Date of Judgment : 13.01.2023

A.K. MOHAPATRA, J.

I have Heard Mr. G.R. Sethi, learned counsel for the Petitioner and Mr. T.K. Pattnaik, learned Additional Standing Counsel appearing for the State-Opposite Parties. Perused the writ petition and the documents annexed thereto.

2. The present writ petition has been filed by the Petitioner with a prayer to quash the order dated 10.02.2021 passed by the Opposite Party No.5-Supreintendent of Police, Kendrapada under Annexure-7 and further to direct the Opposite Parties to give him appointment under the OCS (RA) Rules, 1990 and to grant all financial and consequential benefits flowing from such appointment.

3. The factual matrix as pleaded in the writ petition, in gist, is that the father of the Petitioner while working as a Constable in Kendrapara Police District died in harness on 30.06.2013 leaving behind his wife and two sons, as the surviving legal heirs. The present Petitioner being the eldest of the two sons applied for appointment under the Rehabilitation Assistance Scheme pursuant to OCS (RA) Rules, 1990 in the year 2014.

4. So far as the present Petitioner is concerned, admittedly he is one of the legal heirs of the deceased Government employee. He has passed +2 Examination and after the death of his father, he could not continue further with his studies. Since the family was in distress condition, the Petitioner had to give up his studies and at an early age he was compelled by the circumstance to earn the livelihood for the family. Accordingly, the Petitioner has applied for appointment on compassionate ground by submitting his application under OCS (RA) Rules, 1990 with no objection affidavit shown by his mother and younger brother. It is further stated that the mother of the Petitioner was suffering from several ailments, as such, she was unable to do any job and in support of such contention, the Petitioner has filed a medical certificate issued by the Standing Medical Board, Cuttack wherein it has been specifically mentioned that the mother of the Petitioner is unfit for any Government job.

5. After due scrutiny of Petitioner's application for appointment under Rehabilitation Assistance Scheme, the Opposite Party No.5 had initially issued letter

dated 13.8.2015 to the Opposite Party No.2 for consideration of his case for appointment under Rehabilitation Assistance Scheme as per the relevant rules. However, the case of the Petitioner was kept pending for a number of years although several posts of Constable/Sepoy were vacant under the administrative control of Opposite Parties No.2 and 3.

6. Opposite Party No.5 vide order dated 14.12.2017 directed the Petitioner to appear before the committee on 18.12.2017 at 10.00 A.M. on District Police Office, Kendrapara along with all original documents/testimonials for verification and evaluation. Pursuant to such order, the Petitioner appeared before the Opposite Party No.5 and his documents were duly verified by the office of Opposite Party No.5. After verification of documents, the Petitioner was anxiously waiting for appointment. To the misfortune of the Petitioner, several years after the documents were verified, the Petitioner received another order on 10.2.2021 from the office of the Opposite Party No.5 directing the Petitioner to resubmit his application under the amended rules, i.e., OCS (RA) Rules 2020 notified by the G.A. Department vide its Notification No.5651/Gen dated 17.02.2020.

7. Learned counsel for the Petitioner at the outset submitted that the father of the Petitioner died in harness on 30.06.2013 leaving behind the Petitioner and others as the surviving legal heirs. Since the family was in distress, the Petitioner with the no objection of other legal heirs had applied for appointment under the OCS (RA) Rules, 1990 in the year 2014. Most unfortunately, the Opposite Parties-Authorities sat over the matter and did not take any decision. Although in the meanwhile, the documents/testimonials of the Petitioners were duly verified and the case of the Petitioner for appointment was at the final stage and the Petitioner was waiting for the appointment order since December, 2017, the Opposite Parties delayed the issuance of appointment letter for a couple of years. In the meantime, the new rule was notified. Now the authorities have rejected his application by applying the new rules, i.e., OCS (RA) Rules, 2020. Such fact has been communicated to the Petitioner vide letter dated 10.02.2021 under Annexure-7.

8. Learned counsel for the Petitioner further argued that the conduct of the Opposite Parties is not only illegal, but the same is contrary to the very object of the Rehabilitation Assistance Scheme. The Rehabilitation Assistance Scheme was introduced in the State with an avowed objective to provide assistance and support to the family members of Government employees, who have died in harness. Further, the whole intention behind having such rule is to provide economic support and to save the family from starvation death. However, in the present case, the conduct of the Opposite Parties is contrary to the object behind having such a rule.

9. Earlier a coordinate Bench of this Court vide order dated 23.03.2021 disposed of the writ petition by referring to the judgments delivered by the Supreme Court in the case of ***Canara Bank and another v. M. Mahesh Kumar,*** reported in

(2015) 7 SCC 412 and in the case of ***Indian Bank and others v. Promila and another,*** reported in ***(2020) 2 SCC 729*** as well as several decisions of this Court and finally the impugned order under Annexure-7 was set aside and a direction was issued to the Opposite Parties to issue appointment order in favour of the Petitioner under the Rehabilitation Assistance Scheme to a post which is suitable considering the educational qualification of the Petitioner.

10. The order dated 23.3.2021 passed by a coordinate Bench of this Court was assailed in appeal by filing W.A. No.797 of 2021 before a Division Bench of this Court. A Division Bench of this Court vide order dated 14.09.2022 allowed the writ appeal and the impugned order dated 23.03.2021 was set aside and the matter was directed to be listed before the Roster Bench.

11. After disposal of the above noted W.A. No.797 of 2021, a counter affidavit has been filed on behalf of the Opposite Parties No.2 to 5. In the counter affidavit, the State-Opposite Parties have not disputed the factual position pleaded in the writ petition rather they have accepted most of the fact pleaded by the Petitioner. However, the Opposite Parties No.2 to 5 in their counter affidavit have stated that pursuant to resolution of the G.A. Department dated 17.02.2020, the Petitioner was asked vide letter dated 15.09.2020 to submit a fresh application in accordance with G.A. Department Notification dated 17.02.2020. The Petitioner pursuant to letter dated 15.09.2020 had applied afresh on 05.10.2020. Thereafter, the application form of the Petitioner was examined and evaluated by a committee and the Petitioner had secured 23 points out of 85 points. Since the Petitioner was found ineligible by the committee, his case was not recommended for appointment under the Rehabilitation Assistance Scheme. It is alleged in the counter affidavit that the aforesaid facts were suppressed by the Petitioner in the writ petition. Copy of the order dated 10.02.2021, the evaluation sheet, copy of the letter dated 15.09.2020 and application form dated 05.10.2020 have been filed by the Opposite Parties No.2 to 5 along with their counter affidavit.

12. Learned Additional Standing Counsel appearing for the State-Opposite Parties submitted that OCS (RA) Rules, 2020 is a more comprehensive rule and the same provides for a mechanism to assess the penurious condition of the family members of the deceased employee. While considering the case of the Petitioner by applying the Rules, 2020, it was found that the Petitioner is ineligible for appointment on compassionate ground. He further contended that the Government of Odisha in G.A. & P.G. Department vide its Circular dated 2.3.2021 has issued clear instruction to all departments to consider all pending cases seeking rehabilitation appointment under the new rules, i.e., OCS (RA) Rules, 2020. He further contended that the new rule has superseded the old rule of the year 1990. Therefore, all pending as well as new applications are to be considered only under the new Rules, 2020. He further argued that appointment under Rehabilitation Assistance Scheme is not a matter of right, but the same is governed by the Schemes/Regulations/Rules as has

been held by the Hon'ble Supreme Court. Further drawing attention of this Court to the provisions of Rule-6(9) of the Rules, 2020, learned Additional Standing Counsel argued that all pending cases as on the date of publication of the new rules shall be dealt with in accordance with the new rules. Mr. T.K. Pattnaik, learned Additional Standing Counsel further referring to the judgment of the Hon'ble Supreme Court in the ***State Bank of India and another v. Raj Kumar***, reported in ***(2010) 11 SCC 661*** submitted that no aspirant has vested right to claim for appointment on compassionate ground. Further, referring to the judgment of the Supreme Court in ***MGB Gramin Bank v. Chakrawarti Singh, reported in (2014) 13 SCC 583*** wherein it has been held that the compassionate appointment has to be considered in accordance with prevalent scheme and no aspirant can claim that his case should be considered as per the scheme existing on the date of death of the Government employee.

13. In reply to the *Canara Bank's* case (supra) relied upon by the learned counsel for the Petitioner, learned Additional Standing Counsel admitted that there are conflicting views in the opinion of different Benches of the Supreme Court. Accordingly, the matter has been referred to a larger Bench in the case of ***S.B.I. v. Sheo Shankar Tiwari,*** reported in ***(2019) 5 SCC 600***. Further, referring to the judgment of the Hon'ble Supreme Court in the case of ***State of Himanchal Pradesh v. Sashi Kumar***, reported in ***(2019) 6 SCC 253***, submitted that the appointment to any public post in the service of the State has to be made on the basis of principles in accordance with Article 14 and 16 of the Constitution and the compassionate appointment is an exception to the general rule.

14. Further, referring to the judgment of the Hon'ble Supreme Court in the case of ***N.C. Santosh v. State of Karnataka, reported in (2020) 7 SCC 617***, the learned Additional Standing Counsel argued that the law governing compassionate appointment will be as per the norms prevailing on the date of consideration of application.

15. Therefore, he submitted that the dependent of a deceased Government employee can only agitate his right to be considered for appointment and cannot claim appointment as a matter of right.

16. In course of argument, learned Additional Standing Counsel appearing for the State-Opposite Parties also referred to some of the observations made by the Hon'ble Supreme Court in the cases of ***State of Madhya Pradesh v. Amit Shrivas (Civil Appeal No. 8564/2015) and Anup Ku. Senapati v. State of Odisha***.

17. Referring to ***Anup Ku. Senapati's*** **case (supra)**, learned Additional Standing Counsel appearing counsel for the State-Opposite Parties submitted that one cannot claim any benefit under the repealed rules which was not in force at the time of consideration.

18. Having heard learned counsel appearing for the respective parties and upon a careful analysis of the facts made hereinabove, this Court at this juncture deems it proper to analyze the legal position keeping in view the argument on the point of law advanced by the learned counsels for the respective parties.

19. No doubt, the deceased Government employee died in the year 2013 and the Petitioner had initially submitted his application in the year 2014. His application was scrutinized and considered in the year 2017 under the 1990 Rules and since the authorities did not raised any objection at least nothing was communicated to the Petitioner for a period of two years, it can be presumed that the Petitioner's application was valid and, as such, he was eligible to be appointed, although no appointment order was issued till 2020 when the new rule came into force. At this juncture, this Court would like to comment that the attempt in the writ application to suppress the development that took place in the year 2020 is of the serious nature. However, considering the objective behind the Rehabilitation Assistance Scheme, this Court would like to give a warning to the Petitioner and the counsel involved by directing them not to indulge in such type of practice in future.

20. Reverting back to the issue involved in the present writ petition, this Court after careful analysis of the legal position, is of the considered view that though there exists rule in the shape of Rule-6(9) in the Rules 2020 to consider all pending applications under the new Rules, 2020, the case of the Petitioner is peculiar and stands in a different footing. In the context of the present case, this Court would like to refer to the judgment of the Hon'ble Supreme Court in the matter of ***Malaya Nanda Sethy v. State of Odisha and others,*** reported in ***AIR 2022 SC 2836*** wherein the Hon'ble Apex Court while considering the peculiar facts and circumstances of the case presented before it for adjudication, decided that the rule prevalent at the time of death of the deceased employee shall be applicable to the claim made by the dependent family members. After going through the judgment in the case of *Malaya Nanda Sethy* (supra), this Court observed that the said case was decided in the background of OCS Rehabilitation Rules of the State of Odisha and the facts of that case are somewhat similar to the facts of the present case.

21. Moreover, in the case of ***Indian Bank*** **(supra),** where the issue with regard to applicability of the scheme was directly an issue and after detailed analysis of law, the Hon'ble Supreme Court arrived at the conclusion that the claim for compassionate appointment must be decided only on the basis of relevant scheme prevalent on the date of demise of the Government employee in harness and the subsequent scheme cannot be looked into.

22. This Court also considered the contention raised by the learned Additional Standing Counsel appearing on behalf of the State-Opposite Parties. Learned Additional Standing Counsel appearing on behalf of the State-Opposite Parties referred to the judgment in *Sheo Shankar Tiwari* (supra). In *Sheo Shankar Tiwari's*

case (supra), the Hon'ble Supreme Court while taking note of conflicting views by two different Benches of Hon'ble Supreme Court of equal strength has referred the matter to a larger Bench and that the issue has not been finally adjudicated by the larger Bench. Therefore, till the issue is finally adjudicated by the larger Bench, the judgment of the Hon'ble Supreme Court in *Malaya Nanda Sethy's case* (supra) delivered in a scenario similar to the one involved in the present case and involving identical rules and being a later judgment will have force and binding precedent and this Court is bound by such a decision. Otherwise also, the conduct of the Opposite Parties in keeping application pending for almost about a decade and rejecting the same by applying the new rule which came into force in 2020 appears to be grossly arbitrary and discriminatory. This Court is also aware of a development that several similarly placed persons have been given appointment and some of them must have applied much after the Petitioner for such appointment. In such view of the matter, the decision taken by the Opposite Party No.5-Supreintendent of Police, Kendrapada vide order dated 10.02.2021 under Annexure-7 is unsustainable in the eye of law. Even in the judgment in *N.C. Santosh* (supra), which is heavily relied upon by the learned counsel for the State, in Paragraph-20 of the said judgment, it has been observed in clear terms that the norms prevailing on the date of consideration of the application should be the basis for consideration of claim for compassionate appointment. Applying the said principle to the facts of the present case, the case of the Petitioner was finally considered in December, 2017 and the authorities were supposed to issue the appointment orders only as has been done in the case of similarly situated other employees. However, due to delay and laches on the part of the Opposite Parties, the Petitioner did not get the much anticipated appointment letter like similarly placed other candidates. Therefore, by upholding the decision of the authorities under Annexure-7, this Court would be giving a seal of approval to the injustice that has been done to the Petitioner.

23. In view of the analysis made hereinabove, this Court is of the considered view that the law laid down by the Hon'ble Supreme Court in *Malaya Nanda Sethy* (supra) would squarely apply to the fact of the present case. Accordingly, the impugned order dated 10.02.2021 passed by the Opposite Party No.5-Supreintendent of Police, Kendrapada under Annexure-7 is unsustainable in the eye of law and, accordingly, the same is required to be quashed and is hereby quashed. Further, the authorities are directed to consider the case of the Petitioner for compassionate appointment under the OCS (RA) Rules, 1990 within a period of three months from the date of production of certified copy of this judgment and in the event the Petitioner is found eligible, he may be appointed under the OCS (RA) Rules, 1990 within the aforesaid stipulated period of time.

24. With the aforesaid observations and directions, this writ petition is allowed. However, there shall be no order as to cost.

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2023 (I) ILR - CUT - 541

V. NARASINGH, J.

W.P.(C) NO. 22890 OF 2014

MAHESWAR DASH .....Petitioner

.V.

UNION OF INDIA & ORS. .....Opp. Parties

CENTRAL CIVIL SERVICES (PENSION) RULES, 1972 – Rule 40 and 49 – The petitioner joined as constable CISF on 30.03.1982 and compulsorily retired on 30.11.1991 – Whether the petitioner is entitled to the benefit of pension under Rule 40 & 49 of the 1972 Rule – Held, Yes – The petitioner having 9 years and 8 months of service, the period of 8 months by fiction of law has to be treated as one complete year, in computing the service period as qualifying service as envisaged under Rule 49(1) of 1972 Rules thereby entitling petitioner for pension on account of compulsory retirement in terms of Rule 40 of 1972 Rules – The provision of payment of pension being a beneficial legislation ought to be interpreted liberally. (Para 30-31)

Case Laws Relied on and Referred to :-

1. (1994) volume 4 SCC 711 : Oil & Natural Gas commission Vs. Utpal Kumar Basu
2. (2020) 10 SCC 766 : Shanti Devi Alias Shanti Mishra Vs. Union of India & Ors.

For Petitioner : Mr. M.K. Khuntia

For Opp. Parties : Mr. D.R. Bhokta, CGC.

JUDGMENT Date of Hearing : 02.09.2022: Date of Judgment: 06.01.2023

V. NARASINGH, J.

1. The petitioner being duly selected was appointed as a constable under the Opposite Party No. 2 (Deputy Inspector General, CISF, NEZ, East Kolkata Township, Kolkata) on 30.3.82.

2. He was dismissed from service by order dated 30.11 1991. The said order of dismissal, on the representation of the petitioner was modified to one of compulsory retirement from service with effect from 30.11.1991 by the Revisional Authorities in terms of its order dated 2/3rd of April, 1998 at Annexure-3. In the said order it was mentioned that the petitioner is entitled to draw two third compensation pension and gratuity as admissible.

3. Being aggrieved by the amount of gratuity and compensation pension paid to him in terms of the order at Annexure-3, the petitioner approached this court by filing W.P.(C) No.15549/2013 with a prayer to modify the punishment order and granting pension. By order dated 5.3.2014, this Court disposed of the said Writ Petition directing the Opposite Party No. 2 to dispose of the appeal keeping in

view sub Rule-3 of Rule 40 of the Central Civil Services (Pension) Rules, 1972 (herein after referred to as CCS (Pension) Rules, 1972).

4. The Opposite Party No. 2 having rejected the grievance of the Petitioner by order dated 07.05.2014 at Annexure-10 holding that the petitioner is not eligible for pension as he has not completed 10 years qualifying service in terms of Rule 49 (1) of CCS (Pension) Rules 1972, the present Writ Petition has been filed assailing the said order of rejection at Annexure-10.

5. The prayer in the Writ Petition is quoted hereunder for convenience of ready reference;

> *" i). To direct the Opposite Party No.3 to modify the order under Annexure-3 to the extent that the petitioner be compulsorily retired from service w.e.f. 13.2.98 not from 30.11.91.*
>
> *ii). To direct the Opposite Parties to allow the pension of the petitioner as per Rule 33,40 and 39 of Central Civil Service (Pension) Rules, 1972.*
>
> *iii). To direct the Opposite Parties to release arrear pension of the petitioner with 18% interest.*
>
> *iv). To quash the order dtd.7.5.14 under Annexure-10.*

6. It is apt to state here that during the course of hearing learned counsel for the petitioner on instruction submitted that he does not want to press the prayer-i as quoted above. As such the Writ Petition is confined to prayers at ii, iii, and iv as above.

7. At the outset learned counsel for the Union of India, Shri D.R. Bhokta, CGC raised a preliminary objection regarding maintainability of the present Writ Petition on the ground of territorial jurisdiction. And, relied on the decision of the apex Court in the Case of ***Oil & Natural Gas commission vs. Utpal Kumar Basu*** *reported in* ***(1994) volume 4 SCC 711*** and the order of this court dated 27.1.1997 in OJC No. 4760 of 1992 relating to the very same petitioner.

8. On a bare perusal of the impugned order of rejection of petitioner's prayer for recalculation of his emoluments in the light of the order of compulsory retirement, it is seen that the same was communicated to the petitioner at his residential address in the district of Bhadrak,within the territorial jurisdiction of this Court. In this context, learned counsel for the petitioner relied on the judgement of the apex court in the case of ***Shanti Devi Alias Shanti Mishra vs. Union of India and others*** reported in ***(2020) 10 SCC 766***. It is apposite to state here that in Utpal Kumar Basu(Supra), which is relied on by the learned counsel for the Union of India, it was held by the apex court referring to the principle of "forum convenience" that the Writ Petition is maintainable in the High Court within the territorial jurisdiction of which one resides and more so in the case of a compulsorily retired employee like the present petitioner.

9. Hence applying the law laid down by the apex court in the case of ***Shanti Devi*** (supra), in the factual matrix of the case at hand, the challenge to the territorial jurisdiction of this court to entertain the present Writ Petition is negated. The Writ Petition is thus held maintainable.

10. On perusal of the impugned order at Annexure-10 it can be seen that the petitioner's prayer for entitlement of pension in terms of Rule-40 of the CCS (Pension) Rules did not find favour with the authorities relying on Sub Rule (1) to Rule-49 of the CCS (Pension) Rules of not rendering the qualifying service of 10 years.

11. In the said impugned communication the authorities held that the petitioner is not eligible for pension under Rule 49 for not having 10 years of qualifying service, so as to entitle him to pension (in terms of Rule-40).

12. It is stated in the impugned order that Rule-40 deals with "quantum of pension and/or gratuity in case of compulsory retirement as a means of punishment, which can be reduced by Disciplinary Authority but pension is admissible only under Rule 49(1) of the CCS (Pension) Rules, 1972". And, as the petitioner does not have the qualifying service of 10 years which is the condition precedent to be eligible in terms of Rule-49, he is not entitled to pension, as claimed. "And, further that Rule 40 & 40(3) is not attracted" and accordingly dismissed the petitioner's appeal.

13. Heard learned counsel for the petitioner and the Opposite Parties and perused the record.

14. The sole issue that comes up for consideration in this Writ Petition is whether the petitioner having joined on 30.03.1982 and compulsorily retired on 30.11.1991, is entitled to be granted the benefit of pension under Rule 40 & 49 of the CCS (Pension) Rules,1972.

15. Admittedly CISF Rules, 1969 do not contain any separate Rule relating to Pension. Rule 65 of the CISF Rule, 1969 states that "the Rules relating to superannuation Pension, Provident Fund gratuity of supervisory officers and members of the force shall be same as those applicable to one Central Government Servants" and thus the case at hand would be governed by the CCS (Pension) Rules, 1972.

16. To appreciate the lis in its proper perspective, it is necessary to refer to the relevant provisions of CCS (Pension) Rules, 1972, which has a direct bearing on the point at issue. Rule 40 deals with compulsory retirement pension. The said Rule is extracted hereunder;

> *"**40. Compulsory retirement pension** .-*
>
> *(1) A Government servant compulsorily retired from service as a penalty may be granted, by the authority competent to impose such penalty, pension or gratuity or both at a rate not less*

than two-thirds and not more than full compensation pension or gratuity or both admissible to him on the date of his compulsory retirement.

(2) Whenever in the case of a Government servant the President passes an order (whether original, appellate or in exercise of power of review) awarding a pension less than the full compensation pension admissible under these rules, the Union Public Service Commission shall be consulted before such order is passed.

Explanation.- In this sub-rule, the expression "pension" includes gratuity.

(3) A pension granted or award under sub-rule (1) or, as the case may be, under sub-rule (2), shall not be less than the amount of (Rupees three thousand five hundred) per mensem."

16.A. Rule 49 under Chapter-7 deals with the regulation of amount of pension which reads as under;

"49. Amount of Pension

(1) In the case of a Government servant retiring in accordance with the provisions of these rules before completing qualifying service of ten years, the amount of service gratuity shall be calculated at the rate of half month's emoluments for every completed six monthly period of qualifying service.

xxx xxx xxx

(2) Subject to the proviso to sub-rule (2) of Rule 38, in the case of a Government servant retiring in accordance with the provisions of these rules after completing qualifying service of not less than ten years, the amount of pension shall be calculated at fifty per cent of emolument or average emoluments, whichever is more beneficial to him, subject to a minimum of nine thousand rupees per mensem and maximum of one lakh twenty-five thousand rupees per mensem.

xxx xxx xxx

(3) In calculating the length of qualifying service, fraction of a year equal to three months and above shall be treated as a completed one half-year and reckoned as qualifying service.

17. It is not in dispute that the petitioner joined in service on 30.03.1982 & initially dismissed from service by order dated 30.11.1991. On rejection of his appeal the petitioner approached this Court by filing OJC No.4760 of 1992 and in terms of the order passed by this Court dated 27.01.1997, the petitioner preferred revision. The Revisional Authority by order dated 2nd/3rd April 1998 at Annexure-3 modified the punishment of dismissal to one of compulsory retirement w.e.f 30.11.1991 and directed that the petitioner to be entitled to two-third compensation pension and gratuity as admissible.

18. Being aggrieved by the calculation of his emolument as per the order dated 17.01.2000 at Annexure-4 the petitioner sought for recalculation of amount of pension and gratuity initially by representation dated 17.11.2000 (Annexure-5) and reiterated by representation dated 18.08.2008 (Annexure-6).

19. The petitioner thereafter approached this Court in OJC No.17247 of 2001. The said writ petition was disposed of by order dated 12.08.2008 giving direction to DIG, CISF NEZ HQrs to dispose of the appeal of the petitioner within six months, if the same was pending and the petitioner was granted l iberty to submit another

memorandum of appeal before the said Authority within a period of three weeks to facilitate early disposal. And, the said appeal was preferred within a period of three weeks as fixed. As the Authorities did not dispose of the same, assailing such inaction, the petitioner preferred W.P.(C) No.15549 of 2013 and by order dated 05.03.2014, this Court directed the Opposite Party No.2 to dispose of the appeal of the petitioner in accordance with law and while doing so further directed to specifically deal with the question as to whether the petitioner is entitled to monthly pension as per sub-rule (3) of Rule-40 of CCS (Pension) Rules, 1972.

20. As already noted in obedience to such direction the impugned order at Annexure-10 dated 07.05.2014 was passed.

21. On a bare perusal of the Rule 40 extracted above, it can be seen that the said rule categorically deals with pension of a government servant as in the present case, who is compulsorily retired from service and it stipulates payment of pension or gratuity or both at a rate not less than two-thirds and not more than the full compensation pension or gratuity or both admissible to him on the date of his compulsory retirement and sub-rule (3) thereof specifies that the pension granted shall not be less than the amount of Rs.375/- per Mensem .

22. The underlying principle is that the person who suffered the penalty of compulsory retirement ought to be ordinarily granted full compensation pension and retirement gratuity admissible on the date of his compulsory retirement. As opposed to extreme penalties of removal or dismissal consequentially resulting in loss of pension. At this juncture reference can be made to Rule 49 relying on which the authorities have denied the claim of the petitioner in terms of Rule 40 of CCS (Pension) Rules.

23. Rule 49 of the CCS (Pension) Rules coming under the Chapter-VII (Regulation of Amount of Pensions) deals with the case of government servant retiring in accordance with the provisions of the Pension Rules after qualifying service of 10 years.

24. It is urged by the learned counsel for the petitioner that on a bare reading of the Rule 49 it can be seen that the same is ex-facie not applicable in the case at hand in as much as the petitioner being compulsorily retired, his case is squarely covered under Rule 40.The submission of the learned counsel for the petitioner in this regard in Paragraph-17 is extracted hereunder;

> *"17. That, on a bare reading of Rule 40 it is crystal clear that when a Govt. servant compulsorily retired from service as a penalty may be granted by the authority competent to impose penalty, pension or gratuity or both @ not less than 2/3 and not more than full compensation or gratuity or both amenable to him on the date of compulsory retirement. As would be evident from Annexure-3 the petitioner was imposed with the compulsory retirement from service w.e.f. 30.01.1991 and entitled to draw 2/3 compensation pension and gratuity. Since the petitioner has been imposed with punishment to draw 2/3 compensation pension as per Rule 40 he is entitled to pension as he has compulsorily retired*

from service as a major penalty. It is humbly submitted that as cited Rule 49 of pension rules same is not applicable in the case of petitioner. It is humbly submitted that Rule 35 to Rule 41 of pension rules deals with classes of pension and conditions governing their grant. As per Rule 35 a superannuation pension is to granted Govt. servants who is retired on his attaining the age of compulsorily retirement Rule 36 deals with retiring pension where as Rule 37 deals with pension is absorption under corporation company or body. Rule 38 deals with invalid pension and Rule 39 deals with compensation pension. Whereas Rule 40 deals with compulsory retirement pension. Rule 49 deals with amount of pension to a Govt. servant who retires after completion of 10 years of qualifying service. The compensation pension under Rule 39 and 40 and the amount pension fixed in Rule 49 are two distinct things. Hence it is wrong to say if one has not completed 10 years of qualifying service he is not entitled to compensation pension is misinterpretation of law and complete non-application of mind. Hence the same is liable to be quashed. A copy of the order dtd.7.5.14 is marked to this petition as ***ANNEXURE-10****."*

25. Per contra in Paragraph-30 of the counter the Opposite Parties have stated as under;

*"**30**.That in reply to para 17 it is humbly submitted here that the averment made by the Petitioner in this paragraph is nothing but figment of his surmise and conjecture. In this regard it is submitted that if a person, who retires from service before completing 10 (ten) years qualifying service without committing any misconduct, he is given amount of pension in accordance with Rule-49 of CCS (Pension) Rules 1972. And whereas, Sub-Rule (3) under Rule-40 of CCS (Pension) Rules 1972 interalia states to See GID Below Rule 49, then how can a person committing severe misconduct,whois awarded with the penalty of "Compulsory retirement" before completing minimum 10 (Ten) years qualifying service, be given pension in accordance with Rule-40 of CCS (Pension) Rules-1972 ? Hence, the averment made by the Petitioner in this paragraph is totally wrong and misinterpretation of law and completely based on his imagination and just an attempt to misguide the Hon'ble High Court to achieve undue advantage by sitting in his Home."*

26. It is apt to state here that Chapter-V of the CCS (Pension) Rules 1972 deal with "Classes of pensions and conditions governing their grant" and one of the Classes of pension as enumerated in Rule 40 thereof is compulsory retirement pension, as quoted herein above.

26.A. On a bare perusal of Rule 40 of the CCS (Pension) Rules, it can be seen that a Government Servant compulsorily retired from service as a penalty, as in the present case, may be granted, by the authority competent to impose such penalty, Pension or gratuity or both at a rate not less than two-thirds and not more than full compensation pension or gratuity or both admissible to him on the date of his compulsory retirement.

27. The submission of the learned counsel for the petitioner that Rule 40 of CCS (Pension) Rules is to be interpreted independently so as to entitle a Government Servant compulsorily retired to get pension irrespective of minimum qualifying service would lead to an anomalous scenario. In as much as, where an employee who has not suffered any disqualification in terms of punishment would not be entitled to pension for not completing 10 years of qualifying service. Yet, one who is

Compulsorily retired would be eligible to receive pension though he has not completed 10 years of qualifying service.

27.A. The rule makers could foresee such an anomaly and therefore the word 'admissible' has been specifically mentioned in Rule-40 of CCS (Pension) Rules. The word "admissible" thus must be given its full play.

Meaning of the word appearing in the statute should be contextually understood.

It is a the primary Rule of interpretation that the words appearing in particular provision must be so interpreted which would subserve the objective of such provision, Rule 40 of CCS (Pension) Rules as in the present case.

28. The admissibility and quantum of pension is stated in Rule 49 of CCS (Pension) Rules and as per said Rule, to be entitled to get minimum pension the government servant has to complete qualifying service of not less than ten years.

The Authority in impugned order at Annexure-10 have negated the petitioner's entitlement to pension on the ground that he has not completed 10 years of qualifying service.

29. In the case at hand, the petitioner joined in service on 30.03.1982 and compulsorily retired from service w.e.f. 30.11.1991 treating the suspension period as such. Thus the petitioner has completed 9 year and 8 months of service. Learned counsel for the petitioner submits that the period of service of petitioner has to be rounded off to ten years in terms of provisions contained in Rule-49(3) of CCS (Pension) Rules, as admittedly the petitioner is governed under the said Rule.

In this context the petitioner has relied upon judgment of Apex Court in State Bank of Patiala vs. Pritam Singh Bedi (2014 AIR SCW 4007) seeking rounding off the 9 year 8 months as 10 years of qualifying service.

30. Undisputedly the petitioner has completed 9 years and 8 months of service. Hence in terms of Rule 49(3) of CCS (Pension) Rules, culled out hereunder for sake of convenience of ready reference;

> "Rule 49(3) of CCS Pension Rules reads as thus:-
>
> *(3). In calculating the length of qualifying service, fraction of a year equal to three months and above shall be treated as a completed one half-year and reckoned as qualifying service."*

The petitioner having putting 9 years and 8 months of service, the period of 8 months by fiction of law has to be treated as one complete year, in computing the service period as qualifying service as envisaged under Rule 49(1) of CCS (Pension) Rules thereby entitling of petitioner for pension on account of compulsory retirement in terms of Rule 40 of CCS (Pension) Rules.

31. It is trite law that while considering claim for pension interpretation which would further such entitlement to be preferred without affecting the intent of the provision. The provision of payment of pension being a beneficial legislation ought to be liberally interpreted as held by Apex Court in catena of decision.

It is to be borne in mind that there is no embargo in application of Rule 49(3) of CCS (Pension) Rules in case of an employee like the petitioner who has been awarded the punishment of compulsory retirement in as much as by operation of Rule 40 thereof, the petitioner is entitled to pension and other emoluments stated therein as "admissible".

32. On a close analysis of the Rules quoted herein above, it is held that the petitioner shall be governed by the provisions of Rule 40 of the CCS (Pension) Rules dealing with compulsory retirement pension read with Rule 49(3) thereof and as such the impugned order at Annexure-10 dated 07.05.2014 so far as it relates to denial of pensionary benefits relying on Rule 49(1) of the CCS (Pension) Rules, 1972 is quashed.

33. Opposite Parties are directed to calculate petitioner's pension in terms of Rules 40 & 49(1) & (3) of CCS (Pension) Rules as discussed above and his entitlement be disbursed within a period of six months from the date of receipt/production of copy of this judgment.

34. So far as claim of interest is concerned it is the settled law that interest is the compensation to be paid for withholding the amount to which the pensioner is otherwise entitled to. But, such principle cannot be applied mechanically to an incumbent who is made to retire compulsorily. Hence, in the peculiar facts of the present case, this Court is not persuaded to grant any interest.

35. In the event the entitlement as above, are not disbursed, within the period as stipulated, the petitioner shall be entitled to interest @7% from the date of passing of the impugned order dated 07.05.2014 till the date of actual payment.

36. The Writ Petition thus stands disposed of.

37. No order as to costs.

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2023 (I) ILR - CUT - 548

V. NARASINGH, J.

BLAPL NO. 7941 OF 2022

SATENDRA KUMAR .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

BLAPL NO.7985 OF 2022
RAJU MEHETWA @ MAHATO ……..Petitioner
.V.
STATE OF ODISHA ……..Opp. Party

BLAPL NO.11197 OF 2022
ANIL KUMAR PANDIT ……Petitioner
.V.
STATE OF ODISHA ……Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 173 (2)(8) and proviso to section 167(2) r/w Section 36-A(4) of the N.D.P.S. Act – Alleged commission of offences under Sections 20(b)(ii)(C)/27- A/29 of the N.D.P.S. Act – The Investigating officer filed preliminary charge-sheet within the stipulated period of 180 days and final charge sheet was filed later on – Whether the petitioner is entitled to be released on default bail keeping in view his indefeasible right under proviso 167(2) of the Code? – Held, No – As report under Section 173(2) of the Code was submitted within the stipulated period of 180 days and cognizance was taken on the basis of such preliminary charge sheet, there was no necessity to seek extension in terms of the proviso to Section 36-A(4) of the Act, and as such there is no infringement of indefeasible right of the petitioner in the case at hand so as to warrant his release on "default bail". (Para 30-33)

Case Laws Relied on and Referred to :-

1. (2009) 17 SCC 631: Sanjay Kumar Kedia @ Sanjay Kedia Vs. Narcotics Control Bureau & Anr.
2. (2021) 2 SCC 485:M. Ravindran Vs. Intelligence Officer,Directorate of Revenue Intelligence.
3. CRLMC No.1 of 2020 : Sk. Raju @ Raju & Ors. Vs. State of Odisha.
4. (2021) 12 SCC 1 : S. Kasi Vs. State.
5. (1994) 4 SCC 602 : Hitendra Vishnu Thakur Vs. State of Maharashtra.
6. (2002) 3 SCC 496 : Haryana Financial Corporation Vs. Jagdamba Oil Mills.

For Petitioner : Mr. S.D. Das, Sr. Adv., Mr. M.M. Swain, Mr. B.P. Pradhan
For Opp. Party : Mr. K.K. Gaya, ASC.

JUDGMENT Date of Hearing :25.01.2023: Date of Judgment:.01.02.2023

V. NARASINGH, J.

1. Since all the three BLAPLs arise out of the same P.S. Case (Chandrapur P.S. Case No.17 of 2020) (T.R. No.05/2022 on the file of learned Additional Sessions Judge-cum-Special Judge, Gunupur), they were heard together on the consent of the parties and are being disposed of by this common judgment.

2. Heard Mr. S.D. Das, learned senior counsel for the Petitioner and Mr. K.K. Gaya, learned Addl. Standing Counsel.

3. The petitioner (Satendra Kumar) is an accused in connection with T.R. No.05 of 2020, pending in the file of the learned Additional Sessions Judge-cum-Special Judge, Gunupur, for alleged commission of offences under Sections 20(b)(ii)(C)/27- A/29 of the N.D.P.S. Act.

4. Being aggrieved by the rejection of his application for bail U/s.439 Cr.P.C. by the learned Additional Sessions Judge-cum- Special Judge, Gunupur, by order dated 22.07.2022 in the aforementioned case, the present BLAPL has been filed.

5. The undisputed facts are that the petitioner along with his two other co-accused namely, Raju Mehetwa @ Mahato (BLAPL No.7985 of 2022) and Anil Kumar Pandit(BLAPL No.11197 of 2022) were taken into custody on 27.05.2020 for alleged commission of offences under Sections 20(b)(ii)(C)/27-A/29 of the N.D.P.S. Act, 1985 for carrying contraband (Ganja) to the tune of 245Kgs.

6. On 22.11.2020, the Investigating officer submitted the charge-sheet, styling the same as "preliminary charge-sheet" on the 179th day, keeping the investigation open under Section 173(8) of the Code of Criminal Procedure, 1973 (Code).

7. The order passed by the learned Special Judge on 22.11.2020 is culled out hereunder:-

T.R.-5/2020

"The case record is put up today as the I.O. of this case is submitted the Preliminary Charge Sheet no.29, Dtd. 22.11.2020 u/S **20(b)(ii)(C) of N.D.P.S.** Act against the accused persons namely 1. **Anil Kumar Pandit**, S/O- Late Jagadish Pandit of Village- Near Pratapnagar Sabeli, P.S- Nandangari, Madoli-93, North- East Delhi, 2. **Satendra Kumar,** S/O- Sriram Pritsa of Village- Srirampur, P.S- Bella, Dist-Sitamani (Bihar) and 3. **Raju Mehetwa**, S/O-Sukan Mehetwa of Village- Kharrabisampur, P.S-Behla, Dist- Korihari (Bihar) and has kept the investigation open as per 173(8) of Cr.P.C for arrest of the other two accused persons namely Duli Bibar and **Abhiram Bibar**. He also submitted sixteen sheets of Case Diary, eleven sheets of statement u/S.161 Cr.P.C, two sheets of Spot Map, four sheets of Seizure list, two sheets of Zimanama and other connecting documents (in total 60 sheets). Tag the same in the case record.

Perused the preliminary charge sheet & other connecting papers and found that there is a prima facie material against the accused persons namely. 1. **Anil Kumar Pandit**, 2. **Satendra Kumar and** 3. **Raju Mehetwa** for commission of offence u/S 20(b)(ii)(C) of the N.D.P.S. Act. Hence, cognizance of the offence u/S 20(b)(ii)(C) of the N.D.P.S. Act is taken against the above named accused persons.

Put up on date fixed for submission of Final Charge sheet and further order."

8. On 11.08.2021, the Investigating Officer submitted the "final charge-sheet" and the order passed is quoted hereunder:-

T.R.05/2020

> "The record is put up today as the I.O. of this case is submitted Final Charge Sheet vide C.S.19 dated 31.07.2021 for the offence u/S- **20(b)(ii)(C)/27-A/29** of the **N.D.P.S. Act**, against accused person namely 01. **Anil Kumar Pandit**, aged about- 43 years, S/o- Late Jagadish Pandit of Village- Near Pratap nagar Sabeli, PS: Nandangiri, Madoli-93, North east Delhi,2. **Satendra Kumar**, aged about 27 years S/O- Sriram Krishna vill: Srirampur, Ps- Bella, Dist- Saltamani (Bihar) **3. Raju Mehetwa**, aged about 19 years S/O: Sukan Mahetwa, Vill: Kharrabisampur, PS: Behla, Dist- Korihari (Bihar) 4. **Duli Bibara** aged about 56 years, S/O: Late Mani Bibara of Vill Gerengaguda PS: Chandrapur Dist: Rayagada **5. Abhiram Bibara**, aged about 31 years, S/O: Duli Bibara, Vill: Gerengaguda, PS: Chandrapur, Dist: Rayagada showing accused person namely **Abhiram Bibara** as absconder. He also submitted Two (02) sheets of Case Diary along with final charge sheet (in total 12 sheets).
>
> Perused the charge sheet along with the case record. It transpires from the case record that on the preliminary charge sheet No.29, Dated 22.11.2020 filed on date 22.11.2020 **U/S 20(b)(ii)(C) N.D.P.S**. Act, against accused persons namely **Anil Kumar Pandit, 02. Satendra Kumar, 3. Raju Mehetwa**. The cognizance of offence U/s 20(b)(ii)(C) N.D.P.S. Act has already been taken on that very day. Now the I.O has submitted the final Charge Sheet against above said three accused persons and two others namely **Duli Bibara and Abhiram Bibara**, showing Abhiram Bibara as absconder. There is prima facie material against all the above named accused persons for the offence punishable U/S 20(b)(ii)(C) N.D.P.S. Act. As the cognizance of the offence U/S 20(b)(ii)(C) N.D.P.S. Act has already taken, it need not require to take cognizance again. Put up on the date fixed."

9. It is the submission of the learned senior counsel Mr. Das for the petitioner that there is no concept of filing of the "preliminary charge-sheet". Since the final charge-sheet was filed on the 440th day, and admittedly, there being no extension of the period in terms of Section 36-A(4) proviso of the N.D.P.S. Act, each day of the custody of the petitioner is illegal and keeping in view his indefeasible right under proviso to 167(2) of the Code, he is to be released on "default bail".

10. At the outset, it is submitted by the learned State counsel that before the learned Court in seisin infringement of such indefeasible right on non filing of the charge sheet/final form within the stipulated period, in the face of non extension of the time limit in terms of Section 36-A(4), detention being illegal was never urged. Hence, learned State counsel submitted that on the said count alone, the BLAPL is liable to be rejected.

11. In view of the authoritative pronouncements of the apex Court relating to the indefeasible right of an accused, this Court notwithstanding that such a ground is being canvassed for the first time in this BLAPL, proceeds to consider the same on its own merits.

12. Learned senior counsel Mr. Das for the petitioner has relied upon the following judgments to fortify his submissions.

> (i) **Sanjay Kumar Kedia @ Sanjay Kedia Vs. Narcotics Control Bureau and Another - (2009) 17 SCC 631**

(ii) **M. Ravindran vs. Intelligence Officer, Directorate of Revenue Intelligence - (2021) 2 SCC 485**

(iii) **Sk. Raju @ Raju & Others Vs. State of Odisha (CRLMC No.1 of 2020** disposed of on **01.07.2020) (OHC)**

12(A). Learned counsel Mr. M.M. Swain appearing in BLAPL No.7985 of 2022 and learned counsel Mr. B.P. Pradhan appearing in BLAPL No.11197 of 2022 adopted the submission of the learned senior counsel.

13. It is the submission of the learned counsel for the State that once charge-sheet has been filed in the case at hand on 179th day i.e. within the stipulated period of 180 days in terms of Section 36-A(4) of the NDPS Act, there is no scope to urge violation of indefeasible right in terms of proviso to Section 167(2) of the Code.

14. Learned counsel for the State further submitted that content of the final report is significant and merely because the same has been referred to and styled as preliminary charge sheet, it does not lose its legal import and it ought to be considered as the final report in terms of Section 173(2) of the Code and more so when cognizance has been taken on the basis of the same as in the instant case. He also relied on the provisons of Orissa Police Manual and the judgment of the apex Court in the case of **S. Kasi Vs. State reported in (2021) 12 SCC 1**.

15. It is the submission of the learned counsel for the State that once "charge sheet" has been filed in whatever form, the right of the accused to get default bail does not merit consideration. Hence, it is stated that indefeasible right though undoubtedly gets precedence over the right of the State to carry on investigation, is curtailed on submission of charge-sheet. It is his submission that if the law laid down in this context in its proper prospective in the case of **S. Kasi** (Supra) is applied contextually in the case at hand it has to be unerringly held that there has been no violation of right of the petitioner much less indefeasible right to be released on "compulsive bail".

16. The dispute in the case at hand falls within a narrow compass i.e. as to whether preliminary charge-sheet filed on 22.11.2020 can be treated as an intimation to the learned Court in seisin on completion of investigation and in the instant case under the N.D.P.S. Act within 180 days in terms of Section 36-A(4).

17. Preliminary charge-sheet has been referred to in Rule 172- (f) of the Odisha Police Rules under Chapter-IX thereof dealing with "Investigation" is quoted hereunder for convenience of ready reference:-

xxx xxx xxx

"(f) **Preliminary Charge Sheet** :- If after a limit of 15 days provided by Section 167, Cr.P.C., a further remand of the accused is considered necessary to obtain further evidence the Investigating Offcier shall submit a report styled as Preliminary Charge Sheet and not in the form of charge sheet to the Magistrate in order to enable him to grant remand under Section 344, Cr.P.C. This preliminary charge sheet shall state facts of the case and show briefly the evidence so far collected.

It must be shown-

(i) that sufficient evidence has been obtained to raise suspicion that the accused may have commuted an offence.

(ii) that it appears likely that further evidence may be obtained by a remand."

xxx xxx xxx

18. The word "charge sheet" has not been defined in the Code. Section 173 of the Code refers to report of police officer on completion of investigation.

Section 173(2)(i) of the Code states that as soon as the investigation is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report in the form prescribed by the State Government stating the details as enumerated therein. Such form has been prescribed by the State Government (Vol-II of Police Manual Form No.32)

Section 173(8) of the Code clothes the Investigating Agency with the Additional power to continue the investigation and forward a "further report or reports" in the form prescribed and also stipulates that the provision of Section 173(2) to (6) of the Code shall apply to such report or reports, as they apply in relation to a report forwarded under Section 173(2) of the Code.

19. Rule 174(a) of PMR deals with charge sheets. It states that when the case is found to be true and prima facie case is made out, a charge sheet shall be submitted in PM form No.32 to the Court competent to take cognizance as soon as possible after the arrest and by the quickest means and reference has been made regarding the briefest particulars to be noted in terms of Section 173 and 190(b) of the Code.

20. The reference to preliminary charge sheet under Rule 172(f) has thus to be understood in the context of Rule 173(a) dealing with completion of investigation and Rule 174 of the Orissa Police Manual referring to charge sheet.

21. In the case at hand, it can be seen that the police officer forwarded to the Court competent to take cognizance report in the prescribed form. It has to be borne in mind that on the basis of such report cognizance has been taken and more particularly in the order dated 11.08.2021, the learned Court has specifically stated that as cognizance of the offences under Section 20(b)(ii)(C) of NDPS Act has already been taken, **it is not required to take cognizance again**. Hence, it is clear that even cognizance of the offence has been taken within the time limit of 180 days as stipulated under Section 36-A(4) of the Special Act, 1985. Hence, this Court does not find any force in the submission of the learned Counsel for the petitioner that the report of the police officer on completion of investigation under Section 173 of the Code read with Section 36- A(4) proviso was not submitted.

21(A). As such report was admittedly submitted on the 179th day, as rightly stated by the learned counsel for the State, there was no necessity for the prosecution to

seek extension of time for completion of investigation as envisaged under proviso to Section 36-A(4) of NDPS Act, 1985.

22. Hence, it is not necessary to further elaborate regarding the indefeasible right of the accused in terms of proviso to 167(2) of the Code on non conclusion of investigation within the time stipulated.

23. The submission of the learned senior counsel for the petitioner in the factual matrix of the case at hand referring to **M. Ravindran vs. Intelligence Officer, Directorate of Revenue Intelligence** reported in **(2021) 2 SCC 485** is not on sound foundation and is on account of fallacious appreciation regarding the applicability of **M. Ravindran (Supra)** in the case at hand.

24. Inasmuch as in **M. Ravindran** (Supra), the points to be decided was stated as under at Page-499.

> "10.1.(a) whether the indefeasible right accruing to the appellant under Section 167(2) CrPC gets extinguished by subsequent filing of an additional complaint by the investigating agency.
>
> 10.2.(b) Whether the Court should take into consideration the time of filing of the application for bail, based on default of the investigating agency or the time of disposal of the application for bail while answering."

25. As already discussed, this Court did not find force in the submission that the report styled as "Preliminary Charge Sheet" submitted on the 179th day, on the basis of which cognizance was taken, cannot be stated to be a report under Section 173(2) of Cr.P.C.

26. It is nobody's case that the subsequent report by the Investigating Agency in terms of its power conferred under Section 173(8) of the Code amounts to "subsequent filing of an additional complaint" by the Investigating Agency. Hence, both the points

> (i) The question of learned Court in seisin taking into consideration the time of filing of the application for bail on account of default of Investigating Agency, not submitting the report under Section 173(2) of the Cr.P.C within the time prescribed by the special statute (NDPS Act), in the case at hand within 180 days in the first place and
>
> (ii) The time of disposal of such application for bail on account of subsequent filing of additional complain does not arise in the case at hand. In as much as admittedly even no application was moved before the learned Court in seisin for release on default bail.

27. Thus reliance on the judgment of the apex court in the case of **M. Ravindran (Supra)** is bereft of its context. The judgment reported in **Sanjay Kumar Kedia (Supra)** is clearly distinguished on facts and as such has no application in the case at hand. It was held in the said case that extension granted therein under proviso to Section 36-A(4) of NDPS Act did not satisfy the condition laid down and "also did not remotely satisfy the test laid down in **Hitendra Vishnu Thakur Vs. State of Maharashtra – (1994) 4 SCC 602**". Therefore, orders of Court below in the said case were set aside and direction was passed to release the accused on default bail.

28. Such mechanical reliance on precedents militates against the law laid down by the apex Court in the matter of interpretation of judgments (**Ref:- Haryana Financial Corporation V. Jagdamba Oil Mills reported in (2002) 3 SCC 496**) and by this Court in the case of **Sk. Jumman @ Badruddin Vs. State of Odisha - BLAPL No.7354 of 2022** disposed of on 05.01.2023.

29. In fact in one of the judgments relied upon by the learned senior counsel for the petitioner (**Sk. Raju @ Raju & Others Vs. State of Odisha (CRLMC No.1 of 2020** disposed of on 01.07.2020), this Court examined the issue of the right of an accused to be released on default bail for non submission of charge sheet within the period stipulated under the NDPS Act.

30. After referring in detail to the schematic arrangement of the Cr.P.C. and taking note that reference to preliminary charge sheet is a misnomer, this Court held thus

xxx xxx xxx

> "Notwithstanding the term so used, it is always upto the Court receiving such charge-sheet, to find out at the stage of taking cognizance, as to whether or not the so-called preliminary charge- sheet qualifies to be a Final Form under Section 173(a) of the Code, to be acted upon in view of Section 190 of the Code."

xxx xxx xxx

31. The report submitted by the police officer under Section 173(2) of the Code in the case at hand though styled as a preliminary charge sheet, in the considered view of this Court, conforms to the test laid down by this Court to be acted upon and in fact cognizance was taken on the basis of such preliminary charge sheet, as already noted.

32. Hence, the assertion of the learned senior counsel for the petitioner that the final charge sheet submitted on 11.08.2021 i.e. on the 440th day from the period of custody is to be construed as the charge sheet under Section 173(2) of the Code cannot stand to reason. And as report under Section 173(2) of the Code was submitted within the stipulated period of 180 days, there was no necessity to seek extension in terms of the proviso to Section 36- A(4).

33. As such, this Court finds sufficient force in the submission of the learned counsel for the State Mr. Gaya that in the factual backdrop of the case at hand that there is no infringement of indefeasible right of the petitioner in the case at hand so as to warrant his release on "default bail".

34. Hence, on a conspectus of materials on record and on application of the law governing the field, as discussed, this Court does not find any merit in the bail applications and the same accordingly stand rejected.

35. The BLAPLs accordingly disposed of. No costs.

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2023 (I) ILR - CUT - 556

BIRAJA PRASANNA SATAPATHY, J.

WPC(OAC) NO.199 OF 2018

SUJIT KUMAR BEHERA .....Petitioner

.V.

D.G AND I.G OF POLICE & ORS. .....Opp. Parties

SERVICE LAW – Disciplinary Proceeding – Proceeding against the petitioner was initiated due to implication in P.S. Case – Since the prosecution could not prove the charges against the petitioner, he was acquitted from all the charges and set at liberty – Whether order of punishment imposed against the petitioner by the Disciplinary Proceeding is sustainable? – Held, No – As per decision of Apex Court in the case of *G.M. Tank Vs. State of Gujarat* as well as *Captain M. Paul Anthony Vs. Bharat Gold Mines Ltd*. the order of punishment is not sustainable. (Para 6-6.1)

For Petitioner : M/s. G.R. Sethi

For Opp. Parties : M/s. M.K. Balabantaray,Standing Counsel

ORDER Date of Hearing: 21.12.2022 and Date of Order: 03.01.2023

BIRAJA PRASANNA SATAPATHY, J.

1. The Present Writ Petition has been filed by the Petitioner challenging the order dated 09.08.2016 passed under Annexure-5 and subsequent order passed by the appellate authority on 18.11.2017 under Annexure-7 as well as by the revisional authority on 23.10.2017 under Annexure-9.

2. The factual matrix giving rise to the filing of the present writ petition is that the petitioner while continuing as a Constable in Angul District, he was proceeded with a disciplinary proceeding vide Angul District Proceeding No.27 dated 24.11.2014 under Annexure-1.

Though the petitioner submitted his explanation to the charges, but Opposite Party no.3 while appointing the Enquiry Officer as well as the Marshalling Officer directed for conduct of the enquiry against the petitioner. Even though the Enquiry Officer while causing the enquiry did not find any material against the petitioner, but without any basis submitted the enquiry report on 20.04.2016 under Annexure-2 by holding the petitioner guilty of the charges. The petitioner though submitted his reply to the said enquiry report while making his reply to the first show-cause under Annexure-3,but Opposite Party No.3 without proper appreciation of the same, issued the second show-cause by proposing punishment of one black mark.

2.1. The Petitioner on receipt of the second show-cause though gave a detailed reply, but the Opposite Party No.3 once again without proper appreciation of the same, passed the order of punishment vide order dated 09.08.2016 under Annexure-5. The petitioner thereafter preferred an appeal before Opposite Party No.2 under Annexure-6. But the said authority rejected the appeal vide his order dated 4817 under Annexure-7. The Petitioner though preferred a revision before Opposite Party no.1 under Annexure-8, but the revisional authority as like the appellate authority, also rejected the revision vide order passed on 23.10.2017 under Annexure-9.

3. It is the main contention of the learned counsel for the Petitioner that the proceeding against the petitioner was initiated under Anenxure-1 on 24.11.2014 because of his implication in a criminal case in Angul Colliery P.S. Case No.240 dated 19.09.2014 under Sections 452,435/506 of the Indian Penal Code. In the said criminal case, the petitioner was charged with the allegation that he came to the house of the complainant Ranjit Singh and lid fire to his motorcycle bearing Regd. No.OR-19 C 4326 and threatened the complainant's family members to kill them unless they withdrew the case filed by the complainant's sister Smt. Kusuma Devi in Angul Colliery P.S. Case No.155 of 2014.

3.1 It is contended that even though the proceeding against the petitioner was initiated basing on the allegation made in the aforesaid Colliery P.S. Case No.240 dated 19.09.2014 as well as Colliery P.S. Case No.155 of 2014, but the petitioner was acquitted in both the proceeding vide judgement dated 03.06.2015 in G.R. Case No.865 of 2014 arising out of Colliery P.S. Case No.240 of 2014 and G.R. Case No.537 of 2014 arising out of Colliery P.S. Case No.155 of 2014 under Annexure-10 series. Learned counsel for the petitioner vehemently contended that since prior to disposal of the disciplinary proceeding, the petitioner was already acquitted in both the criminal proceedings vide judgment dated 3.06.2016 under Annexure-10 series, the petitioner should not have been inflicted with the punishment vide order under Annexure-5 on 09.08.2016, which is much after the order of acquittal passed against him.

3.2 It is also contended that though the factum of acquittal was brought to the notice of the appellate authority as well as the revisional authority with the plea that the charges in the disciplinary proceeding was issued only because of the implication of the petitioner in both the criminal cases, from which he has been acquitted and accordingly the petitioner should not have been imposed with the order of punishment, but the appellate authority as well as the revisional authority without proper appreciation of the said plea, dismissed the appeal as well as revision by confirming the order of punishment passed under Annexure-5.It is also contended that since the petitioner was acquitted in both the criminal proceedings vide judgement under Annexure-10 series, the complainant Ranjit Singh, in order to harass the petitioner tried to prove his allegation before the enquiry officer and basing on the said deposition of the informant in the F.I.R, the Enquiry Officer held the petitioner guilty of the charges.

3.3. It is however contended that the self-same informant who also deposed in both the criminal proceedings, his evidence was not accepted by the learned SDJM while acquitting the petitioner from the charges. Hence, the evidence of the said informant should not have been accepted by the enquiry officer as well as by the disciplinary authority.

Since the charges in both the criminal proceeding and disciplinary proceeding are same, in view of acquittal in the criminal proceeding, no order of punishment should have been passed by the disciplinary authority.

3.4. Mr. G.R. Sethi, learned counsel for the Petitioner in support of his aforesaid submission relied on a decision of this Court reported in 110 (2010) CLT 501. This Court in Para 14 of the said judgment has held as follows:

> *"14. "Misappropriation" is a criminal offence, prescribed under Section 403 of the I.P.C., which mandates that whoever dishonestly misappropriates or converts to his own use any movable property is liable to be prosecuted for "Misappropriation". Although, the present case arises from a disciplinary proceeding, although the Petitioner has admitted, loss to the Government exchequer, but the F.I.R filed by him & the investigation thereto, having been completed by the police, with the conclusion that the "facts true", but Final Report having been submitted, that there was "no clue" available to apprehend the accused, the said benefit has to enure to the benefit of the Petitioner. No doubt a disciplinary proceeding may continue independent of the criminal proceeding. Yet when the nature of the charge is criminal in nature, the disciplinary authority would be bound by the findings arrived at in the criminal case. It is well settled by the Hon'ble Supreme Court in the case of Cap. M. Paul Anthony v. Bharat God Mines Ltd & another reported in AIR 1999 SC 1416:*
>
> *"Departmental proceedings & criminal case-Based on identical set of facts-Evidence in both proceedings common-Employee acquitted in criminal case-Said order of acquittal can conclude departmental proceedings. Order of dismissal already passed before decision of criminal case liable to be set aside."*

3.5. Similarly, learned counsel for the petitioner relied on another decision of this Court reported in 2022 (Suppl.) OLR 875.This Court in Para 6 of the said judgment has held as follows:

> *"6. Thus, from a conspectus of the ration of aforementioned case, it is evident that if a person is honourably acquitted from the charges in the criminal case, continuance of the disciplinary proceeding on the self-same charges would not be proper. In the instant case, however final report true was submitted for insufficient evidence specifically on the ground that the tainted G.C. notes had not been recovered. Obviously, this cannot be treated as being akin to an honourable acquittal in a criminal case where the concerned court exonerates the accused from all charges basing on the evidence on record. This Court, therefore, finds no merit in the contentions advanced by the Petitioner challenging the initiation and continuance of the disciplinarily proceeding despite submission of final report in the Vigilance case.*

3.6. Mr. Sethi, learned counsel for the petitioner accordingly contended that in view of the decisions of this Court, which have been passed taking into the decision of the Hon'ble Apex Court in the case of G.M. Tank Vs. State of Gujarat as well as Captain M. Paul Anthony Vs. Bharat Gold Mines Ltd., punishment passed against the petitioner in the Disciplinary Proceeding under Amnexure-5 and confirmed

vide order passed under Annexure-7 & 9 cannot sustain legally security and liable for interference of this Court.

4. Mr.M.K. Balabantaray,learned Standing Counsel appearing for the State-Opposite Parties on the other hand made his submission basing on the stand taken in the counter affidavit filed by Opposite Party no.3.

4.1. It is contended that during course of enquiry and while recording the statement of the informants in both the criminal cases, namely, Ranjit Singh and Kusuma Devi, being examined as P.Ws. 2 & 3, they proved the charges against the petitioner. Hence, there was no occasion on the part of the Disciplinary authority to accept the plea of the petitioner regarding his acquittal in the criminal cases. It is also contended that proceeding against the petitioner has been strictly conducted in accordance with the provision contained under Rule 15 of the OCS (CCA) Rules and there is no violation of any of the provision. Therefore, the petitioner has been rightly punished with imposition of the punishment vide order under Annexure-5. The appellate authority as well as the revisional authority taking into account the materials produced during the enquiry, upheld the order of punishment while dismissing the appeal vide order at Annexures-7 & 9.

5. I have heard Mr. G.R. Sethi, learned counsel appearing for the Petitioner and Mr. M.K. Balabantaray,learned Standing Counsel appearing for the Opposite Parties. On the consent of the learned counsel appearing for the parties, the matter was taken up for disposal at the stage of admission.

06. Having heard learned counsel for the parties and after going through the materials available on record, this Court finds that the petitioner was proceeded with the charges in the Departmental Proceeding initiated under Annexure-1 because of his implication in Colliery P.S. Case No.240 dated 19.09.2014 and so also in Colliery P.S. Case No.155 of 2014. While in Colliery P.S. Case No.240 of 2014, the informant was one Ranjit Singh, in the other Criminal case i.e. Colliery P.S. Case No.155 of 2014, one Kusuma Devi was the informant. Prior to completion of the enquiry, the petitioner faced the trial in both the cases before the learned S.D.J.M, Talcher in G.R. Case No.865 of 2014 and 537 of 2014. Since the prosecution could not prove the charges against the petitioner, the petitioner was acquitted of all the charges and was set at liberty vide judgment dated 03.06.2015 under Annexure-10 series. Since the informant in both the cases are the P.W.2 & 3 in Disciplinary Proceeding, their statement should not have been believed In view of the fact that the competent Criminal Court did not believe their statements taken on oath. Not only that since the petitioner was proceeded in the Disciplinary proceeding because of his implication in the criminal case, in view of his acquittal in both the cases, placing reliance of the decision of this Court as cited supra, no order of punishment should have been imposed against the petitioner. Therefore, this Court is of the view that the order of punishment has been passed in violation of the ratio decided by this

Court relying on the view of the Hon'ble Apex Court in the case of G.M Tank Vs. State of Gujarat as well as Captain M. Paul Anthony Vs. Bharat Gold Mines Ltd.

6.1. Taking into account the view of this Court as cited supra, Apex Court which has been followed by this Court, I am inclined to held that the order of punishment passed against the petitioner under Annexure-5 and confirmed vide orders passed by the appellate authority under Annexure-7 and by the Revisional Authority under Anneuxre-9 are not legally sustainable. Therefore, this Court is inclined to quash the order under Annexure-5, 7 & 9. While quashing the same, this Court allows the writ petition. However, there shall be no order as to costs.

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2023 (I) ILR - CUT - 560

BIRAJA PRASANNA SATAPATHY, J.

W.P.(C) NO. 31034 OF 2022

M/s. H.M. CONSTRUCTIONS COMPANY, WEST BENGAL .....Petitioner

.V.

POWER GRID CORPORATION OF INDIA LTD., NEW DELHI & ORS. .....Opp.Parties

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 & 227 – The Petitioner filed an application before the Authority with a prayer for acceptance of the documents, which are proposed to be included by way of amendment – The Arbitrator rejected the petition – Whether writ is maintainable against the order of Arbitrator when the impugned order is not appealable one? – Held, Yes – It is the considered view of this Court that the present Writ Petition is maintainable – Since the impugned order is not appealable one, the petitioner cannot be rendered remediless and this Court is competent to decide the points raised by the Petitioner. (Para 6-6.9)

(B) INTERPRETATION OF STATUTE – Whether the Arbitral Tribunal is bound by provisions of Civil Procedure Code? – Held, No – But it is not incapacitated in drawing sustenance from those rules. (Para 7)

Case Laws Relied on and Referred to :-

1. (1999) 4 SCC-710 :Industrial Credit and Investment Corporation of India Ltd. Vs. Grapco Industrial Ltd.
2. AIR 1999 SC-3426:Allahabad Bank, Calcutta Vs. Radha Krishna Maity & Ors.
3. (2001) 2 SCC-762 :Lekh Raj Vs. Munilal & Ors.
4. (2010) 1 OLR-963 :Smt. Satyabati Pradhan Vs. Shyamsundar Nayak & Ors.
5. (2014) Supp-1 OLR-1113:Surendranath Dhal & Anr. Vs. Bhaba Das & Ors.

6. (2022) 1 SCC-75:Bhaven Construction through authorized Signatory Premjibhai K.Shah Vs. Executive Engineer, Sardar Sarovar Narmada Nigam Ltd. & Anr.
7. (2021) 4 SCC-379 : N.N.Global Mercantile Pvt. Ltd Vs. Indo Unique Flame Ltd. & Ors.
8. (2019) 17 SCC-385 : Sunil Vasudeva & Ors. Vs. Sundar Gupta & Ors.
9. (2018) 11 SCC 470 : Srei Infrastructure Finance Limited Vs. Tuff Drilling Pvt Ltd.

For Petitioner : M/s.S.S.Rao & S.E.Haque

For Opp. Parties : Mr.A.N.Das, N.Sarkar & E.A.Das.

JUDGMENT Date of Hearing:14.12.2022 : Date of Judgment:06.01.2023

BIRAJA PRASANNA SATAPATHY, J.

1. This Writ Petition has been filed to quash the order dated 11.11.2022 passed by the learned Arbitrator under Annexure-4 and with a further prayer to direct the learned Arbitrator to accept the petition for amendment and to proceed with the case by accepting the documents in accordance with law.

2. The factual background giving rise to filing of the present writ petition is that with regard to the dispute arising out of a contract for Package-F site preparation, leveling and grading for 400 KV Buy Extension at 765/400 KV Angul Pooling Station Span No.ODP/BB/C7M-1077/1-442,the Petitioner when approached this Court in ARBP Proceeding No.26/2020, the present Opposite Party No.5 was appointed as the sole Arbitrator as per theorder passed by this Court on 22.01.2021.After such appointment of the sole Arbitrator, the dispute was registered vide Arbitration ProceedingNo.9/2021and the Arbitration Proceeding commenced from 05.03.2021. During pendency of the matter before the sole Arbitrator, the Petitioner filed a petition on 19.10.2022 under Annexure-1, with a prayer to allow the proposed amendment. Similarly, the Petitioner also filed another petition under Order-13, Rule-1 of the C.P.Cfor acceptance of the documents, which are proposed to be included by way of amendment. Learned Arbitrator when rejected both the Petitions vide the impugned order dated 11.11.2021 under Annexure-4, the present Writ Petition was filed challenging the order and with the further prayer to allow the amendment as prayed for with the acceptance of the documents so indicated in the proposed amendment.

3. It is the main contention of the learned counsel appearing for the Petitioner that during course of hearing, the Opposite Party-Company herein when adjusted an amount of Rs.9,02,959.64/- paisa vide letter dated 23.02.2022 and also returned the 7th R.A Bills with the plea that same is defective one, the Petitioner was compelled to file the Petition for amendment in order to bring on record, the communication dated February, 23, 2022 and the documents in support of his claim for settlement of the 7th R.A bills.

3.1. It is contended that unless the proposed amendment is allowed by accepting the documents enclosed to the amendment petition, the Petitioner will be seriously prejudiced and non-admission of those documents will jeopardize his claim. But the

learned Arbitrator on the ground that the facts noted in the proposed amendment and the documents sought tobe introduced were all within the knowledge and possession of the petitioner at the time of filing of the claim petition they were never filed earlier during course of the proceeding rejected both the prayers vide the impugned order. At the fagend of the proceeding, when the matter is fixed for argument, these new facts and documents are being introduced to patch up the lacunae in the pleadings and the evidence of the petitioner for improving its case.

3.2. It is contended that learned Arbitrator while rejecting the petition vide the impugned order under Annexure-4 failed to appreciate the prejudice that will be caused to the petitioner, if the documents sought to be introduced by way of amendment are not taken on record. Accordingly, it is contended that the impugned order is not legally sustainable and is liable for interference of this Court.

3.3. Learned counsel for the Petitioner in support of his aforesaid contention relied on the decision of the Hon'ble Apex Court in the case of ***Industrial Credit and Investment Corporation of India Ltd. Vs. Grapco Industrial Ltd.,*** reported in ***(1999) 4 SCC-710.***

3.4. Learned counsel for the Petitioner also relied on another decision of the Hon'ble Apex Court in the case of ***Allahabad Bank, Calcutta vs. Radha Krishna Maity and others*** reported in ***AIR 1999 SC-3426*** and the decision in the case ***Lekh Raj vs. Munilal & Others*** *reported in* ***(2001) 2 SCC-762***.

3.5. Learned counsel for the Petitioner also relied on another decision of this Court in the case of ***Smt. Satyabati Pradhan vs. Shyamsundar Nayak & Others*** reported in ***(2010) 1 OLR-963*** and another decision in the case of ***Surendranath Dhal & Another vs. Bhaba Das & Others*** reported in ***(2014) Supp-1 OLR-1113.***

4. Mr. A.N.Das, learned counsel appearing for the Opposite Parties through Caveat made his submission basing on the stand taken in their preliminary counter affidavit as well as the objection filed to the interim application.

4.1. It is the main contention of the learned counsel appearing for the Opposite Parties that the Arbitration Proceeding filed by the Petitioner under the Arbitration and Conciliation Act, 1996 seeking multifarious claims in connection with the agreement dated 6.3.2017. After commencement of the proceeding before the learned Arbitrator on 05.03.2021, the Opposite Parties filed their defence statement and in the meantime after closure of evidence from both the sides, the matter is fixed for argument. In order to delay the proceeding, the Petitioner filed the petition for amendment as well as the petition with a prayer to accept the documents, which are reflected in the amendment petition.

4.2. Learned counsel for the Opposite Parties vehemently contended that the present writ petition is not maintainable under Articles-226 & 227 of the

Constitution of India against an order passed and arising out of a proceeding initiated under the Arbitration and Conciliation Act, 1996. Since the Arbitration and Conciliation Act, 1996 is a complete Code by itself, the proceeding is ought to be proceeded with and governed as per the provision prescribed in the said act. Therefore, the Writ Petition against the impugned order is not maintainable in the eye of law.

4.3. It is also contended that the impugned order dated 11.11.2022 passed by the learned Arbitrator under Annexure-4 is an appelable one under Section-37 of the Arbitration and Conciliation Act, 1996. The Petitioner earlier had also taken recourse to the said provision, while filing an appeal against the order dated 10.02.2022 passed by the learned sole Arbitrator in the present proceeding.

4.4 It is also contended the evidence from both the sides was closed on 20.09.2022 and the matter was posted for hearing and for oral submission to 29.09.2022. Accordingly, it is contended that the present writ petition against the impugned order is not maintainable and the Petitioner can avail the benefit of alternate remedy of appeal as provided under Section-37 of the Arbitration and Conciliation Act, 1996.

4.5. It is also further contended that the document sought to be incorporated by the Petitioner by way of amendment were very much available with the petitioner while filing the claim statement after initiation of the proceeding before the Arbitrator on 05.03.2021. Therefore, no illegality or irregularity has been committed by the learned Arbitrator in rejecting the prayer for amendment as well as the prayer for acceptance of the document vide the impugned order at Annexure-4. Not only that it is also contended that since the Petitioner against the order passed by the sole Arbitrator on 10.02.2022 has already preferred an appeal under Section-37 of the Act before the competent Court, this Court is not required to interfere with the impugned order and Petitioner may prefer an appeal against the impugned order.

4.6. Mr. Das in support of the aforesaid submission relied on the decision of the Hon'ble Apex Court in the case of ***Bhaven Construction through authorized Signatory Premjibhai K.Shah vs. Executive Engineer, Sardar Sarovar Narmada Nigam Limited & Another*** reported in ***(2022) 1 SCC-75*** and another decision in the case of ***N.N.Global Mercantile Private Limited vs. Indo Unique Flame Limited & Others reported in (2021) 4 SCC-379***.

4.7. Hon'ble Apex Court in the decision in Bhaven Construction, in Para-11 to 17, 20 and 22 has held as follows:-

> *"11. Having heard both parties and perusing the material available on record, the question which needs to be answered is whether the arbitral process could be interfered under Article 226/227 of the Constitution, and under what circumstance?*
>
> *12. We need to note that the Arbitration Act is a code in itself. This phrase is not merely perfunctory, but has definite legal consequences. One such consequence is spelled out under*

Section 5 of the Arbitration Act, which reads as under "Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part." The non-obstante clause is provided to uphold the intention of the legislature as provided in the Preamble to adopt UNCITRAL Model Law and Rules, to reduce excessive judicial interference which is not contemplated under the Arbitration Act.

13. The Arbitration Act itself gives various procedures and forums to challenge the appointment of an arbitrator. The framework clearly portrays an intention to address most of the issues within the ambit of the Act itself, without there being scope for any extra statutory mechanism to provide just and fair solutions.

14. Any party can enter into an arbitration agreement for resolving any disputes capable of being arbitrable. Parties, while entering into such agreements, need to fulfill the basic ingredients provided under Section 7 of the Arbitration Act. Arbitration being a creature of contract, gives a flexible framework for the parties to agree for their own procedure with minimalistic stipulations under the Arbitration Act.

15. If parties fail to refer a matter to arbitration or to appoint an arbitrator in accordance with the procedure agreed by them, then a party can take recourse for court assistance under Section 8 or 11 of the Arbitration Act.

16. In this context, we may state that the Appellant acted in accordance with the procedure laid down under the agreement to unilaterally appoint a sole arbitrator, without Respondent No. 1 mounting a judicial challenge at that stage. Respondent No. 1 then appeared before the sole arbitrator and challenged the jurisdiction of the sole arbitrator, in terms of Section 16(2) of the Arbitration Act.

17. Thereafter, Respondent No. 1 chose to impugn the order passed by the arbitrator under Section 16(2) of the Arbitration Act through a petition under Article 226/227 of the Indian Constitution. In the usual course, the Arbitration Act provides for a mechanism of challenge under Section 34. The opening phase of Section 34 reads as

34. Application for setting aside arbitral award.- (1)'Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub section (3)'. The use of term 'only' as occurring under the provision serves two purposes of making the enactment a complete code and lay down the procedure".

xxx xxx xxx

20. In the instant case, Respondent No. 1 has not been able to show exceptional circumstance or 'bad faith' on the part of the Appellant, to invoke the remedy under Article 227 of the Constitution. No doubt the ambit of Article 227 is broad and pervasive, however, the High Court should not have used its inherent power to interject the arbitral process at this stage. It is brought to our notice that subsequent to the impugned order of the sole arbitrator, a final award was rendered by him on merits, which is challenged by the Respondent No. 1 in a separate Section 34 application, which is pending.

xxx xxx xxx

22. The High Court did not appreciate the limitations under Articles 226 and 227 of the Constitution and reasoned that the Appellant had undertaken to appoint an arbitrator unilaterally, thereby rendering the Respondent No. 1 remediless. However, a plain reading of the arbitration agreement points to the fact that the Appellant herein had actually acted in accordance with the procedure laid down without any mala fides".

4.8. Similarly, Hon'ble Apex Court in the decision in **N.N.Global Mercantile Private Limited,** in Para-52 and 53 has held as follows:-

> *"**52**. We are of the view that the Writ Petition filed by the Respondent No. 1 to challenge the Order dated 18.01.2018 passed by the Special Commercial Court / District Judge-I in Commercial Dispute No. 62/2017 was not maintainable, since a statutory remedy under the amended Section 37 of the Arbitration Act is available. Section 37(1) has been amended by Act 3 of 201649. Section 37(1)(a) provides for an appeal to be filed against an Order refusing to refer the parties to arbitration. Section 37(1)(a) reads as :*
>
> *"**37. Appealable orders**. – (1) 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; "*
>
> *53. Since the judgment and order of the Commercial Court dated 18.01.2018 refusing to refer the parties to arbitration was an appealable order under Section 37(1)(a) of the Arbitration Act, the Writ Petition was not maintainable. The appeal would lie before the Commercial Appellate Division of the High Court under Section 13(1A) of the Commercial Courts Act, 2015. Section 13(1A) read as :*
>
> *"13. Appeals from decrees of Commercial Courts and Commercial Divisions.–(1) Any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of 60 days from the date of judgment or order.*
>
> *(1A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or,as thecase may be, Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or order: Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and Section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996)."*
>
> *In view of the availability of a statutory remedy, the judgment of the High Court passed under Articles 226 and 227 of the Constitution is liable to be set aside on the ground of maintainability".*

5. I have heard Mr. S.S.Rao, learned counsel appearing for the Petitioner and Mr. A.N.Das, learned counsel appearing for the Opposite Parties. On their consent, the matter was taken up for final disposal at the stage of admission.

6. This Court after going through the materials available on record and the submissions made by the learned counsel for the Parties finds that the proceeding under the Arbitration and Conciliation Act, 1996 was initiated before the learned Arbitrator in Arbitration Proceeding No.9/2021 w.e.f. 05.03.2021. This Court finds that the amendment application filed by the Petitioner under Annexure-1 was necessitated in course of the proceeding as the opposite parties vide letter dated 23.02.2022 adjusted a sum of Rs.9,02,964.64 paisa. Similarly, though the dispute also includes the claim made by the Petitioner towards the 7th R.A bills, but in course of the proceeding when the said 7th R.A bill was returned by the Opposite Parties by holding the same as a defective one, the Petitioner in support of his claim towards such 7th R.A bill proposed to include certain documents by way of amendment and all those documents were enclosed to the petition for amendment.

The Petitioner also filed the other petition for acceptance of all those documents, as the evidence prior to filing of the petition, from both the side was already closed. But since learned counsel for the Opposite Parties at the first instance raised the question of maintainability and the jurisdiction of this Court to entertain such a petition by exercising the power under Article-226 & 227 of the Constitution of India, this Court feels it proper to decide the said issue at the first instance.

6.1. Learned counsel appearing for the Opposite Parties though vehemently contended that as against the impugned order, the present writ petition is not maintainable in exercise of the power under Articles 226 and 227 of the Constitution of India but in the case of **Bhaven Construction** as cited (supra). Hon'ble Apex Court in Para-17 to 19 of the said judgment has held as follows:-

> *"17. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a Constitutional right. In Nivedita Sharma v. Cellular Operators Association of India, (2011) 14 SCC 337, this Court referred to several judgments and held:*
>
> *"11.We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation L. Chandra Kumar v. Union of India, (1997) 3 SCC 261. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation*
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> *18. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a Constitutional right. In Nivedita Sharma v. Cellular Operators Association of India, (2011) 14 SCC 337, this Court referred to several judgments and held:*
>
> *"11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation - L. Chandra Kumar v. Union of India, (1997) 3 SCC 261. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/ instrumentality or any public authority ororder passed bya quasijudicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. (emphasis supplied)*

It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient.

19. In this context we may observe M/s. Deep Industries Limited v. Oil and Natural Gas Corporation Limited, (2019) SCC Online SC 1602, wherein interplay of Section 5 of the Arbitration Act and Article 227 of the Constitution was analyzed as under:

"16. Most significant of all is the non- obstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed (See Section 37(2) of the Act).

17. This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non-obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us herein above so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction."

6.2. In the case of **Deep Industries** (supra) Hon'ble Apex Court in Para- 16, 17 & 18 has held as follows:-

"16. Most significant of all is the non obstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed [see Section 37(2) of the Act].

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17. This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us hereinabove so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction.

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18. In Nivedita Sharma v. COAP, this Court referred to several judgments and held: (SCC pp. 343-45, paras 11-16)

"11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the

nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation- L Chandra Kumar v. Union of India'. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

12. In Thansingh Nathmal v. Supt. of Taxes, this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p. 1423, para 7)

'7. ... The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.'

13. In Titaghur Paper Mills Co. Ltd. v. State of Orissa", this Court observed:

'11. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford10 in the following passage: (ER p. 495)

"… There are three classes of cases in which a liability may be established founded upon a statute..... But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it…. the remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd.11 and has been reaffirmed by the Privy Council in Attorney General of Trinidad & Tobago v. Gordon Grant & Co. Ltd. 12 and Secy of State v. Mask & Co.13 It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.'

14. In Mafatlal Industries Ltd. v. Union of India, B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed:

'77. … So far as the jurisdiction of the High Court under Article 226 or for that matter, the jurisdiction of this Court under Article 32 is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment."

15. In the judgments relied upon by Shri Vaidyanathan, which, by and large, reiterate the proposition laid down in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad, Muzaffarnagaris, it has been beld that an alternative remedy is not a bar to the entertaining of writ petition filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where the order under challenge is wholly without jurisdiction or the vires of the statute is under challenge.

16. It can, thus, be said that this Court has recognised some exceptions to the rule of alternative remedy. However, the proposition laid down in Thansingh Nathmal v. Supt. of Taxes 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."

6.3. In the case of ***Radhey Shyam*** (supra) Hon'ble Apex Court in Para- 25 and 26 has held as follows:-

"25. It is true that this Court has laid down that technicalities associated with the prerogative writs in England have no role to play under our constitutional scheme. There is no parallel system of King's Court in India and of all the other courts having limited jurisdiction subject to the supervision of the King's Court. Courts are set up under the Constitution or the laws. All the courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. Writ jurisdiction is constitutionally conferred on all the High Courts. Broad principles of writ jurisdiction followed in England are applicable to India and a writ of certiorari lies against patently erroneous or without jurisdiction orders of tribunals or authorities or courts other than judicial courts. There are no precedents in India for the High Courts to issue writs to the subordinate courts. Control of working of the subordinate courts in dealing with their judicial orders is exercised by way of appellate or revisional powers or power of superintendence under Article 227. Orders of the civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/civil courts. While appellate or revisional jurisdiction is regulated by the statutes, power of superintendence under Article 227 is constitutional. The expression "inferior court" is not referable to the judicial courts, as rightly observed in the referring order! in paras 26 and 27 quoted above.

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26. The Bench in Surya Dev Rai also observed in para 25 of its judgment that distinction between Articles 226 and 227 stood almost obliterated. In para 24 of the said judgment distinction in the two articles has been noted. In view thereof, observation hat scope of Articles 226 and 227 was obliterated was not correct as rightly observed by the referring Bench in para 32 quoted above. We make it clear that though despite the curtailment of revisional jurisdiction under Section 115 CPC by Act 46 of 1999, jurisdiction of the High Court under Article 227 remains unaffected, it has been wrongly assumed in certain quarters that the said jurisdiction has been expanded. Scope of Article 227 has been explained in several decisions including Waryam Singh v. Amarnath45, Ouseph Mathai v. M. Abdul Khadir, Shalini Shyam Shetty v. Rajendra Shankar Patil and Sameer Suresh Gupta v. Rahul Kumar Agarwals In Shalini Shyam Shetty7 this Court observed: (SCC p. 352, paras 64-67)

"64. However, this Court unfortunately discerns that of late there is a growing trend amongst several High Courts to entertain writ petition in cases of pure property disputes. Disputes relating to partition suits, matters relating to execution of a decree, in cases of dispute between landlord and tenant and also in a case of money decree and in various

other cases where disputed questions of property are involved, writ courts are entertaining such disputes. In some cases the High Courts, in a routine manner, entertain petitions under Article 227 over such disputes and such petitions are treated as writ petitions.

65. We would like to make it clear that in view of the law referred to above in cases of property rights and in disputes between private individuals writ court should not interfere unless there is any infraction of statute or it can be shown that a private individual is acting in collusion with a statutory authority.

66. We may also observe that in some High Courts there is a tendency of entertaining petitions under Article 227 of the Constitution by terming them as writ petitions. This is sought to be justified on an erroneous appreciation of the ratio in Surya Dev and in view of the recent amendment to Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999. It is urged that as a result of the amendment, scope of Section 115 CPC has been curtailed. In our view, even if the scope of Section 115 CPC is curtailed that has not resulted in expanding the High Court's power of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow the regime of law.

67. As a result of frequent interference by the Hon'ble High Court either under Article 226 or 227 of the Constitution with pending civil and at times criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problems in the administration of justice. This Court hopes and trusts that in exercising its power either under Article 226 or 227, the Hon'ble High Court will follow the time-honoured principles discussed above. Those principles have been formulated by this Court for ends of justice and the High Courts as the highest courts of justice within their jurisdiction will adhere to them strictly."

6.4. In the case of ***Shalini Shyam Shetty*** (supra) Hon'ble Apex Court in Para 37, 43, 48 & 49(d) to (o) has held as follows:-

"37. The Constitution Bench in Nagendra Nath, unanimously speaking through B.P. Sinha, J. (as His Lordship then was) pointed out that High Court's power of interference under Article 227 is not greater than its power under Article 226 and the power of interference under Article 227 of the Constitution is limited to ensure that the tribunals function within the limits of its authority. (emphasis supplied)

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43. In a rather recent decision of the Supreme Court in Surya Dev Rai v. Ram Chander Rai, a two-Judge Bench of this Court discussed the principles of interference by the High Court under Article 227. Of course in Surya Dev Rai this Court held that a writ of certiorari is maintainable against the order of a civil court, subordinate to the High Court (SCC p. 688, para 19 of the Report). The correctness of that ratio was doubted by another Division Bench of this Court in Radhey Shyam v. Chhabi Nath and a request to the Hon'ble Chief Justice for a reference to a larger Bench is pending. But insofar as the formulation of the principles on the scope of interference by the High Court under Article 227 is concerned, there is no divergence of views.

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48. The jurisdiction under Article 226 normally is exercised where a party is affected but power under Article 227 can be exercised by the High Court suo moto as a custodian of justice. In fact, the power under Article 226 is exercised in favour of persons or citizens for vindication of their fundamental rights or other statutory rights. The jurisdiction under Article 227 is exercised by the High Court for vindication of

its position as the highest judicial authority in the State. In certain cases where there is infringement of fundamental right, the relief under Article 226 of the Constitution can be claimed ex debito justitiae or as a matter of right. But in cases where the High Court exercises its jurisdiction under Article 227, such exercise is entirely discretionary and no person can claim it as a matter of right. From an order of a Single Judge passed under Article 226, a letters patent appeal or an intra-court appeal is maintainable. But no such appeal is maintainable from an order passed by a Single Judge of a High Court in exercise of power under Article 227. In almost all the High Courts, rules have been framed for regulating the exercise of jurisdiction under Article 226. No such rule appears to have been framed for exercise of High Court's power under Article 227 possibly to keep such exercise entirely in the domain of the discretion of High Court.

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49. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:

(d) The parameters of interference by High Courts in exercise of their power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in Waryam Singh and the principles in Waryam Singh have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in Waryam Singh', followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and courts subordinate to it, "within the bounds of their authority".

(f) In order to ensure that law is followed by such tribunals and courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (). High Court can interfere in exercise of its power of superintendence when there has been patent perversity in the orders of the tribunals and courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) The High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in L. Chandra Kumar v. Union of India and therefore abridgment by a constitutional amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and courts subordinate to the High Court.

(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

(0) An improper and a frequent exercise of this power will be counterproductive and will divest this extraordinary power of its strength and vitality."

6.5. In the case of ***Punjab Agro Industries*** (supra) Hon'ble Apex Court in Para 7 and 9 has held as follows:-

"7. The Act does not provide for an appeal against the order of the Chief Justice or his designate made under sub-section (4) or sub-sections (5) and (6) of Section 11. On the other hand, sub-section (7) of Section 11 makes it clear that a decision of the designate under sub- sections (4), (5) or (6) of Section 11 is final.As no appeal was maintainable against the order of the designate and as his order was made final, the only course available to the appellant was to challenge the order, even if it is a judicial order, by a writ petition under Article 227 of the Constitution of India.

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9. We have already noticed that though the order under Section 11(4) is a judicial order, having regard to Section 11(7) relating to finality of such orders and the absence of any provision for appeal, the order of the Civil Judge was open to challenge in a writ petition under Article 227 of the Constitution. The decision in SBP [(2005) 8 SCC 618] does not bar such a writ petition. The observations of this Court in SBP [(2005) 8 SCC 618] that against an order under Section 11 of the Act, only an appeal under Article 136 of the Constitution would lie, is with reference to the orders made by the Chief Justice of a High Court or by the designate Judge of that High Court. The said observations do not apply to a subordinate court functioning as designate of the Chief Justice."

6.6. Not only that since it is fairly admitted in the bar that the impugned order is not appealable one, if this Court accepts the submission of the learned counsel for the Opposite Parties that the present Writ Petition is not maintainable under Articles-226 & 227 of the Constitution, then the Petitioner as per the considered view of this Court will be rendered remediless. Therefore, in view of the decision of the Hon'ble Apex Court in the case of the ***Sunil Vasudeva & Others vs. Sundar Gupta & Others***

reported in ***(2019) 17 SCC-385***, this Court is competent to decide the issue raised by the Petitioner.

6.7. Hon'ble Apex Court in Para-31 of the decision in Sunil Vasudeva has held as follows:-

> *"31. In the given facts and circumstances, we are not inclined to dilate the issues on merits raised in the Writ Petition No. 18500(w) of 1985 filed at the instance of the respondents before the High Court of Calcutta, but if the civil suit was not maintainable as alleged in view of Section 293 of the Income Tax Act and this was the purported defence of the respondents and of the Income Tax Department and consequential effect to the Order dated 8th September, 1965 of which a reference has been made by us, no party could be left remediless and whatever the grievance the party has raised before the Court of law, has to be examined on its own merits. In our considered view, there appears no error being committed by the High Court in passing the impugned judgment dated 24th September, 2014 in exercise of its review jurisdiction and that needs no interference by this Court".*

6.8. Not only that the Hon'ble Apex Court in the case of ***Bhaven Construction*** as cited (supra) has followed the view of the Hon'ble Apex Court rendered in the case of ***Deep Industries Limited***.

6.9. Therefore, in view of the decision rendered in the case of ***Bhaven Construction as well as Deep Industries Limited and other decisions as cited (supra),*** it is the considered view of this Court that the present Writ Petition is maintainable before this Court.Not only that since the impugned order is not appelable one, in view of the decision rendered in the case of ***Sunil Vasudeva as cited (supra)***, the petitioner cannot be rendered remediless and this Court is competent to decide the points raised by the Petitioner. Hon'ble Apex Court in another decision in the case of ***Srei Infrastructure Finance Limited vs.Tuff Drilling Private Limited*** reported in ***(2018) 11 SCC 470***. In Para-13, 14 and 17 has held as follows:-

> *"13. The law of Arbitration was earlier governed by the Arbitration Act, 1940. The Law Commission of India and several other organizations expressed opinion that the 1940 Act needs extensive amendments to make it more responsive to contemporary requirements. In the wake of rise in commercial litigation both at domestic and international level, a need was felt for a comprehensive law to deal the subject. The United Nations Organization on International Trade Law (UNCILTRAL) adopted a Model Law on International Commercial Arbitration in the year 1985. Taking into consideration domestic arbitration as well as international commercial arbitration, Parliament enacted the Arbitration and Conciliation Act,1996. Main objective for introducing the legislation was to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration. In Section 2 of the Act, arbitral tribunal has been defined to mean a sole arbitrator or a panel of arbitrators. The arbitral tribunal was entrusted with various statutory functions, obligations by the enactment.*
>
> *14. Arbitration is a quasi judicial proceeding, equitable in nature or character which differs from a litigation in a Court. The power and functions of arbitral tribunal are statutorily regulated. The tribunals are special arbitration with institutional mechanism brought into existence by or under statute to decide dispute arising with reference to that particular*

statute or to determine controversy referred to it. The tribunal may be a statutory tribunal or tribunal constituted under the provisions of the Constitution of India. Section 9 of the Civil Procedure Code vests into the Civil Court jurisdiction to entertain and determine any civil dispute. The constitution of tribunals has been with intent and purpose to take out different categories of litigation into the special tribunal for speedy and effective determination of disputes in the interest of the society. Whenever, by a legislative enactment jurisdiction exercised by ordinary civil court is transferred or entrusted to tribunals such tribunals are entrusted with statutory power. The arbitral tribunals in the statute of 1996 are no different, they decide the lis between the parties, follows Rules and procedure conforming to the principle of natural justice, the adjudication has finality subject to remedy provided under the 1996 Act. Section 8 of the 1996 Act obliges a judicial authority in a matter which is a subject of an agreement to refer the parties to arbitration. The reference to arbitral tribunal thus can be made by judicial authority or an arbitrator can be appointed in accordance with the arbitration agreement under Section 11 of the 1996 Act".

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17. Section 19 of the Act provides for determination of rules of procedure. Sub-clause (1) of Section 19 provides that the arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. The words "arbitral tribunal shall not be bound" are the words of amplitude and not of a restriction. These words do not prohibit the arbitral tribunal from drawing sustenance from the fundamental principles underling the Civil Procedure Code or Indian Evidence Act but the tribunal is not bound to observe the provisions of Code with all of its rigour. As per sub-clause (2) of Section 19 the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings".

7. In view of the decision in ***Srei Infrastructure Finance Limited as cited (supra)***, as per the considered view of this Court, though the Arbitral Tribunal is not bound by rules of procedure contained in Civil Procedure Code and Evidence Act, but it is not incapacitated in drawing sustenance from those rules. But the learned Arbitrator has not followed the decision contained in ***Srei Infrastructure Finance Limited*** while considering the matter with passing of the impugned order.

7.1. Therefore, this Court taking into account the decisions rendered in ***Bhaven Construction*** as well as ***Deep Industries Limited and other decisions as cited (supra)*** not only held the writ petition is maintainable, but also in view of the decision rendered in the case of Sunil Vasudeva as well as ***Srei Infrastructure Finance Limited*** held that the Petitioner cannot be rendered remediless.

8. After due consideration of the grounds taken in the petition under Annexures-1 & 2, it is the view of this Court that the documents proposed to be incorporated by the Petitioner are relevant for proper adjudication of the lis and unless the same are accepted, the Petitioner will be seriously prejudiced.

Taking into account the above discussions, this Court is inclined to quash the order dated 11.11.2022 and while quashing the same directs the learned Arbitrator to allow the amendment as prayed for by the Petitioner in its petition dated 19.10.2022 under Annexure-1 as well as the other Petition at Annexure-2. The Writ Petition accordingly succeeds and allowed. However, there shall be no order as to costs.

2023 (I) ILR - CUT- 575

MURAHARI SRI RAMAN, J.

WPC(OAPC) NO. 168 OF 2014

SANJAYA KUMAR PANDA & ORS. ……Petitioners

.V.

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

ODISHA CIVIL SERVICES (Pension) Rules, 1992 r/w Amendment Rules, 2005 – Whether the 1992 Pension Rules r/w 2005 Amendment Rules would be applicable to SWECHHASEVI SIKSHYA SAHAYAK / SIKSHYA SAHAYAK, appointed in the year 2001/2003 on annual contract basis and treated as Junior Teachers in the year 2007 and subsequently became Regular Primary School Teachers in the year 2008/2009? – Held, No – The date of engagement as SWECHHASEVI SIKSHYA SAHAYAK cannot be reckoned as the date for the purpose of determining application of the Odisha Civil Services (Pension) Rules, 1992, reason indicated with reference to relevant rule and case law.

(Para 7-9)

Case Laws Relied on and Referred to :-

1. (2006) 9 SCC 321 : State of Haryana Vs. Charanjit Singh & Ors.
2. 2022 LiveLaw (SC) 512 = (2022) 11 SCC 436 : Dr. K.M. Sharma & Ors. Vs. State of Chhatisgarh & Ors.
3. (2002) 10 SCC 656 : Dhyan Singh & Ors. Vs. State of Haryana & Ors.
4. W.P. (C) No. 17023 of 2012 : Chandra Shekar Sahoo Vs. State of Odisha & Ors.
5. (2011) 9 SCR 1 = (2011) 7 SCC 397 : Union of India Vs. Arulmozhi Iniarasu
6. O.A. Nos. 3345 (C) to 3352 (C) of 2012 : Mayadhar Pradhan & Ors. Vs. State of Odisha & Ors.
7. 2023 LiveLaw (SC) 91 = 2023 SCC OnLine SC 114 : Vibhuti Shankar Pandey Vs. The State of Madhya Pradesh & Ors.
8. (2020) 12 SCC 131 : Parmeshwar Nanda Vs. State of Jharkhand.
9. (2022) 4 SCC 40 : Dr. G. Sadasivan Nair Vs. Cochin University of Science and Technology represented by its Registrar & Ors.

For Petitioners : Mr. Budhadev Routray, Sr. Adv.
M/s. Subhadutta Routray,Jagdish Biswal

For Opp. Parties : Mr. Ramanath Acharya,Standing Counsel(School & Mass Education)

JUDGMENT Date of Hearing: 03.02.2023: Date of Judgment: 24.02.2023

MURAHARI SRI RAMAN, J.

1. The petitioners, working as Assistant Teachers in respective Schools in the District of Khordha, approached the learned Odisha Administrative Tribunal, Cuttack Bench, Cuttack by way of Original Application, which was registered bearing Provisional No.168 (C) of 2014, under Section 19 of the Administrative Tribunals Act, 1985, for grant of following relief:

*"*** direct the respondents to extend the benefits of Odisha Civil Services (Pension) Rules, 1992 and the extension of General Provident Fund (Odisha) Rules and further the respondents be directed to deduct the GPF from the monthly salary of the present applicants in accordance with the General Provident Fund (Odisha) Rules, 1938 within a reasonable time to be fixed by this Hon'ble Tribunal."*

1.1. The learned Odisha Administrative Tribunal vide Order dated 18.08.2014, passed the following order:

"4. 18.08.2014 P. No.168(C)/2014

**** Issue notice on the question of admission as to why this case shall not be disposed of at the stage of admission. Counter be filed within four weeks and rejoinder, if any, be filed within two weeks thereafter.*

List this case after six weeks."

1.2. After abolition of the Odisha Administrative Tribunal by virtue of Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) Notification F. No.A-11014/10/2015-AT [G.S.R.552(E).], dated 2nd August, 2019, said Original Application has been converted to Writ Petition and renumbered as WPC (OAPC) No.168 of 2014 and counter-affidavit of the opposite party No.3-Director of Elementary Education, Odisha has come to be filed on 27th July, 2022.

Fact of the case:

2. As adumbrated by the petitioner, it is revealed from the petition that the petitioners in 17 numbers, in response to an Advertisement dated 24.12.2000 for the post of "SWECHHASEVI SIKSHYA SAHAYAK" ("SSS", for short) in the Primary Schools and the Upper Primary Schools issued by the Director, Primary School Directorate, Odisha, having offered for engagement, were selected as SSS, later on renamed as "SIKSHYA SAHAYAK", in view of Government of Odisha, Department of School and Mass Education Resolution No. II-SME/LMC-150/06-673/SME., dated 10.01.2008, which reads thus:

"2. That, henceforth all the Swechhasevi Sikshya Sahayaks (SSS) including the existing one and the new recruits shall be called as Sikshya Sahayaks (SS)."

2.1. A Chart enclosed to the petition as Annexure-3 indicates that date of engagement of the petitioner Nos.1 to 15 was 12th July, 2001, whereas the petitioner Nos.16 and 17 were stated to be engaged on 19th July, 2001 and 26th July, 2003 respectively. However, while the petitioner Nos.1 to 16 have joined the duty on different dates during July, 2001, the petitioner No.17 joined on 28th July, 2003. While the petitioner Nos.1 to 16 became Junior Teacher with effect from 01.12.2007, the petitioner Nos.16 and 17 became Junior Teachers from 23.10.2007 and 11.09.2007 respectively. Subsequently, they became regular Primary School Teachers [the petitioner Nos.1 to 16 on 01.04.2008, the petitioner No.16 on 01.11.2009 and the petitioner No.17 on 21.09.2009].

2.2. It is the claim of the petitioners that since their date of engagement as "SS" was prior to 01.01.2005, i.e., the date on which the Odisha Civil Services (Pension) Amendment Rules, 2005 (for brevity referred to as "Rules, 2005") has come into force, they are entitled to the regular pension as per the pre-amended provisions of the Odisha Civil Services (Pension) Rules, 1992 (for convenience referred to as "Rules, 1992"). They also claim to be entitled to similar treatment as has been extended by the Government by virtue of Finance Department Resolution dated 04.04.2007, whereby the provisions of the Rules, 1992 are made applicable to the persons, appointed under work-charged and job-contract establishments prior to 01.01.2005, but brought over to the regular establishments on or after 01.01.2005.

Question raised in the present writ petition:

3. Whether the Odisha Civil Service (Pension) Rules, 1992 as amended by virtue of the Odisha Civil Service (Pension) Amendment Rules, 2005, came into force with effect from 01.01.2005, would be applicable to the petitioners, initially engaged as SSS/SS in the year 2001/2003 on annual contract basis and treated as Junior Teachers in the year 2007 and subsequently became Regular Primary School Teachers in the year 2008/2009?

Arguments advanced by the counsel for the petitioners:

4. Sri Budhadev Routray, learned senior counsel referring to Office Order dated 05.05.2008 issued by Collector-cum- CEO, Zilla Parisad, Khordha vide Annexure-6 series, submitted that pursuant to Resolution No.673/SME, dated 10.01.2008 of the Government of Odisha in School and Mass Education Department read with Instruction of the Government in Letter No.4823, dated 03.03.2008 and Letter No.5475, dated 14.03.2008 and [1]Odisha Primary Education Programme Authority Memo No.2104, dated 13.03.2008, all the eligible "Junior Teachers of Khordha District who successfully completed six years of satisfactory engagement as per engagement verification reports received from concerned BDOs, were appointed as "REGULAR PRIMARY SCHOOL TEACHERS" under Zilla Parisad in the scale of pay of Rs.3,600/- —100— 5,600/- with all admissible allowances thereon as applicable to the regular teachers in Level-V of the Elementary Cadre with effect from 01.04.2008".

4.1. Even though the instant petitioners have been given the status of "Junior Teacher" in the year 2007 and became Regular Primary School Teacher during the year 2008/2009, they are eligible to pensionary benefits as envisaged in the pre-amended provisions contained in Rules, 1992 and the changed circumstance as

1 Odisha Primary Education Programme Authority (OPEPA) came in to existence as a registered society on 30th January 1996. The School & Mass Education (S&ME) Department in the Government of Odisha has the responsibility to achieve the goals of Universal Elementary Education (UEE). The S&ME Deptt. operates through two agencies namely Directorate of Elementary Education (DEE) and Odisha Primary Education Programme Authority (OPEPA) to realize the goals of UEE. While DEE manages the entire manpower of teachers, inspectors & administrators, OPEPA implements the flagship program of SSA in the entire State. ***
: http://opepa.odisha.gov.in/website/

per the Odisha Civil Services (Pension) Amendment Rules, 2005 shall have no application to their case inasmuch as they were engaged in the year 2001 and 2003, as the case may be.

4.2. Drawing parity with the case of one Sri Ashis Kumar Mahanty, Trained Graduate Teacher-Assistant Teacher of Government High School, Kotpad in the District of Koraput, while working on contractual basis, has been accorded pension in terms of pre-amended Rules, 1992, after his regularization post-01.01.2005, the learned senior counsel urged that the present petitioners are also entitled to claim pension in the same terms.

4.3. It is the further case of the petitioners that by virtue of Government of Odisha in Finance Department Letter dated 4thApril, 2007, the persons who were appointed under job-contract and work-charged establishment prior to 01.01.2005 and brought over to regular establishment on or after said date, are not covered under the provisions of the Odisha Civil Services (Pension) Amendment Rules, 2005, but are governed in terms of pre-amended Rules,1992 read with existing provisions contained in the General Provident Fund (Odisha) Rules, 1938. In tune with above letter, the Directorate of Health Services vide Letter dated 20.09.2011 extended similar benefit to the persons appointed on contractual basis. Hence, Sri Budhadev Routray, learned Sr. Advocate for the petitioners urged that the State Government is not justified in discriminating the petitioners-teachers who joined on contractual basis as SSS in 2001/2003.

Arguments advanced by the learned Standing Counsel for the School and Mass Education Department:

5. Sri Ramanath Acharya, learned Standing Counselsubmitted that the petitioners were engaged under a scheme to function as SSS on execution of agreement in 2001/2003 in terms of Department of School and Mass Education Resolution No.27021/SME, dated 03.10.2000.

5.1. It is submitted that it has been stipulated in Clause 10 of the Resolution dated 10.01.2008 that SS after completion of three years of continuous satisfactory engagement will be eligible for appointment as Junior Teacher by the Zilla Parishad on contractual basis with consolidated remuneration of Rs.3,500/- per month with effect from 1st December, 2007. However, as per Clause 12.1 ibid. with certain conditions the Junior Teachers after completion of three years of continuous satisfactory engagement as such under Zilla Parishads will be eligible for appointment as Regular Primary School Teachers by the Zilla Parishads with effect from 1st April, 2008 on the basis of the number of vacancies to be transferred from the existing District Cadre to the Zilla Parishad Cadre. Essentially, it is submitted on behalf of the opposite parties that SSS is voluntary service on the basis of annual contract under a scheme which does not contemplate treating them to have been "appointed" prior to 01.01.2005 so that pensionary benefit can be extended as per extant Rules, 1992.

5.2. Since the petitioners joined respective schools in 2001/2003 as SSS on "annual" contract basis and became Regular Primary School Teacher in the year 2008/09, i.e., after 01.01.2005, cannot claim identical treatment inasmuch as the School and Mass Education Department has not framed any policy in this regard. Rather the Office Order vide Annexure-6 shows that the petitioners are "appointed as Regular Primary School Teachers under Zilla Parishad" which in unambiguous terms envisages fresh appointment without treating the period served as contractual teacher in continuation of said appointment.

5.3. It is vehemently objected to that the petitioners under no stretch of imagination be treated to be covered under the Rules, 1992 as it existed prior to 01.01.2005. The Chart vide Annexure-3 to the writ petition as prepared by the petitioners would go to show that they have become Junior Teachers in 2007 which is after the Rules, 2005 came into force and referred to following sub-rule (4) of Rule 3 as inserted to the Rules, 1992 by way of amendment:

> *"1. ****
>
> *(2) They shall be deemed to have come into force with effect from the 1st day of January, 2005.*
>
> *2. In the Odisha Civil Services (Pension) Rules, 1992, after sub-rule (3) of Rule 3 the following sub-rule shall be added namely—*
>
> *'(4) Notwithstanding anything contained in these rules, all persons appointed under the Government of Odisha with effect from 1st day of January 2005 shall not be eligible for Pension as defined under sub-rule (1) of Rule 3 of the said rules but shall be covered by the defined contribution Pension Scheme as specified below:*
>
> *(i) The monthly contribution would be 10% of the salary and Dearness allowance to be paid by the employee and the Government would also provide a matching contribution. The contribution so made would be deported in a non- withdrawable pension tier-I account. Such funds will be invested by pension fund managers as approved by Pension Fund Regulatory and Development Authority (PFRDA) under different categories of scheme which would be a mix of debt and equity. The fund managers would give out easily understood information about the performance of different investment schemes so that individual Government employee would be able to make informed choices about which scheme to choose.*
>
> *(ii) In addition to the above provision, each individual may also have a voluntary tier-II account at his option. This option is provided as General Provident Fund will be withdrawn for employees recruited to the State Government Service with effect from 1st January,2005, Government will make no contribution into this account. In tier-II system, the individual may subscribe 10% of his salary and these assets would be managed through exactly the above procedure. However, the employee would be free to withdraw part or all of second tier of his money at any time. This withdrawable account does not constitute pension investment and would attract no social tax treatment.*
>
> *(iii) At the time of retirement, Government servant will receive the lump sum amount of 60% deposited in pension tier-I account as pension wealth and it is mandatory to the Government servant to invest remaining 40% of his pension wealth to*

purchase as annuity from an Insurance Regulatory and Development Authority—regulated life insurance company. The annuity shall provide for pension for the life time of the employee and his dependent parents and his spouse at the time of retirement. The individual would receive lump-sum of the remaining pension wealth, which he would be free to utilise in any manner. Individuals would have the flexibility to leave the pension system prior to age of 58 years or 60 years as the case may be. In such case the mandatory annuitisation would be 80% of the pension wealth.' "

5.4. Referring to Resolution dated 10th January, 2008 of the Department of School and Mass Education, Sri Acharya, learned Standing Counsel further went on to submit that in view of Clause 10 of said Resolution that "the Sikshya Sahayak (SS) after completion of three years of continuous satisfactory engagement will be eligible for appointment as Junior Teacher by the Zilla Parishad on contractual basis with consolidated remuneration of Rs.3,500/- per month with effect from 1st December 2007", the petitioners have been engaged as "Junior Teachers" as is apparent from the Chart prepared by the petitioners vide Annexure-3 to the Writ Petition. It is admitted position that the petitioners were found eligible for appointment as "Regular Primary School Teacher" after "completion of 6 years of continuous satisfactory engagement as Sikshya Sahayak and Junior Teacher, taken together, as on 1st April, 2008" in terms of Clause 12.2 of said Resolution dated 10.01.2008. Ergo, the Chart vide Annexure-3 shows that the petitioners having completed six years since the date of "engagement" (contra- distinct with the term "appointment") in the year 2001/2003 as SSS/SS and subsequently in 2007 as Junior Teacher, they were appointed as "Regular Primary School Teacher" in the year 2008/2009. As the appointment as "Regular Primary School Teacher was after the date of insertion of sub-rule (4) of Rule 3 in the Odisha Civil Services (Pension) Rules, 1992, i.e.,01.01.2005, the claim in the Writ Petition that the petitioners would be covered under the Rules,1992 as it existed prior to said effective date is misconceived.

5.5. In furtherance of what is submitted, Sri Ramanath Acharya, learned Standing Counsel advanced argument that the Letter dated 04.04.2007 and Letter dated 20.09.2011 under Annexure-4 and Annexure-5 respectively being related to job-contract/work-charged persons, the benefit of said letters cannot be made available to the case of present petitioners.

5.6. In absence of complete details with regard to manner and context of engagement/appointment of Sri Ashish Kumar Mahanty, Assistant Teacher of Government High School, Kotpad in the District of Koraput in the pleading, the petitioners cannot be allowed to claim the benefit.

5.7. Under such premises, the learned Standing Counsel for the School and Mass Education Department has requested for dismissal of the Writ Petition.

Consideration of pleadings, contentions and arguments of respective parties:

6. The petitioners claimed to have responded to Advertisement dated 24th December, 2000 purportedly floated pursuant to Resolution bearing No.27021/S&ME, dated 3rd October, 2000 of the Government of Odisha in Department of School and Mass Education, and applied for being SSS (which was subsequently named as SS) and joined as SSS on annual contract basis.

6.1. Clauses of said Resolution dated 03.10.2000 so far as relevant for the present purpose are extracted hereunder:

> *"3. Keeping all these in view and with the limited resources of the State, a scheme of 10,023 para- teachers (3rd teachers in U.P. school) is mooted. 3* ***Such para-teachers*** *would be responsible for ensuring enrolment of school going children of the designated locality. It shall be their duty to interact with the parents/guardians for regular attendance of their wards. In order to increase retention and check dropout rate, they shall function as a link between the educational institution to which they are attached and the concerned community. Further, they may be called upon* ***to assist the teachers*** *in imparting education in primary/upper primary schools. In consideration of all these factors,* ***the State Govt. have been pleased to introduce a scheme of 'Swechhasevi Sikhya Sahayak' with the following terms and conditions.***
>
> *4.* ***Engagement.***
>
> *4.1. The Swechhasevi Sikhya Sahayak (SSS)* ***is a scheme for volunteers*** *and that those who accept the terms and conditions and offer to render Voluntary service could be engaged as such.* ***When the engagement of the volunteers is no longer required or when central assistance for the purpose is discontinued, they shall be disengaged****. The State Govt. have the option of down sizing the strength of Swechhasevi Sikhya Sahayak if on account of resource constraint, it is unable to retain that number. Swechhasevi Sikhya Sahayak will be engaged in each education district separately by a Committee to be headed by the Collector-cum-Chief Executive Officer, Zilla Parishad as Chairman CI of Schools, DI of schools, District Employment officer and the District Welfare Officer as members in the Committee.*
>
> *****
>
> *8. Assignment*
>
> *The Swechhasevi Sikhya Sahayak (S.S.S.) shall motivate* ***the parents/guardians of the village*** *in which Primary Schools is situated for enrolment of children within the age of group of 6-14 years. It shall be his duty* ***to contact parents/guardians*** *in case children fail to a attend classes regularly and get back such children to the classes. Wherever applicable,* ***he will work under the administrative control of the Head Pandit/Head Master or Head Pandit in charge of school to which he is assigned and shall be entrusted with the teaching of primary school students upto Class-VII*** *and may be assigned any other work in furtherance of the objective of universal primary education as decided by Govt. in School & Mass Education Deptt. and C.E.O., Zilla Parishad from time to time.*
>
> *8.1. ****
>
> *8.2. The Swechhasevi Sikhya Sahayak will be paid Rs.1500/- (Rupees one thousand five hundred only) per month as* ***consolidated honorarium****.*

8.3. ***

8.4. ***The engagement would be on the basis of annual contract.***

8.5. The agreement between the Collector-Cum-C.E.O., Zilla Parishad and Swechhasevi Sikhya Sahayak is to be signed on stamped paper besides the engagement order.

8.6. ***

8.7. Funds as required for honorarium of Swechhasevi Sikhya Sahayak for each district will be placed with the respective ***Zilla Parishad who shall pay to the Sikhya Sahayaks*** *on certification of regular attendance by the Head Pandit/Head Master."*

6.2. Resolution No.11676-IISME-LM-214/05(pt)/SME, dated 31.05.2006 provides:

"9. The Sikshya Sahayak (SS) after completion of 4 years of continuous satisfactory engagement will be eligible for appointment as Junior Teacher by the Zilla Parishad on contractual basis with consolidated remuneration of Rs.3000/- per month.

The following conditions must be fulfilled by the Sikhya Sahayak for appointment as Junior Teachers by the Zilla Parishad, namely:

i) The Sikshya Sahayak (SS) must have rendered 4 years of continuous service satisfactorily from the date of engagement;

ii) The Sikshya Sahayak (SS), must have ensured 90% attendance of children in respective schools in all classes;

iii) The Village Education Committee must have given positive certificates about attendance and performance of the SS in the schools for the last 4 years;

iv) The Sikshya Sahayak (SS) must not have any adverse reports during last 4 years of service in the school as SS. They must have ensured Minimum Level of Learning (MLL) for the students as prescribed by the competent authority; and

v) The Sikshya Sahayak (SS) must have reduced the drop-out of Primary and Upper Primary School to below 10%.

9.1. Candidates not fulfilling the criteria contained in para-9 above shall not be considered for appointment as junior teachers by the Zilla Parishad.

9.2. The eligibility conditions specified in para-9 shall not apply to 7,855 numbers of SSS engaged during the year 2001.

11. The vacancies out of the sanctioned posts in primary and upper primary schools will be filled up by appointment of regular primary school teachers by the Zilla Parishad from among the junior teachers. The above vacancies The above vacancies against which regular primary school teachers would be appointed will be transferred to the Zilla Parishad cadre from the existing district cadre as per 73rd Amendment of the Constitution of India, as all the schools would henceforth in phases be transferred to Panchayati Raj bodies as to be decided by the Govt.

12. The junior teachers after completion of 5 years of continuous satisfactory engagement as such under Zilla Parishads will be eligible for appointment as regular primary school teachers by the Zilla Parishads on the basis of the number of vacancies to be transferred from the existing District Cadre to the Zilla Parishad cadre and subject to the fulfilment of following conditions:

(i) The Junior teachers must have rendered at least 5 years of service as such satisfactorily with an unblemished records.

(ii) They must have ensured 90% attendance of Children in their respective schools in all classes.

(iii) They must have been given positive certificate by the VEC about regular attendance and satisfactory teaching. They must have ensured Minimum Level of Learning (MLL) for the students as prescribed by the competent authority.

(iv) They must have reduced the dropout of children on the schools below 10%."

6.3. Resolution No.II-SME-LMC-150/06-673/SME, dated 10.01.2008 provides:

"4.4 Orders of engagement shall be issued by the Zilla Parishad through its Chief Executive Officer-Cum- Collector of the District. The engagement will be on an annual contract basis. Contract will be renewed in subsequent years depending on the performance of the candidate. While renewing the contract of the Sikshya Sahayaks (SSs), the Zilla Parishad / Collector-cum-CEO, Zilla Parishad must see that the Village Education Committee of the concerned school has given positive certificate in his/her favour about regular attendance and satisfactory teaching. The Sikshya Sahayak (SS) can be removed from engagement with 30 days prior notice, if she/he violates the conditions of the contract or is considered unsuitable later on by the authorities or on the basis of adverse report of the Village Education Committee.

***

9.1 The Sikshya Sahayaks (SS) will get remuneration of Rs.3000/- per month with effect from 1st December 2007.

***

9.3 The engagement would be on the basis of annual contract.

***

10. The Sikshya Sahayak (SS) after completion of 3 years of continuous satisfactory engagement will be eligible for appointment as Junior Teacher by the Zilla Parishad on contractual basis with consolidated remuneration of Rs.3500/- per month with effect from 1st December 2007.

The following conditions must be fulfilled by the Sikhya Sahayak for appointment as Junior Teachers by the Zilla Parishad, namely:

i) The Sikshya Sahayak (SS) must have rendered 3 years of continuous service satisfactorily from the date of engagement;

ii) The Sikshya Sahayak (SS), must have ensured 90% attendance of children in respective schools in all classes;

iii) The Village Education Committee must have given positive certificates about attendance and performance of the SS in the schools for the last 3 years;

iv) The Sikshya Sahayak (SS) must not have any adverse reports during last 3 years of service in the school as SS. They must have ensured Minimum Level of Learning (MLL) for the students as prescribed by the competent authority; and

v) The Sikshya Sahayak (SS) must have reduced the drop out of children of Primary and Upper Primary School to below 10%.

10.2 The eligibility conditions specified in para-10 shall not apply to 7855 numbers of SSS engaged during the year 2001.

11. The vacancies out of the sanctioned posts in primary and upper primary schools will be filled up by appointment of regular primary school teachers by the Zilla Parishad from among the Sikshya Sahayaks. The above vacancies against which regular primary school teachers would be appointed will be transferred to the Zilla Parishad cadre from the existing district cadre as all the schools would in phases be transferred to Panchayati Raj bodies as to be decided by the Government.

12.1 The Junior Teachers after completion of 3 years of continuous satisfactory engagement as such under Zilla Parishads will be eligible for appointment as regular primary school teachers by the Zilla Parishads with effect from 1st April 2008 on the basis of the number of vacancies to be transferred from the existing District Cadre to the Zilla Parishad cadre and subject to the fulfilment of following conditions.

(i) The Junior Teachers must have rendered at least 3 years of service as such satisfactorily with an unblemished records.

(ii) They must have ensured 90% attendance of Children in their respective schools in all classes.

(iii) They must have been given positive certificate by the Village Education Committee about regular attendance and satisfactory teaching. They must have ensured Minimum Level of Learning (MLL) for the students as prescribed by the competent authority.

(iv) They must have reduced the dropout of children on the schools below 10%.

12.2 Notwithstanding anything to the contrary in Para-12.1, a Sikhya Sahayak after completion of 6 years of continuous satisfactory engagement as Sikhya Sahayak and Junior Teacher, taken together, as on 1st April, 2008, shall be eligible for appointment as Regular Primary School Teacher.

13. The Junior Teachers of Zilla Parishads on rendering satisfactorily service as reviewed every 3 years can continue in service but not beyond 58 years of age."

6.4. Resolutions afore-quoted unequivocally speak that SSS/SS is required to assist the teachers and the engagement is under a scheme with certain terms and conditions. Such engagement is based on "annual contract" between the Collector-*cum*-Zilla Parishad and the SSS. The SSS/SS is to offer voluntary service and is entitled to receive consolidated "honorarium" from the funds of the Zilla Parishad.

6.5. The engagement of SS on contractual basis is purely temporary and for specific periods only to meet the exigency of work, and as such, filled up only on contract basis. The term 'contract' and the limited period stipulated in the terms of engagement is one year.

6.6. As is apparent from the Chart in Annexure-3 to the Writ Petition, in consonance with Clause 12.2 of Resolution dated 10.01.2008, the petitioners have been appointed as "Regular Primary School Teachers" taking six years continuous engagement as SS and Junior Teacher taken together as on 01.04.2008. It has been clarified in Clause 11 thereof that the vacancies out of the sanctioned posts in Primary and Upper Primary Schools will be filled up by "appointment" of Regular Primary School Teachers by the Zilla Parishad from among the Sikshya Sahayaks.

6.7. It is apt to notice following provisions contained in the Odisha Education Act, 1969 and the Odisha Elementary Education (Method of Recruitment and Conditions of Service of Teachers and Officers) Rules, 1997.

THE ODISHA EDUCTION ACT, 1969:

"3. Definitions.—

(l) UPPER PRIMARY SCHOOL means an educational institution imparting instructions in standards of Class VI and VII and may have the standards of Primary School attached to it.

(m) PRESCRIBED means prescribed by rules.

(n) PRIMARY SCHOOL means any educational institution imparting elementary standard of education comprised in Standards of Classes I to V."

THE ODISHA SUBORDINATE EDUCATION (METHOD OF RECRUITMENT AND CONDITIONS OF SERVICE) RULES, 1997:

"2. Definitions.—

(1) In these rules, unless the context otherwise requires—

(f) POST shall mean and include the posts of Assistant Teachers, Headmasters/ Headmistresses, Junior and Senior Co-ordinators (Non-Formal Education), Sub-Inspector of Schools, Deputy Inspector of Schools, District Inspector of Schools and such other post as may be notified by Government from time to time.

(g) PRIMARY SCHOOLS means the schools having classes from Class I to Class V.

(i) SERVICE means the Odisha Elementary Education Service.

(k) TEACHER means an employee whose work is to impart teaching.

(l) UPPER PRIMARY SCHOOL means the school having classes up to VII.

(2) All other words and expressions used and not defined in these rules, unless the context otherwise requires, shall have the same meaning as respectively assigned to them in the Odisha Service Code.

3. Constitution of Service.—

(1) The Service shall comprise of the following levels, namely—

(i) The Odisha Elementary Education Service, Level-V;
(ii) The Odisha Elementary Education Service, Level-IV;
(iii) The Odisha Elementary Education Service, Level-III;
(iv) The Odisha Elementary Education Service, Level-II;
(v) The Odisha Elementary Education Service, Level-I.

(2) ***(i) The Odisha Elementary Education Service, Level-V shall consist of the Posts of Assistant Teachers of Government Primary Schools and Assistant Teachers of Government Upper Primary Schools****.*

(ii) The Odisha Elementary Education Service, Level-IV shall consist of the Posts of Headmasters/Headmistresses of Government Primary Schools.

(iii) The Odisha Elementary Education Service, Level-III shall consist of the following categories of posts namely—

(a) Headmasters/Headmistresses of Government Upper Primary Schools;

(b) Junior Co-ordinators (Non-Formal Education);

(c) Sub-Inspector of Schools; and

(d) Such other posts as Government may from time to time determine.

(iv) The Odisha Elementary Education Service, Level-II shall consist of the following categories of posts, namely—

(a) Deputy Inspector of Schools;

(b) Senior Co-ordinators (Non-Formal Education and

(c) Such other posts as Government may from time to time determine.

(v) The Odisha Elementary Education Service, Level-I shall consist of posts of District Inspector of Schools and such other posts as Government may from time to time determine.

(3) Level-I and Level-II of the service shall separately constitute State cadre and all other levels of Service shall separately from the district cadre.

6. Recruitment.—

(a) ***Vacancies in the posts belonging to Level-V of the service shall be filled up by way of direct recruitment.***

(b) Vacancies in the post belonging to Levels-IV, III, II and I shall be filled up by promotion.

7. Eligibility for direct recruitment.—

In order to be eligible for direct recruitment to the posts belonging to Level-V of the service a candidate must satisfy the following conditions, namely:

(a) He/She must be a citizen of India;

(b) He/She shall be under 32 years of age and over 18 years of age as on the first day of August of the year of recruitment:

Provided that the maximum age limit may be relaxed by 5 years in case of inservice candidates, candidates belonging to Scheduled Castes or Scheduled Tribes, candidates with approved Military Service and Women candidates and by 3 years in case of candidates belonging to Socially and Educationally Backward Class;

(c) He/She Must be of good moral character;

NOTE.— He/She shall have to submit certificate to that effect from two responsible Gazetted Officers (not being his/her relations);

(d) He/She, if married, must not be having more than one spouse living; (e) He/She must have passed High School Certificate Examination or an equivalent Examination and must have completed Secondary Teacher's Training/Certified Teachers Course from a recognised Board or University;

NOTE.— Person already in the service of Government shall have to apply through proper channel for direct recruitment to the service subject to his being within the prescribed age-limit and being otherwise eligible and subject further to his/her application being received through proper channel within scheduled times as may be determined by the Committee: Provided that the Committee may entertain advance

copies of application on the condition that original copies together with "No objection" Certificate from the competent authority is received within such times as may be determined by the Committee.

15. Seniority and gradation list.—

(1) (a) The District Inspector of Schools of the concerned Education Districts, shall maintain gradation list separately for the post belonging to Level-V, Level-IV and Level-III of the service strictly on the basis of seniority.

(5) The seniority of teachers and officers appointed to different posts belonging to different levels of the service in any year shall be regulated in the following manner, namely:

(a) Teachers appointed to the Level-V, IV, III and II and officers appointed to the Level-I of the service shall be ranked inter se in the order in which their names are arranged by the respective committee constituted for the purpose;

****"*

THE ODISHA SERVICE CODE:

"11. CADRE means the strength of a service or part of a service sanctioned as a separate unit."

***Legal position**:*

7. Conjoint reading of aforesaid provisions makes it clear that the term "service" as mentioned in the Odisha Subordinate Education (Method of Recruitment and Conditions of Service) Rules, 1997 would be encompassed within the meaning of "CADRE" as defined in the Odisha Service Code. None of the "SERVICE" comprising "LEVEL" contained in the aforesaid Act and rules does mention about SSS/SS so as that the same would be embraced within connotation of "CADRE". Rather SSS/SS involves voluntary element and the job requirement is basically to motivate the parents/guardians of the village in which Primary School is situated for enrolment of children within the age of group of 6-14 years and it is the duty of SSS/SS to contact parents/guardians. The nature of job requirement qua SSS/SS suggests that it is to render assistance to the teacher and SSS/SS himself is not a "teacher". It is significant to note that the engagement of SSS/SS is contractual subject to renewal annually.

7.1. It is explicit from aforesaid provisions that strength of service as contemplated in the definition of the term "CADRE" is the service which commences at "THE ODISHA ELEMENTARY EDUCATION SERVICE, LEVEL-V" which consists of the Posts of Assistant Teachers of Government Primary Schools and Assistant Teachers of Government Upper Primary Schools as per Rule 3(2)(i) of the Odisha Elementary Education (Method of Recruitment and Conditions of Service of Teachers and Officers) Rules, 1997. While Rule 6 prescribes for filling up of the Odisha Elementary Education Service, Level-V by way of direct recruitment, as per Rule 7 the eligibility for direct recruitment inter alia required that a candidate must have passed "High School Certificate Examination or an

Equivalent Examination and must have completed SecondaryTeacher's Training/Certified Teachers Course from a recognized Board or University".

7.2. Since the petitioners have claimed to have been appointed as "Regular Primary School Teacher" in the years 2008 and 2009, they for the first time, thus, entered into the "service" as defined under Rule 2(1)(i) of the Rules, 1997, read with concerned Resolution(s) which can be construed to be within the meaning of "CADRE" in terms of the Odisha Service Code. Therefore, it is fallacious to claim that the period of contractual engagement (annually) of the petitioners is to be taken into consideration as "service" so as to claim pension as per provision existed prior to effective date on which the Odisha Civil Service (Pension) Amendment Rules, 2005 came into force.

7.3. It has been well-settled that if it is a contractual engagement, the engagement comes to an end on the date stipulated in the contract, and if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. All appointments made by the Government, having its origin in contracts, do not result in acquisition of a status by the appointees.

7.4. In State of Haryana Vrs. Charanjit Singh & Others, (2006) 9 SCC 321 it has been laid down that:

> *"22. Where a person is employed under a contract, it is the contract which will govern the terms and conditions of service. In State of Haryana Vrs. Surinder Kumar, (1997) 3 SCC 633 person employed on contract basis claimed equal pay as regular workers on the footing that their posts were interchangeable. It was held that these persons had no right to the regular posts until they are duly selected and appointed. It was held that they were not entitled to the same pay as regular employees by claiming that they are discharging the same duties. It was held that the very object of selection is to test the eligibility and then to make appointment in accordance with the rules. It was held that the respondents had not been recruited in accordance with the rules prescribed for recruitment.*
>
> *23. In Union of India Vrs. K.V. Baby, (1998) 9 SCC 252 the question was whether commission- bearers/vendors are entitled to the same salary as regular employees.* ***It was held that their appointment and mode of selection, their qualifications cannot be compared with regular employees. It was held that by their very nature of employment they cannot be equated with regular employees****. It was held that recruitment rules and service conditions do not apply to such persons. It was held that their responsibilities cannot be equated with those of regular employees."*

7.5. In the case of Dr. K.M. Sharma and Others Vrs. State of Chhatisgarh and Others, 2022 LiveLaw (SC) 512 = (2022) 11 SCC 436 it has been observed as follows:

> *"Heavy reliance is placed on Rule 7 and it is the case on behalf of the appellants that after completion of the probation period as mentioned in Rule 7, Shiksha*

> *Karmis will have to be paid the pay equivalent to the pay-scale of the Municipal teachers. The aforesaid submission has no substance. On a fair reading of Rule 7, it is clear that on completion of the probation period, the Shiksha Karmis shall be confirmed as Shiksha Karmis only and they shall be put in the regular pay-scale of the Municipality as Shiksha Karmis and not as the Municipal teachers. As observed hereinabove, Municipal teachers are appointed under the Rules, 1968. As per Rule 4 of the Shiksha Karmis Rules, 1998, Shiksha Karmis shall have to be paid the scales of pay as given in the Schedule I to the aforesaid Rules. The respective Shiksha Karmis are paid the pay scales as per Schedule I of Rule 4.* ***Therefore, when the Municipal teachers and the Shiksha Karmis are appointed under different Rules and there are different methods of selection and recruitment, a Shiksha Karmi cannot claim parity in pay-scale with that of Municipal teachers on the principle of equal pay for equal work****. Therefore, it is observed and held that Shiksha Karmis, who are governed by the Shiksha Karmis Rules, 1998 under which they were appointed, are entitled to pay-scales under the Shiksha Karmis Rules, 1998 only, which are being paid to them."*

7.6. Thus, the engagement of SSS under a scheme being not part of "CADRE" as defined in Rule 11 of the Odisha Service Code, nor was it in a pay scale or was the engagement under sanctioned strength of "SERVICE" as envisaged under Rule 3 of the Odisha Elementary Education (Method of Recruitment and Conditions of Service of Teachers and Officers) Rules, 1997, in the absence of any specific rule granting pensionary benefit to the SSS/SS, on their being appointed as regular primary school teachers subsequently, it is difficult to direct the opposite parties to extend such benefit to the SSS engaged on annual contract basis.

7.7. The Hon'ble Supreme Court of India in Dhyan Singh & Others Vrs. State of Haryana & Others, (2002) 10 SCC 656 has been pleased to make the following observation:

> *"These appeals and the writ petition raised a common question as to whether the services rendered as an Adult Education Supervisor under a Non-formal Education Scheme evolved by the State of Haryana can be counted for the purpose of granting pensionary benefits as well as for the purpose of fixation of his pay, when such an employee is recruited to a regular post under the State Government either with or without break of service. Needless to mention that these appellants after having served for a number of years under the Rural Education Literacy Project/State Adult Education Programme the Scheme itself under which they had been discharging their duties stood abolished, and consequently the appellants ceased to be employees. They had approached this Court in a writ petition, which was registered as Writ Petition No. 1040 of 1990 seeking a mandamus to the State Government for their absorption in any regular cadre of the State Government. In the said case, the counsel appearing for the State of Haryana fairly stated that the Government is prepared to absorb the applicants in the State's service as and when vacancies in the cadre of Social Studies Teachers and Masters are available, and on the basis of the said statement made by the counsel appearing for the State of Haryana the writ petition was disposed of with the direction that the Government should utilise the past experience of these persons by absorbing them suitably as and when vacancies would occur in the post, as already stated. Pursuant to the said direction of this Court, the appellants were recruited to the post of Teachers on different dates in the year 1993, and they were taken in as fresh*

recruits. Their salary having been fixed at the initial stage of the scale of pay for the post in question, the appellants, therefore, approached the High Court seeking relief that their pay in the scale of pay should be fixed up taking the past services into account, and that their past services rendered under the Scheme should also be taken into account for the purpose of deciding their pension. The High Court relying upon the circular issued by the Government on 13.11.1995 came to the conclusion that no part of the services rendered by the appellants as Supervisors in the Adult Education Scheme can be considered either for the purpose of determining the initial amount of salary which they would get on their regular absorption nor can the same be taken into account for deciding the pensionary benefits, ultimately, which the appellants would receive on superannuation from the regular services. It is this judgment of the High Court, which is the subject-matter of challenge in these appeals. Mr Pankaj Kalra, appearing for the appellants strenuously contended that by judgment of this Court the appellants having been given the regular pay scale while continuing as Adult Education Supervisors under the Scheme on the basis that they were discharging full-time duties, there is no rationale to deny the relief sought for by the appellants in the writ petition. Mr Kalra also contended that the High Court was totally in error by coming to the conclusion that the appellants had rendered service as part-time Supervisors, which is belied by the earlier decision of this Court. He further contended that since under the government rules and regulations the temporary employees, the ad hoc employees and the work-charged employees are entitled to count their services for the purposes of getting the pensionary benefits, it would not be fair to discriminate against this particular group of employees, though undoubtedly, they had served the period under a particular scheme. Having considered the two contentions made, and having applied our mind to the rules and regulations that were shown to us, we are not in a position to accept either of the contentions raised by Mr Kalra. The continuance/engagement of the appellants under the specific scheme cannot be held to be an employment under any establishment of the Government. Such schemes are taken up for certain contingencies when money for the same is provided either by the Central Government or at times by some foreign countries. ***But the employment under such scheme not being a part of the formal cadre of the State Government, it is difficult to hold that the period for which an employee rendered service under such scheme can be counted either for the purposes of deciding their pensionary benefits or even for fixing of their salary in the scale of pay once they are regularly absorbed****. The judgment of this Court pursuant to which the appellants were absorbed as against regular posts in the Government itself would indicate that the Court had taken a compassionate view, and not on any rights which flowed from the past services rendered by the appellants under the Scheme in question, and that also under the concession of the counsel appearing for the State Government. We have not been shown any rules or regulations of the State, which even confer pensionary benefits for such services rendered by the appellants. In this view of the matter, it is difficult for us to find any infirmity with the impugned judgment of the High Court. We, therefore, see no merits in these appeals and the writ petition, which are accordingly dismissed, but in the circumstances, there will be no order as to costs."*

7.8. In *Chandra Shekar Sahoo Vrs. State of Odisha & Others, W.P. (C) No. 17023 of 2012*, vide Order dated 07.04.2022, the Division Bench of this Court held as follows:

> *"7. The apex Court in Dhyan Singh (supra), the apex Court held that the continuance/engagement of the appellants therein under a specific scheme cannot be construed to be an employment under any establishment of the Government. Such schemes are taken up for certain contingencies when money for the same is provided either by the Central Government or at times by some foreign countries, but the employment under such scheme not being a part of the formal cadre of the State Government, it is difficult to hold that the period for which an employee rendered service under such scheme can be counted either for the purposes of deciding their pensionary benefits or even for fixing of their salary in the scale of pay once they are regularly absorbed.* ***It is also further mentioned that no rule or regulations have been shown which even confer pensionary benefits for the past service rendered by the appellants under the scheme****. Benefit of past service under the scheme is therefore not admissible. The similar view has also been taken by this Court in W.P.(C) No. 14961 of 2012 [State of Odisha Vrs. Santanu Kumar Dash, disposed of on 22.03.2022]."*

7.9. Sri Budhadev Routray, learned senior counsel having not brought to notice any provision acknowledging date of engagement as SSS/SS under Scheme is reckoned as the date of joining in the "SERVICE" [defined under Rule 2(1)(i) of the Odisha Elementary Education (Method of Recruitment and Conditions of Service of Teachers and Officers) Rules, 1997] within the meaning of "CADRE" [defined under Rule 11 of the Odisha Service Code] so as to entail the petitioners to claim pensionary benefit as envisaged under the pre-amended provisions of the Odisha Civil Services (Pension) Rules, 1992, the contention of the petitioners cannot be acceded to.

7.10. Sri Budhadev Routray, learned senior counsel placed reliance on the Judgment of the Hon'ble Punjab and Haryana High Court in the case of ***Harbans Lal Vrs. State of Punjab and Others***, 2010 SCC OnLine P&H 8181, Petition(s) for Special Leave to Appeal being CC No. 17901/2011 against said Judgment got dismissed on 30.07.2012 by the Hon'ble Supreme Court.Further, the Review against such dismissal, being Review Petition (C) No.2038 of 2013, was also not entertained by the Apex Court vide Order dated 4th November, 2015. Taking cue from the view expressed in the said Judgment by the Hon'ble Punjab and Haryana High Court that the "entire daily wage service of petitioner" "till the date of his regularization is to be counted as qualifying service for the purpose of pension", it is, therefore, submitted that the period of service rendered by the SSS/SS is required to be taken into consideration so as to enable him to be covered under the pre-amended scheme of pension as provided under the Rules, 1992. Per contra, it is opposed by Sri Ramanath Acharya, learned Standing Counsel that the said case is distinguishable not only on facts but also in law inasmuch as the statutory provisions contained in the Punjab Civil Services Rules vis-à-vis pensionary benefits extended thereby.

7.11. Before considering applicability of ratio of the Judgment relied on by the counsel, it is relevant to refer to *Union of India Vrs. Arulmozhi Iniarasu, (2011) 9 SCR 1 = (2011) 7 SCC 397*, wherein it has been laid down as follows:

"Before examining the first limb of the question, formulated above, it would be instructive to note, as a preface, the well- settled principle of law in the matter of applying precedents that the Court should not place reliance on decisions without discussing as to how the fact situation of the case before it fits in with the fact situation of the decision on which reliance is placed. The observations of the courts are neither to be read as Euclid's theorems nor as provisions of statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Disposal of cases by blindly placing reliance on a decision is not proper because one additional or different fact may make a world of difference between conclusions in two cases. [Ref.: Bharat Petroleum Corpn. Ltd. Vrs. N.R. Vairamani, (2004) 8 SCC 579; Sarva Shramik Sanghatana(KV), Mumbai Vrs. State of Maharashtra, (2008) 1 SCC 494; and Bhuwalka Steel Industries Limited Vrs. Bombay Iron & Steel Labour Board, (2010) 2 SCC 273]."

7.12. As per clause (r) of Rule 2 of the Odisha Civil Services (Pension) Rules, 1992, the 'QUALIFYING SERVICE' has been defined to mean the service rendered by a Government servant, which shall be taken into account for the purpose of pension and gratuity admissible under these rules.

7.13. Rule 14 of the said Rules, 1992 prescribes as follows:

"14. Counting of service on contract.—

(1) A person who is initially engaged by the Government on a contract basis for a specified period and is subsequently appointed to the same or another post in a temporary or substantive capacity in a pensionable establishment without interruption of duty, may opt either—

(a) to retain the Government contribution in the contributory provident fund with interest thereon including any other compensation for that service; or

(b) to agree to refund to the Government the monetary benefits referred to in clause (a) or to forgo the same if they have not been paid to him and count in lieu thereof the service for which the aforesaid monetary benefits paid or have become payable.

(2) The option under sub-rule (1) shall be communicated to the Appointing Authority under intimation to the Accounts officer within a period of three months from the date of issue of the order of transfer to pensionable service or if the Government servant is on leave on that day, within three months of his return from leave.

(3) If no communication is received by the Appointing Authority within the period referred to in sub-rule (2), the Government servant shall be deemed to have opted for the retention of the monetary benefits payable or paid to him on account of service rendered on contract."

7.14. Nothing is placed on record to demonstrate that the period of service rendered as daily wage employee being taken into consideration with reference to provisions of the Punjab Civil Services Rules is akin to service rendered by the SSS/SS and payments made over to the petitioners herein qualifies for consideration as stipulated under Rule 18 of the Odisha Civil Services (Pension) Rules. While Chapter-III ibid. has provided for certain periods to be counted for the purpose of pension, it inter alia prescribed under Rule 18 the following:

"18. Conditions subject to which service qualifies—

(1) Service does not qualify for pension unless it is rendered in a pensionable establishment/post.

(2) The entire continuous temporary or officiating service under Government without interruption in the same post or any other post, shall count for the purpose of pension in respect of all categories of Government servants except in the following cases, namely:

(i) Period of service in a non-pensionable establishment;

(ii) Period of service in the work-charged establishment;

(iii) Period of service paid from contingencies;

(iv) Where the employee concerned resigns and is not again appointed to service under Government or is removed/dismissed from public service;

(v) A probationer who is discharged from service for failure to pass the prescribed test or examination;

(vi) Re-employed .pensioner,Government servants engaged on contract and Government servants not in whole time employment of Government;

(vii) Service paid from Local Fund or Trust Fund;

(viii) Service in an office paid by fees whether levied by law or under authority of the Government or by Commission; and

(ix) Service paid out of the grant in accordance with Law or Custom.

(3) Notwithstanding anything contained in clauses (i) and (ii) of sub-rule (2) a person who is initially appointed by the Government in a work-charged establishment for a period of five years or more and is subsequently appointed to the same or another post in a temporary or substantive capacity in a pensionable establishment without interruption of duty, the period of service so rendered in work- charged establishment shall qualify for pension under this rule.

(4) Notwithstanding anything contained in sub-rule (1) Government, may, by general or special order, prescribe any class of service or post which were previously borne under work-charged establishment or paid from contingencies to be pensionable.

(5) Notwithstanding anything contained in sub-rules (1)and (2) in case of a Government servant belonging to Government of India or other State Government on his permanent transfer to the State Government the continuous service rendered by him under pensionable establishment of Government of India or any other State Government, as the case may be, shall count as qualifying service for pension.

(6) Notwithstanding anything contained in clause (i) & (iii) of sub-rule (2), a person who is initially appointed in a job-contract establishment and is subsequently brought over to the post created under regular/pensionable establishment, so much of his job contract service period shall be added to the period of his qualifying service in regular establishment and would render him eligible for pensionary benefits. (Vide Finance Department Notification No.45865/F., dt.01.09.2001)"

7.15. Rule 11 of the Rules, 1992 also lays down the conditions of qualifying service in the following terms:

"11. Conditions of qualifying service.—

Subject to the provisions hereinafter contained, the service of a Government servant shall qualify for pension if it conforms to the following three conditions, namely:

(1) The service must be under Government,

(2) The employment must be in a pensionable establishment/post, and

(3) The service must be paid by Government."

7.16. Rule 10 of Rules, 1992 provides for commencement of qualifying service in the following terms:

"10. Commencement of qualifying service.—

Subject to the provisions of these rules, qualifying service of a Government servant shall commence from the date he takes charge of the post ***to which he is first appointed either substantively or in an officiating or temporary capacity****:*

Provided that except for compensation gratuity, a Government servant's service does not qualify for pension till he has completed eighteen years of age:

Provided further that nothing contained in this rule shall apply to the persons who were in service on the 8th September, 1962 and in whose case a lower age- limit had been prescribed."

7.17. The term "Government servant" has been defined in Rule 2(b) of the Odisha Government Servants' Conduct Rules, 1959, as follows:

"GOVERNMENT SERVANT means any person appointed to serve in connection with the affairs of the State, in respect of whom the Government of Odisha is empowered to make rules under Article 309 of the Constitution of India, whether for the time being such person serving in connection with the affairs of the Government of India or of any State, or is on Foreign Service, or on leave;"

7.18. Provision of Rule 2(1)(e) of the Rules,1992 defines "EMOLUMENTS" to mean the basic pay as defined under Rule 33(a)(i) of the Odisha Service Code. The provisions of Rule 33(a)(i) of the Odisha Service Code provides definition of "PAY" which is being quoted herein below:

"PAY means the amount drawn monthly by a Government servant as—

(i) the pay other than special pay or pay granted in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity or to which he is entitled by reason of ***his position in the cadre****."*

7.19. It is, thus, evident from the definition of 'PAY' as per the provision made in Rule 33(a)(i) of the Odisha Service Code that the amount drawn monthly by a Government servant as the pay other than special pay or pay granted in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity or to which he is entitled by reason of his position in the cadre. So an employee has to be in the cadre by virtue of the order passed by the competent authority. A person would be entitled to get pension on the basis of the pay attached to the post.

7.20. When the period of assignment of the petitioners as SSS/SS is taken into consideration vis-à-vis aforesaid rules, none of the rules which specified qualifying service does fit into so as to entitle them to urge that the period of service rendered in the capacity of SSS/SS would be reckoned for the purpose of determination of date of initial appointment even as they are borne in the Odisha Elementary Education Service, Level-V Cadre in 2008/09.

7.21. Reference as made by the learned senior counsel appearing for the petitioners to Letter dated 04.04.2007 of the Government of Odisha in Finance Department clarifying that "the persons who are appointed under job-contract and work-charged establishment prior to 01.01.2005 and brought over to the regular establishment on or after 01.01.2005 are not to come under the coverage of the OCS (Pension) Amendment Rules, 2005 as notified in Finance Department Notification No.44451/F., dated 17.09.2005" has no application to the instant case for the simple reason that the petitioners-SSS/SS are treated to be neither job- contract nor work-charged employees.

7.22. In identical fact situation, the learned Odisha Administrative Tribunal had the occasion to consider the effect and impact of said Letter dated 04.04.2007 in respect of engagement of Applicants-Sikshya Sahayaks prior to 01.01.2005 in a batch of matters being *Mayadhar Pradhan and Others Vrs. State of Odisha and Others, O.A. Nos. 3345 (C) to 3352 (C) of 2012* and repelling the claim of the Applicants in the said Original Applications, vide Order dated 28.09.2012, said Tribunal observed and held as follows:

> *"*** The applicants who were earlier engaged as Sikshya Sahayak and later became Junior Teacher and thereafter engaged as regular Teacher under the administrative control of Zilla Parishad, have filed these Original Applications with a prayer for a direction to the respondents to enroll/cover them under Odisha Civil Services (Pension) Rules, 1992 and General Provident Fund (Odisha) Rules.*
>
> ***
>
> *Mr. Behera, learned counsel for the applicants submits that the applicants, who were engaged as Sikshya Sahayak with a consolidated remuneration of Rs.4,000/- per month and three years thereafter Rs.4,500/- per month on becoming Junior Teacher and also three years thereafter as regular Teacher under Zilla Parishad in the regular scale of pay of Rs.3,600/- — 5,600/-, have filed these cases with a prayer to enroll/cover them under Odisha Civil Services (Pension) Rules,1992 and General Provident Fund (Odisha) Rules. Even though the pension in respect of the Government Departments has been abolished on introduction of Contribution Pension Scheme in the State Government Service with effect from 01.01.2005, since the applicants were engaged in Sikshya Sahayak much prior to the abolition of Pension Scheme, treating them as job-contract/work-charged employee working in different projects,they shall also be covered by the Pension Rules by virtue of the Letter of Clarification issued by the Government of Odisha in Finance Department dated 04.04.2007 (Annexure-3), but not under Contribution Pension Scheme.*

Considering the submissions made by the learned counsel for both the parties and keeping in view the fact that the applicants in all these cases, who were appointed initially as Sikhya Sahayak with consolidated remuneration and three years thereafter as Junior Teacher with higher consolidated remuneration and also three years thereafter as regular Teacher with regular scale of pay, are continuing under the administrative control of Zilla Parishad and the Letter of Clarification issued by the Government of Odisha in Finance Department dated 04.04.2007 (Annexure-3) is only relating to the job- contract/work-charged employees and since the applicants have never been engaged as job-contract or work-charged employees, the said Clarification/Letter of instruction shall not be applicable in the case of the applicants who were engaged as Sikshya Sahayak, Junior Teacher and regular Teacher under the Zilla Parishad.

In view of the above, we are not inclined to entertain the relief as has been sought for by the applicants in these Original Applications.

All these cases are accordingly disposed of."

7.23. This Court does not find any plausible ground to vary with aforesaid view expressed by the learned Odisha Administrative Tribunal in the case of Mayadhar Pradhan (supra). Concurring with such view, this Court is, therefore, inclined to say that the present petitioners, who were engaged as Sikshya Sahayaks in the year 2001/2003 and subsequent thereto became Junior Teacher and ultimately appointed as Regular Primary School Teachers in the year 2008/2009, are not entitled to the benefit of Rules, 1992, but being borne in the Odisha Elementary Education Service, Level-V Cadre in 2008/09, the position of law as existing in the said year(s), i.e., the Odisha Civil Services (Pension) Amendment Rules, 2005, which came into force with effect from 01.01.2005, would apply.

7.24. Further reference to Letter dated 20.09.2011 issued by the Director of Health Services, Odisha with reference to aforesaid Letter dated 04.04.2007 of the Finance Department, by the petitioners is also misplaced inasmuch as the "incumbents" in health services appointed prior to 01.01.2005 are brought over on "regular basis" after 01.01.2005 "as such". Under such backdrop they were stated to be covered under the Rules, 1992 and the General Provident Fund (Odisha) Rules, 1938.

7.25. In the case of *Vibhuti Shankar Pandey Vrs. The State of Madhya Pradesh & Ors., 2023 LiveLaw (SC) 91 = 2023 SCC OnLine SC 114* the Hon'ble Supreme Court in the context of regularization of the daily rated employees laid down the principles as follows:

*"3. *** The learned Single Judge while allowing the writ petition gave directions for regularization of the appellant from the date on which his juniors were regularized. This order was challenged by the State Government before a Division Bench which allowed the appeal of the State Government. The Division Bench rightly held that the learned Single Judge has not followed the principle of law as given by this Court in Secretary, State of Karnataka and Ors. Vrs. Umadevi and Ors., (2006) 4 SCC 1, as* ***initial appointment must be done by the competent authority and there must be***

> ***a sanctioned post on which the daily rated employee must be working. These two conditions were clearly missing in the case of the present appellant****. The Division Bench of the High Court therefore has to our mind rightly allowed the appeal and set aside the order dated 27.06.2019.*
>
> *4. In view of the law laid down by the Constitution Bench of this Court in Uma Devi (supra), the appellant had no case for regularization. There is no scope, hence, for our interference with the order of the Division Bench of the Madhya Pradesh High Court. Appeal is dismissed."*

7.26. In *Parmeshwar Nanda Vrs. State of Jharkhand, (2020) 12 SCC 131* it has been considered qua appointees who served in Project as follows:

> "23. The case of Baliram Singh Vrs. State of Bihar, 2016 SCC OnLine Pat 9958 arises out of the policy of the State of Bihar wherein the past service has been specifically ordered to be considered for pension. Since in the State of Jharkhand, the policy decision is to treat them as fresh appointments without any benefit of seniority and pay protection, therefore, to count the period when the appellants were working under a Project as pensionable service is beyond comprehension. ***The appellants have been appointed as fresh candidates and, therefore, their period of service for pension has to be calculated from the date of their regular appointment and therefore they cannot get any benefit of past service rendered by them***."

7.27. The case of the petitioners is not embraced in any of the valid grounds envisaged in the provisions nor in the legal proposition as enunciated by the Hon'ble Courts. There is nothing on record to suggest that the engagement of SSS/SS on annual contractual basis is against any sanctioned post within the meaning of "CADRE" as defined under the Odisha Service Code. Under the aforesaid premise, this Court does not find any scope to countenance the contentions of Sri Budhadev Routray, learned Senior Advocate that the petitioners,being engaged in 2001/2003, i.e., prior to 01.01.2005, are entitled to claim pension in terms of the Odisha Civil Services (Pension) Rules, 1992, as it stood prior to 01.01.2005, i.e., date on which the Odisha Civil Service (Pension) Amendment Rules, 2005 came into force.

7.28. In view of provisions of Rule 4 of the General Provident Fund (Odisha) Rules, 1938, that "all temporary Government servants after a continuous service of one year, and all permanent Government servants shall subscribe to the Fund" read with proviso thereto as added by virtue of Notification SRO No.490/2007, dated 31.08.2007 stipulating that "these rules shall not apply to Government servants appointed on or after the 1st January 2005 to services and posts in connection with the affairs of the State, either temporarily or permanently", SSS/SS being not "Government servants", the prayer for a direction to the opposite parties to deduct GPF from monthly salary cannot be allowed. Copy of Advertisement dated 24.12.2000 vide Annexure-2 pursuant to which the petitioners claimed to have made application(s) for engagement of SWECHHASEVI SIKSHYA SAHAYAK, clearly stipulated that they would get "engagement" in Primary/Upper Primary Schools on

the basis of "annual contract" under the Zilla Parishad. There is no ambiguity that it is the stage of their appointment as "Regular Primary School Teacher" in the year 2008/2009 is considered to be "the Odisha Elementary Education Service, Level-V", the petitioners have been taken as Government servants.

8. Further argument of Sri Budhadev Routray, learned Senior Advocate appearing for the petitioners is that parity ought to have been maintained inasmuch as Sri Ashish Kumar Mahanty, Assistant Teacher of Government High School, Kotpad in the District of Koraput, having qualification of Trained Graduate Teacher, who was serving as contract teacher, albeit regularized in the service on 08.03.2010, has been extended the pensionary benefit as per extant provisions contained prior to the effective date of the Odisha Civil Service (Pension) Amendment Rules, 2005.

8.1. Sri Routray vehemently contended that since no objection is raised by the opposite parties in the counter, the case of the petitioners deserves to be considered and they cannot be discriminated.

8.2. It is to be mentioned that except document showing "Application for admission in Provident Fund", nothing is on record to show that the circumstances and context under which his case is considered by the competent authority.

8.3. Such argument of Sri Routray appears to be attractive, but on the face of Division Bench decision of the learned Odisha Administrative Tribunal, Cuttack Bench, Cuttack having refused similar relief claimed in *Mayadhar Pradhan and Others* (supra), this Court does not find force in said argument.

8.4. Nevertheless, it may be pointed out that provisions of Rules 114 and 115 of the Odisha Civil Services (Pension) Rules, 1992, can be invoked by the competent authority in the Government.

8.5. Rules 114 and 115 stand as follows:

> *"114. Power to relax.—*
>
> *Where Governor is satisfied that the operation of any of the provisions of these rules causes undue hardship in any particular case, he may, by order, for reasons to be recorded in writing, dispense with or relax the requirements of the said provision to such extent and subject to such conditions as he may consider necessary for dealing with the case in a just and equitable manner:*
>
> *Provided that no such order of relaxation shall be made with the prior consultation of the Finance Department.*
>
> *115. Interpretation.—*
>
> *Where any doubt arises as to the interpretation of these Rules, it shall be referred to the Government in the Finance Department for decision."*

8.6. It may beneficial to extract the following passages from *Dr.G. Sadasivan Nair Vrs. Cochin University of Science and Technology* represented by its Registrar and Others, *(2022)4 SCC 404*:

> *"32. While we accept the settled position of law that the rule applicable in matters of determination of pension is that which exists at the time of retirement, we are unable to find any legal basis in the action of the respondent University of selectively allowing the benefit of Rule 25(a).* ***The law, as recognized by this Court in Deoki Nandan Prasad Vrs. State of Bihar - AIR 1971 SC 1409 and Syed Yousuddin Ahmed Government of Andhra Pradesh & Ors. Vrs. Syed Yousuddin Ahmed, (1997) 7 SCC 241 unequivocally states that the pension payable to an employee on retirement shall be determined on the rules existing at the time of retirement. However, the law does not allow the employer to apply the rules differently in relation to persons who are similarly situated.***
>
> *33. Therefore, we are of the view that if the respondent University sought to deny the benefit of Rule 25(a), in light of the proviso which was subsequently inserted thereby limiting the benefit of the Rule, it ought to have done so uniformly. The proviso could have been made applicable in relation to all employees who retired from service of the respondent University following the introduction of the proviso, i.e. after 12th February 1985. However, the action of the respondent University of selectively applying the proviso to Rule 25(a) in relation to the appellant, while not applying the said proviso in relation to similarly situated persons, is arbitrary and therefore illegal. Such discrimination, which is not based on any reasonable classification, is violative of all canons of equality which are enshrined in the Constitution of India."*

8.7. Extending benefit of pension to the categories of persons/employees under the relevant rules requires policy decision to be taken by the appropriate Government. Thus, the petitioners are at liberty to seek appropriate remedy as available in law.

8.8. If the Authorities concerned find that the case of Sri Ashish Kumar Mahanty, Assistant Teacher of Government High School, Kotpad in the District of Koraput has semblance of the case of the petitioners, in comparison to that of the petitioners/applicants in Mayadhar Pradhan and Others (supra), the denial of the benefit to the petitioners would be arbitrary and not in accordance with law.

Conclusion:

9. In view of aforesaid analysis of facts, position of law as discussed *supra* and reasons ascribed in the foregoing paragraphs, in the result, while holding that the date of engagement as SWECHHASEVI SIKSHYA SAHAYAK cannot be reckoned as the date for the purpose of determining application of the Odisha Civil Services (Pension) Rules,1992 (as it existed prior to amendment vide the Odisha Civil Services (Pension) Amendment, 2005 came into force), the prayer of the petitioners to issue writ of mandamus to the opposite parties to extend the benefits of the Odisha Civil Services (Pension) Rules, 1992 and the General Provident Fund (Odisha) Rules, 1938 is hereby refused.

9.1. The writ petition is disposed of with the liberty granted to the petitioners to seek appropriate remedy as pointed out above.

9.2. In the circumstances, there is no order as to costs.

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SANJAY KUMAR MISHRA, J.

L.A.A NO. 5 OF 2022

TANUPRIYA SENAPATI .....Appellant

.V.

LAND ACQUISITION ZONE OFFICER, KHURDA ROAD, BOUDH .....Respondent

RIGHT TO FAIR COMPENSATION AND TRANSPARENCY IN LAND ACQUISITION, REHABILITATION AND RESETTLEMENT ACT, 2013 – Section 64 – The referral court rejected the petition U/s 64 solely on the ground that the present Appellant received the awarded compensation amount and never gave any written objection at any point of time – Whether such ground for rejection sustainable? – Held, No – When the Appellant received the awarded compensation amount under protest, the impugned judgment is not sustainable and hereby set aside and matter is remanded back to the Court below. (Para 11)

Case Laws Relied on and Referred to :-

1. (1994) 4 SCC 67 : Ajit Singh & Ors. Vs. State of Punjab & Ors.
2. (2015) 15 SCC 343: Chandra Bhan (Dead) Vs. Ghaziabad Development Authority
3. (2007) SCC Online Orissa 167 : (2007) 104 CLT 460 : Bulani Swain Vs. Special Land Acquisition Officer M.C.I.I. Project & Anr.
4. L.A.A. No. 41 of 2021:Sujata Senapati Vs.Land Acquisition Zone Officer, Khurda Road, Boudh.

For Appellant : Mr. S.K. Joshi

For Respondent : Mr. G.N. Rout, A.S.C.

JUDGMENT Date of Judgment:30.01.2023

SANJAY KUMAR MISHRA, J.

1. Though the matter is listed under the heading "Fresh Admission", in view of the limited issue, as pointed out in the grounds of appeal, so also the recent judgment passed by this Court and cited by the learned Counsel for the Appellant, the matter is taken up at the stage of fresh admission for final disposal on consent of the learned Counsel for the parties.

2. This Appeal has been preferred against the judgment dated 24.08.2021, passed by the Presiding Officer LAR & R Authority, Berhampur, in LAR & R Case No. 88 of 2020 vide which the reference Petition under Section-64 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, shortly, (RFCTLAR & R) Act, 2013, was dismissed solely on the ground that the present Appellant received the awarded compensation amount

without any protest and never gave any written objection at any point of time, for which has no cause of action in his favour.

3. Mr. Joshi, learned Counsel for the Appellant submits that the referral court has mis-directed himself in dismissing the reference petition on the ground that the Claimant/Appellant has never raised any objection in writing to the award at any point of time, which is contrary to the written objection filed by the Respondent. To substantiate his argument, Mr. Joshi files a photo copy of the objection filed by the Land Acquisition Zonal Officer, Boudh, dated 24.08.2021, wherein it has been clearly indicated that "the Appellant/Petitioner has received the compensation under protest". Further, he submits that there is no express provision under the RFCTLAR & R Act, 2013 to raise objections after passing of award by the Collector under Section-37 of the Act, 2013 except filing of reference Petition under Section-64 of the Act.

4. He submits that though the Appellant filed an Application under Section-64 of the Act, 2013 but the same was illegally dismissed vide Order dated 24.08.2021, though it is the stand of the Appellant before the Court below that being noticed by the Respondent U/S-37(2) to receive the compensation amount, the Appellant was being compelled to receive the same under protest and claimed for higher compensation by filing the Petition to refer the matter to the Authority for determination of the actual amount and additional amount of compensation for the acquired land. Mr. Joshi further submits that though the Respondent, while denying the higher compensation in his objection, admitted that the present Appellant/Petitioner has received the compensation under protest, the Court below erroneously dismissed the application filed under Section-64 of the RFCTLAR & R Act, 2013, on the ground of lack of cause of action.

5. Learned Counsel for the Petitioner submits that even if for the sake of argument, it is accepted that the Appellant/Petitioner has received the compensation without any protest, in view of the settle position of law, the very fact of filing an application for reference by the interested person(present Appellant) within the stipulated period of limitation will leave to an inference of fact that Appellant never accepted the compensation without protest and the protest is very much inherent. To substantiate his argument Mr. Joshi relied on the judgments of the Apex Court in case of ***Ajit Singh and Others v. State of Punjab and Others reported in (1994) 4 SCC 67***, ***Chandra Bhan (Dead) v. Ghaziabad Development*** Authority reported in (2015) 15 SCC 343, so also judgment passed by coordinate bench in case of ***Bulani Swain v. Special Land Acquisition Officer M.C.I.I. Project and another*** reported in (2007) SCC Online Orissa 167 : (2007) 104 CLT 460 and a recent judgment of this Court dated 13.12.2022, in case of ***Sujata Senapati v. Land Acquisition Zone Officer, Khurda Road, Boudh*** in L.A.A. No. 41 of 2021.

6. Learned Counsel for the State submits that the said judgments are not applicable, so far as the present Appeal is concerned as those judgments have been passed referring to the provisions enshrined under Section-18 of the Land Acquisition Act, 1894, shortly, L.A. Act, 1894, whereas the impugned Order of rejection/judgment passed by the Court below is in terms of Section-64 of the RFCTLAR & R Act, 2013.

7. For better appreciation, it is apt to reproduce below the Section-18(1) of the L.A. Act, 1894, so also Section-64(1) of the RFCTLAR & R Act, 2013 to demonstrate that the said provisions are almost similar to each other.

> "18. Reference to Court. - (1) ***Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the person to whom it is payable,*** or the apportionment of the compensation among the persons interested.
>
> 64. Reference to Authority.–(1) ***Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Authority, as the case may be, whether his objection be to the measurement of the land, the amount of the compensation, the person to whom it is payable,*** the rights of Rehabilitation and Resettlement under Chapters V and VI or the apportionment of the compensation among the persons interested:
>
> Provided that the Collector shall, within a period of thirty days from the date of receipt of application, make a reference to the appropriate Authority:
>
> Provided further that where the Collector fails to make such reference within the period so specified, the applicant may apply to the Authority, as the case may be, requesting it to direct the Collector to make the reference to it within a period of thirty days.
>
> (Emphasis supplied)

8. In case of ***Ajit Singh and Others*** (supra), the apex Court held as follows:

> 5. Having regard to the contiguity of these lands the High Court is correct in its valuation. Besides, the date of notification, issued under Section 4 of the Act, is October 4, 1978 while Exh.R-6 is nearer to it, namely, August 16, 1978, in comparison to Exh. A-6 dated January 14, 1977. Inasmuch as the appellants have filed an application for reference under Section 18 of the Act that will manifest their intention. Therefore, the protest against the award of the Collector is implied notwithstanding the acceptance of compensation. The District Judge and the High Court, therefore, fell into patent error in denying the enhanced compensation to the appellants.

Similarly, in case of ***Chandra Bhan (Dead)*** (supra), referring to the judgment in ***Ajit Singh and Others (supra)***, it was held as follows:

> "The principal contention urged by the learned counsel for GDA was that since the compensation was accepted by the claimants without any protest, the reference was not maintainable. In our opinion, this contention is without any substance for

several reasons. In Ajit Singh v. State of Punjab2 it was held that since the appellants therein had filed an application for reference under Section-18 of the Act, it manifested their intention. Consequently, the protest against the award of the Collector was implied notwithstanding the acceptance of compensation."

A coordinate Bench in case of ***Bulani Swain*** (supra), referring to the judgment of the apex Court in ***Ajit Singh and Others*** (supra), held as follows:

"5. The learned Counsel for the Petitioner submitted that the Petitioner filed an application for reference under Section 18 of the Act immediately after receiving the compensation amount and considering the said application the Land Acquisition Officer passed the order without giving her an opportunity of hearing. If any such opportunity would have been given to the petitioner, she would have explained that she has protested at the time of receiving compensation. The very fact that she had filed an application for reference immediately after receiving the compensation clearly shows her intention to protest was implied against the award of the Land Acquisition Officer notwithstanding acceptance of compensation. Law is well settled that at the time of deciding the question as to whether a reference can be made or not principle of natural justice should be followed. (See (1994) 4 SCC 67, Ajit Singh v. State of Punjab).

6. The right to seek a reference under Section 18 of the Act is valuable right of the person whose land has been acquired and in the process of deciding an application seeking a reference to the Civil Court, the basic principles of natural justice are to be observed. As the petitioner has filed an application for reference under Section 18 of the Act that will manifest that intention. xxx …."

9. This Court, vide judgment dated 13.12.2022, in case of Sujata Senapati (Supra) held as follows:

"7. That apart, on bare perusal of RFCTLAR & R Act, 2013 vis-a-vis L.A. Act, 1894, it is crystal clear that there is no such specific procedure or form provided under the said acts for recording the protest and the very fact of filing an application for reference by interested person within the stipulated period of limitation, will lead to an inference of fact that the interested person never accepted the compensation without protest and the protest is very much inherent. The right to file a petition for proper assessment of the market value of the land acquired is inherent in the right of ownership of a person to the property that is sought to be acquired by the State, which is the only protection granted to the owner of the land.

On a hyper-technical ground that express protest was not made, on the said basis State cannot deny the land owner, the right to seek reference to the Civil Court for a reasonable compensation. Fair administration of the State demands that they bestow objective approach to such a situation and citizens are not deprived of their property just for hyper technical reason.

8.Further, the provisions do not prescribe any particular mode of protest. It is also no where postulate that the protest must be in writing. Hence, the referral Court should bear in mind the purport and purpose in reference.As the award of the Collector is nothing but an offer on behalf of the Government, the amount of compensation payable to a person, who is deprived of his property in a Welfare State under the State's right of eminent domain, a person so deprived of his property

is entitled to have fair and reasonable amount of compensation with reference to the true market value of the land as on the date of issuance of notification and the same should not be denied on mere technical plea."

10. It is pertinent to reproduce below one of the paragraphs of the objection dated 24.08.2021, filed by the Land Acquisition Zonal Officer, Boudh:

> "That in reply to Para No. 2, the Land Acquisition Collector has issued notices u/s 21(4) of the act vide PR No.1171/ Date 19.11.19 stating that the Government intends to take possession of the land and that claims to compensations and rehabilitation and resettlement for all interest in such land may be paid to him. The notice has been published at all designated places. The Recorded Tenant was issued the notice and Sri Jani Senapati S/o- Uddhab Senapati has received the notice (Copy enclosed vide annexure- C). Also notice of awards u/s 37(2) of the act has been issued at all designated places and Sri Manoj Senapati S/o- Jani Senapati has received the notice. **The petitioner has received the compensation under protest**. Hence the claim of the petitioner that the award has been passed behind the back of the petitioner is not true."
>
> (Emphasis supplied)

11. In view of the settled position of law, so also the objection filed by the Land Acquisition Zonal Officer, which clearly demonstrates that the Appellant received the awarded compensation amount under protest, the impugned judgment dated 24.08.2021, passed in LAR & R Case No. 88 of 2020, is hereby set aside and the matter is remanded back to the Court below for re-adjudication of the said case in accordance with law giving opportunity to the parties.

12. As the referral case is of the year 2020, the referral Court is directed to conclude the proceeding in LAR & R Case No.88 of 2020 at the earliest, preferably within a period of six months from the date of communication of the certified copy of the Judgment.

13. Accordingly, the Appeal stands disposed of.

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2023 (I) ILR - CUT- 604

G. SATAPATHY, J.

CRLMC NO. 3921 OF 2016

NATA @ NATABAR BEHERA .....Petitioner

.V.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Offence under section 307/34 of IPC – Prayer for quashing of the criminal proceeding on the ground of compromise – Whether a criminal proceeding can be quashed when the offence is non-compoundable? – Held, No – Reason indicated. (Para 14)

Case Laws Relied on and Referred to :-

1. (2019) 5 S.C.C. 688 : State of Madhya Pradesh Vs. Lakshmi Narayan & Ors.
2. 1977 (4) S.C.C. 551 : Madhu Limaye Vs. The State of Maharashtra.
3. 1992 Supp.(1) SCC 335:State of Haryana & Ors.Vs. Bhajanlal & Ors.
4. 2022 Live Law (SC) 642:Daxaben Vs. the State of Gujarat & Ors.
5. (2017) 68 OCR(SC) 982:Parbathbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & Ors. Vs. State of Gujarat & Anr.
6. (2021) 84 OCR (SC) 539:Ramgopal & Anr. Vs. The State of Madhya Pradesh

For Petitioner : Mr. C.R.Satapathy

For Opp. Parties: Mr. S.S. Pradhan,AGA, Mr. B. Tripathy [O.Ps. No. 2 & 3]

JUDGMENT Date of Hearing: 09.12.2022: Date of Judgment: 23.12.2022

G. SATAPATHY, J.

1. This is an application under section 482 of Cr.P.C. by the Petitioner seeking to quash the criminal proceeding pursuant to the FIR in Dharmasala P.S. Case No. 239 of 2001 corresponding to C.T Case No.369 of 2010 of the Court of learned C.J.M-cum-Assistant Sessions Judge, Jajpur (now pending in the Court of learned Assistant Sessions Judge, Chandikhol) on the ground of amicable settlement between the petitioner (accused person) in one side and, injured victim and informant in other side.

2. Facts in precise are one Sashikala Sahoo lodged an FIR before the OIC, Kuakhia of Out Post against the Petitioner and another alleging against the Petitioner for giving sword blows on the head of her husband on 02.09.2001 at 5PM, while they were waiting for their eldest son at Ghosara near Banka Sahi on a motor cycle. It is also alleged in the FIR that the Petitioner had also given blows on the left and right side of the head of the injured and when the Informant protested, the Petitioner vowed to kill the injured and when one of the eye witness who was fishing nearby place asked as to why he is inflicting cut wounds on the head of the injured by dealing sword blows, the Petitioner intimidated such eye witness to kill him, and as a result of the sword blows, the injured fell down on the ground and after assault, the Petitioner fled away from the spot.

On the above FIR, investigation ensued which resulted in submission of charge-sheet against the Petitioner for offence under section 307/34 of IPC under which charge was framed against the petitioner, but the Petitioner has approached this Court in this application for quashing the criminal proceeding on the ground of compromise.

3. In the course of hearing of the CRLMC, Mr. C.R. Satapathy, learned counsel for the Petitioner submits that the Petitioner in one side and injured and Informant in other side have amicably settled the dispute between them and the injured as well as the informant does not want to proceed further in this case and accordingly, they have filed affidavits. On the aforesaid submission, Mr. C.R. Satapathy, learned counsel for the Petitioner prays to quash the criminal proceeding initiated against the Petitioner.

4. Mr. B. Tripathy, learned counsel for the informant and injured echoing the submission of the Petitioner further submits that the Informant as well as the injured has no objection, if the criminal proceeding is quashed against the Petitioner and in support of such contention, he drew the attention of the Court to the affidavits sworn in by Informant Sashikala Sahoo and injured Lakshmidhar Sahoo which are filed in this case.

5. Mr. S.S. Pradhan, learned A.G.A. in contrast submits that the offence alleged against the Petitioner are neither compoundable nor can be quashed as the offence under section 307 of the IPC is not only grave, but also serious and is an offence against society.Learned A.G.A. by relying upon the decision in the case of ***State of Madhya Pradesh Vrs. Lakshmi Narayan and others; (2019) 5 S.C.C. 688*** prays to dismiss the CRLMC.

6. After hearing the parties upon perusal of record, it is noticed that the present petitioner has not only been charge sheeted for the commission of offences punishable U/Ss. 307/34 of I.P.C. but also charge has been framed against him for such offence, which is predominantly a heinous and serious offence and has deep impact on the society. There is also no dispute that the offence U/S. 307 of the I.P.C. is non- compoundable in nature. In this case, learned counsel for the petitioner has produced the certified copy order sheet dated 19.10.2022 in C.T. Case No. 369 of 2010 which reveals about non-execution of NBWA against the petitioner, who is the accused person in the aforesaid case, which was posted on 25.11.2022 for production of the accused person-cum-petitioner.

7. The invocation of jurisdiction U/S. 320 of the Cr.P.C. for the purpose of compounding an offence is not the same, rather it is distinct from invocation of jurisdiction U/S. 482 of the Cr.P.C. to quash the criminal proceeding on an amicable settlement of dispute by the parties and it is clear beyond doubt that the power to quash a criminal proceeding U/S. 482 of the Cr.P.C. can be invoked, even if for non-compoundable offences, provided that if on the face of complaint/F.I.R., or charge sheet together with accompanying documents, no offence is primafacie constituted/made out. In other words, the test is that taking the allegations on record as they are, without adding or subtracting anything, if no offence is made out, such criminal proceeding may be quashed by the High Court in exercise of power U/S.482 of Cr.P.C. to secure the ends of justice or to prevent the abuse

of process of any Court. There is no quarrel over the position of law that while exercising its jurisdiction U/S. 482 of Cr.P.C.in a case where settlement of dispute amongst the parties has been advanced as a ground for quashing the criminal proceeding, the High Court has to be more careful and cautious, especially when non-compoundable offence U/S. 307 of I.P.C. which is a heinous and serious offence and has deep impact on the society, is alleged against the accused but mere incorporation of such section in the F.I.R. or charge sheet without any primfacie materials would not stand in the way of High Court to exercise its inherent power to quash the proceeding.

8. Since the petitioner herein has sought for to invoke the inherent jurisdiction of this Court to quash the criminal proceeding instituted against him for offence involving U/S. 307 of IPC on the sole ground of settlement of dispute amongst themselves, the only question crops up for consideration about justifiability of invocation of inherent power of this Court to quash the proceeding against the petitioner for offence involving non-compoundable offence like 307 of IPC on the basis of facts and circumstance of the present case. The underlying principle by which a criminal proceeding can be quashed on the ground of settlement of disputes between the parties is no more alien to law, which has already been clarified and enunciated by Apex Court in a plethora of decisions. In such cases, the High Court is not denuded of inherent power to quash a criminal proceeding where there is settlement of dispute amongst the parties to secure the ends of justice or to prevent abuse of process of Court, but such exercise of power must be invoked sparingly and cautiously. In ***Madhu Limaye Vrs. the State of Maharashtra; 1977 (4) SCC 551***, at the outset, the Apex Court has noticed the principles to the effect that the inherent power of the High Court should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice. In the oft quoted and most celebrated decision in the matter of exercise of jurisdiction U/S. 482 of Cr.P.C. in ***State of Haryana and others Vrs. Bhajanlal and others; 1992 Supp.(1) SCC 335***, the Apex Court had held that the power of quashing a criminal proceeding should be exercised very sparingly with circumspection and that too, in the rarest of rare cases. The extra-ordinary or inherent powers do not confer any arbitrary jurisdiction on the Court to act according to its whim or caprice. The Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegation made in the F.I.R. or the complaint.

9. In coming back to the cases of quashment of non-compoundable offences on the basis of compromise, it is felt apposite to refer to the most recent decision of the Apex Court in ***Daxaben Vrs. the State of Gujarat and others; 2022 Live Law (SC) 642***, wherein the Apex Court has held at paragraphs-38, 39 and 40 as follows:-

> "38. However, before exercising its power U/S.482 of the Cr.P.C. to quash an F.I.R., criminal complaint and/or criminal proceedings, the High Court, as observed above, has to be circumspect and have due regard to the nature and gravity of the offence. ***Heinous or serious crimes, which are not private in nature and have a serious impact on society cannot be quashed on the basis of a compromise between the offender and the complainant and/or the victim***. Crimes like murder, rape, burglary, dacoity and even abetment to commit suicide are neither private nor civil in nature. Such crimes are against the society. ***In no circumstances can prosecution be quashed on compromise, when the offence is serious and grave and falls within the ambit of crime against society.***
>
> 39. Orders quashing F.I.Rs. and/or complaints relating to grave and serious offences only on basis of an agreement with the complainant, would set a dangerous precedent, where complaints would be lodged for oblique reasons, with a view to extract money from the accused. Furthermore, financially strong offenders would go scotfree, even in cases of grave and serious offences such as murder, rape, bride-burning, etc. by buying off informants/complainants and settling with them. This would render otiose provisions such as Sections 306,498-A,304-B etc. incorporated in the I.P.C. as a deterrent, with a specific special purpose.
>
> 40. In criminal jurisprudence, the position of the complainant is only that of the informant. **Once an F.I.R. and/or criminal complaint is lodged and a criminal case is started by the State, it becomes a matter between the State and the accused.** The State has a duty to ensure that law and order is maintained in the society. It is for the State to prosecute offenders. **In case of grave and serious non-compoundable offences which impact society, the informant and/or complainant only has the right of hearing, to the extent of ensuring that justice is done by conviction and punishment of the offender. An informant has no right in law to withdraw the complaint of a non-compoundable offence of a grave, serious and/or heinous nature, which impact society."** (emphasis supplied by bold letters)

10. True it is that quashing of criminal proceeding on the ground of settlement of dispute between the informant & injured and the accused person has come up before different Courts more than often and it has come before the Apex Court once again in the case of ***Parbathbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & others Vrs. State of Gujarat and another; (2017) 68 OCR(SC) 982***, wherein a three Judge Bench of Apex Court while summarizing the broad principles on which inherent power of High Court can be invoked, has set out the principles for quashing of criminal proceeding on the ground of settlement of dispute at paragraph-15(v),(vii) and (vii) as follows:-

> "(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, ***revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated***;
>
> (vi) In the exercise of the power under *Section 482* and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. ***Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed***

> ***though the victim or the family of the victim have settled the dispute***. Such offences are, truly speaking, not private in nature but have a serious impact upon society. ***The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;***
>
> (vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;"

11. In coming to situations where and when criminal proceedings involving non-compoundable offences can be quashed by exercise of power U/S. 482 of Cr.P.C., the Apex Court in ***Ramgopal and another Vrs. The State of Madhya Pradesh; (2021) 84 OCR (SC) 539*** has held at paragraph-13 as follows:-

> "13. It appears to us that criminal proceedings involving non-heinous offences or where the offences are predominantly of a private nature, can be annulled irrespective of the fact that trial has already been concluded or appeal stands dismissed against conviction. Handing out punishment is not the sole form of delivering justice. Societal method of applying laws evenly is always subject to lawful exceptions. It goes without saying, that the cases where compromise is struck post conviction, the High Court ought toexercise such discretion with rectitude, keeping in view the circumstances surrounding the incident, the fashion in which the compromise has been arrived at, and with due regard to the nature and seriousness of the offence, besides the conduct of the accused, before and after the incidence. The touchstone for exercising the extraordinary power under Section 482 Cr.P.C. would be to secure the ends of justice. There can be no hard and fast line constricting the power of the High Court to do substantial justice. A restrictive construction of inherent powers under Section 482 Cr.P.C. may lead to rigid or specious justice, which in the given facts and circumstances of a case, may rather lead to grave injustice. ***On the otherhand, in cases where heinous offences have been proved against perpetrators, no such benefit ought to be extended, as cautiously observed by this Court in Narinder Singh & Ors. vs. State of Punjab & Ors. 2014(II) CLR(SC)722; (2014) 6 SCC 466 and Laxmi Narayan (Supra)."***

12. On coming back to the contention of the State, it appears that the learned AGA has relied upon the decision in the case of ***Laxmi Narayan (supra)*** wherein in a similar situation like the present case, the Apex Court after noticing the law on the point and authorities laid down in a catena of decisions has observed at paragraph-15.4 as follows:-

> "***Offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves***. *However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to*

whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used, etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge-sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paras 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove".

13. Adverting to the facts of the present case on the touchstone of the principles laid down by the Apex Court in the decisions referred to above, there appears little dispute that the petitioner has sought for exercise of power to quash the criminal proceeding instituted against him on the ground of compromise and settlement between the parties and accordingly, he has impleaded the informant and injured as opposite party Nos.2 & 3 who have filed their responses on 21.11.2022 by way of affidavits stating therein in essence now the matter has already been amicably settled without any coercion and they do not want to proceed in the case further and they do not have any objection, if the matter is quashed. It is reminded that mere settlement of disputes amongst the parties does not ipso facto enure to their benefit seeking to quash the proceeding, unless the same is permissible in accordance with true spirit of law. Admittedly, the informant in this case is not the injured, but the record indicates that the husband of the informant-cum-OP No.3 is the injured, whose injury report has been withheld by the petitioner for perusal of this Court inasmuch as although, the petitioner has produced the certified copy of FIR and charge sheet but has failed to produce the injury report of the injured for reason best known to him. However, the certified copy of charge sheet produced by the petitioner in this case discloses that the petitioner had allegedly assaulted the injured by means of a sword on his head and left hand causing grievous injury to his person, along with co-accused. The essential ingredient of the offence U/S. 307 of IPC is the mensrea/intention to kill and the aforesaid allegation against the petitioner for causing grievous injury to the injured by allegedly inflicting sword blows on the head of the injured primafacie disclose the required intention/mensrea to constitute such offence. Besides, the present dispute cannot be given the flavor civil dispute nor the allegation raised against the petitioner disclose about the dispute amongst the parties to be an individual in nature,rather the allegation, *perse* suggests the offence to be against the society. Moreover, the certified copy of order sheets of the case produced on behalf of the petitioner itself indicate about framing of charge against the petitioner for offence U/S. 307 of IPC but subsequently, NBWA was issued against the petitioner for his default in

attending the Court, nonetheless charge sheet was placed against the petitioner showing him absconder which by itself speaks about the conduct of the petitioner.

14. A careful conspectus of the allegations on record together with discussion made hereinabove, especially when charge has been framed against the petitioner for offence U/S. 307 of I.P.C. which in the present circumstances of the case may be considered as heinous and serious offence and a crime against the society but not against any individual alone and taking into consideration the nature of allegation in this case to have a serious impact on the society, this Court does not consider it proper to exercise the power U/S. 482 of Cr.P.C. to quash the criminal proceeding instituted against the petitioner merely on the ground of amicable settlement between the parties, more particularly when there appears allegation against the petitioner for assaulting the injured on his head which is a vital part of the body by means of a sword and causing grievous injuries to the injured. In the result, the CRLMC merits no consideration and is accordingly dismissed.

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2023 (I) ILR – CUT - 611

CHITTARANJAN DASH, J.

CRLMC NO. 3756 OF 2016

KULAMANI PARIDA .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Cognizance of offence under sections 420/467/468/471/120-B of IPC – Plea of petitioner that being a Chartered Accountant by profession he discharges his professional duty by submitting "No Objection Certificate" in Form No. 17 before the Authority – There was no scope for him to go behind the document to ensure that whether the documents in question supplied by the Client are genuine or not – Held, though the allegations are category of economic offence but the petitioner in discharging his professional duty is above all the allegations as alleged – Consequently this court finds no material to proceed against the Petitioner attributing the Criminal liability so as to continue the proceeding and as such is liable for being interfered with exercising the Jurisdiction under Section 482 Cr.PC. (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.

10. 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 physician would 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.

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 the person 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.

25) In Pandurang Dattatraya Khandekar vs. Bar Council of Maharashtra & Ors (1984) 2 SCC 556, this Court held that "…there is a world of difference between the giving of improper legal advice and the giving 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 High Court in quashing the criminal proceedings and reject the stand taken by the CBI.

13. 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 co accused 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 not come 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.
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> 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 settled position 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 has been committed.
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> 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).
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> 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.

14. 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 be decided 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 in pursuance 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 conspiracy between 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, has clarified 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."

15. 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. Insequel, 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.

16. 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.

17. 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.

18. The CRLMC is disposed of.

2023 (I) ILR - CUT - 620

CHITTARANJAN DASH, J.

ABLAPL NO.13868 OF 2022

RAMESH KUMAR BEHURIA .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 438 – Application for Bail in anticipation of arrest for Offences U/s 120(B)/420/468/471/467 of Indian Penal Code r/w Section 13(2) and 13(1) (d) of the Prevention of Corruption Act – The petitioner firm availed loan from the bank and siphoned off the money transferring in favour of various firms which are matter of probe and examination during trial – As the Petitioner alleged to have committed fraud involves economic Offence and no material is available supporting the bonafide conduct of the Petitioner where by this Court would be inclined to exercise the extra ordinary Judicial discretion granting anticipatory bail to the Petitioner – Held, bail not allowed.

Case Law Relied on and Referred to :-

1. AIR 2019 SC 4198: P. Chidambaram Vs. Directorate of Enforcement

For Petitioner : Mr. B.P. Pradhan

For Opp. Party: Mr. Sarthak Nayak, Advocate for the CBI

ORDER Date of Order:16.11.2022

CHITTARANJAN DASH, J.

1. Heard Mr. Pradhan, the learned counsel for the Petitioner and Mr. S. Nayak, learned counsel for the CBI.

2. By means of this application, the Petitioner seeks bail U/s.438 Cr.P.C. in anticipation of arrest for his alleged involvement in the offences U/s.120(B)/420/468/471/467 IPC read with Section 13(2) and 13(1)(d) of the Prevention of Corruption Act (herein after in short called the P.C.Act) in connection with CBI, ACB Bhubaneswar P.S. Case No.RC0152022A0011/2022 pending in the court of learned Special Judge, CBI-I, Bhubaneswar.

3. It is alleged that the Petitioner being the proprietor of M/s.R.K. Behuria availed cash credit limit of Rs.250 lakh on 20th February, 2009 from Bank of Baroda and availed further cash credit limit of Rs.1200 lakh as export packing credit, foreign bills purchase and foreign bills discounting on 23rd March, 2012 from the said Bank on the basis of the documents submitted by the firm M/s. R.K. Behuria. As the said loan account remained irregular, it was declared as Non-Performing

Asset (NPA) on 31st March, 2014 and having found the borrower to have played fraud with the bank in utilization of fund and submission of documents in availing the loan, the bank reported the same to Reserve Bank of India on 15th April, 2014.

4. According to the statement of the bank, an amount of Rs.12.18 crores is outstanding against M/s. R.K. Behuria towards loan as of 30th September 2022. It is further alleged that after availing the above loan facility Mr. R.K. Behuria had not utilized the said fund for the purpose it was sanctioned and dishonestly diverted the loan funds to various other entities which do not appear to be in the line of business of the borrower as declared by him while availing the loan and thereafter siphoned off the loan funds during the period 2009 to 2014.

5. It is also alleged that substantial amount of loan funds have been transferred to M/s. Rotomac Global PTE Ltd., and Rotomac Global Pvt. Ltd. Singapore, not being anyway connected with the line of business of the borrower. It is also alleged that the borrower firm represented by its proprietor Mr. R.K.Behuria along with other unknown persons/entities/unknown public servants in pursuance of a criminal conspiracy, with dishonest intention of causing wrongful loss to the bank and wrongful gain to themselves diverted/siphoned off the loan funds in favour of different entities and thereby misappropriated the same by playing fraud with the bank and thereby are amenable to the offence alleged mentioned above.

6. In connection with the above, the Assistant General Manager (Branch Manager), Bank of Baroda, Barbil submitted a written report before the Superintendent of Police/HOB, Central Bureau of Investigation, Anti-Corruption Branch, Nayapalli, Bhubaneswar on 27th September, 2022 whereupon the above referred CBI, ACB, Bhubaneswar P.S. case was registered.

7. Learned counsel for the Petitioner, *inter alia*, submitted that there is absolutely no element as to fraud having been committed by the Petitioner with the Bank. He further submitted that the Bank initiated the recovery proceeding before the Debts Recovery Tribunal and nowhere in its averments before the Tribunal, the Bank alleged fraud to have been committed by the Petitioner save and except the prayer for recovery of the outstanding dues. Mr. Pradhan for the Petitioner also urged that M/s. R.K. Behuria is a bonafide borrower and availed cash credit limit for the purpose of his business which he continued having import and export transaction and accordingly the transaction in respect to the firm in Singapore is quite obvious and no manner of illegality can be attributed to it alleging siphoning/diverting off the fund and the transaction being undertaken between the year 2009 to 2014, there was absolutely no occasion for the Bank to proceed against the Petitioner on the plea of fraud to have been committed with the Bank after a lapse of five years.

8. Mr. Pradhan Learned counsel for the Petitioner drew the attention of the Court to the document submitted by the Bank along with the FIR and pointed out that as against the heading **"Recovery Action**" the bank declared to have made

recovery from all the collateral securities given by the Petitioner firm in favour of bank at the time of availing loan and received Rs.3,50,50,698.60 from sale of collateral mortgage, (2) proceeds from the fixed deposit Rs.49,54,388/-, (3) other credit in the account of the firm Rs.10,55,230/- and from the savings account Rs.23,417/- and as such there was nothing to deduce any fraud to have been committed with the Bank inasmuch as the collateral securities stood with the Bank could be put to sale and a substantial part of the loan amount has already been recovered. Consequently, the present case has been hatched against the Petitioner with an ulterior motive just to cause harassment and the Petitioner as such is entitled to the prayer for anticipatory bail.

9. Mr. Nayak, learned counsel for the CBI, on the contrary vehemently opposed the contentions of the petitioner. He submitted that the Petitioner firm right from its inception while applying for the loan resorted to inflated figures in its sale/stocks/debtors against relying on forged documents more particularly the sales and purchase contract No.PGRPL/RKB/IOF/044/2013 dated 10.04.2013 showing the buyer to be M/s. Pacific Global Resources PTE Ltd., Singapore. It is also contended that the Petitioner having availed the loan diverted the funds in respect to M/s. Maa Samaleswari Iron and Steel Company Pvt. Ltd and M/s. Samaleswari Export Industries besides M/s.Rotomac Global Pvt. Ltd. and M/s. Rotomac Global PTE Ltd., Singapore whose line of activities were not the same as that of the borrower against which he had availed the loan and thereby the transaction were suspicious leading prima facie to the conclusion that the Petitioner having knowledge that he was not to utilize the fund for the purpose the same he was to avail represented the Bank the falsity and managed to avail loan that was finally siphoned off otherwise then being utilized for the purpose it was availed.

10. Taking through the Court through the documents annexed to the FIR, Mr. Nayak contended that the act of the Petitioner in committing fraud with the Bank is tell tale clear as reveals from the documents as mentioned in the chart and as such the Petitioner has antecedent in committing such fraud earlier with the financial organization has rightly been agitated in the appropriate forum. He also submitted that that the recovery proceeding has been separately initiated before the DRT and the absence of averments as to the commission of fraud before the DRT cannot be taken to the advantage of the Petitioner inasmuch as both the proceedings would go separate and independent of each other.

11. The Apex Court in the case of ***P. Chidambaram v. Directorate of Enforcement*** reported in ***AIR 2019 SC 4198*** held as under :

> "67. Ordinarily, arrest is a part of procedure of the investigation to secure not only the presence of the accused but several other purposes. Power under Section 438 Cr.P.C. is an extraordinary power and the same has to be exercised sparingly. The privilege of the pre-arrest bail should be granted only in exceptional cases. The

judicial discretion conferred upon the court has to be properly exercised after application of mind as to the nature and gravity of the accusation; possibility of applicant fleeing justice and other factors to decide whether it is a fit case for grant of anticipatory bail. Grant of anticipatory bail to some extent interferes in the sphere of investigation of an offence and hence, the court must be circumspect while exercising such power for grant of anticipatory bail. Anticipatory bail is not to be granted as a matter of rule and it has to be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary remedy."

12. The Apex further held as under :

"76. Power under Section 438 Cr.P.C. being an extraordinary remedy, has to be exercised sparingly; more so, in cases of economic offences. Economic offences stand as a different class as they affect the economic fabric of the society. In Directorate of Enforcement v. Ashok Kumar Jain (1998) 2 SCC 105, it was held that in economic offences, the accused is not entitled to anticipatory bail."

xxx xxx xxx

79. Observing that economic offences constitute a class apart and need to be visited with different approach in the matter of bail, in Y.S. Jagan Mohan Reddy v. (2013) 7 SCC 439, the Supreme Court held as under:-

"34. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

35. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations."

13. It emerges from the case in hand that the Petitioner firm availed loan for the purpose it declared before the Bank and as such it was incumbent upon the Petitioner firm to utilize the loan fund in the business purportedly for which the loan was availed. As alleged herein by the Bank, there is ample of material prima facie indicating the Petitioner firm to have siphoned off the money transferring in favour of various firms. The fact that the transfer made in favour of the companies abroad are in line with the business of the Petitioner firm are matter of probe and examination during trial. The materials and documents that apparently discloses the funds to have been transferred is sufficient to indict the bonafideness of the firm as to if it acted in furtherance to the one it committed before the Bank and the purpose for which it availed the loan. Further, the Firm while remained irregular in its repayment in the loan account it engaged in transaction with the firms that prima facie suggest the conduct of the Petitioner abortive of its intention in availing the

loan. The fact that the Bank proceeded for recovery of the loan is altogether a separate cause of action and cannot be expected averments to have been made with regard to the fraud. This is because the recovery proceeding was not on the ground of fraud but for the default on the part of the Petitioner in the repayment of loan against securities. It is needless to mention that the transaction in question with which the Petitioner alleged to have committed fraud involves economic offence.

14. In essence, therefore, no material is available supporting the bonafide conduct of the Petitioner whereby this Court would be inclined to exercise the extra ordinary judicial discretion granting anticipatory bail to the Petitioner. The prayer for anticipatory bail, accordingly deserves no consideration. The ABLAPL stands dismissed.

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