THE INDIAN LAW REPORTS
(CUTTACK SERIES)

Containing Judgments of the High Court of Orissa.

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

OCTOBER-2023

Pages : 319 to 642

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/-

All Rights Reserved.

Every care has been taken to avoid any mistake or omission. The Publisher, Editor or Printer would not be held liable in any manner to any person by reason of any mistake or omission in this publication

ORISSA HIGH COURT, CUTTACK

ACTING CHIEF JUSTICE

The Hon'ble Shri Justice Dr. B.R. SARANGI, *B.Com.(Hons.), LL.M., Ph.D.*

PUISNE JUDGES

The Hon'ble Shri Justice ARINDAM SINHA, *LL.B.*

The Hon'ble Shri Justice DEBABRATA DASH, *B.Sc. (Hons.), LL.B.*

The Hon'ble Shri Justice S.K. SAHOO, *B.Sc., M.A. (Eng.& Oriya), LL.B.*

The Hon'ble Shri Justice K.R. MOHAPATRA, *B.A, LL.B.*

The Hon'ble Shri Justice BIBHU PRASAD ROUTRAY, *B.A. (Hons.), LL.B.*

The Hon'ble Shri Justice Dr. SANJEEB KUMAR PANIGRAHI, *LL.M., Ph.D.*

The Hon'ble Miss Justice SAVITRI RATHO, *B.A. (Hons.), LL.B.*

The Hon'ble Shri Justice MRUGANKA SEKHAR SAHOO, *M.Sc., LL.B.*

The Hon'ble Shri Justice RADHA KRISHNA PATTANAIK, *B.Sc. (Hons.), LL.B.*

The Hon'ble Shri Justice SASHIKANTA MISHRA, *M.A., LL.B.*

The Hon'ble Shri Justice A. K. MOHAPATRA, *B.Com., LL.B.*

The Hon'ble Shri Justice V. NARASINGH, *B.Com.(Hons.), LL.M.*

The Hon'ble Shri Justice BIRAJA PRASANNA SATAPATHY, *M. Com., LL.B.*

The Hon'ble Shri Justice M. S. RAMAN, *B. Com. (Hons.), LL.B.*

The Hon'ble Shri Justice SANJAY KUMAR MISHRA, *B.Com., LL.B.*

The Hon'ble Shri Justice GOURISHANKAR SATAPATHY, *B.Sc., LL.B.*

The Hon'ble Shri Justice CHITTARANJAN DASH, *B.A., LL.B.*

The Hon'ble Shri Justice SIBO SANKAR MISHRA, *B.Sc. (Hons.), LL.B.*

The Hon'ble Shri Justice ANANDA CHANDRA BEHERA, *B.A, LL.B.*

ADVOCATE GENERAL

Shri ASHOK KUMAR PARIJA, *B.Com., LL.B.*

REGISTRARS

Shri P.K. PATRA , *Registrar General*
Shri A.K. PASCHIMAKABAT, *Registrar (Vigilance) & Registrar (Administration)I/C*
Shri SUMAN KUMAR MISHRA, *Registrar (Judicial)*

NOMINAL INDEX

PAGE

A. Mohan -V- Babita Ram & Ors. 491
Adarsha Pathagar -V- The Manager (TS) Land, Rourkela Steel Plant & Ors. 528
Alekha Kumar Panigrahi -V- State of Odisha & Ors. 578
Alethes Kharin Dhanphul -V- State of Odisha & Ors. 624
Bhagirathi @ Tima Bibhar -V-State of Odisha. 334
Bibhuti Bhusan Rout -V- Sasmita Nayak & Anr. 319
Biswanath Beura-V- State of Orissa & Anr. 596
Biswanath Parhi -V- United Commercial Bank & Ors. 567
Brundaban Pradhan-V- State of Odisha (DEPT. of Home Affairs) & Ors. 324
Dr. Nursingha Charan Sarangi -V- State of Odisha & Ors. 483
Dusmanta Kumar Bisoi & Ors. -V- Debes Chandra Nandi & Ors. 541
ENKON Pvt. Ltd., Bhubaneswar & Ors. -V- Harekrushna Subudhi. 604
Himanshu Patnaik & Anr.-V- State of Odisha & Ors. 545
J. Sameswar Rao -V- State of Orissa & Ors. 588
Jayanta Behera & Ors.-V- State of Odisha. 520
Kartik Senapati -V- State of Odisha & Ors. 556
Laxmidhar Swain & Ors.-V- State of Odisha & Ors. 516
M/s. Ecometrix consultants Pvt. Ltd. & Anr. -V- B.D.A & Ors. 346
M/s. Milan Developers & Builders Pvt. Ltd.-V- State of Odisha & Ors. 411
M/s. Netrine Confectionary Ltd.,Andhra Pradesh -V- Smt. K. Renuka. 479
M/s. Shreeram Traders -V- The Commissioner of Commercial Taxes, Orissa & Ors. 378
M/s. United India Insurance Co.Ltd.-V- Sri ram Fukar Majhi & Ors. 497
Mahendra Bag -V- State of Orissa. 611
Mohammad Hamid Siddiqui -V- Najibun Begum. 616
Nagesu Sabar-V- State Of Odisha. 401
Narottam Mallick @ Naik -V- State of Odisha & Ors. 374
Raghunath Jew Thakur -V- The Commissioner of Endowments, Odisha, Bhubaneswar & Anr. 522
Raghunath Naik -V- State of Odisha & Ors. 628
Raju Banjara & Ors.-V- Bhikaru Gond. 621
Ranjan Kumar Patasani & Anr. -V- State of Orissa. 537
Rashmi Ranjan Pal @ Aju -V- State of Odisha. 392
Ratnamanjari Rana & Ors. -V- Legal Manager, M/s. IFFCO Tokio General Alliance Co. Ltd., Cuttack & Anr. 499
Sandeep Jajodia -V- IDBI Bank Ltd. & Ors. 502
Snehaprava Mohapatra & Ors.-V- Sudhanshu Kumar Mohapatra. 633
State of Odisha & Anr. -V- Sri Amarendra Mallick & Ors. 360

State of Odisha (G.A.Vigilance)-V- Sanjubala Rout. 454
State of Orissa -V- Jagat Bhotra. 574
Sujaya Shankar Singh Deo -V- Smt. Puspa Kumari Devi & Ors. 388
Sukumar Gouda -V- State of Odisha. 466
Sura @ Suresh Naik -V- State of Odisha. 380
Susil Moharana -V- State of Odisha. 445
Union of India & Ors. -V- Sarat Chandra Khuntia & Anr. 340
Urmilla Sahu & Ors. -V- Sri Santosh Kumar Sahu. 426

ACTS & CODE,REGULATION & RULES

Acts & No.	
1908- 5	Code of Civil Procedure, 1908
1973- 02	Code of Criminal Procedure, 1973
1950	Constitution of India, 1950
1872 - 1	Evidence Act, 1872
1984- 66	Family Courts Act, 1984
1956- 32	Hindu Minority And Guardianship Act, 1956
1956- 30	Hindu Succession Act, 1956
1860-45	Indian penal code, 1860
1963-36	Limitation Act, 1963
1986-25	Muslim Women(Protection of Rights On Divorce) Act, 1986
1893-04	Partition Act, 1893
1951- 11	Orissa Hindu Religious Endowment Act, 1951
1882-04	Transfer of Property Act, 1882
1975- 38	The Orissa Reservation of Vacancies In Post And Services(For Scheduled Castes And Scheduled Tribes) Act, 1975
2005- 04	Orissa Value Added Tax Act, 2004

CODE :- The Insolvency and Bankruptcy Code, 2016

REGULATION:- Uco Bank Officers Employees Conduct Regulation, 1976

RULES :- Central Civil Service Pension Rule, 1972
Orissa Civil Services (Classification Control Appeal) Rules, 1962
Orissa Civil Services (Pension) Rules, 1992

TOPICAL INDEX

Alternative Remedy
Criminal Trial
Compensation
Criminal trial
Principle of Natural Justice
Property law
Regulation
Res-Judicata
Service law

SUBJECT INDEX

PAGE

ALTERNATIVE REMEDY – Whether writ petition is maintainable, when alternative remedy is available? – Held, Yes – When the question involved is one of Jurisdiction – The writ petition is maintainable.

Sandeep Jajodia -V- IDBI Bank Ltd. & Ors.
2023 (III) ILR-Cut…… 502

CIVIL PROCEDURE CODE, 1908 – Section 21 – Objection to jurisdiction – When the suit is ripe for trial and it is posted for evidence of the plaintiff, the petitioner filed the petition to decide the issue of territorial jurisdiction of Learned trial Court – The Learned trial Court rejected the application – Whether the order of rejection is sustainable? – Held, Yes – Adjudication of issue of territorial jurisdiction of the Court will certainly be a piece-meal trial of the suit as rightly held by learned trial Court.

M/s. Netrine Confectionary Ltd., Andhra Pradesh -V- Smt. K. Renuka.
2023 (III) ILR-Cut…… 479

CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 27 – Whether the lower appellate court was right in allowing the petition U/o. 41 Rule 27 of CPC without giving any opportunity to the other parties to rebut the same – Held, No – The contesting party ought to have been granted an opportunity to rebut such evidence so that ends of Justice would have been better served.

Dusmanta Kumar Bisoi & Ors. -V- Debes Chandra Nandi & Ors.
2023 (III) ILR-Cut…… 541

CENTRAL CIVIL SERVICE PENSION RULE, 1972 – Rule 23 r/w Rule 10(6),(7)CCS of (CCA) Rule, 1965 and Sub Rule (5) & (7) of Fundamental Rules – The delinquent officer was placed under suspension – As per Rule 10(6) and (7) of 1965 Rule the order of suspension is required to be reviewed within 90 days – Suspension order was not extended after review – The suspension order passed by the authority merged with the final order of compulsory retirement – Whether the suspension period will be treated as qualifying service for the purpose of pension and pensionary benefit? – Held, Yes.

Union of India & Ors. -V- Sarat Chandra Khuntia & Anr.
2023 (III) ILR-Cut…… 340

COMPENSATION –The contention of claimant that the deceased had income of ₹ 28000/- per month and they filed IT return amounting to ₹ 927/- for the Assessment year 2012-13 – The insurer did not adduce any rebuttal evidence

to disbelieve the contention of the claimants with regard to income of the deceased – Effect of – Held, no reason is found to disbelieve the income of the deceased when IT return was filed by the deceased sufficiently before his death, his name shown in the same is bound to be accepted, accordingly compensation modified.

Ratnamanjari Rana & Ors. -V- Legal Manager, M/s. IFFCO Tokio General Alliance Co. Ltd., Cuttack & Anr.
2023 (III) ILR-Cut…… 499

CONSTITUTION OF INDIA, 1950 – Article 226 – Bias – Petitioner has filed present writ petition seeking the prayer to quash/ set aside the nomination of Opp. Party No. 3 as a member of selection committee for the purpose of conferring Vyasakabi Fakirmohan Odia Bhasa Samman, 2020 on the ground of Bias, because Opp. Party no 3 is the life member of Utkal Sahitya Samaj – Held, in absence of any material or scrap of paper to show that the opposite party no. 3 had influenced the selection committee for conferment of the award, the nomination can not be quashed as the decision/recommendation of the selection committee was manned by the experts in the field.

Dr. Nursingha Charan Sarangi -V- State of Odisha & Ors.
2023 (III) ILR-Cut…… 483

CONSTITUTION OF INDIA, 1950 – Article 226 – Custodial Violence – Necessary direction with regard to check of custodial violence issued to the Director General of Police, Odisha – Further direction issued to pay sum of Rs. one lakh to the wife of Petitioner for the physical assault caused in the police station.

Brundaban Pradhan-V- State of Odisha (DEPT. of Home Affairs) & Ors.
2023 (III) ILR-Cut…… 324

CONSTITUTION OF INDIA, 1950 – Articles 226 & 227 r/w section 61 of insolvency and bankruptcy Code, 2016 – Whether writ is maintainable against an order passed U/s. 95 of the Code? – Held, Yes – Section 95 of the code is under part III of IBC, where no appeal lies against the impugned order – So the writ is maintainable.

Sandeep Jajodia -V- IDBI Bank Ltd. & Ors.
2023 (III) ILR-Cut…… 502

CONSTITUTION OF INDIA, 1950 – Article 226 – Power of the court while directing the de novo inquiry – The valuable articles of the petitioners just vanished in thin air from the public sector bank and the investigating agency after thorough investigation found no clue, what happened to the

valuable article belonging to the petitioner – Question raised – Held, this court is of the considered view that the petitioners have been deprived of a fair investigation which is apparent on the face of the record – This would definitely result in miscarriage of justice unless this court intervenes in the matter and directs for re-investigation of the matter by an independent agency like CBI.

Himanshu Patnaik & Anr.-V- State of Odisha & Ors.
2023 (III) ILR-Cut…… 545

CONSTITUTION OF INDIA, 1950 – Article 226 – Petitioner was retrenched from service without complying any of the mandatory provisions under the Industrial Dispute Act – Learned Labour Court directed for reinstatement without back wages – The management as well as petitioner challenges the order of Labour Court – The writ petition filed by the management rejected and direction issued to the management to reinstate the workman forthwith all consequential benefits – The Opp. Party reinstate petitioner but denied the consequential benefits on the ground of "no work no pay"– Whether non payment of consequential benefits is sustainable? – Held, No – The authority blatantly disobey the dictum of this court – The impugned order is not sustainable in law being contrary to the direction of this court – Direction given with exemplary cost of Rs. 25000/-.

Alethes Kharin Dhanphul -V- State of Odisha & Ors.
2023 (III) ILR-Cut…… 624

CONSTITUTION OF INDIA, 1950 – Article 226 – The state level scrutiny committee gave a finding that petitioner had faked his caste identity –The petitioner has been dismissed from service pursuant to order passed by the SLSC – There is nothing on record to show that petitioner entered into government service on the basis of his caste certificate – Whether the impugned report of SLSC and order of dismissal is sustainable? – Held, No – Reason indicated.

Narottam Mallick @ Naik -V- State of Odisha & Ors.
2023 (III) ILR-Cut…… 374

CRIMINAL PROCEDURE CODE, 1973 – Section 125 r/w Muslim Women (Protection of Right to Divorce) Act, 1986 – Jurisdiction of family court – As per the Act, a magistrate has Jurisdiction to entertain the claim of maintenance of the divorced women – Whether family court have the Jurisdiction to entertain an application U/s. 125 of the Cr.P.C – Held, Yes.

Mohammad Hamid Siddiqui -V- Najibun Begum.
2023 (III) ILR-Cut…… 616

CRIMINAL PROCEDURE CODE, 1973 – Section 167(2) – Statutory/ Mandatory Bail – In the present case, though the charge sheet was filed within the statutory period but the cognizance was taken beyond the above period – Whether delay in taking cognizance of the case confer any vested right on the accused to be released on bail? – Held, No.

Ranjan Kumar Patasani & Anr.-V- State of Orissa.
2023 (III) ILR-Cut…… 537

CRIMINAL PROCEDURE CODE, 1973 – Section 227 – Discharge – Basic principle the court should follow while deciding an application for discharge – Discussed with reference to case laws.

Rashmi Ranjan Pal @ Aju -V- State of Odisha.
2023 (III) ILR-Cut…… 392

CRIMINAL PROCEDURE CODE, 1973 – Sections 323, 482 – Whether the court of sessions can pass order for trial/hearing of two or more cases pending before it, one after the other on the same day, if they are found to be "case" and "counter case" or "cross case" – Held, yes –Applying the same principle as exercised by the magistrate in exercise of power U/s. 323 Cr.P.C, the court of session can also pass such order as this will prevent conflicting-Judgments from being delivered and would therefore be in the interest of Justice.

Laxmidhar Swain & Ors.-V- State of Odisha & Ors.
2023 (III) ILR-Cut…… 516

CRIMINAL PROCEDURE CODE, 1973 – Section 378 – Offences punishable U/s.13(2) r/w section 13(1)(d) and section 7 of the Prevention of Corruption Act, 1988 – The learned trial court found the appellant not guilty and acquitted her – The state of Odisha G.A Vigilance has preferred appeal against acquittal – Principles governing appeal against acquittal – Discussed.

State of Odisha (G.A.Vigilance)-V- Sanjubala Rout.
2023 (III) ILR-Cut…… 454

CRIMINAL PROCEDURE CODE, 1973 – Section 378(1) (6) – Principles governing the exercise of power in an appeal against acquittal – Discussed with reference to case laws.
State of Orissa -V- Jagat Bhotra
2023 (III) ILR-Cut…… 574

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – The learned SDJM passed order of taking cognizance of offence U/ss. 294/341/506/406 of IPC without any discussion of ingredients of the offences – Whether the

order of cognizance is sustainable? – Held, No. –The learned SDJM was not vigilant enough to rule out over implication of the petitioners in this case and he had probably passed the impugned order mechanically taking cognizance offence without making any discussion as to the ingredient of the offences – The impugned order along with criminal proceeding quashed.

ENKON Pvt. Ltd., Bhubaneswar & Ors. -V- Harekrushna Subudhi.
2023 (III) ILR-Cut…… 604

CRIMINAL TRIAL – Commission of offences U/Ss. 302 & 379 of the IPC – Trial court convicted the accused on the basis of circumstantial evidence – The Trial Court has disbelieved the evidence of solitary eyewitness by holding her to be not truthful witness but accepted the seizure of mobile phone set pursuant to the statement of the accused while on police custody – Whether mere recovery of mobile phone-set is enough to hold the accused to be the perpetrator of crime? – Held, No.

Nagesu Sabar -V- State of Odisha.
2023 (III) ILR-Cut…… 401

CRIMINAL TRIAL – Testimony of witness – Whether minor discrepancy discredit the testimony of the witness – Held, No – Reason indicated with reference to case law.

Sura @ Suresh Naik -V- State of Odisha.
2023 (III) ILR-Cut…… 380

EVIDENCE ACT, 1872 – Section 27 – Recovery of weapon of offence – Necessary conditions for applicability of the section – Explained with reference to case law.

Nagesu Sabar-V- State of Odisha.
2023 (III) ILR-Cut…… 401

EVIDENCE ACT, 1872 – Section 45-A – Whether the voice recording could be confronted to prosecution witness without a certificate of an expert U/s. 45 of the Act? – Held, No.

Jayanta Behera & Ors.-V- State of Odisha.
2023 (III) ILR-Cut…… 520

EVIDENCE ACT, 1872 – Sections 63 & 65 – When a secondary evidence would be admissible in place of an original document – Discussed.

Susil Moharana -V- State of Odisha.
2023 (III) ILR-Cut…… 445

FAMILY COURTS ACT, 1984 – Section 19(1), 19(3) r/w section 28(4) of the Hindu Marriage Act, 1955 – Period of limitation for appeal – For filing of an appeal U/s. 19(1) of the 1984 Act pertaining to the proceeding under Hindu Marriage Act, whether the period of limitation will be 90 days or 30 days? – Held, the non-obstante provision of section 20 of the Family Courts Act overrides the contrary provision in any other law and hence, the period of limitation for filing an appeal from a Judgment or order of a Family Court shall be 30 days and not 90 days.

Bibhuti Bhusan Rout -V- Sasmita Nayak & Anr.
2023 (III) ILR-Cut…… 319

HINDU MINORITY AND GUARDIANSHIP ACT, 1956 – Section 6 – Principle of law relating to custody of child – Discussed with reference to case laws.

Urmilla Sahu & Ors. -V- Sri Santosh Kumar Sahu.
2023 (III) ILR-Cut…… 426

HINDU SUCCESSION ACT, 1956 – Sections 6, 8, 9 and 15 – Appellant/ plaintiff filed the suit for partition of the ancestral properties – The suit properties were self acquired properties of the common ancestor, who was the grand-father of plaintiff and defendants – The learned Trial Court decreed the suit entitling the plaintiff and defendants 1/8th share each from the suit schedule properties – The 1st appellate court by applying the provision of section 6 of the 1956 Act as, it was stand prior to the Amendment of Act, 2005 modified the share of plaintiff and respondent 5, 6, 7 each from 1/8th to 1/40th share each – Whether the order of 1st Appellate court is sustainable? – Held, No – In a suit for partition the daughters would inherit equal share as that of the sons in the ancestral properties and the death of their father before or after the date of amendment to sec 6 of the Act, 1956 would be irrelevant.

Snehaprava Mohapatra & Ors.-V- Sudhanshu Kumar Mohapatra.
2023 (III) ILR-Cut…… 633

INDIAN PENAL CODE, 1860 – Section 52-A – Harbour – Definition and implication – Discussed.

Rashmi Ranjan Pal @ Aju -V- State of Odisha.
2023 (III) ILR-Cut…… 392

INDIAN PENAL CODE, 1860 – Section 212 – Necessary ingredients which are to be established by the prosecution to bring home the guilt of an offence U/s. 212 of code – Enumerated.

Rashmi Ranjan Pal @ Aju -V- State of Odisha.
2023 (III) ILR-Cut…… 392

INDIAN PENAL CODE, 1860 – Section 307 – Conviction and sentence of appellant to undergo rigorous imprisonment for a period of five years–Neither there was any medical evidence available on record to indicate that the injuries sustained by PW2 on the assault of appellant were sufficient in ordinary course to cause death of a person nor there was any evidence on record to disclose any grievous injuries to PW2 – There was no evidence against the appellant beyond reasonable doubt which would establish his intention to commit murder of the injured – Whether the punishment of imprisonment for a period of five years Justified? – Held, No – Taking into consideration the nature of injuries sustained by the injured and the act of the appellant, this Court considers that sentence of rigorous imprisonment for one year to the appellant would meet the ends of justice.

Mahendra Bag -V- State of Orissa.
2023 (III) ILR-Cut…… 611

INDIAN PENAL CODE, 1860 – Sections 300,302, 304 Part (II) – Appellant was convicted and sentenced to undergo imprisonment for life for commission of offence under section 302 of the Indian Penal Code – The prosecution witnesses have not been able to provide information as to whether there was any kind of existing quarrel between the two parties – The I.O has admitted during his evidence that his investigation reveals that just prior to assault there was push and pull between the accused and deceased while they were taking liquor – Whether the act of appellant was pre-mediated and with an intention to cause the death of the deceased? – Held, No – When the attack was not pre-mediated and not with an intention to cause death, even if the injury inflicted was a serious one, it by itself may not be decisive but is one of the relevant factors 300 IPC. The appellant is guilt of commission of the offence U/s. 304 part 1 and not under Sec 302 of IPC.

Sura @ Suresh Naik -V- State of Odisha.
2023 (III) ILR-Cut…… 380

INDIAN PENAL CODE, 1860 – Sections 302,304 (II) – From the nature of injuries, it appears that there was no intention to kill the deceased, but to cause pain – There were assaults in quick succession – Effect of –The conviction under section 302 of the IPC is liable to be interfered with and accordingly it is interfered and set-aside – In absence of intention to murder, the Appellant convicted U/s. 304 Part-(II) of the IPC.

Bhagirathi @ Tima Bibhar -V-State of Odisha
2023 (III) ILR-Cut…… 334

INDIAN PENAL CODE, 1860 – Sections 324 & 506 Part (II) – Necessary ingredients to attract the offence – Discussed.

Susil Moharana -V- State of Odisha.
2023 (III) ILR-Cut…… 445

INDIAN PENAL CODE, 1860 – Sections 376(3)/376(2)(n) – Whether non-conducting of the DNA test to determine the paternity aspect of the child which the victim has given birth, can be a ground to disbelieve the evidence of the victim – Held, No – If the version of the prosecutrix is believed, basic truth in her evidence is ascertainable and if it is found to be credible and consistent, the same would form the basis of conviction – Conducting DNA test is not a sine quanon in cases of rape as such tests are merely incidental to determine the culpability of an accused for commission of crime.

Sukumar Gouda -V- State of Odisha.
2023 (III) ILR-Cut…… 466

THE INSOLVENCY AND BANKRUPTCY CODE, 2016 – Section 95 r/w Rule 16(d) of the National company Law Tribunal Rules, 2016 – The IDFC Bank filed application U/s. 7 of the code against the corporate Debtor before NCLT Mumbai – The NCLT Cuttack Bench has been formed on 12.07.2018 vide notification being S.O. 3430(E) having territorial Jurisdiction over state of Odisha and state of Chhatisgarh –On 18.08.2021 the NCLT Mumbai transferred the main matter along with all pending application to NCLT Cuttack Bench – Whether the NCLT Mumbai has the Jurisdiction to transfer the pending cases – Held, No –There is no automatic transfer as no such provision is laid down in the Notification, transfer of proceedings would only be made by the president of NCLT in terms of Rule 16(d) of the NCLT Rules, 2016.

Sandeep Jajodia -V- IDBI Bank Ltd. & Ors.
2023 (III) ILR-Cut…… 502

LIMITATION ACT, 1963 – Section 5 – Sufficient cause – Delay of 2989 days – What constitute sufficient case – Explain with reference to case laws.
Raju Banjara & Ors.-V- Bhikaru Gond.
2023 (III) ILR-Cut…… 621

MOTOR VEHICLE ACT, 1988 – Section 167 r/w Employee Compensation Act, 1923 – Whether compensation under both the Acts is permissible? – Held, No.

M/s. United India Insurance Co.Ltd.-V- Sri Ram Fukar Majhi & Ors.
2023 (III) ILR-Cut…… 497

MUSLIM WOMEN(PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986 – Section 5 r/w Section 125 of Code of Criminal Procedure –Whether provision under Section 125 of Cr.P.C can be resorted to by the Muslim women(divorce) in seeking maintenance ? – Held, Yes – The Muslim women can claim maintenance under the Cr.P.C and unlike the Muslim personal law even the divorced women are given right to maintenance under the Cr.P.C.

Mohammad Hamid Siddiqui -V- Najibun Begum.
2023 (III) ILR-Cut…… 616

ORISSA CIVIL SERVICES (PENSION) RULES, 1992 – Rule 7 r/w rule 15 and 16 of Orissa Civil Services (Classification Control and Appeal) Rules, 1962 – On the date of filing of the writ petition no charge memo in connection with any proceeding had been served on the petitioner – In the meantime 10 years have elapsed after his superannuation –Whether authority concerned were justified to withhold the gratuity so also the full pension of the petitioner on the plea of pending of departmental proceeding – Held, No.

Biswanath Beura-V- State of Orissa & Anr.
2023 (III) ILR-Cut…… 596

ORISSA CIVIL SERVICES (CLASSIFICATION CONTROL APPEAL) RULES, 1962 – Rule 15(10) (i) (b) – The disciplinary authority issued 2nd show cause notice without giving his disagreement note and the reason for not agreeing with the finding of the inquiry officer – Effect of – Held, in view of such non-compliance of the statutory provision this court is inclined to interfere with the impugned order of punishment.

J. Sameswar Rao -V- State of Orissa & Ors.
2023 (III) ILR-Cut…… 588

ODISHA HINDU RELIGIOUS ENDOWMENT ACT, 1951 – Section 41 – Determination of a deity to be a private or public deity – Duty of commissioner – Enumerated with reference to case law.

Raghunath Jew Thakur -V- The Commissioner of Endowments, Odisha, Bhubaneswar & Anr.
2023 (III) ILR-Cut…… 522

ORISSA PUBLIC PREMISES (EVICTION OF UNAUTHORISED OCCUPANTS) ACT, 1971 r/w Article 226 of Constitution of India, 1950 – The Petitioner challenges the initiation and continuance of proceeding under the Act – Whether Judicial review by invoking Article 226, against show cause notice is maintainable? – Held, No.

Adarsha Pathagar -V- The Manager (TS) Land, Rourkela Steel Plant & Ors.
2023 (III) ILR-Cut…… 528

ORISSA RESERVATION OF VACANCIES IN POST AND SERVICES(FOR SCHEDULED CASTES AND SCHEDULED TRIBES) ACT, 1975 – Section 6 r/w letter dated 3rd April, 2003 issued by Government of Orissa S.T and S.C Development Department to all department – Whether section 6 of ORV Act applicable in case of appointment by promotion? – Held, Yes – The Department of the Government of Odisha could not take different stand at different time – All the Department of Government of Odisha must speak in one voice.

State of Odisha & Anr. -V- Sri Amarendra Mallick & Ors.
2023 (III) ILR-Cut…… 360

ORISSA VALUE ADDED TAX ACT, 2004 – Section 65(1) r/w Rule 73 of OVAT Rule, 2005 – There is no prescription in the rule regarding the procedure, in which the statement is to be furnished – Whether the impugned order of the authority by imposing the penalty on petitioner for non filing of the statement is sustainable? – Held, No – Reason indicated.

M/s. Shreeram Traders -V- The Commissioner of Commercial Taxes, Orissa & Ors.
2023 (III) ILR-Cut…… 378

PARTITION ACT, 1893 – Section 4 – There was a dwelling house existing over the suit property and by demolishing the same, mother of the petitioner had an intention to construct a new building for her living – But, due to paucity of funds she could not build the same – Whether the property in question had lost its character of a dwelling house & an application U/s. 4 of the Act is maintainable? – Held, No – Only because the property was being used for some other purpose for a temporary period it would not lose its character of a dwelling house.

A. Mohan -V- Babita Ram & Ors.
2023 (III) ILR-Cut…… 491

PRINCIPLE OF NATURAL JUSTICE – The authority black listed & banned the petitioner company for three years without issuing any show cause notice – Whether the impugned order is sustainable in the eyes of law? – Held, No – Since the impugned order has been passed without issuing any show cause notice and without giving any opportunity of hearing to the petitioner No.1 company, it amounts to violation of principle of natural justice and cannot be sustained in the eyes of law.

M/s. Ecometrix consultantsPvt. Ltd. & Anr. -V- B.D.A, Bhubaneswar & Ors.
2023 (III) ILR-Cut…… 346

PROPERTY LAW – The vendor of the plaintiff had the alienable right over the suit property – The vendor have executed the registered sale deed in the year 1983 – Neither the defendants nor their predecessor-in-interest have challenged the same on any specific ground by filing suit except questioning the authority of the vendor which has been negated by the court below – The defendant for the first time in the present appeal stated that it is a created document – Whether the submission of defendants acceptable at this stage? – Held, No – The finding of the First Appellate Court that the plaintiff has the right title and interest over the suit property and as such entitled to recover the possession of the suit land from the defendants has to hold the field.

Sujaya Shankar Singh Deo -V- Smt. Puspa Kumari Devi & Ors.
2023 (III) ILR-Cut…… 388

RES-JUDICATA – Previous set of dispute was against the vendor and vendor's vendor of the petitioner involving the same land – Present dispute is against the petitioner – Whether the same proceeding is hit by principle of Res-Judicata ? – Held, Yes.

M/s. Milan Developers & Builders Pvt. Ltd.-V- State of Odisha & Ors.
2023 (III) ILR-Cut…… 411

SERVICE LAW – Appointment – Petitioner being an ex-serviceman applied to the post of Odisha Civil services Examination, 2020 – Petitioner qualified in preliminary, main as well as personality test – During verification of original document the authority rejected the candidature of the petitioner on the ground that, the discharge certificate was issued after the last date of submission of online application form – Whether such ground for rejection is sustainable under law ? – Held, No – On a careful examination of the grounds laid down in the clause-II of the advertisement this court observed that there is no specific ground under which the candidature of the petitioner could have been rejected as has been done – This court has no hesitation to hold that the OPSC had no authority to reject the candidature of the petitioner.

Kartik Senapati -V- State of Odisha & Ors.
2023 (III) ILR-Cut…… 556

SERVICE LAW – Appointment – The petitioner by producing fake B.A and B.Ed. mark-sheet has managed to get selected and appointed as Shikhya Sahayak in the year 2003 – The authority by order dated 28.10.2016 disengage the petitioner after following due procedure – The petitioner challenges the impugned order of disengagement – Held, fraud vitiates everything this court is not inclined to interfere with the impugned order.

Alekha Kumar Panigrahi -V- State of Odisha & Ors.
2023 (III) ILR-Cut…… 578

SERVICE LAW – The petitioner was removed from the service/ post of sepoy on the basis of Departmental Proceeding – The allegation against the petitioner for submission of forged caste certificate at the time of appointment – On the basis of allegation one FIR was lodged and charge sheet was filed – The Learned Trial Court framed charges against the petitioner U/s. 468/420 IPC – Eventually the Trial Court acquitted petitioner from the charges – Whether the impugned order of removal sustainable? – Held, No – Undisputedly the petitioner is a schedule caste and the element of forgery also could not be proved by the opposite parties conclusively either in Criminal Trial or in the departmental proceeding, removal order passed by the Opp. Party is set aside.

Raghunath Naik -V- State of Odisha & Ors.
2023 (III) ILR-Cut…… 628

TRANSFER OF PROPERTY ACT, 1882 – Section 105 – Lease – Distinction between renewal and extension – Discussed with reference to case law.

Adarsha Pathagar -V The Manager (TS) Land, Rourkela Steel Plant & Ors.
2023 (III) ILR-Cut…… 528

UCO BANK OFFICERS EMPLOYEES CONDUCT REGULATION, 1976 – Regulation 6(17) – Violation of the mandatory provisions relating to Regulation 6(17) – The Delinquent officer has not got himself examined during the inquiry – It would be incumbent upon the inquiry officer to generally question him on the circumstances appearing against him –This is a self-contained safeguard against arbitrariness as a facet of principles of natural justice – Effect of – Held, since there is patent violation of Regulation 6(17) by the Opp. Party, this court has no alternative but to relegate the matter to the stage, where the petitioner shall be given an opportunity in terms of Regulation.

Biswanath Parhi -V- United Commercial Bank & Ors.
2023 (III) ILR-Cut…… 567

——o ——

2023 (III) ILR – CUT- 319

FULL BENCH

S.TALAPATRA, C.J, K.R. MOHAPATRA, J & Dr. S.K. PANIGRAHI, J.

MATA NO. 54 OF 2020

BIBHUTI BHUSAN ROUT ……....Appellant

-V-

SASMITA NAYAK & ANR. ……....Respondents

FAMILY COURTS ACT, 1984 – Section 19(1), 19(3) r/w section 28(4) of the Hindu Marriage Act, 1955 – Period of limitation for appeal – For filing of an appeal U/s. 19(1) of the 1984 Act pertaining to the proceeding under Hindu Marriage Act, whether the period of limitation will be 90 days or 30 days? – Held, the non-obstante provision of section 20 of the Family Courts Act overrides the contrary provision in any other law and hence, the period of limitation for filing an appeal from a Judgment or order of a Family Court shall be 30 days and not 90 days. (Para 10-12)

Case Laws Relied on and Referred to :-

1. MATA No.54 of 2020: Bibhuti Bhusan Rout Vs. Sasmita Nayak & Anr.
2. 2017 (II) OLR 802 : Smt. Swarnalata Nayak @ Nahak @ Lily Vs. Manoj Kumar Nahak and Ratnamala Nahak.
3. AIR 2002 SC 591 : Savitri Pandey Vs. Prem Chandra Pandey.
4. 2021 SCC Online SC 3285 : Arunoday Singh Vs. Lee Anne Elton.

For Appellant : M/s. Deepali Mohapatra

For Respondents: Mr. Suryakanta Dwibedi

ORDER Date of Order :26.09.2023

BY THE BENCH:

1. This matter is taken up through Hybrid Mode.

2. Heard Mr. Gautam Mukherji, learned Senior Counsel, Mr. Gautam Misra, learned Senior Counsel, Mr. Samir Kumar Mishra, learned Senior Counsel, Mr. Prafulla Kumar Rath, learned Senior Counsel and Ms. Pami Rath, learned Senior Counsel, Ms. Deepali Mohapatra, learned counsel appearing for the Appellant and Mr. Suryakanta Dwibedi, learned counsel appearing for the Respondents. This reference has emerged from the matrimonial appeal being MATA No.54 of 2020.

3. By the order dated 15th May, 2023 passed in MATA No.54 of 2020, titled as ***Bibhuti Bhusan Rout v. Sasmita Nayak and another***, a Division Bench of this Court, has taken note of the decision of ***Smt. Swarnalata Nayak @ Nahak @ Lily v. Manoj Kumar Nahak and Ratnamala Nahak; 2017 (II) OLR 802***,whereby it has been held that for filing of an appeal under Section 19(1) of the Family Courts Act, 1984 pertaining to the proceeding under the Hindu Marriage Act, 1955, the period of

limitation will be of 90 days, even though the Family Courts Act, 1984 has laid down the period for limitation under Section 19(3) in the following terms:

> *"3. Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court."*

4. The Division Bench which held that the limitation period will be 90 days at par with Section 28(4) of the Hindu Marriage Act, 1955 observed that the apex Court in ***Savitri Pandey v. Prem Chandra Pandey; AIR 2002 SC 591***, has observed that the period of 30 days is inadequate for preferring and filing an appeal. Therefore, in ***Savitri Pandey*** (supra), the apex Court had directed the State to reconsider the provisions relating to the period of limitation under Section 28(4) of the Hindu Marriage Act and make the change in the law.

5. Pursuant to that direction, Section 28(4) of the Hindu Marriage Act was amended by extending the time of limitation to 90 days. In ***Swarnalata Nayak*** (supra), the said Division Bench of this Court,on consideration of the reasons provided in Savitri Pandey (supra),held that even in case of the appeal filed under Section 19(3) of the Family Court Act, 1984, the period of limitation will be 90 days. It has been observed in ***Swarnalata Nayak*** (supra) as follows:

> *"1. It is well established in law that procedural law is always subservient to the substantive law. While provisions of "the 1955 Act" are substantive in nature, the provisions under "the 1984 Act" are mainly procedural. Therefore, the period of limitation, as provided under the substantive law for filling the appeal would prevail over the limitation period prescribed in the procedural law.*
>
> *2. While Sub-Section 3 of Section 19 of "the 1984 Act" deals with a general provision; Sub-Section 4 of the Section 28 of "the 1955 Act" providing 90 days period of limitation as incorporated by way of an amendment on 22.12.2003 substituting earlier period of 30 days of limitation is a special provision in the background of the observations of the Supreme Court in Savitri Pandey v. Prem Chandra Pandey reported in AIR 2002 SC 591.*
>
> *3. The purpose of amending Sub-Section 4 of Section 28 of "the 1955 Act" was to overcome the inconvenience and hardship faced by the litigant public as pointed out by the Supreme Court in Savitri Pandey's case (supra). Keeping in mind the purpose of amendment of Sub-Section 4 of Section 28 of "the 1955 Act" w.e.f. on 23.12.2003, the period of limitation as provided therein must be given prominence and predominance.*
>
> *4. Where two interpretations are possible with regard to the limitation period, the one stipulatingthe larger period of limitation is to be preferred.*
>
> *5. 90 days limitation period as provided pursuant to the amendment of Sub-Section 4 of Section 28 of "the 1955 Act" which was brought in by the Act 50 of 2003 substituting earlier period of 30 days being a product of later enactment has to prevail over Sub-Section 3 of Section 19 of "the 1984 Act", which is an earlier enactment."*

6. The Division Bench, which referred the matter for reconsideration by a larger Bench, has suggested a few questions for consideration. Those are as follows:

> *"1. (i) Whether there is any unattended gap left by the legislature for which the said provision is not adequately comprehensible or (ii) whether there was any occasion to hold or observe that two interpretations are possible with regard to the period of limitation under sub-Section 3 of Section 19 of the Family Courts Act or (iii) whether it was occasioned to call upon the court to interpret and expand the prescribed period of limitation observing that the amendment of sub-Section 4 of Section 28 of the Hindu Marriage Act, 1955 as brought about by the Act of 50 of 2003 substituting earlier period of 30 days being a provision of the latter enactment shall have to prevail over sub-Section 3 of Section 19 of the Family Courts Act, 1984, which is an earlier enactment?*
>
> *2. (i) Whether it was correct to bring the tool of interpretation that the procedural law is always subservient to the substantive law, in as much as that doctrine by itself provides the predominance of the substantive law in the interface with the procedural law, (ii) whether it was correct to hold by implication that Section 19(1) of the Family Courts Act is not a substantive law and it is merely procedural law, subservient to Section 28 of the Hindu Marriage Act, 1955, as the proceeding was instituted under provision of the Hindu Marriage Act, 1955?*
>
> *3. Whether two ecosystems of justicing which are developed by way of enactments for serving the special legislative purposes can be declared subservient to one, giving one law the status of dominant law, in as much as the Family Courts Act 1984 is supplemental in nature, but it cannot be denied that its provisions are substantive in its ecosystem?*
>
> *4. Whether the interpretation as adopted in Swarnalata (supra) can be sustained as it has rendered sub-Section 3 of Section 19 of the Family Courts Act otiose substituting the period of limitation from 30 days to 90 days by supplanting?"*

7. We have heard learned Senior Counsel and the learned counsel appearing for the parties in the proceeding. Clearly, there are two sets of views, one is supporting the view as taken by the Division Bench in Swarnalata Nayak (supra) and the other set of view is not supporting the proposition of ***Swarnalata Nayak*** (supra). It has been stated by the learned Senior Counsel that while considering Swarnalata Nayak (supra), the provisions of Section 20 of the Family Courts Act, 1984 was not noticed. Section 20 of the Family Courts Act provides as follows:

> *"**Act to have overriding effect**. The provisions of this Act shall have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."*

8. There cannot be any amount of dilemma in understanding the purpose of Section 20 of the Family Courts Act, 1984. What the Division Bench in ***Swarnalata Nayak*** (supra) has observed is very difficult to accept jurisprudentially for two fundamental reasons viz.- (i) Even in ***Savitri Pandey*** (supra), though the Supreme Court found the period of limitation under Section 28 (4) is inadequate and it required change, but they did not legislate the rules providing the longer time, and the reason is quite understandable. Though in ***Savitri Pandey*** (supra), the apex Court had strongly recommended for the legislative change, but the Court did not make the said change. The domain of the court is well-demarcated and I t does not extend to

legislate. Hence, the Court has to exercise refrain while dealing with any provisions of law. Moreover, it is the well acknowledged canon of interpretation of law that by way of interpretation, any provision of a valid statute cannot be made otiose.

(ii) In view of the non-obstante clause in Section 20 of the Family Courts Act, no other law can have any conflicting relation with any provision of the Family Courts Act as the provision of the Family Courts Act will prevail over.

9. What is important is the area of operation. Section 20 of the Family Courts Act, 1984 secures dominant position for the Family Courts Act, 1984. It overrides other Acts. In the referral note, a Division Bench of this Court has dwelled on the very object of the Family Courts Act. One of them is the expeditious disposal. The Statement of Objects and Reasons of Family Courts Act, 1984 has been referred. The said statement of Objects and Reasons read as under:

> *"Several associations of women, other organizations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th Report (1974) had also stressed that in dealing with disputes concerning the family the Court ought to adopt <u>an approach radically different from that adopted in ordinary civil proceedings</u> and that it should make <u>reasonable efforts at settlement before the commencement of the trial</u>. The Code of Civil Procedure, 1908 was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the Courts in adopting this conciliatory procedure and the courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. <u>The need was therefore, fell in the public interest, to establish Family Courts for Speedy Settlement of family disputes</u>."*
>
> *[Emphasis added]*

10. It is evidently clear that the shortening of the period of limitation falls within the object of speedy disposal. Therefore, the shorter period as prescribed under sub-Section 3 of Section 19 of the Family Courts Act, 1984 is harmonious to the object and reasons and the Family Courts Act, as reproduced. The Family Courts Act, 1984 has been enacted for developing a new ecosystem for instituting the dispute relating to the family affairs. We should recognize that various High Courts have taken divergent opinions in this matter. But, finally, the apex Court has attended the issue and given a quietus in ***Arunoday Singh v. Lee Anne Elton: 2021 SCC Online SC 3285***. The apex Court has observed in ***Arunoday Singh*** (supra) as follows:

> *"14. Section 29(2) of the Limitation Act says that where any special or local law prescribes for any suit, appeal or application, a period of limitation different from the period prescribed by the Schedule to the Limitation Act, the provision of Section 3 of the Limitation Act would apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4*

to 24 (inclusive) shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law.

15. Under Article 116 of the Schedule to the Limitation Act the period of limitation prescribed for an appeal to the High Court from any decree or order is 90 days. The period of limitation for appeal to the High Court from the decree or order of the same Court is 30 days. Section 39(4) of the Special Marriage Act also provides that every appeal under the aforesaid Section is to be preferred within a period of 90 days from the date of the decree or order.

16. However, as observed above, Section 19(3) of the Family Courts Act requires every appeal from a judgment or order of the Family Court to be filed within 30 days. The provisions of the Family Court Act have effect notwithstanding anything inconsistent contained in any other law for the time being in force.

17. Section 19(3) of the Family Courts Act provides a shorter period of limitation than Section 39(4) of the Special Marriage Act, 1954 or Article 116 of the Schedule to the Limitation Act, 1963. There is an inconsistency between the period of limitation for filing an appeal prescribed by the Family courts Act and the Special Marriage Act, as also the Limitation Act.

18. By reason of the non-obstante provision of Section 20 of the Family Courts Act giving overriding effect to the Family Courts Act, the period of limitation for filing an appeal from a judgment and order of a Family Court constituted under the Family Courts Act would be 30 days and not 90 days. The High Court thus found that the Appeal was delayed, even though the Appeal was filed well within 90 days.

19. The Appeal was under Section 19 of the Family Courts Act which is not substantive law relating to marriage and divorce but an Act for constitution of Family Courts to deal with disputes relating to marriage and family affairs. The proceedings in the Family Court relating to marriage and divorce are not proceedings under the Family Courts Act even though the procedure prescribed under the Family Courts Act may be followed. Section 29(3) of the Limitation Act is, therefore, not attracted to appeals under the Family Courts Act. Moreover, there is no inconsistency between Section 19 of Family Courts Act, 1984 and Section 5 of the Limitation Act, 1963 which provides for condonation of delay in filing an appeal where there is no sufficient cause.

20. Section 29(2) of the Limitation Act clearly provides that where any special or local law prescribes a period of limitation different from the period prescribed by the Schedule to the Limitation Act, the provisions contained in Sections 4 to 24 of the Limitation Act would apply only insofar as and to the extent to which they are not expressly excluded by such special or local law."

11. It has been in uncertain terms, observed by the apex Court that the non-obstante provision of Section 20 of the Family Courts Act overrides the contrary provision in any other law and hence, the period of limitation for filing an appeal from a judgment and order of a Family Court constituted under the Family Courts Act shall be 30 days and not 90 days.

12. The said declaration of law definitely falls within Article 141 of the Constitution of India and hence, the said law, as declared, becomes a binding for all the Courts in the Country. Hence, we answer this reference by declaring that the

judgment in ***Smt. Swarnalata Nayak @ Nahak @ Lily v. Manoj Kumar Nahak and Ratnamala Nahak; 2017 (II) OLR 802*** cannot be treated as good law any more. Therefore, so far as the period of limitation for the appeal from the judgment or the order of the Family Court is concerned, it shall be 30 days in terms of sub-Section 3 of Section 19 of the Family Courts Act, 1984.

13. Before we part with the records, we express our deep appreciation for the learned Senior Counsel for their effort to exposit the divergent positions taken by the various Courts on the same issue.

14. We would be failing in our duty if we do not record the anxiety, as expressed by the learned Senior Counsel regarding the difficulties faced by the people from the rural segments and the under-developed regions in filing an appeal before the High Court. In this regard, we should observe that such causes are considered liberally for condoning the delay as the High Court intends to secure the interest of substantive justice.

15. In the above terms, the reference is disposed of.

—— o ——

2023 (III) ILR – CUT - 324

S. TALAPATRA, J & SAVITRI RATHO, J.

WPCRL NO.112 OF 2020

BRUNDABAN PRADHAN ....Petitioner

-V-

STATE OF ODISHA
(DEPT. OF HOME AFFAIRS) & ORS. ....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Article 226 – Custodial Violence – Necessary direction with regard to check of custodial violence issued to the Director General of Police, Odisha – Further direction issued to pay sum of Rs. one lakh to the wife of Petitioner for the physical assault caused in the police station.

For Petitioner : Mr. Rohit Ranjan Ray
For Opp. Parties : Mr. D. Nayak, AGA

JUDGMENT Date of Judgment :17.03.2023

S. TALAPATRA, J.

1. By means of this writ petition, the petitioner has urged this Court for issuing a writ of Habeas Corpus for releasing the wife of the petitioner namely Rupa @ Snehalata Pradhan and his brother namely Dhaneswar Pradhan who were unlawfully taken to the custody by the opposite parties No.3 & 5 (typed as 4) on 10.10.2020.

2. It has been alleged that on 10.10.2020, Rupa @ Snehalata Pradhan was taken into custody and on 14.10.2020 Dhaneswar Pradhan was taken into custody. The police went to the rented house of Rupa @ Snehalata Pradhan at Bhubaneswar and breaking the lock, took away cash of Rs.2,00,000/-, Mangalsutra and other valuable items including Mobile Phone and gold ornaments. The local people witnessed the incident but they did not disclose anything out of fear.

3. The mother-in-law of the petitioner went to Baselisahi Police Station and saw her daughter-in-law tormented and tortured and she found marks of beating all over her body. The police did neither forward the arrested person/s to the Judicial Magistrate nor were they shown to be in custody. In such circumstances, the petitioner, husband of Rupa @ Snehalata Pradhan, has filed this petition primarily for release.

4. It has been also stated that Rupa @ Snehalata Pradhan has a physically challenged child and the said child has been facing serious difficulty for her unlawful custody. It has been stated in the petition that, when the mother of the petitioner raised objection against the unlawful police action, she was threatened by the police personnel and asked her 'to keep a safe distance' from the persons confined, otherwise they will be entangled in several cases. The petitioner had also approached the higher authority of the police, Odisha Human Rights Commission and also the S.D.J.M., Khurda for inquiry and release.

5. In their counter affidavit, the opposite parties No.4 & 5 have stated that the allegations as leveled by the petitioner in respect of illegal custody of Rupa @ Snehalata Pradhan and Dhaneswar Pradhan are all false, baseless and without an iota of truth.

6. It has been categorically stated in their counter affidavit, at para-3, that the petitioner's wife Rupa @ Snehalata Pradhan and his brother, Dhaneswar Pradhan had never been arrested or illegally confined by the police on 10.10.2020 and 14.10.2020.

7. It has been admitted by those opposite parties that on the basis of the complaint filed by the mother of the petitioner namely Kuni Pradhan, a complaint case being Misc. Case No.191 of 2020 was registered in the court of the S.D.J.M., Khurda under Section-57 read with Section-97 of the Cr.P.C. The S.D.J.M., Khurda by his order dated 14.10.2020 directed all the opposite parties including the Superintendent of Police, Khurda, Superintendent of Police, Puri, I.I.C., Khurda Police Station and I.I.C., Baselisahi Police to submit their reply. Accordingly, the opposite parties No.3 & 5 had submitted their reply stating that no such person namely Rupa @ Snehalata Pradhan, wife of the petitioner was ever arrested or detained in connection with any case within the jurisdiction of the Baselisahi Police Station. The said complaint case being Misc. Case No.1991 of 2022 was rejected by the order dated 20.10.2020 delivered by the S.D.J.M., Khurda.

8. But in para-5 of the counter affidavit, the opposite parties No.3 & 5 have unfolded as follows:

> *"It may be relevant to submit here that on 30.10.2020 at about 8 PM.,S.I. of Police, Satyabadi Police Station namely Sri Basanta Kumar Jena caught raid handed four persons who were moving in a Maruti Suzuki Ciaz Car without number coming from the Pipili side. On verification, it was found that four persons were sitting inside the car including two ladies. The driver of the car on seeing the police team (who were performing motor vehicle checking duty at Pattnikia Chhack) alighted out of the car and fled away. It is relevant to state here that out of four persons sitting inside the car, two were ladies and one of them is the petitioner's wife Rupa @ Snehalata Pradhan. On personal search of Rupa @ Snehalata Pradhan in presence of two independent witnesses and Executive Magistrate, brown sugar of 301 grams and Rs.2000/- and one Mobile Phone were seized from her exclusive and unauthorized possession as she failed to produce any authority/license regarding possession of such narcotics substance.Accordingly, a case was registered vide Satyabadi P.S. Case No.364/2020 under Sections-21(c)/29 of the NDPS Act against Rupa @ Snehalata Pradhan, Rasmita Pradhan @ Mama, Kanhu Pradhan,Bishnu Sahu, Hamid, Sapa, Litan Behera and one Saraswati Behera as during interrogation, it was revealed that they were involved in supplying of Brown Sugar for the purpose of sale in the districts of Puri and Khurda."*

A copy of the F.I.R. has been filed along with the counter affidavit.

9. According to the opposite parties No.3 & 5, due arrest memo was prepared and filed in the court of the local Magistrate. It has been categorically denied by the opposite parties No.3 & 5 that the brother of the petitioner namely Dhaneswar Pradhan had been illegally detained since 14.10.2020.

10. Dhaneswar Pradhan has been living with his wife in his in-law's house since October, 2020. Surprisingly, the petitioner, who is not a victim, did not file any rejoinder against the said assertion made in the writ petition.

11. Amidst conflicting claims, in the order dated 11.07.2022, we had recorded the submission of Mr. A.K. Nanda, learned Addl. Government Advocate who was appearing for the State.

12. It has been stated that Rupa @ Snehalata Pradhan was arrested by Satyabadi Police Station in connection with a case-for dealing with the narcotic substance and she was produced virtually before the local court on 31.10.2020, in Satyabadi P.S. Case No.354/2020. Under the judicial order, her custody was extended. After the exchange of affidavit was complete and the version of the State was available, we passed the order dated 11.07.2022 directing the Inspector General of Police, Law & Order, Odisha to enquire into whether the petitioner's wife namely Rupa @ Snehalata Pradhan was illegally detained by the Baselisahi Police Station. It was categorically directed that the Inspector General of Police, Law & Order shall also inquire into what happened to Rupa @ Snehalata Pradhan after 10.10.2020 till 31.10.2020. Such report was directed to be filed by 29.08.2022. In the order dated 06.09.2022, it has been reflected that in the State of Odisha, there is no post like

Inspector General of Police, Law & Order. However, the State, in terms of our order dated 11.07.20922, assigned the responsibility of inquiry to the Inspector General of Police, Central Range, Cuttack.

13. We modified our order dated 11.07.2022 in terms of the above change. We had further directed to complete the inquiry within thirty days from 06.09.2022. The Inspector General of Police, Central Range, Cuttack had filed the inquiry report on 11.10.2022. By the order dated 14.10.2022, we directed the Registry to furnish a copy of the report to the petitioner to file his response. The petitioner filed the response to the inquiry report on 16.11.2022. The additional response was filed by the Inspector General of Police, Central Range, Cuttack in response to the reply filed by the petitioner on the inquiry report, on 04.01.2023. From the report filed by the Inspector General of Police, Central Range, Cuttack on 11.10.2022, it appears that the petitioner's wife Rupa @ Snehalata Pradhan, the petitioner and two other persons, unrelated to the police administration namely Purna Chandra Nayak @ Sapa and Mr. Litan Behera were present in the Satyabadi Police Station on 14.09.2022 when the Inspector General of Police, Central Range, Cuttack commenced his inquiry. That apart, four Police officers were examined during the inquiry namely Jibananda Jena, the then IIC, Baselisahi Police Station, Puri, Sri Devi Prasad Patra, OPS, Dy. S.P., the then IIC of Satyabadi Police Station, Basanta Jena, S.I. of Police and the informant of Satyabadi P.S. Case No.364 of 2020, Subhashree Priyadarshini Nanda, S.I. of Police and the Investigating Officer of Satyabadi Police Station Case No.364 of 2020 under Section- 21(C)/29 of the NDPS Act.

14. That apart, two independent witnesses namely Sri Makunda Mohapatra and Sri Prahallad Nayak were examined during the investigation.

15. The wife of the petitioner has stated in the inquiry that the Inspector, Jibanananda Jena and three others had come to her house at Khordha in plane cloth around 7-8 PM on 10th October, 2020. They asked her to come with them, which she obeyed. She was taken in a police vehicle to her house in Bhubaneswar situated near Rabi Talkies (Nilamadhab Apartment) which she had taken on rent. From there, they took her and kept her at Baselisahi Police Station. While she was at Baselisahi Police Station, she was beaten up by the police personnel. She also alleged that Inspector Jibanananda Jena asked for Rs.10,00,000/- from her and she gave Rs.4,00,000/- through her niece, Ms. Sweety @ Madhusmita Behera who was staying in Baripada. However, on 31.10.2020 (on the day of Kumar Purnima) at 5 AM, she was brought to Satyabadi Police Station and she was produced in the court on the same day, after she was medically examined. The petitioner also supported the statement of his wife namely Rupa @ Snehalata Pradhan.

16. Sri Purna Chandra Nayak @ Sapa is a co-accused in the Satyabadi Police Station Case No.364 of 2020. He has corroborated the detention of Rupa @ Snehalata Pradhan. He has stated that he was also detained for 11 days along with

his co-brother-in-law, Sukanta Nayak and his friend, Nimei. He was forwarded from Baselisahi Police Station, whereas his co-brother-in-law and his friend were let off. When he was taken to Baselisahi Police Station, he had seen Rupa @ Snehalata Pradhan at the Police Station.

17. The witness, Sri Litan Behera, did not disclose anything about the petitioner's wife, but he had stated that he was also taken to Baselisahi Police Station and thereafter, on the next morning, he was taken to Satyabadi Police Station. This statement clearly implies that Litan Behera was detained by Baselisahi Police Station on 31.10.2020.

18. Sri Jibanananda Jena, Inspector, who has been accused of causing unlawful detention and unleashing torture, has stated that he was working in Baselisahi Police Station from 15.08.2019 to 07.12.2020. But he is not aware of any Rupa @ Snehalata Pradhan being detained at Baselisahi Police Station during his tenure. He has flatly denied that neither did he go for conducting raid nor did he pick up Rupa @ Snehalata Pradhan on 10.10.2020 from her house at Khurda town. He had never detained Rupa @ Snehalata Pradhan from her house at Khurda town or detained her for 20 days in Baselisahi Police Station.

19. Sri Devi Prasad Patra, the then IIC of Satyabadi Police Station had narrated about the detention of the wife of the petitioner in connection with possession of brown sugar during patrolling on Bhubaneswar-Puri National Highway and the seizure of narcotic substance from their possession.

20. Sri Basanta Jena, S.I. of Police (retd.) was leading the said evening patrol. He corroborated the statement of Sri Devi Prasad Patra, the then IIC.

21. Two independent witnesses as named before were the seizure witnesses and therefore, they had no occasion to know what happened between 10.10.2020 to 31.10.2020.

22. According to the Inspector General of Police, Central Range, Cuttack, there is no evidence except the statements of three witnesses that Rupa @ Snehalata Pradhan was detained in Baselisahi Police Station. But he did not give any reason why their statements have been discarded.

23. On the basis of the statements of two seizure witnesses, the Inspector General of Police, Central Range, Cuttack, has come to an inference that the wife of the petitioner was caught red-handed in presence of the said two independent witnesses. Hence, the version of those three witnesses that she was under detention in the Baselisahi Police Station is a figment of imagination. Moreover, there is no technical evidence or the Station Diary Entry as regards the detention of the wife of the petitioner in the Baselisahi Police Station during the period from 10.10.2020 to 30.10.2020. Hence, it has been observed that the allegations are bound to fall through in absence of clinching evidence.

24. In response to the said report, the petitioner reiterated their version and criticized the report for ignoring the statement of Sri Purna Chandra Nayak @ Sapa. Sri Purna Chandra Nayak @ Sapa has categorically stated that he saw Rupa @ Snehalata Pradhan at Baselisahi Police Station. So far as two independent witnesses are concerned, the petitioner has stated that those witnesses namely Makunda Mohapatra and Prahallad Nayak gave their consent to accompany the raiding party after being briefed about the information. There had been no attempt from the Inspector General of Police, Central Range, Cuttack to verify whether those persons were at all at the place from where Rupa @ Snehalata Pradhan was arrested by using the techno-scientific inputs. There had been lot of CCTV cameras around, but no input has been collected from those CCTV cameras. In the additional reply, filed by the petitioner on 16.11.2022, it has been questioned why the Inspector General of Police, Central Range, Cuttack did not feel it necessary to ascertain what happened to Rupa @ Snehalata Pradhan after 10.10.2020 till 31.10.2020. The reference in this regard was specific. Strangely, the Superintendents of Police, Puri & Khurda were not examined. Such slip-shod inquiry does not serve the interest of fair inquiry.

25. It has been stated by the petitioner that the Inspector General of Police, Central Range, Cuttack did not give due importance to the statements of those witnesses who corroborated the case of the petitioner and as a result of which, the finding as returned by the Inspector General of Police, Central Range, Cuttack turns out to be perverse for non-consideration of the material records. Even, the niece of the wife of the petitioner was not examined, though it had been categorically stated that Rupa @ Snehalata Pradhan paid the IIC, Baselisahi Police Station, a sum of Rs.4,00,000/- through her niece namely Sweety @ Madhusmita Behera.

We have referred the part of the response for demonstrating how the inquiry report has been prepared.

26. It has been further stated that the CCTV cameras in the Police Station were not installed, complying the direction of the apex court in ***Shafi Mohammad vs. State of Himachal Pradesh: Judgment dated 03.04.2018***. The entire approach of the Inspector General of Police, Central Range, Cuttack is lost in protecting the incalcitrant or the image of the police force.

27. A further reply has been filed by the Inspector General of Police, Central Range, Cuttack. In para-6 of the said reply, it has been stated by the Inspector General of Police, Central Range, Cuttack that during examination, Rupa @ Snehalata Pradhan, had stated to have been beaten up by the police at Baselisahi Police Station. But she did not disclose anything about her medical examination by the Medical Officer, District Jail, Puri. She has not complained about any illtreatment by the police while she was forwarded to the Sessions Judgecum-Special Judge, Puri and then it has been stated that "*her treatment while she was in jail, is not relevant and need not be considered.*" It will unfold that the said observation is unwarranted and unacceptable.

28. It has been further observed that the report of the Medical Officer, District Jail, Puri dated 05.11.2020 reveals that Rupa @ Snehalata Pradhan was examined by the Medical Officer of the District Jail, Puri in pursuance of the letter No.698, dated 04.11.2020. One old injury on her right buttock suspected to have been caused by multiple strokes by hard and blunt object was found by the Medical Officer and opined that the age of the injury is about a fortnight. According to the Inspector General of Police, Central Range, Cuttack, since Rupa @ Snehalata Pradhan was arrested on 31.10.2020, the said inquiry cannot be linked to her detention.

29. On the other hand, while she was medically examined by the Medical Officer, CHC, Sakhigopal after being arrested, no external injuries were detected. For better appreciation, a copy of the arrest memo, inspection memo, forwarding report and medical examination report have been enclosed with the said reply. There had been no attempt to relate the inquiry with the illegal detention since 10.10.2020.

30. Sri Purna Chandra Nayak has stated that he could not recollect the date when he was detained in Baselisahi Police Station, but clearly remembered that he saw Rupa @ Snehalata Pradhan in that Police Station.

31. It has been asserted by the Inspector General of Police, Central Range, Cuttack that without delving into the merits of Satyabadi P.S. Case No.364 of 2020, inquiry was conducted about the alleged illegal detention of Rupa @ Snehalata Pradhan in the police custody from 10.10.2020 to 30.10.2020.

32. It has been averred that the CCTV footage are automatically deleted after 15 days, as the maximum storage capacity is for 15 days. Those CCTVs, installed around/in the Police Station building were of no help. But there is no statement whether the Inspector General of Police, Central Range, Cuttack had made any initiative to check up whether any material can still be retrieved from the CCTV cameras.

33. We have thoroughly examined the records as produced with the affidavits.

34. Mr. R.R. Ray, learned counsel has urged this Court to discard the report of the Inspector General of Police, Central Range, Cuttack as, it is apparent on the face of the records, that he did not carry out the investigation fairly. This observation that the injury report signed by the Medical Officer, CHC, Sakhigopal goes to show that no external injury was detected. But it is not very clear whether the procedure as laid down under Section-53(2) of the Cr.P.C. was followed. If Rupa @ Snehalata Pradhan was examined properly, the old injury as detected by the Medical Officer of the District Jail could not have escaped the notice.

35. Mr. Ray, learned counsel has referred to the medical report dated 05.11.2022 as furnished by the Medical Officer, District Jail, Puri in which he opined as follows :

> *"Our female ward inmate Snehalata sustained severe bruises in her right buttock on an area 6 inch X 7 inch caused by multiple strokes by hard and long object or hard objects, the epidermis is damaged and the skin became gangrenous & getting peeled out gradually, new skin to take time, cover up started in peeled up area. Age of injury about a fortnight-15 days. Simple in nature but may take time to heal up or may need skin grafting surgery."*

The certified copy of the injury report is available at Flag-B of the records. This report debunks the slip-shod report of the Inspector General of Police, Central Range, Cuttack.

36. Mr. Nayak, learned Addl. Government Advocate has appeared for the opposite parties and submitted that there is no material of worth on the basis of which the allegation as made by the petitioner and his wife can be held established. The inquiry report as submitted by the Inspector General of Police, Central Range, Cuttack has clearly opined that the petitioner's wife was never detained in the Baselisahi Police Station and there is no question of her being assaulted inside the Police Station.These allegations according to Mr. Nayak, learned Addl. Government Advocate has been made to exert pressure on the police.

37. Mr. Nayak, learned Addl. Government Advocate has further stated that the petitioner's wife was caught red- handed with the narcotic materials and as such, inference as drawn is bonafide and cannot be doubted.

38. That apart, Mr. Naik, learned Addl. Government Advocate has submitted that it is difficult to accept that the family members like the petitioner, who is the husband of Rupa @ Snehalata Pradhan could not take up their grievances for a period which is more than a fortnight. They could have knocked the door of the justice. According to Mr. Nayak, learned Addl. Government Advocate, no adverse inference against the opposite parties No.3 & 5 can be drawn.

39. In the turn of events, this Court cannot issue any writ of Habeas Corpus as now the petitioner's wife is under custody as per the order of the Court for her being implicated in the Satyabadi Police Station Case No.364 of 2020. Hence, the prayer for issuance of writ of Habeas Corpus stands dismissed, but the ancillary facts that have emerged cannot be overlooked by us.

40. Before the writ petition was filed, the IIC, Baselisahi Police Station and the Superintendent of Police, Puri were transferred. There were serious allegations including custodial violence and custodial death against them. Even the Inspector General of Police, Central Range, Cuttack did not answer the specific reference made by this Court on what had happened to Rupa @ Snehalata Pradhan after 10.10.2020 till 31.10.2020 and the same was left unanswered in the inquiry report. There had been denial on the basis of records.

41. From the evidence as led from the side of the petitioner, it would be apparent that the wife of the petitioner namely Rupa @ Snehalata Pradhan was

illegally detained in the Baselisahi Police Station for the period from 10.10.2020. The medical report as referred above, clearly indicates that the wife of the petitioner was subjected to physical assault on her buttock. Those cannot be self-inflicted. The evidence of the Medical Officer in the jail cannot be brushed aside. Moreover, it corroborates the version of the petitioner's wife. The date of assault as projected by the Doctor tallies with the statement of the wife of the petitioner, the petitioner and Sri Purna Chandra Nayak. But that aspect of the matter was casually dealt by the Inspector General of Police, Central Range, Cuttack. In a case of custodial torture, a scratch of evidence should embolden the Court to come to an inference when there is silence and no explanation.

42. That apart, it has been stated by Mr. Ray, learned counsel that the inquiry has been conducted after two years of the occurrence. There has been change in the circumstances and the persons who were posted at the Police Station, most of them were transferred. No efforts have been made to examine them. If they were examined, they could have revealed relevant facts relating to the detention of the wife of the petitioner or torture upon her. Even the incumbent IIC of Baselisahi Police Station expressed ignorance in respect of the detention of the petitioner's wife. It is like denial for defence. It has been stated by Mr. Ray, learned counsel while making the closing statement, that the injury sustained by the wife of the petitioner speaks of the brutality of the inhuman torture by the Police.

43. We have taken the pieces of the materials that have surfaced in the inquiry and reflected in the report of the Inspector General of Police, Central Range, Cuttack, collating with other records including the medical records and we are of the view that the statement of the wife of the petitioner, the petitioner and Sri Purna Chandra Nayak can be trusted for drawing inference about the detention of the petitioner's wife in the Baselisahi Police Station. The Inspector General of Police, Central Range, Cuttack has not given any answer to our query that what happened to the petitioner's wife for the period from 10.10.2020 to 30.10.2020. It means the Inspector General of Police, Central Range, Cuttack had totally believed the then IIC of Baselisahi Police Station and failed to take any note of the injury on the person of the petitioner's wife.

44. Moreover, explanation as given in the report by the Inspector General of Police, Central Range, Cuttack fails to shed light on the truth. We have sifted the materials and recorded our observation.

45. We are not inclined to accept the report of the Inspector General of Police, Central Range, Cuttack in toto, but we have utilized the materials for verification of the rival version.

46. We are of the considered view that the wife of the petitioner was detained by the opposite party No.5 at the Baselisahi Police Station. She was beaten by the police causing serious injuries on the right buttock.

47. It remains still a conundrum that the petitioner’s wife was examined after her arrest on 31.10.2020, but she did not bear any marks of injury. How old injuries were found in a gangrenous state on the right buttock of the wife of the petitioner on the subsequent medical examination. There is no answer in the report. Silence is more eloquent.

48. The medical examination was carried out on 04.11.2020 and it has been stated after examination, the age of the injuries was about 15 days, which come very close to 10.10.2020. The injury report dated 05.11.2020 is available with the record. The report of the Inspector General of Police, Central Range, Cuttack does not explain this facet.

49. When any occurrence takes place within the four walls of the Police Station, it is very difficult to get any witness, even of the circumstantial for the known reasons. But here, we do not find any reason to disbelieve the petitioner, the petitioner’s wife, Sri Purna Chandra Nayak and the medical report. The petitioner tried to knock the door of justice, without delay. It answers the question relating to the post-occurrence response. Those indicate that the petitioner’s wife was assaulted by the police inside the Baselisahi Police Station on or after 10.10.2020 and she had received the injuries which are reflected in the medical examination report dated 05.10.2020.

50. The Medical Officer’s opinion is very distinct and reliable. As such, we hold that the petitioner’s wife namely Rupa @ Snehalata Pradhan was subjected to illegal detention and she had suffered physical torture inside the Baselisahi Police Station.

51. Having observed thus, we direct the Director General of Police, Odisha, Cuttack to start a departmental enquiry against the then Inspector in charge of Baselisahi Police Station, who was posted during the period from 10.10.2020 to 30.10.2020. On the basis of the outcome, the Director General of Police, Odisha shall pass the appropriate order. Such inquiry shall be completed within a period of six months from the date of receiving a copy of this order.

52. We would further direct the Director General of Police, Odisha to strictly implement the National Human Rights Commission (NHRC)’s recommendation on custodial justice. The Odisha Police shall practise the recommendation of the NHRC which reads *inter alia* as under:

> “There should be zero tolerance for violation of human rights in custody, in cases where misconduct or guilt of police personnel is established, it should be ensured that penalties imposed should be commensurate with the misconduct/guilt.”

53. In addition, we direct the opposite parties to pay a sum of Rs.1,00,000/- (Rupees one lakh) to the wife of the petitioner namely Rupa @ Snehalata Pradhan within a period of three months from the date when the petitioner will submit a copy of this order, as damages that she has suffered for the physical assault occurred in the Police Station.

54. In the above terms, this writ petition stands allowed.

55. No further orders for costs.

56. A free copy of this Judgment be supplied to the counsel for the petitioner.

57. The Registry is directed to send a copy of this order to the Director General of Police, Odisha.

—— o ——

2023 (III) ILR – CUT- 334

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

CRLA NO. 754 OF 2011

BHAGIRATHI @ TIMA BIBHAR ……….Appellant

-V-

STATE OF ODISHA ……….Respondent

INDIAN PENAL CODE, 1860 – Sections 302,304 (II) – From the nature of injuries, it appears that there was no intention to kill the deceased, but to cause pain – There were assaults in quick succession – Effect of – The conviction under section 302 of the IPC is liable to be interfered with and accordingly it is interfered and set-aside – In absence of intention to murder, the Appellant convicted U/s. 304 part-(II) of the IPC.
(Para 19-20)

Case Law Relied on and Referred to :-

1. AIR 2004 SC 1264 : State of Rajasthan Vs. Dhool Singh.

For Appellant : Mr. Bhabani Sankar Das, & Ms. Debaki Marandi

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

JUDGMENT Date of Judgment :04.09.2023

S.TALAPATRA,C.J.

1. Heard Mr. Bhabani Sankar Das, learned counsel appearing for the Appellant and also Mr. J. Katikia, learned Additional Government Advocate for the State-Respondent.

2. The Appellant, by means of this appeal, questions the legality of the judgment dated 26th November, 2011 passed by the Additional Sessions Judge (FTC), Bargarh in C.T. Case No.191/36 of 2009-10 (corresponding to G.R. Case No.316 of 2009 of the court of SDJM, Bargarh and Bheden PS Case No.28 of 2009).

3. By the said judgment, the Appellant has been convicted under Section 302 of the Indian Penal Code, 1860 (IPC) and acquitted from the charge of Section 498-A of the IPC. As consequence upon the conviction, the Appellant has been sentenced to suffer the imprisonment for life with fine of Rs.5000/- with default rigorous imprisonment (RI) of six months.

4. Briefly stated, the prosecution case is that one Jabdu Dip (P.W.17) of village Telipali under Binka PS lodged a written report before the Officer-in-Charge, Bheden PS stating that his daughter, namely, Pramila @ Binodini Bibhar (deceased) was severely beaten by her husband Bhagirathi @ Tima Bibhar, the Appellant herein. On 9th May, 2009 at about 11 PM through one Ananda Bhesra (P.W.18), he came to know about the said occurrence. Without wasting any time, he tried to contact the Appellant. His daughter succumbed to the injuries. The Informant visited the place of occurrence with his son, Upendra Dip (P.W.19) and co-villager Ananda Bhesra. On their return from the place of occurrence, he filed a complaint to the Police on 10th May, 2009. It has been categorically stated by the Informant that he found bleeding injuries on various parts of the body of the deceased. The Informant suspected that, that was a case of murder committed by the Appellant.

5. On the basis of such written report, Bheden PS Case No.28 of 2009 was registered under Section 302 of the IPC. On completion of investigation, charge sheet was filed against the Appellant under Sections 498-A and 302 of the IPC and the case was committed to the court of the Sessions Judge, Bargarh and subsequently, to the court of the Additional Sessions Judge (FTC), Bargarh for trial. The Additional Sessions Judge (FTC), Bargarh (hereinafter referred to as “the Trial Judge”) framed the charge against the Appellant on 27th July, 2010 under Section 302 of the IPC for committing murder of his wife Pramila @ Binodini Bibhar and also under Section 498- A of the IPC for causing cruelty by wilful conduct and causing grave injury or danger to life.

6. The charge was totally denied by the Appellant. In order to substantiate the charge, the prosecution adduced 21 witnesses and placed few documents such as inquest report, first information report, post-mortem examination report and the chemical examination report in the evidence. After appreciation of the evidence, the Trial Judge returned the finding of conviction under Section 302 of the IPC and did not find any evidence in support of the charge under Section 498-A of the IPC. The Trial Judge has observed that the evidence of PWs 9, 10 and 13 are cohesive and on the basis of the said evidence, it can be deduced that the Appellant has caused the death of the deceased by assault. Such death amounts to murder within the meaning of Section 300 of the IPC. Even the Trial Judge has appreciated the defence evidence. The defence plea, as it evinces from the records, is that the deceased was leading an adulterous life and as the Appellant had witnessed her in a comprising position with the other person whose name has been disclosed by P.W.21 and he got angry and assaulted the deceased mindlessly. The Trial Judge, however, has observed in the impugned judgment on appreciation of evidence as follows:

> "25. In the facts and circumstances of the case, it is clearly held that the accused caused the death of the deceased by his act with the intention of causing death, but it was not done in the heat of passion or under immediate impulses caused by grave and sudden provocation."

7. Mr. Das, learned counsel for the Appellant has submitted that the said inference is the outcome of inappropriate reading of the evidence. To buttress his contention, he has referred, in particular, the evidence of P.W.9-Sandhya Suna, who testified that on the day of occurrence, they saw the Appellant assaulting his wife, Pramila by a stick and an iron pipe. They tried to pacify the situation, but the Appellant did not listen to them and they left the place of occurrence. At about 11.30 PM, as stated by P.W.9, they came to a nearby place where they found the Appellant and at that time, the Appellant disclosed that he had killed his wife Pramila. Then, they proceeded to the place of occurrence and found Pramila (deceased) who was lying dead in the house of the Appellant with bleeding injuries on her head. During the cross-examination, her statement could not be dented and no material could be extracted which can either destroy the prosecution case or strongly support the defence case. P.W.10-Bedamati Suna has stated almost in the similar tune that of P.W.9. But, P.W.10 has revealed something more. She has stated that the Police was informed by them. She has also stated in the trial that she saw the beating along with P.W.9. They had requested the Appellant not to assault the deceased. They have also given description of the occurrence which took place, in their presence.

8. P.W.13-Dr. Kamalini Satpathy was the Assistant Surgeon in the DHH, Bargarh and on 10th May 2009, she was requisitioned to carry out the post-mortem examination over the dead body of the deceased. In the course of the post-mortem examination, she had observed as follows:

> "The deceased is a female of average build, dark complexion, rigor mortis over the left forelimbs, eyes have closed, mouth has closed, multiple bruise present over the body and over the scalp and upper part of the vagina."

9. She has separately given the list of injuries she found at the time of post-mortem examination, which are as follows:

> " (i) Bruise 2" x 2" over the left eye.
>
> (ii) Bruise 1" x ½" above the left eyebrow on decession of clots present below the skin and substantial tissues.
>
> (iii) Bruise 2" x 2" of the left side of the left hand.
>
> (iv) Bruise 3" x 1" irregular inside over the right upper part of abdomen and right hip joint.
>
> (v) Bruise 2" x 1" present on the right upper part of the thigh including the right hip joint.
>
> (vi) Bruise 3" x ½" and left side of the back extending up to the back of neck.
>
> (vii) Lacerated injury 2" x ¾ the muscle deep present in the external surface of the left forearm.

> (viii) Lacerated injuries two in number place side by side one cm. apart from each other. The size of injury upper part of vagina bleeding present.
>
> (ix) Lacerated injury 2cm x ½" into the bone deep present over the right tibia under tibia bone fracture.
>
> (x) Lacerated injury 2" x 1" into the brain deep present over left occipital and present on decession the under occipital and parietal fracture. The brain matter grossly damaged in the fracture side, present blood in the substance of brain. All the above noted injuries are ante-mortem in nature on further decession of the body the brain lacerated into lacerated size both chamber of heart empty, lungs impact. Stomach containing little amount of semi digested food material. Kidneys pale and intact liver pale intact, spine intact, uture normal size, and immoral normal fitness, all the above feature noted are ante mortem in nature.

10. Thereafter, the postmortem examination report has been filed which is marked as Ext.3. She has clearly stated that due to shock caused by haemorrhage and injuries on the vital organs like brain, the death has occurred. From the side of the defence, no cross examination has been carried out.

11. Mr. Das, learned counsel for the Appellant has persuaded us to see the testimony of P.W.21-Basudev Chhatria, who investigated the case. In his testimony P.W.21 has stated *inter alia* as follows:

> "19. The reason of murder of the deceased was due to her illicit relationship with one Manbodh Muguri of village-Acchandapali and she was also found in compromising position with that person by the accused. I have filed a P.R. under Section 493 of IPC against that Manbodh Muguri."

12. Mr. Das, learned counsel for the Appellant has made a serious attempt to highlight the fact that since the deceased was living an adulterous life and she was found in compromising position, that angered the Appellant and out of that uncontrolled passion,he had mindlessly beaten up his wife. Ultimately, those injuries were proved to be fatal for the life of his wife.According to Mr. Das, learned counsel for the Appellant the act of the Appellant does not constitute murder, but it may be brought under the category of culpable homicide not amounting to murder. According to Mr. Das, learned counsel for the Appellant, the acts of the Appellant can be brought under Exception 4 of Section 300 of the IPC. Exception 4 provides that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.When this Court queried Mr. Das, learned counsel for the Appellant regarding the injury at the parietal region and on vagina, he has immediately stated that the Appellant was mindlessly beating without looking into the parts of the body of the deceased and there was no intention which is apparent from his conduct, to cause murder of his wife. Absence of intention would bring these acts of the Appellants under the category of homicide without being murder. As such, Mr. Das, learned counsel for the Appellant has submitted that the conviction under Section 302 of the IPC be

interfered with and the Appellant be convicted for committing culpable homicide not amounting to murder.

13. In response, Mr. J. Katikia, learned Additional Government Advocate for the State-Respondent has clearly stated that there is no doubt about the Appellant's involvement in beating of his wife. He assaulted her in presence of P.Ws.9 and 10. He had beaten his wife with lathi and iron rod. True it is that P.Ws.9 and 10 have categorically stated that the deceased and the Appellant was quarreling and the Appellant was beating the deceased by iron rod and a lathi. Both the weapons were seized during the investigation by P.W.21. Having referred to the testimony of P.W.13, the post-mortem doctor, Mr. Katikia, learned Additional Government Advocate has stated that the said acts of the Appellant cannot be brought under Exception-4, inasmuch as, even there may be quarrel, but the Appellant acted in a cruel and unusual manner.

14. We have perused the testimonies of the witnesses particularly whose testimonies were relied for returning the finding of conviction. The other witnesses who were examined, are the post occurrence witnesses or the formal witnesses or the witnesses of the seizure of the iron pipe or stick (lathi) which were used in the assault. As such, we have not discussed their testimonies in detail. The weapons were also recovered from the accused, but as the defence did not take any plea to question the evidence on assault, we have not dilated the analysis further. There is no challenge against the prosecution's plea that what were seized are the weapons of offence, and used by the Appellant. The extra judicial confession that was made before P.Ws.9 and 10 becomes admissible as the Appellant made such extra judicial confession voluntarily and without any pressure or coercion.

15. Thus, there is no doubt that the Appellant had assaulted the deceased and there were ten injuries spread over her body as it appears from the postmortem examination report. According to the doctor, one injury that was found in the left occipital region caused decession and fracture.

16. Having appreciated the evidence, the nature of injuries and the testimonies of P.Ws.9 and 10 in particular, we are of the view that the deceased and the Appellant were engaged in a quarrel over what issue that has not been established by the prosecution, but from the testimony of P.W.21, which is otherwise inadmissible, we may get some light. There is no direct evidence on the adulterous life of the deceased. But, from the evidence that has surfaced, it can be gathered without any amount of suspicion that the assault has taken place while both the deceased and the Appellant were engaged in a quarrel. Despite intervention from P.Ws.9 and 10, they were not dissuaded.

17. We have also taken note of the submission made by Mr. J. Katikia, learned Additional Government Advocate that there was unusual cruel conduct of the Appellant. It is very difficult to infer specifically whether the acts of the Appellant

were unusually cruel or not. But, from the nature of the injuries, it appears that there was no plan to kill the deceased, but to cause pain. There were assaults in quick succession. As such, it is very difficult to come to an inference of presence of intention to kill or of unusual cruel conduct. Thus, the benefit should go to the Appellant.

18. It is then stated by Mr. Das, learned counsel for the Appellant that since 11th May 2009, the Appellant is behind the bar. Since we have observed that for absence of intention to kill, the said culpable homicide cannot be treated as murder, at the same time, there are adequate materials to convict the Appellant for committing the culpable homicide not amounting to murder. The culpable homicide amounts to murder when from the nature of injuries, the intention to kill can be established. It is well established principle in the criminal jurisprudence that the number of injuries is irrelevant. It is not always the determining factor in ascertaining the intention. It is the nature of injury and the part of body where those are inflicted. The weapon used in causing such injury is the indicator to the fact whether the accused caused the death of the deceased with an intention of causing death or not (***State of Rajasthan v. Dhool Singh: AIR 2004 SC 1264).***

19. We have seen that there were multiple injuries on the body of the deceased. One injury was fatal and cause of death. The injury on the occipital region has become fatal. But, on overall appreciation of nature of the assault and the pattern, we are of the view that intention to kill cannot be inferred. Therefore, the conviction under Section 302 of the IPC is liable to be interfered with and accordingly, it is interfered and set aside. But, the materials are in abundance to convict the Appellant under Section 304 of the IPC for committing culpable homicide not amounting to murder. The Appellant deserves to be convicted under Section 304 Part-II as intention to kill could not be proved by the prosecution. In this regard, we must observe that even the episode of seeing the deceased in a compromising situation has not been proved by the prosecution to show that the same was the reason to cause murder of the Appellant's wife.

20. In absence of intention to murder, we convict the Appellant under Section 304 Part-II of the IPC without framing any formal charge taking recourse to Section 222 of the Cr.P.C.. Consequently, the Appellant is sentenced to suffer ten years RI with fine of Rs.5000/- and in default of payment of fine, the Appellant shall further suffer another one year imprisonment.

21. As it appears from the records, the Appellant has already served out more than fourteen years of imprisonment in the meanwhile; we direct that the Appellant be released forthwith, if not wanted in any other case. In the result, the appeal stands partly allowed.

—— o ——

2023 (III) ILR – CUT - 340

Dr. B.R.SARANGI, J & MURAHARI SRI RAMAN, J.

W.P(C) NO. 32684 OF 2020

UNION OF INDIA & ORS. ……..Petitioners

-V-

SARAT CHANDRA KHUNTIA & ANR. ………Opp. Parties

CENTRAL CIVIL SERVICE PENSION RULE, 1972 – Rule 23 r/w Rule 10(6),(7)CCS of (CCA) Rule, 1965 and Sub Rule (5) & (7) of Fundamental Rules – The delinquent officer was placed under suspension – As per Rule 10(6) and (7) of 1965 Rule the order of suspension is required to be reviewed within 90 days – Suspension order was not extended after review – The suspension order passed by the authority merged with the final order of compulsory retirement – Whether the suspension period will be treated as qualifying service for the purpose of pension and pensionary benefit? – Held, Yes. (Para 12-15)

Case Laws Relied on and Referred to :-

1. AIR 1955 SC 600 : Om Prokash Gupta Vs. State of U.P.
2. AIR 1974 SC 1281: (1974) 4 SCC 396 : H.L. Mehra Vs. Union of India.

For Petitioners : Mr. Shasi Bhusan Jena

For Opp. Parties : M/s. Nirmal Ranjan Routray,J. Pradhan, T.K. Choudhury & S.K. Mohanty

JUDGMENT Date of Hearing: 11.07.2023: Date of Judgment:13.07.2023

Dr. B.R.SARANGI, J.

1. The Union of India and its functionaries, by means of this writ petition, seek to quash the order dated 20.01.2020 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 17 of 2011, directing the present petitioners to treat the suspension period of opposite party no.1 from 03.04.2004 till the date of compulsory retirement from service as qualifying service for the purpose of pension and pensionary benefits and to grant him all consequential benefits including arrear differential pension and pensionary benefits as per provisions of law within three months, if the same benefits have not already been extended to him.

2. The factual matrix of the case, in brief, is that opposite party no.1 was appointed as supporting staff (Grade-I) in the office of the petitioner no.3 w.e.f. 07.04.1983 and subsequently promoted as supporting staff (Grade-II) w.e.f. 26.08.1996. While opposite party no.1 was continuing in service, he indulged in union activities and challenged the action of petitioner no.3, who, on contemplation of disciplinary proceeding, placed opposite party no.1 under suspension vide order dated 07.07.2003. A charge sheet was issued, which was challenged by opposite

party no.1 in O.A. No. 136 of 2004 before the Central Administrative Tribunal, Cuttack Bench, Cuttack. Subsequently, since there were some lacuna, petitioner no.3 withdrew the charge sheet on 28.05.2004 with a liberty to issue fresh charge sheet. Thereafter, charge sheet was issued against opposite party no.1 on 21.07.2004. The said charge sheet was challenged by opposite party no.1 in O.A. No. 114 of 2005, which was dismissed by the Tribunal on 06.02.2005. The said order of the Tribunal was challenged by opposite party no.1 before this Court in W.P.(C) No. 343 of 2006, where an interim order was passed on 24.01.2006. Subsequently, after appearance of the petitioners, this Court, vide order dated 06.04.2009,vacated the interim order dated 24.01.2006. The petitioners were given liberty to proceed with the disciplinary proceeding and accordingly the petitioners proceeded with the disciplinary proceeding and concluded the same by passing the final order dated 16.04.2009 against opposite party no.1 awarding major penalty of compulsory retirement from service with immediate effect.

2.1 Opposite party no.1 filed another Original Application before the Central Administrative Tribunal, Cuttack Bench, Cuttack challenging the order of suspension, which was passed on 07.07.2003, on the basis of the information supplied to him under the Right to Information Act, 2005 on 04.10.2010 pertaining to periodical review of the order of suspension.

2.2 Opposite party no.1, being aware of imposition of major punishment of compulsory retirement, submitted a representation to petitioner no.3 on 25.10.2010 with a prayer for deemed duty of reinstatement in service after compulsory retirement. But petitioner no.3 did not pass any order on the representation filed by opposite party no.1. Thereafter, opposite party no.1 filed O.A. No. 17 of 2011 challenging the suspension order as well as M.A. No. 18 of 2011 for condonation of delay in filing the Original Application.

2.3 The petitioners filed objection to the condonation of delay and also filed counter to O.A. No. 17 of 2011. The matter was listed on 05.09.2017. On that date, the counsel for opposite party no.1 was absent on repeated calls, for which the Tribunal dismissed the case for non-prosecution. Thereafter, opposite party no.1 filed M.A. No. 572 of 2017 for restoration of O.A. No. 17 of 2011 as well as MA for condonation of delay. Since MA was filed without affidavit, the Tribunal dismissed the same. Therefore, opposite party no.1 filed another MA with affidavit. Thereafter, the matter was heard on 06.01.2020 and order was pronounced on 20.01.2020, allowing the Original Application and directing the petitioners to treat the suspension period of opposite party no.1 from 03.04.2004 till the date of compulsory retirement from service as qualifying service for the purpose of pension. Hence, this writ petition.

3. Mr. S.B. Jena, learned counsel appearing for the petitioner vehemently contended that the Tribunal has committed an error while passing the order impugned and allowed the Original Application by taking the suspension period as

qualifying service from the date of suspension till the date of compulsory retirement, and according to him the Tribunal ought not have directed for extension of the said benefit to opposite party no.1. He further contended that even though petitioners had raised preliminary objection regarding maintainability of the Original Application before the Tribunal and also raised the objection that the claim made by opposite party no.1 is barred by limitation, but the Tribunal condoned the delay on the ground that in the punishment order it has not been mentioned as to how the suspension period was treated and the parties have not placed any order on any pleading as required under Sub-rule (5) of FR 54(B) and allowed the MA for condonation of delay. It was also contended that after award of major punishment of compulsory retirement, opposite party no.1 had challenged the suspension order dated 07.07.2003 with a prayer for deemed reinstatement and the Tribunal had not whispered a single word with regard to the contention raised by the petitioners in the counter at paragraph-1. Thereby, it was contended that grounds taken by the Tribunal for allowing the Original Application filed by opposite party no.1 is, as per Sub-rule (5) of FR 54-B, whether it was reviewed or not and in the punishment order it has not mentioned as to how the suspension period was treated, but, fact remains, from Annexure-3 it is revealed that the order of suspension was reviewed from time to time and the review was also made for 9th time on 28.06.2008 and it was extended in favour of opposite party no.1. But the learned Tribunal, without appreciating the same, passed the impugned order, which is not sustainable in the eye of law.

4. Per contra, Mr. N.R. Routray, learned counsel appearing for opposite party no.1 contended that when the order of compulsory retirement was passed, the authorities have not taken into consideration as to how the period is to be treated. In absence of any specific order with regard to the manner of treating the suspension period, the order of compulsory retirement passed by the petitioners cannot be sustained in the eye of law. It is further contended that as per Rule-10(6) and (7) of CCS (CCA) Rules, 1965, an order of suspension is required to be reviewed within 90 days and, as per Office Memorandum dated 19.03.2004, all pending cases of suspension were required to be reviewed on or before 02.04.2004. The review of the suspension order was conducted on 30.08.2004, for which continuation of his suspension from 03.04.2004 onwards was illegal and he should be deemed to be reinstated in service with effect from 03.04.2004 with all consequential service benefits. It was also contended that in the Original Application opposite party no.1 had filed MA No. 18 of 2011 for condonation of delay in filing the O.A. on the ground that the fact of non-review of his case, as per the Office Memorandum dated 19.03.2004, came to his knowledge after he obtained information under the Right to Information Act, 2005 on 04.10.2010, after which he submitted the representation. Therefore, delay in filing the Original Application should have been condoned. Opposite party no.1 had also filed MA No. 295 of 2018 for amendment of the Original Application to quash the proceeding of the review committee dated 30.08.2004 and the said MA was pending. Therefore, the continuation of the order

of suspension from 03.04.2004 had been challenged and it was not necessary to challenge the proceedings of the review committee. Consequentially, MA No. 295 of 2018 was dismissed. Finally, on 06.01.2020, the OA as well as the MA for condoning the delay in filing the OA were heard together. Since the order of compulsory retirement had not indicated the position of the order of suspension and as such, no independent order had been passed as to how to treat the order of suspension period while passing major punishment of compulsory retirement, thereby, the Tribunal considered the same and passed the order impugned. Consequentially, the Tribunal has not committed any error apparent on the face of the record, so as to exercise the writ jurisdiction of this Court to interfere with the order so passed by the Tribunal.

5. This Court heard Mr. S.B. Jena, learned counsel appearing for the petitioners and Mr. N.R. Routray, learned counsel appearing for opposite party no.1 in hybrid mode and perused the records. 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. Before delving into the merits of the case, for a just and proper adjudication of the case Sub-rules (5) and (7) of Fundamental Rules (FR) 54-B are referred to:-

> *"(5) In case other than those falling under sub rules (2) and (3) the Government servant shall subject to the provisions of sub-rules (8) and (9) be paid such amount not being the whole of the pay and allowances to which he would have been entitled had he not been suspended, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any submitted by him in that connection within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice.*
>
> *xxx xxx xxx*
>
> *(7) In a case falling under sub-rule (5), the period of suspension shall not be treated as a period spent on duty unless the competent authority specifically directs that it shall be so treated for any specified purpose:*
>
> *Provided that if the Government servant so desires such authority may order that the period of suspension shall be converted into leave of any kind due and admissible to the Government servant.........."*

7. The Tribunal, while considering the pleadings of the parties, formulated two grounds, such as:-

> *(i) The applicant failed to raise the issue earlier when he had filed cases unsuccessfully challenging the suspension order and the punishment orders and hence, it is not open to raise the issue belatedly in this OA.*
>
> *(ii) The OA is barred by limitation in view of delay which has not been explained satisfactorily.*

While answering ground (i), the Tribunal extended the benefit in favour of opposite party no.1. Similarly, while answering ground (ii), the same was also decided in favour of opposite party no.1.

8. Taking into consideration the factual matrix, as delineated above, it is made clear that when the petitioner was placed under suspension, as per the provisions contained in sub-rules (6) and (7) of Rule 10 of the Central Civil Service (Classification, Control and Appeal) Rules, 1965, the order of suspension has to be reviewed before expiry of 90 days period. To substantiate such contention, the opposite party no.1, having received the information under the Right to Information Act,2005, stated that no order regarding review of his suspension was communicated to him and the matter came to his knowledge after receiving the information on 04.10.2010/21.10.2010 under the Right to Information Act, 2005, after which he submitted a representation on 25.10.2010 before the authorities.

9. But fact remains, while opposite party no.1 was under suspension, the punishment of compulsory retirement was imposed on him vide order dated 16.04.2009. The disciplinary authority had to pass an order as to how the period of suspension will be treated. Subrules (5) and (7) of the Fundamental Rules (FR) 54-B are applicable to the period of suspension, when a suspended government servant is punished in the disciplinary proceeding. Needless to say, the order of punishment of compulsory retirement was imposed, vide order dated 16.04.2009, in which nothing has been mentioned with regard to the manner of treating the suspension period. As per Sub-rule (5), the disciplinary authority should have passed the order as to how the suspension period was to be treated, but it was not done. The punishment order dated 16.04.2009 further implied that the suspension period cannot be treated as on duty, as per Sub-rule (7) of FR 54- B since no specific order to that effect was made by the competent authority. As a consequence thereof, opposite party no.1 could have challenged treatment of his suspension period, while challenging the punishment order, as both the issues were interlinked. But a solemn duty is cast on the competent authority to pass an order, either as a part of the punishment order or by a separate order about treatment of the suspension period as required under Subrule (5) of FR 54-B. But nothing has been placed on record to indicate as to why the order of punishment has not mentioned about the treatment of the suspension period, though as per Sub-rule (7) of FR 54-B, it is incompetent on the part of the competent authority to pass an order with regard to the suspension of opposite party no.1 while passing the order of punishment of compulsory retirement. The disciplinary authority could have passed an order under Sub-rule (5) of FR 54-B, which was necessary, since opposite party no.1's qualifying service for the purpose of pension/pensionary benefits depends on how the suspension period was treated.

10. At this stage, it is of relevance to have a glance on Rule 23 of the CCS (Pension) Rules, 1972, which reads as follows:-

> *"23.* ***Counting of periods of suspension****.- Time passed by a Government servant under suspension pending inquiry into conduct shall count as qualifying service where, on conclusion of such inquiry, he has been fully exonerated or the suspension is held to be wholly unjustified; in other cases, the period of suspension shall not count unless the authority competent to pass orders under the rule governing such cases expressly declares at the time that it shall count to such extent as the Competent Authority may declare."*

11. The above mentioned provision, on a careful reading, also requires the competent authority to pass an order as to what extent the suspension period would be counted for the purpose of qualifying service of opposite party no.1, on which the pension and pensionary benefits of opposite party no.1 would depend. To what extent the period of suspension has been considered for the purpose of pensionary benefits has not been furnished by either of the parties in the Original Application.

12. On general principles, an order of interim suspension will end with a final order made in the enquiry proceedings or the conclusion of the investigation or enquiry or trial in relation to the criminal offence pending which the order of suspension had been made.

In ***Om Prokash Gupta v. State of U.P., AIR 1955 SC 600***, the apex Court held, the order of suspension could only come to an end with an order replacing it. For example, if as a result of the enquiry an order of dismissal by way of penalty had been passed, the order of suspension lapsed with the passing of the order of dismissal.

In ***H.L. Mehra v. Union of India, AIR 1974 SC 1281: (1974) 4 SCC 396***, the apex Court held:-

> *"Now, when the order of dismissal is passed, the vinculum juris between the Government and the servant is dissolved: the relationship of master and servant between them is extinguished. Then the,order of suspension must a fortiori come to an end."*

13. In view of the above settled position of law, it is made clear that even though the interim suspension order passed by the authority merged with the final order of compulsory retirement, but no order has been passed with regard to treatment of the suspension period in the order of compulsory retirement. As a consequence thereof, the pensionary benefits of opposite party no.1 would be affected, depending on how his suspension period was to be treated. Therefore, the competent authority was required to pass an order regarding suspension period of opposite party no.1, which has not been done. Since no such order has been placed either before the Tribunal or before us by the parties in their pleadings as required under Sub-rule (5) of FR 54-B, the contention raised by the learned counsel for the petitioners, that opposite party no.1 did not raise this issue earlier, will not be helpful for the petitioners, in view of the aforesaid reasons. Therefore, this Court is of the considered view that since no order has been passed with regard to manner of treatment of the period of suspension, it would affect the pension and pensionary benefits under Rule 23 of CCS (Pension) Rules, 1972.

14. The stand of opposite party no.1 to treat him on duty after 02.04.2004, since the suspension order was not extended after review, as per Rule 10 (6) and (7) of the CCS(CCA) Rules, 1965 read with the Office Memorandum dated 19.03.2004, cannot be accepted in view of Sub-rule (7) of FR 54-B and since the punishment as per order dated 16.04.2009 was upheld by the Tribunal and the opposite party no.1 failed to raise the issue in earlier Original Application filed by him challenging the punishment order. Therefore, the claim for payment of full salary/increments during the said period of suspension treating it as on duty cannot be sustained. However, the claim for counting the above period for pension and pensionary benefits of opposite party no.1 certainly deserves consideration.

15. Accordingly, the direction given by the Tribunal to treat the suspension period of opposite party no.1 from 03.04.2004 till the date of compulsory retirement from service as qualifying service for the purpose of pension and pensionary benefits and to grant him all consequential benefits, including arrear differential pension and pensionary benefits, as per the provisions of law, cannot be said to be faulted with so as to cause an interference by this Court. Rather, there is ample force with regard to extension of such benefit to opposite party no.1. As a consequence thereof, this Court is not inclined to interfere with the order dated 20.01.2020 passed by the Central Administrative Tribunal in O.A. No. 17 of 2011 under Annexure-6, rather directs the petitioners to comply the same.

16. In the result, therefore, the writ petition stands dismissed. However, there shall be no order as to costs.

—— o ——

2023 (III) ILR – CUT -346

Dr. B. R. SARANGI, J & M.S. RAMAN, J.

W.P.(C) NO. 33871 OF 2022

M/s. ECOMETRIX CONSULTANTS PVT. LTD. & ANR. ....Petitioners
.V.
B.D.A, BHUBANESWAR & ORS. ....Opp. Parties

PRINCIPLE OF NATURAL JUSTICE – The authority black listed & banned the petitioner company for three years without issuing any show cause notice – Whether the impugned order is sustainable in the eyes of law? – Held, No – Since the impugned order has been passed without issuing any show cause notice and without giving any opportunity of hearing to the petitioner No.1 company, it amounts to violation of principle of natural justice and cannot be sustained in the eyes of law. (Para 8-34)

Case Laws Relied on and Referred to :-

1. (1975) 1 SCC 70: M/s Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Anr.
2. (1990) 3 SCC 752 : Mahabir Auto Stores & Ors. Vs. Indian Oil Corporation Ltd.
3. (2021) 1 SCC 804:AIR 2020 SC 5753 : Vetinda Pharmaceuticals Limited Vs. State of Uttar Pradesh & Anr.
4. (2014) 9 SCC 105:AIR 2014 SC 3371 : Gorkha Security Services Vs. Govt. of NCT of Delhi & Ors.
5. 1976 2 All ER 865 (HL) : Fairmount Investments Ltd. Vs. Secy. of State for Environment.
6. (1963) 2 SLL RT 66 at 102 : Ridge Vs. Baldwin.
7. (1958) All ER 579 : Byrne Vs. Kinematograph Renters Society Ltd.
8. (1949) 1 All ER 109 : Russel Vs. Duke of Norfolk.
9. (1993) 4 SCC 10 : AIR 1993 SC 2115 : Rattan Lal Sharma Vs. Managing Committee.
10. (1943) AC 627 : General Medical Council Vs. Spackman.
11. AIR 1978 SC 597 : (1978) 1 SCC 248 : Maneka Gandhi Vs. Union of India.
12. AIR 1981 SC 818 : Swadeshi Cotton Mills Vs.Union of India.
13. (1998) 8 SCC 194 : Basudeo Tiwary Vs. Sido Kanhu University & Ors.
14. (2008) 16 SCC 276 Nagarjuna Construction Company Limited Vs. Government of Andhra Pradesh.
15. AIR 2009 SC 2375 : Uma Nath Panday & Ors. Vs. State of U.P. & Ors.
16. AIR1978 SC 851 : (1978) 1 SCC 405 : Mohinder Singh Gill Vs. The Chief Election Commissioner.
17. AIR 1965 SC 1767: (1965) 3 SCR 218 : Bhagwan Vs. Ramchand.
18. AIR 1975 SC 1331: (1975)1 SCC 421 : Sukdev Singh Vs. Bhagatram.
19. (1989) 1 SCC 229 : Raghunath Thakur Vs. State of Bihar.
20. (2012) 11 SCC 257 : Patel Engineering Ltd. Vs. Union of India.

For Petitioners : Ms. Mamata Tripathy

For Opp. Parties : M/s. Sanjib Swain & A.K. Mishra.

JUDGMENT Date of Hearing: 04.08.2023 : Date of Judgment: 08.08.2023

Dr. B.R. SARANGI, J.

M/s Ecometrix Consultants Pvt. Ltd., a company registered under the Companies Act, 2013, as petitioner no.1, and the Manager (Finance) of the said company, as petitioner no.2, have filed this writ petition seeking to quash the letter dated 21.10.2022 under Annexure-5, by which the Letter of Award for selection of Survey Agency issued in favour of the petitioner no.1-company, vide letter dated 13.09.2022, has been cancelled/terminated, since petitioner no.1-company failed to fulfill the terms and conditions, as mentioned in sl. nos.3 and 4 of the above Letter of Award along with the conditions stipulated in Clause-13 of the Request for Proposal (RFP), within stipulated date and time, and the petitioner no.1-company has been blacklisted and banned for at least 3 years to be employed anywhere in the authority works with a warning not to submit any proposal, as Survey Agency, with Bubaneswar Development Authority (BDA) in future, otherwise the same would be rejected.

2. The factual matrix of the case, in a nutshell, is that petitioner no.1, as a consulting company, was established in the year 2015 for providing professional services in GIS, ITES, Water, Environmental and Social Sectors and, as such, petitioner no.1-company has adequate knowledge and experience in providing the same. Therefore, it is empanelled with Odisha Remote Sensing Space Application Centre (ORSAC) and Maharastra Remote Sensing Space Application Centre (MRSAC) along with other Government bodies, such as, Town and Country Planning Authority, Rural Water Supply and Sanitation Organization, Odisha Public Health Engineering Department, Odisha, Bhubaneswar Development Authority, Odisha, etc. and being engaged in various projects of different organizations, the petitioner no.1-company has completed the assignments/ works in time. Apart from the same, many of the works are ongoing in different organizations.

2.1 Opposite party no.1-BDA, which was constituted under the Orissa Development Authorities Act, 1982, and functioning under the control and supervision of the Department of Housing and Urban Development, Govt. of Odisha, issued a Request for Proposal (RFP) on 29.07.2022. In response to the same, the petitioner no.1-company applied for selection of Survey Agency for survey and field verification of land parcels for land demarcation of various plots of land with BDA. Such RFP contained two bid systems, viz., technical and financial. As per the RFP, the date of availability of RFP document was 20.08.2022, the date and time of pre-bid meeting was fixed to 03.08.2022 at 4.00 P.M. in the Conference Room, BDA, Akash Shobha Building, Sachivalaya Marg, Bhubaneswar, the last date and time for receipt of proposals was fixed to 22.08.2022 till 3.00 P.M., place of submission of proposals was before the Secretary, BDA, Akash Shobha Building, Sachivalaya Marg, Bhubaneswar and the date and time for opening of technical proposal was fixed to 24.08.2022 at 4.00 P.M. In adherence to the conditions of the RFP, petitioner no.1-company submitted its bid, which was considered and intimation was sent to the petitioner no.1-company, vide letter dated 13.09.2022, that it was selected as L-1 to undertake survey work as per RFP dated 29.07.2022 and was issued with Letter of Award (LoA) of even date along with format of performance guarantee agreement. Thereafter, the petitioner no.1-company approached the opposite parties for further discussion on 15.09.2022 and the same was done in the office of opposite party no.3 and Planning Member (TP). Clarifications were sought before signing the agreement and accepting the LoA as well as meeting all other requirements under the same, where the petitioner no.1-company was advised to put the same in writing and, as such, the petitioner no.1-company, in response thereto, sent a letter/email on 19.09.2022. Accordingly, on 15.10.2022, opposite party no.3 rejected the request made by the petitioner no.1-company in modification of demarcation point which would affect the payment conditions for being beyond the scope of RFP. Thereafter, opposite party no.3, without any prior notice, whether verbal or written, vide letter dated 21.10.2022, intimated the petitioner no.1-company that the LoA dated 13.09.2022 stands

terminated/cancelled since petitioner no.1-company failed to fulfill the terms and conditions within the stipulated date and time as per sl.nos.3 and 4 of the LoA along with the conditions stipulated in Clause-13 of the RFP. In the said letter, it was further indicated that the petitioner no.1-company has been blacklisted and banned for a period of three years from being employed anywhere in the authority (BDA) works with a warning not to submit any proposal as Survey Agency with BDA in future, otherwise the same would be rejected. Hence, this writ petition.

3. Ms. Mamata Tripathy, learned counsel appearing for the petitioners vehemently contended that the impugned letter of cancellation/termination of LoA on the plea of invoking Clause-13 of the RFP and consequential blacklisting and banning for a period of three years to be employed anywhere in the authority (BDA) works with a warning not to submit any proposal as Survey Agency with BDA in future is arbitrary, unreasonable and contrary to the provisions of law and violates Article 14 of the Constitution of India and also principles of natural justice. It is contended that no show cause notice was issued to the petitioner no.1-company before blacklisting and banning it for a period of three years. It is contended that no contract was executed between the parties, as no agreement was signed by the petitioner no.1-company and till date the petitioner no.1-company has not been awarded the work to be undertaken by it. It is contended that on receipt of the letter dated 21.10.2022, the petitioner no.1-company immediately approached the BDA on 25.10.2022 with a request to accept the LoA dated 13.09.2022 and also undertook to submit the bank guarantee as well as for execution of the agreement for the said work within seven days. In the request for reconsideration and representation dated 26.10.2022, petitioner no.1-company clearly stated that as per sl.nos.3 and 4 of LoA, Clause-13 of the RFP and Clause-2.6 of the RFP are not applicable to it and, therefore, it cannot be subjected to cancellation/termination/blacklisting. In response to the same, on 22.11.2022, the opposite party-authority rejected the request for reconsideration of cancellation/ termination. It is thus contended that such action of the authority in not considering the case of the petitioner no.1-company is an outcome of non-application of mind. Therefore, the petitioners have approached this Court invoking extra-ordinary jurisdiction of this Court to interfere with the same.

To substantiate her contention, learned counsel for the petitioners has relied upon the judgments of the apex Court in the cases of ***M/s Erusian Equipment and Chemicals Ltd. v. State of West Bengal and Anr.,*** (1975) 1 SCC 70; ***Mahabir Auto Stores and others v. Indian Oil Corporation Ltd.,*** (1990) 3 SCC 752; ***Vetinda Pharmaceuticals Limited v. State of Uttar Pradesh and another***, (2021) 1 SCC 804:AIR 2020 SC 5753; ***Gorkha Security Services v. Govt. of NCT of Delhi and others***, (2014) 9 SCC 105:AIR 2014 SC 3371.

4. Mr. S. Swain, learned counsel appearing for the opposite party-BDA, while admitting the fact that pursuant to the RFP dated 29.07.2022 the petitioner no.1-

company was considered as L-1 and selected for Survey Agency for survey and field verification of land parcels for land demarcation of various plots of land with BDA, LoA was issued in its favour, contended that since the petitioner no.1-company put condition by making request by way of filing representation dated 26.10.2022, the same was rejected invoking Clause-13 of the RFP. It is further contended that as per Clauses-3 and 4 of the LoA dated 13.09.2022, the petitioner no.1-company has to return the duplicate copy of the LoA duly signed by the authorized signatory on or before 20.09.2022 and also to indicate the date on which it proposed to execute the agreement with BDA. More so, the petitioner no.1-company was also required to deposit the performance security equivalent to Rs.2 lakhs only in the form of bank guarantee in prescribed format attached in Annexure-1 on or before 20.09.2022 as per Clause-2.6 of the RFP document before execution of agreement. But, instead of returning the duplicate copy of the LoA duly signed by the authorized signatory and depositing the performance security by 20.09.2022, petitioner no.1-company issued a letter on 19.09.2022 to opposite party no.3 and started bargaining by raising certain conditions without complying with the requirements as indicated in the LoA. Thereby, the opposite party-authority was constrained to terminate such LoA as per Clause-13 of the RFP and blacklisted the petitioner no.1-company and banned it for three years to be employed anywhere in the authority works with a warning not to submit any proposal as Survey Agency with BDA in future. Thus, it is contended that no illegality or irregularity has been committed by the authority in issuing the impugned letter of cancellation/ termination so as to cause interference by this Court. Consequentially, dismissal of the writ petition is sought for.

5. This Court heard Ms. Mamata Tripathy, learned counsel appearing for the petitioners and Mr. S. Swain, learned counsel appearing for the opposite parties-BDA in hybrid mode and perused the records. Pleadings having been exchanged between the parties, the matter is being disposed of finally with the consent of learned counsel for the parties at the stage of admission.

6. Before delving into the issues involved, the relevant provisions of the RFP and LoA are quoted below:-

*"**Clause-2.3 of the RPF***

Letter of Award:

After selection, a Letter of Award (the LOA) shall be issued, in duplicate, by BDA to the selected bidder and the bidder shall, with 7 (seven) days of the receipt of the LOA, sign and return the duplicate copy of the LOA in acknowledgement thereof along with the performance security as per the provisions of clause-2.6 below:

In the event the duplicate copy of the LOA duly signed by the selected survey agency is not received by the stipulated date or the performance security is not submitted as per the provisions of the RFP, specified in LOA, the LOA shall stand cancelled for all purposes by BDA. In that case the next lowest bidder may be considered for the project to negotiate and to match the price quoted by L bidder in the manner specified above. Provided, however, that the Vice-Chairman can consider any request for extension for signing of LOA subject to such condition (s) as specified by BDA."

Clause-13 of the RFP- Termination:

If, the performance of selected survey agency is not satisfactory/survey agency has failed to safeguard the interest of BDA, BDA may at its sole discretion, terminate the engagement of the survey agency and also shall forfeit the performance security. Further, the survey agency shall be blacklisted and banned for at least 3 years to be employed anywhere in the authority works. BDA, in doing so, shall intimate the firm in written with its termination letter. The decision of BDA in this matter shall be final and binding."

Clauses-3 and 4 of the LoA:

"3. You are requested to return the duplicate copy of the Letter of Award duly signed by the authorized signatory within seven days from the issuance of this letter as a pre-conditions for execution of agreement. Along with the duplicate copy of the LoA, you shall also indicate the date on which you propose to execute the agreement with BDA for the above mentioned assignment, which shall not be later than 7 days from the issuance of this LoA. A copy of draft agreement shall be shared, in mail, within next seven working days for your perusal.

4. You are further requested to deposit the performance security equivalent to INR 2,00,000/- (Rupees Two lakhs) only in the form of a Bank Guarantee (BG) in the prescribed format attached in Annexure-1 within 7 days from the issuance of LoA as per clause-2.6 of the RFP document before the execution of the Agreement."

7. On perusal of Clause-2.3 of the RFP it would be evident that after selection, a Letter of Award shall have to be issued, in duplicate, by the BDA to the selected bidder and the bidder shall, within seven days of the receipt of the LoA, sign and return the duplicate copy of the LoA with acknowledgement thereof along with the performance security, as per the provision of Clause-2.6. Admittedly, after issuance of LoA, the petitioner no.1-company was to comply with Clause-2.3 mentioned above. But the petitioner no.1-company requested for certain clarification and without answering to the clarification sought by the petitioner company, opposite party-authority invoked Clause-13 and terminated the LoA. As such, Clause-13 of the RFP stipulates that if the performance of selected survey agency is not satisfactory/survey agency has failed to safeguard the interest of BDA, BDA may at its discretion, terminate the engagement of the survey agency and also forfeit the performance security. Further, the survey agency shall be blacklisted and banned for at least three years to be employed anywhere in the authority works. The authority in doing so, shall intimate the firm in writing with its termination letter and, as such, the decision of the BDA shall be final and binding. Thereby, it is the primary responsibility of the opposite party-BDA to show that the performance of the selected survey agency is not satisfactory or the survey agency has failed to safeguard the interest of the BDA. As such, till date no agreement has been executed between the petitioner no.1-company and the opposite parties-BDA and, therefore, question of adjudging the performance of the petitioner no.1-company does not arise or the question of failure of safeguarding interest of the BDA does not arise. More so, the discretion, which has been given to the BDA to terminate the engagement of survey agency and also to forfeit performance security, cannot be exercised, as the

petitioner no.1-company never performed the work in question. As a consequence thereof, the action taken by the opposite parties-BDA in blacklisting and banning the petitioner no.1-company for a period of three years to be employed elsewhere in the authority works, is also absolutely misconceived one. As per Clauses-3 and 4 of the LoA, as mentioned above, the petitioner no.1-company was to return the duplicate copy of the LoA signed by the authorized signatory within seven days and to deposit performance security equivalent to Rs.2 lakhs in the form of bank guarantee in the prescribed format attached. On receipt of LoA, since the petitioner no.1-company made a representation for reconsideration raising certain points, question of returning the duplicate copy of the LoA within the time stipulated or depositing of performance security equivalent to INR two lakhs was not warranted. Needless to say, when the petitioner no.1-company had a grievance and it moved the authority by way of filing representation for reconsideration of its case, without considering the same, the action taken by opposite party no.3 is arbitrary, unreasonable and contrary to the provisions of law.

8. On perusal of records, it appears that, while issuing the letter in Annexure-5 dated 21.10.2022 in cancelling/terminating the LoA issued, vide letter dated 13.09.2022, for selection of survey agency, the opposite party-authority has not issued any notice of show cause nor complied with the principles of natural justice. It is therefore followed that the provisions contained in Clause-13 of the RFP have not been understood by the opposite party-authority and action has been taken whimsically only to put the petitioner no.1-company in harassment. Since the impugned order of cancellation has been passed without issuing any show cause notice and without giving any opportunity of hearing to the petitioner no.1-company, it amounts to violation of the principles of natural justice.

9. The essential of compliance of natural justice is nothing but a duty to act fairly. Natural justice is an antithesis of arbitrariness. It, therefore, follows that *audi alteram partem*, which is facet of natural justice is a requirement of Art.14.

The word ‘nature’ literally means the innate tendency or quality of things or objects and the word ‘just’ means upright, fair or proper. The expression ‘natural justice’ would, therefore, mean the innate quality of being fair.

Natural justice, another name of which is common sense of justice, is the name of those principles which constitute the minimum requirement of justice and without adherence to which justice would be a travesty. Natural justice accordingly stands for that fundamental quality of fairness which being adopted, justice must not only be done but also appears to be done.

The soul of natural justice is “fair play in action”.

10. In ***HK (An Infant) in re***, 1967 1 All ER 226 (DC), Lord Parker, CJ, preferred to describe natural justice as 'a duty to act fairly'.

11. In ***Fairmount Investments Ltd. v. Secy. of State for Environment***, 1976 2 All ER 865 (HL), Lord Russel of Killowen somewhat picturesquely described natural justice as 'a fair crack of the whip'.

12. In ***R. v. Secy. of State for Home Affairs***, ex p. Hosenball, Geoffrey Lane, LJ, 1977 3 All ER 452 (DC & CA), preferred the homely phrase 'common fairness' in defining natural justice.

13. In ***Ridge v. Baldwin***, (1963) 2 SLL RT 66 at 102, Lord Morris of Borth-y-Gest observed that "it is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet ... My Lords, here is something which is basic to our system: the importance of upholding it far transcends the significance of any particular case".

14. In ***Byrne v. Kinematograph Renters Society Ltd***, (1958) All ER 579, while considering the requirements of natural justice, Justice Narman, J said. "........First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thereby, of course, that the tribunal should act in good faith. I do not think that there really is anything more".

15. In ***Russel v. Duke of Norfolk,*** (1949) 1 All ER 109, Tucker, LJ, observed that one essential is that the person concerned should have a reasonable opportunity of presenting his case. The view of Tucker, LJ, in Russell's case (supra) has been approved by the Supreme Court of India in ***Rattan Lal Sharma v Managing Committee,*** (1993) 4 SCC 10 : AIR 1993 SC 2115.

16. In ***General Medical Council v. Spackman,*** (1943) AC 627, Lord Wright pointed out that it should give a full and fair opportunity to every party being heard.

17. In ***A.K. Kraipak and others v. Union of India***, AIR 1970 SC 150: (1969) 2 SCC 262, is a landmark in the growth of this doctrine. Speaking for the Constitution Bench, Hegde, J. observed thus:

> *"If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have far reaching effect than a decision in a quasi-judicial enquiry".*

In ***Maneka Gandhi v. Union of India,*** AIR 1978 SC 597 : (1978) 1 SCC 248, law has done further blooming of this concept. This decision has established beyond doubt that even in an administrative proceeding involving civil consequences doctrine of natural justice must be held to be applicable.

18. In ***Swadeshi Cotton Mills v. Union of India,*** AIR 1981 SC 818, the meaning of 'natural justice' came for consideration before the apex Court and the apex Court observed as follows:-

> *"The phrase is not capable of a static and precise definition. It cannot be imprisoned in the straight-jacket of a cast-iron formula. Historically, "natural justice" has been used in a way "which implies the existence of moral principles of self evident and urarguable truth". "Natural justice" by Paul Jackson, 2nd Ed., page-1. In course of time, judges nurtured in the traditions of British jurispruduence, often invoked it in conjuction with a reference to "equity and good conscience". Legal experts of earlier generations did not draw any distinction between "natural justice" and "natural law". "Natural justice" was considered as "that part of natural law which relates to the administration of justice."*

19. In ***Basudeo Tiwary v Sido Kanhu University and others*** (1998) 8 SCC 194, the apex Court held that natural justice is an antithesis of arbitrariness. It, therefore, follows that *audi alteram partem*, which is facet of natural justice is a requirement of Art.14.

20. In ***Nagarjuna Construction Company Limited v. Government of Andhra Pradesh***, (2008) 16 SCC 276, the apex Court held as follows:

> *"The rule of law demands that the power to determine questions affecting rights of citizens would impose the limitation that the power should be exercised in conformity with the principles of natural justice. Thus, whenever a man's rights are affected by decisions taken under statutory powers, the court would presume the existence of a duty to observe the rules of natural justice. It is important to note in this context the normal rule that whenever it is necessary to ensure against the failure of justice, the principles of natural justice must be read into a provision. Such a course is not permissible where the rule excludes expressly or by necessary intendment, the application of the principles of natural justice, but in that event, the validity of that rule may fall for consideration."*

21. The apex Court in ***Uma Nath Panday and others v State of U.P. and others***,AIR 2009 SC 2375, held that natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice.

22. In ***Mohinder Singh Gill v. The Chief Election Commissioner***, AIR1978 SC 851 : (1978) 1 SCC 405, the apex Court held that natural justice is treated as a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of Authority. It is the bone of healthy government, recognised from earliest times and not a mystic testament of judge-made law. Indeed, from the legendary days of Adam-and of Kautilya's Arthasastra-the rule of law has had this stamp of natural justice which makes it social justice.

23. In ***Bhagwan v. Ramchand***, AIR 1965 SC 1767: (1965) 3 SCR 218, the apex Court held that the rule of law demands that the power to determine questions

affecting rights of citizens would impose the limitation that the power should be exercised in conformity with the principles of natural justice.

24. In ***Sukdev Singh v Bhagatram***, AIR 1975 SC 1331: (1975)1 SCC 421, the apex Court held that whenever a man's rights are affected by decisions taken under statutory powers, the court would presume the existence of a duty to observe the rules of natural justice.

25. The order impugned dated 21.10.2022 in Annexure-5 also indicates that the petitioner no.1- company has been blacklisted and banned for a period of three years to be employed anywhere in the authority works. In absence of any performance made by the petitioner no.1-company and without execution of the agreement, the action of the opposite party-authority in blacklisting and banning the petitioner no.1-company for three years to be employed anywhere in the authority works, is arbitrary and unreasonable and cannot be sustained in the eye of law. Consequentially, the warning given to the petitioner no.1-company to submit any proposal as survey agency with BDA in future also cannot be sustained. Clause-2.3 and Clause-13 of the RFP are self explanatory and both the clauses will apply only when performance of the survey agency is not satisfactory. Performance comes into play, once the agreement/contract is signed and that too during the execution thereof. As such, mere seeking of clarification or filing of representation making any grievance, at the stage of negotiation, cannot be construed to be a contract and in absence of any contract, it is not binding on the parties. There is no provision whatever under BDA's own terms and conditions for blacklisting of the petitioner no.1-company at the stage of floating of tender or any response/expression of interest shown thereto. In absence of consensus ad idem, the opposite parties do not have any power of blacklisting.

26. In ***Mahabir Auto Stores*** (supra), the apex Court held as under:-

> "*It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Con- stitution. Reliance in this connection may be placed on the observations of this Court in M/s Radha Krishna Agarwal & Ors. v. State of Bihar & Ors., [1977] 3 SCC 457.1t appears to us, at the outset, that in the facts and circumstances of the case, the respondent-company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual par- ties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. See M/s Radha Krishna Agarwal v. State of Bihar, (supra) at p. 462, but Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the con- tract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain*

circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration, it depends upon facts and circumstances of a particular transaction whether heating is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to E.P. Royappa v. State of Tamil Nadu & Anr., [1974] 4 SCC 3; Maneka Gandhi v. Union of India & Anr., [1976] 1 SCC 248; Ajay Hasia & Ors. v. Khalid Mujib Sehravardi & Ors., [1981] 1 SCC 722; R.D. Shetry v. International Airport Authority of India & Ors., [1979] 3 SCC 1 and also Dwarkadas Marlaria and sons v. Board of Trustees of the Port of Bombay, [1989] 3 SCC 293. It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."

27. Blacklisting operates as a prejudice to a commercial person not only in present but also puts a taint which could very well go as far as putting a death knell or cause 'Civil Death' or to put it in other words black listing is an instrument of coercion as it will invariably take him out of participating in tender processes as most tenders as a pre-qualification criteria debar blacklisted companies from participating in tender processes and impact their business opportunities. Because of the letter in Annexure-5 in blacklisting and banning the petitioner no.1-company for three years, the petitioner no.1-company is facing the same stigma/ problem and is unable to participate in Government tenders/contracts and, thereby, shortage work would mean closure of the company because of the impugned action of the opposite parties. It has been held in many cases that mere breach of contract is not sufficient to merit an order of blacklisting. It cannot be resorted to when there is breach of terms and conditions of contract but has to be much more, i.e., conduct of the party has to be deviant and aberrant. But in the present case, the opposite party-BDA has blacklisted the petitioner no.1-company even before it has signed the LoA, bereft of the fact that there was no execution of agreement or contract between the parties.

28. Needless to say, the order of blacklisting has to meet the doctrine of proportionality. A doctrine or principle developed by courts to interfere in an administrative discretion when they find that the decisions are irrational,

unreasonable or entails abuse/misuse of power. Although, while exercising power under judicial review, the Courts are reluctant to substitute their own opinion, in fit cases where the penalty or punishment is disproportionate, the Courts will step into remedy the same. Blacklisting has the effect of preventing a person to enter into Government contracts, thereby affecting the fundamental rights enshrined under Article 14 of the Constitution, i.e., a blacklisted person/entity is not treated at par with other persons/parties who are participating in the tender process. This has a cascading effect on a person's fundamental rights guaranteed under Article 19 (1) (g) and Article 21 also.

If the above principles are taken into consideration, the whimsical action taken by the opposite party-BDA in blacklisting and banning the petitioner no.1-company for three years to participate anywhere in the Authority works, cannot be sustained in the eye of law.

29. Mr. S. Swain, learned counsel appearing for the opposite party-BDA has relied upon the Appendix-XXXIV, the Codal provisions for blacklisting contractors, more particularly clause-(f), which reads as under:-

> *"A Chief Engineer of a department may blacklist a contractor with the approval of concerned Administrative Department on the following grounds:*
> *(a) xxx xxx xxx*
>
> *xxx xxx xxx xxx*
>
> *(f) Submission of false/fabricated/forged documents for consideration of a tender"*

30. On perusal of aforementioned clause, it would be evident that the authority may blacklist a contractor with the approval of concerned administrative department in the event of submission of false/fabricated/forged documents for consideration of a tender. But, in the case at hand, nothing has been placed on record to indicate so. Rather, a whimsical argument was advanced justifying the action of the opposite parties in blacklisting the petitioner no.1-company without any materials. Thereby, such action of the opposite parties is deprecated and the opposite parties are warned not to take such type of action on flimsy ground in future. As such, they have to act very cautiously, while dealing with the matter of contract between the parties, because such action deprives a contractor of earning livelihood.

31. In **M/s Erusian Equipment & Chemicals Ltd** (supra), the apex Court highlighted the necessity of giving an opportunity to such a person by serving a show cause notice thereby giving him opportunity to meet the allegations which were in the mind of the authority contemplating blacklisting of such a person. While doing so, in paragraphs-12 and 20, the apex Court held as follows:

> *"12. Under Article 298 of the Constitution the Executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such*

powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal, protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of black- listing, has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of black- listing. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.

xxx xxx xxx

20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

32. In **Raghunath Thakur v. State of Bihar,** (1989) 1 SCC 229, the apex Court held as under:

"4. Indisputably, no notice had been given to the appellant of the proposal of black-listing the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before black-listing any person. In so far as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the PG NO 869 principles of natural justice. It has to be realised that black-listing any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order. In that view of the matter, the last portion of the order in so far as it directs black-listing of the appellant in respect of future contracts, cannot be sustained in law. In the premises, that portion of the order directing that the appellant be placed in the black-list in respect of future contracts under the Collector is set aside. So far as the cancellation of the bid of the appellant is concerned, that is not affected. This order will, however, not prevent the State Government or the appropriate authorities from taking any future steps for blacklisting the appellant if the Government is so entitled to do so in accordance with law, i.e. giving the appellant due notice and an opportunity of making representation. After hearing the appellant, the State Government will be at liberty to pass any order in accordance with law indicating the reasons therefor. We, however, make it quite clear that we are not expressing any opinion on the correctness or otherwise of the allegations made against the appellant. The appeal is thus disposed of."

33. In ***Patel Engineering Ltd. V. Union of India***, (2012) 11 SCC 257, the apex Court emphatically reiterated the principle of blacklisting by explaining the same in the following manner:-

"*13. The concept of Blacklisting is explained by this Court in M/s. Erusian Equipment & Chemicals Limited v. Union of India and others, (1975) 1 SCC 70, as under:*

"20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains."

14. The nature of the authority of State to blacklist persons was considered by this Court in the abovementioned case[1] and took note of the constitutional provision (Article 298)[2], which authorises both the Union of India and the States to make contracts for any purpose and to carry on any trade or business. It also authorises the acquisition, holding and disposal of property. This Court also took note of the fact that the right to make a contract includes the right not to make a contract. By definition, the said right is inherent in every person capable of entering into a contract. However, such a right either to enter or not to enter into a contract with any person is subject to a constitutional obligation to obey the command of Article 14. Though nobody has any right to compel State to enter into a contract, everybody has a right to be treated equally when State seeks to establish contractual relationships[3]. The effect of excluding a person from entering into a contractual relationship with State would be to deprive such person to be treated equally with those, who are also engaged in similar activity.

15. It follows from the above Judgment that the decision of State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into contractual relationship with such persons is called blacklisting. State can decline to enter into a contractual relationship with a person or a class of persons for a legitimate purpose. The authority of State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that State is to act fairly and rationally without in any way being arbitrary – thereby such a decision can be taken for some legitimate purpose. What is the legitimate purpose that is sought to be achieved by the State in a given case can vary depending upon various factors."

Similar view has also been taken by the apex Court in ***Vetinda Pharmaceuticals Limited*** mentioned supra.

34. In view of the above mentioned judicial pronouncements, it is made clear that service of notice of show cause is essential. The same having been absent in the present case, the impugned order of blacklisting and banning the petitioner no.1-company for a period of three years to be employed anywhere in the work of the authority, and consequential warning given not to submit any proposal as survey agency with BDA in future cannot be sustained in the eye of law. Accordingly, the letter dated 21.10.2022 issued by the opposite party no.3 under Annexure-5 is liable to be quashed and is hereby quashed. Both parties are directed to proceed from the date of issuance of LoA in favour of the petitioner no.1-company and work out the same in accordance with law.

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

—— o ——

2023 (III) ILR – CUT- 360

Dr. B.R. SARANGI, J & MURAHARI SRI RAMAN, J.

W.P.(C) NO. 24079 OF 2012

STATE OF ODISHA & ANR. ……...Petitioners

-V-

SRI AMARENDRA MALLICK & ORS. ………Opp. Parties

THE ORISSA RESERVATION OF VACANCIES IN POST AND SERVICES(FOR SCHEDULED CASTES AND SCHEDULED TRIBES) ACT, 1975 – Section 6 r/w letter dated 3rd April, 2003 issued by Government of Orissa S.T and S.C Development Department to all department – Whether section 6 of ORV Act applicable in case of appointment by promotion? – Held, Yes – The Department of the Government of Odisha could not take different stand at different time – All the Department of Government of Odisha must speak in one voice.

Case Laws Relied on and Referred to :-

1. (2023) 3 SCR 112:State of Gujarat Vs. Multiplex Association of Gujarat.
2. (2003) 3 SCC 321:St. Johns Teachers Training Institute Vs. Regional Director, National Council for Teacher Education.
3. (2011) 9 SCC 573 : Pratap Chandra Mehta Vs. State Bar Council of Madhya Pradesh
4. (2008) 6 SCR 334 :Novva Ads Vs. Secretary, Department of Municipal Administration and Water Supply.
5. (2006) 147 STC 146 (Gau) : Shree Sanyeeji Ispat Pvt. Ltd. Vs. State of Assam.
6. (2022) 9 SCR 1003 : Central Warehousing Corporation Vs. Adani Ports Special Economic Zone Limited.

For the Petitioner : Mr. Amiya Kumar Mishra, Addl. Govt. Adv.

For the Opp. Parties : Mr. Millan Kanungo, Sr. Adv.
Mr. Soumya Ranjan Mohanty

JUDGMENT Date of Hearing: 11.08.2023 : Date of Judgment: 16.08.2023

MURAHARI SRI RAMAN, J.

THE CHALLENGE:

Assailing Order dated 17th February, 2012 of the Learned Odisha Administrative Tribunal, Bhubaneswar passed in Original Application bearing O.A. No.490 of 2000 with a direction to reinstate Amarendra Mallick (Applicant) in promotional post as recommended to the Odisha Public Service Commission being found suitable by the Departmental Promotion Committee *vide* Meeting dated 03.06.1997 with reference to Section 6 of the Odisha Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 (for brevity, "ORV Act") and further direction to treat the period between reversion and subsequent promotion as *ad hoc* promotion, the petitioners-State of Odisha have

approached this Court under Article 227 of the Constitution of India with the following prayer(s):

> *"Petitioners therefore most humbly pray that this Hon'ble Court may graciously be pleased to issue rule NISI calling upon the opposite party to show cause as to why the impugned order dated 17.02.2012 passed by the Learned State Administrative Tribunal in O.A. No.490 of 2000 at Annexure-2 shall not be quashed;*
>
> *And if the opposite parties fail to show cause or sufficient cause the said rule be made absolute;*
>
> *And/or pass such other order/orders as this Hon'ble Court may think fit and proper for the ends of justice; ***"*

FACTS:

2. Amarendra Mallick, belonging to Scheduled Caste community, entered in Government Service on 21.12.1986 as a Junior Employment Officer, and is guided by the Odisha Employment Services, Class-II (Recruitment and Conditions of Service) Rules, 1990 framed under proviso to Article 309 of the Constitution of India. Having completed five years of experience in the post of Junior Employment Officer ("JEO",for short), Amarendra Mallik (hereinafter referred to as "Applicant") acquired eligibility for promotion by 1991 and the Departmental Promotion Committee found him suitable in its Meeting held in 03.06.1997. Consequent thereto his name was duly recommended vide Letter dated 23.06.1997 to the Odisha Public Service Commission (in short, "OPSC") for promotion to the post of District Employment Officer ("DEO", for convenience) and the Applicant, being transferred from Nuapada to Kalahandi, joined on 16.07.1997 in the said promotional post.

2.1. While working as such, *vide* Letter dated 16.02.2000, an Order came to be issued reverting him to the feeder cadre to function as "JEO" on the ground that the OPSC did not recommend his name for promotion. Aggrieved by such decision, the Applicant moved the Odisha Administrative Tribunal by way of Original Application which was registered as O.A. No.490 of 2000.

CASE OF THE APPLICANT BEFORE THE ODISHA ADMINISTRATIVE TRIBUNAL:

3. Having been found suitable in the Departmental Promotion Committee, which has duly recommended his name for promotion, the Applicant joined in the promotional post and worked as DEO since 1997. Thus, there was little scope for the OPSC not to accord concurrence.

CASE OF THE STATE OF ODISHA AND THE OPSC BEFORE THE ODISHA ADMINISTRATIVE TRIBUNAL:

4. Meeting of the Departmental Promotion Committee was held on 03.06.1997 to consider filling up of five posts of Employment Officers in Class-II by way of promotion from amongst the eligible JEOs as per the provisions of the Odisha

Employment Services, Class-II (Recruitment and Conditions of Service) Rules, 1990. Out of five vacancies, whereas three vacancies were meant for unreserved category, other two were reserved for Scheduled Caste category and Scheduled Tribe category (each). Since no suitable candidate in Scheduled Tribe category was available in the zone of consideration, on the principle of exchange in tune with the provisions of Section 6 of the ORV Act, the said Committee recommended the name of Amarendra Mallick- Applicant, who belonged to Scheduled Caste community, for promotion to the post of DEO on ad hoc basis vide Labour & Employment Department Notification No.7364, dated 23.06.1997 against the vacancy in Scheduled Tribe category. Thereafter, the OPSC was moved for views on the recommendation of Departmental Promotion Committee vide Labour & Employment Department Letter No.11751/LE., dated 16.09.1997.The OPSC in their Letters bearing No.2112/SC., dated 20.12.1997 and No.4736, dated 13.07.1998 had recommended five suitable officers for promotion to five vacant posts of Employment Officers.

4.1. Since nothing was spelt out about the Applicant regarding suitability, the OPSC was again moved for views/clarification vide Labour & Employment Department Letter No.9844, dated 09.09.1998. On reply, the OPSC in Letter No. 7986/PSC., dated 07.11.1998 had intimated that as there was no Officer from Scheduled Tribe category available in the zone of consideration, one Officer from the General category was recommended for promotion against the Scheduled Tribe vacancy in terms of the provision in the second proviso to Section 7 of the ORV Act read with Rule 5(3) of Odisha Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Rules, 1976 (in short "ORV Rules").

4.2. Before taking action for reverting the Applicant from the post of DEO to JEO, views of the Welfare Department and the Law Department were taken whereby it was clarified that the promotion in absence of suitable person in the Scheduled Tribe category, the filling up of promotional post was required to be made as laid down in the second proviso to Section 7 of the ORV Act. Justifying such action, the petitioners relied on the notification of the Labour & Employment Department bearing No.2536, dated 16.02.2000, whereby the Applicant was reverted to the post of JEO.

5. Since no person was found available in Scheduled Tribe category, one Officer from Scheduled Caste category was recommended for promotion against vacancy in the Scheduled Tribe category in accordance with the provisions of Section 6 of the ORV Act.

FINDINGS OF THE ODISHA ADMINISTRATIVE TRIBUNAL:

6. Reading of Sections 6 and 7 of the ORV Act read with Rule 5 of the ORV Rules makes it clear that reserved posts remaining unfilled after exchange as provided under Section 6, the unfilled vacancy can be filled up by person from

general category in accordance with Section 7. The instant promotion being from post borne in Class- III to the post in Class-II or within Class-II, in view of the second proviso to Section 7, the principle of carry forward of reservation and de-reservation does not apply to the reserved vacancies to be filled up by way of promotion on the basis of selection, where such promotion is to be made from Class-III posts to Class-II posts, within Class-II posts, from Class-II posts to Class- I posts, and from posts in lowest rung of Class-I.

6.1. The learned Odisha Administrative Tribunal held further that Rule 5(3) of the ORV Rules cannot override the provisions contained in Section 6 of the ORV Act empowering the authority for exchange of posts between posts reserved for Scheduled Tribe and Scheduled Caste.

6.2. It was observed that the Applicant, belonging to Scheduled Caste community, being found available and suitable in the Meeting of the Departmental Promotion Committee held in the year 1997, was given promotion on ad hoc basis in accordance with Section 6 of the ORV Act and in fact, he joined and worked as DEO. There was no justification for the OPSC not to accord concurrence and, thereby it erred in its approach to say that the vacancy would go to "unreserved candidate in accordance with sub-rule (3) of Rule 5".

7. The learned Odisha Administrative Tribunal has come to the following conclusion:

> *"11. A conjoint reading of Section 6 of the Act and subrule (3) of Rule 5 makes it manifest that if after application of principles of exchange of vacancies of post between Scheduled Tribe or Scheduled Caste category, still the post/vacancy remains unfilled then it will go to general candidate. To make it clear that if no suitable Scheduled Caste or Scheduled Tribe person is available then it should go general category. In the instant case the applicant, a Scheduled Caste candidate has been available and found suitable by the Departmental Promotion Committee for promotion. Government accepted the recommendation of Departmental Promotion Committee and gave the applicant promotion on ad hoc basis in accordance with Section 6 of the Act. The respondent-OPSC has no justifiable reason to reject the suitability of the applicant without considering the provisions of Section 6 of the Act. The opinion of respondent-OPSC that the post/vacancy should go to unreserved candidate in accordance with sub-rule (3) of Rule 5 is not sustainable.*
>
> *12. In the circumstances, the impugned order of reversion of the applicant at Annexure-3 is not sustainable and stands quashed. The applicant be reinstated in the promotional post forthwith. 1[***] Thus, the matter be again referred to OPSC to reconsider the suitability of the applicant to hold promotional post in accordance with the recommendation of the DPC held on 03.06.1997 in application of Section 6 of the ORV Act.*
>
> *13. To reiterate, the applicant has already been promoted subsequently, so the intervening period between reversion and subsequent promotion should be treated as ad hoc promotion, but on recommendation of OPSC his seniority be reckoned from the date of joining pursuant to Annexure-1 with all service and monetary benefits. This exercise be completed at an early date."*

RIVAL CONTENTIONS BEFORE THIS COURT IN THE PRESENT WRIT PROCEEDINGS:

8. The *ad hoc* promotion given to the Applicant was irregular, and the same not being in consonance with the second proviso to Section 7 of the ORV Act, 1975 read with sub-rule (3) of Rule 5 of the ORV Rules, the Departmental Promotion Committee erred in recommending the case of the Amarendra Mallick. Sri Amiya Kumar Mishra, learned Additional Government Advocate submitted that on misreading of Section 6 of the ORV Act, which relates to "appointment", but not "promotion", the provision of exchange of reservation between the Scheduled Castes and Schedule Tribes could not have been made applicable to the instant case of the Applicant qua promotion from the post of JEO to the post of DEO. Sri Mishra had made valiant attempt to draw distinction between the purport of the second proviso to Section 7 and Section 6 of the ORV Act and urged that whereas the former regulates "promotions" with reference to "reservation", the latter deals with exchange of reservation between "appointments" qua Scheduled Castes and Scheduled Tribes. Since these provisions operate in distinct and different fields, the conclusion arrived at by the learned Odisha Administrative Tribunal is "clouded and in the process arrived at the erroneous conclusion" that reversion of the Applicant-Amarendra Mallick was bad in law.

9. Sri Millan Kanungo, Senior Advocate appearing for the opposite party No.1 along with Sri Soumya Ranjan Mohanty, Advocate would submit that the change in stand of the Government based on the opinion of the OPSC that the promotion of the Applicant, belonging to Scheduled Caste community, to the post of DEO against a vacancy in Schedule Tribe category is contrary to provision contained in Rule 5(3), cannot be countenanced as logical inasmuch as provisions of Section 6 of the ORV Act cannot be read in derogation to sub-rule (3) of Rule 5 of the ORV Rules.

9.1. Referring to the opinion of the Government of Odisha in Scheduled Tribes and Scheduled Castes Development Department vide Letter No.21429-Emp.I (A)-50/2002/ SSD, dated 03.04.2003, Sri Millan Kanungo, learned Senior Counsel argued that provisions of Section 6 of the ORV Act being accepted and adapted to be applicable to the cases of appointment by way of promotion, there cannot be any ambiguity in understanding the purport of provisions of Section 6 read with second proviso to Section 7 of the ORV Act and in view of aforesaid clarification vide Letter dated 03.04.2003 (Annexure-A/1 to the Counter-Affidavit filed by the opposite party No.1), the interpretation put forth by the learned Odisha Administrative Tribunal cannot be faulted with.

9.2. It is forcefully argued by Sri Millan Kanungo, Senior Advocate that though Rejoinder-Affidavit has been filed by the petitioner-Employment & Technical Education & Training Department, nothing is whispered regarding interpretation /opinion rendered by the learned Advocate General as referred to in Letter No.

21429-Emp.I(A)-50/2002/SSD, dated 03.04.2003 issued by the Scheduled Tribes and Scheduled Castes Development Department. The Departments of the Government should not be allowed to speak in two voices. Reiterating what has been stated earlier, the State of Odisha in its Rejoinder-Affidavit merely sailed along with the view expressed by the OPSC ignoring the fact that the opinion of the Advocate General has been accepted in the matter of promotion in terms of Section 6 read with second proviso to Section 7 of the ORV Act.

9.3. Sri Millan Kanungo further brought to the notice of this Court that during the pendency of the writ petition, the Applicant-Amarendra Mallick has died on 15.07.2017. The petition of the opposite party Nos.1(a) to 1(c) being I.A. No.1626 of 2023 has been allowed by this Court vide Order dated 15.05.2023 and said Amarendra Mallick is, therefore, allowed to be represented by his wife and children as legal heirs. Since by virtue of interim Order dated 08.01.2014 and subsequent extension Orders the operation of Order dated 17.02.2012 passed by the learned Odisha Administrative Tribunal has been stayed, circumstance as of now may not justify reinstatement of the Applicant, but the benefit envisaged in the Order of the learned Tribunal is entitled to be extended along with consequential service and pecuniary benefit.

STATUTORY PROVISIONS:

10. Section 6 of the ORV Act reads thus:

"6. Exchange of reservation between the Scheduled Castes and Scheduled Tribes.—

The reserved vacancies in appointments shall be exchanged between the Scheduled Castes and Scheduled Tribes in the event of nonavailability of candidates from the respective communities*, but the vacancies reserved for a particular community shall continue to be reserved for that community only for two recruitment years and if candidates are not available for appointment in particular reserved vacancies in the third year, the vacancy so filled by exchange shall be treated as reserved for the candidates of that particular community who are actually appointed:*

[2][Provided that nothing in this section shall apply to reserved vacancies in appointments in respect of Class III and Class IV posts and services.]

7. Carry-forward of reservation and de-reservation.—

If, in any recruitment year, the number of candidates either from Scheduled Castes or Scheduled Tribes is less than the number of vacancies reserved for them ***even after exchange of reservation between the Scheduled Castes and Scheduled Tribes****, the remaining vacancies* ***may be filled up by general candidates*** *after de-reserving the vacancies in the prescribed manner, but the vacancies so de-reserved may be carried forward to subsequent three years of recruitment:*

Provided that in the years following the recruitment year the normal reserved vacancies together with the vacancies carried forward shall not exceed fifty per cent of the total number of vacancies of the year in which recruitment is made and the excess over fifty per cent of the reserved vacancies shall be carried forward to subsequent years of recruitment.

[3][Provided further that the provisions of this section ***shall not apply to the reserved vacancies to be filled up by promotion on the basis of selection where such promotion*** *is to be made—*

(a) from Class III posts to Class II posts,

(b) within Class II posts,
(c) from Class II posts to Class I posts, and

(d) from posts, in the lowest rung of Class I]

[4][Provided also that nothing in this Section shall apply to the vacancies reserved in respect of Class III and Class IV posts, if candidates are not available for filling up such reserved vacancies these remaining vacancies shall be filled up by holding fresh recruitment only from candidates belonging to the Scheduled Castes or the Scheduled Tribes, as the case may be, and sub-section (5) of Section 9 shall not apply to such vacancies.]"

11. Rule 5 of the ORV Rules reads as follows:

"[5][5. De-reservation of vacancies].—

(1) Vacancies reserved for the Scheduled Castes and Scheduled Tribes [6][in case of initial recruitment] shall not be filled by general candidates without being de-reserved in accordance with the following procedure:

(a) (i) All vacancies except those which are required to be filled under statutory rules or through the Odisha Public Service Commission shall be notified to the local Employment Exchange in the form of requisition as prescribed under the Employment Exchange (Compulsory Notification of Vacancies) Rules, 1960. Simultaneously, a copy of the requisition in case of vacancies in Departments of Government of Heads of Department shall be to Tribal and Rural Welfare Department, and in case of vacancies in subordinate offices to the District Welfare Officer concerned.

(ii) The number of vacancies reserved for Scheduled Castes and Scheduled Tribes out of the total vacancies notified shall be clearly indicated in the requisition furnished to the Employment Exchange.

(iii) If sufficient number of Scheduled Caste and Scheduled Tribe candidates are not available through the Employment Exchange to fill up the vacancies reserved for them, the vacancies shall be advertised by the appointing authorities after getting a clearance certificate from the Employment Exchange.

(iv) While notifying or advertising reserved vacancies it shall be made clear that while the vacancies are reserved for Scheduled Tribes (or Scheduled Castes) Scheduled Caste candidates would also be eligible for consideration in the event of non-availability of suitable Scheduled Tribe candidates and vice versa.

(v) In case suitable Scheduled Caste and Scheduled Tribe candidates are not available to fill up the reserved vacancies even after issue of advertisement, such vacancies shall be de-reserved in accordance with the principles laid down in sub-clause (vi).

(vi) De-reservation of vacancies shall be made by an appointing authority with the prior approval of the authority next above the appointing authority. After such dereservation has been made the appointing authority shall, in case of de-reservation of vacancies in a District Office, intimate the fact to the District Collector concerned and in the case of de

reservation of vacancies in an office of the Head of a Department or a Department of Government to the Tribal and Rural Welfare Department along with a certificate to the effect that he has followed procedure laid down in this connection with regard to de-reservation.

(b) The procedure of de-reservation stated in Subclause (vi) of Clause (a) shall also apply to vacancies to be filled otherwise than through the Employment Exchange.

[7]*[(2) In case of promotion on the basis of seniority subject to fitness, the vacancies reserved for Schedule Caste and Scheduled Tribe and remaining unfilled on the ground of non-availability of candidates belonging to these communities, shall not be filled up without being de-reserved by the appointing. authority by taking orders of the next higher authority.*

(3) In case of promotion based on selection from Class III posts to Class II posts, within Class II posts, from Class II posts to Class I posts and from post in the lowest rung of Class I, the reserved vacancies remaining unfilled, if any, shall be filled up by general candidates.]"

ANALYSIS AND DISCUSSIONS:

12. The undisputed fact remains that the Applicant-Amarendra Mallick being found eligible in the year 1991 for promotion and suitable in the Departmental Promotion Committee Meeting held in the year 1997, his case was recommended for promotion to the post of DEO from JEO to the OPSC on the principle envisaged under Section 6 of the ORV Act to the effect that "the reserved vacancies in appointments shall be exchanged between the Scheduled Castes and Scheduled Tribes in the event non-availability of candidates from the respective communities". As a result thereof he was transferred from Nuapada to Kalahandi and he joined in the post of DEO against vacant post on 16.07.1997. The Applicant challenged the Order 16.02.2000 whereby he was reverted to the original post as the OPSC did not accord concurrence.

12.1. It transpires from reading of provisions contained in Section 6 of the ORV Act that when there is nonavailability of candidate of Scheduled Caste or, as the case may be, Scheduled Tribe, the reserved vacancy "in appointments" can be filled up by exchange. It is understood from the provisions of Section 7 of the ORV Act read with Rule 5(3) of the ORV Rules that if, in any recruitment year, the number of candidates either from Scheduled Castes or Scheduled Tribes is less than the number of vacancies reserved for them even after exchange of reservation between the Scheduled Castes and Scheduled Tribes, the remaining vacancies may be filled up by general candidates after de-reserving the vacancies in the prescribed manner, but the vacancies so de-reserved may be carried forward to subsequent three years of recruitment.

12.2. The expression "after exchange of reservation between the Scheduled Castes and Scheduled Tribes" in Section 7 is significant. The words "remaining vacancies" in Section 7 of the ORV Act and "reserved vacancies remaining unfilled" in Rule 5(3) of the ORV Rules are indication of the fact that the question of filling up of

vacancies meant for reserved candidates from general category would arise only "after exchange of reservation between the Scheduled Castes and Scheduled Tribes".

12.3. Further the rider contained in sub-section (3) of Section 7 of the ORV Act is relevant. The promotion in question being from the post of Class-III to the post of Class-II, Section 7 has no application to the present context. Rule 5(3), as contended by the petitioners (State of Odisha), cannot be read in isolation. It is to be construed along with language contained in Section 7.

12.4. It is trite that rules are not supplant, but supplement the statutory provision. In State of Gujarat Vrs. Multiplex Association of Gujarat, (2023) 3 SCR 112, it has been observed as follows:

> *"18. It has often been held – in the context of rules of procedures that they are meant to facilitate, not supplant justice. In Sangram Singh Vrs. Election Tribunal, Kotah, (1955) 2 SCR 1 this court stated:*
>
> *"16. *** It is procedure, something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of Sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it."*

12.5. In *St. Johns Teachers Training Institute Vrs. Regional Director, National Council for Teacher Education, (2003) 3 SCC 321*, it has been observed that:

> *"10. A regulation is a rule or order prescribed by a superior for the management of some business and implies a rule for general course of action. Rules and regulations are all comprised in delegated legislation.* ***The power to make subordinate legislation is derived from the enabling Act and it is fundamental that the delegate on whom such a power is conferred has to act within the limits of authority conferred by the Act. Rules cannot be made to supplant the provisions of the enabling Act but to supplement it****. What is permitted is the delegation of ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up details."*

12.6. In *Pratap Chandra Mehta Vrs. State Bar Council of Madhya Pradesh, (2011) 9 SCC 573*, it has been opined that:

> *"58. **** ***The Court would be justified in giving the provision a purposive construction to perpetuate the object of the Act****, while ensuring that such rules framed are within the field circumscribed by the parent Act. It is also clear that it may not always be absolutely necessary to spell out guidelines for delegated legislation, when discretion is vested in such delegatee bodies. In such cases, the language of the rule framed as well as the purpose sought to be achieved, would be the relevant factors to be considered by the Court."*

12.7. In *Novva Ads Vrs. Secretary, Department of Municipal Administration and Water Supply, (2008) 6 SCR 334* it has been laid down as follows:

> *"33. It is well settled that a delegated legislation would have to be read in the context of the primary statute under which it is made and, in case of any conflict, it is primary legislation that will prevail.*
>
> *34. In ITW Signode India Ltd. Vrs. Collector of Central Excise, (2004) 3 SCC 48 this Court has held as under:*
>
> *'It is well settled principle of law that in case of a conflict, between a substantive Act and delegated legislation, the former shall prevail inasmuch as delegated legislation must be read in the context of the primary/legislative Act and not vice versa.' ***"*

12.8. In such view of the matter, the interpretation of Rule 5(3) of the ORV Rules as suggested by the Additional Government Advocate is fallacious inasmuch as Rule 5(3) is to be read in harmony with Section 7. To reiterate it can, hence, be said that after exchange of reservation between the Scheduled Castes and Scheduled Tribes in the event of non-availability of candidate, when the vacancy still remains unfilled, in such eventuality, the question of consideration of filling up promotional post by a general candidate would arise. In such contingency, Rule 5(3) of the ORV Rules would attract. Carry forward of reservation and de-reservation has no application in respect of promotion from Class-III posts to Class-II posts, within Class-II posts, from Class-II posts to Class I post and from posts in the lowest rung of Class-I in view of the second proviso to Section 7.

13. By way of Rejoinder-Affidavit the Employment & Technical Education & Training Department submitted that the OPSC in their Letter No.7986/PSC, dated 07.11.1998 intimated that "as there was no Scheduled Tribe Officer available in the zone of consideration, one Officer from the General Category has been recommended for promotion against the Scheduled Tribe vacancy in accordance with the provision made under second proviso to Section 7 of ORV Act, 1975 read with Rule 5(3) of the ORV Rules, 1976." Such a stance is apparently contrary to the express provision contained in said provisions. It has already been held in the foregoing paragraphs that Section 7 would not fit to the present context as the same is applicable for determination of carry forward of reservation and dereservation. No factual detail has been placed by the State of Odisha with regard to recruitment year in question so far as "the number of candidates either from Scheduled Caste or Scheduled Tribes is less than the number of vacancies reserved for them" is concerned. From the document being Letter No.7986/PSC, dated 07.11.1998 issued by the OPSC, the reason ascribed seems to be that "as there was no Scheduled Tribe Officer in the zone of consideration, one Officer from General category has been recommended for promotion against the Scheduled Tribe vacancy". At paragraph 4 of said Letter, the OPSC opined that "the provision made in Section 6 of the ORV Act, 1975 as cited in the Department Letter under reference, is applicable in the case of direct appointment made to Class-II and above ranks and not in the promotion matters". Such a view expressed by the OPSC manifests misreading of said provision. From the opening words "The reserved vacancies in appointments shall be exchanged between the Scheduled Castes and Scheduled Tribes in the event of

non-availability of candidates from the respective communities" it is ex facie made clear that nonavailability of Officer in the Scheduled Tribe category shall have to be filled up by exchanging with Scheduled,Caste candidate.

13.1. To buttress such understanding, aid can be had to Annexure-A/1 to the Counter-Affidavit filed by Amarendra Mallick, which is Letter dated 03.04.2003. For better comprehension, contents of said Letter is reproduced hereunder:

"GOVERNMENT OF ORISSA
S.T. & S.C. DEVELOPMENT DEPARTMENT

21429-Emp.I (A)-50/2002/SSD. Dated, Bhubaneswar, the 3rd of April, 2003

From:

Shri K. C. Mohapatra, OAS(SAG)
Director (ST/SC) & Ex-Officio
Additional Secretary to Government.

To

All Departments of Governments.
All Heads of Departments.
O.P.S.C., Cuttack.

Sub.: Clarification on applicability of exchange of reservation between S.C. and S.T. in case of promotion from Class-III to Class-II and above posts and services.

Section 6 of the ORV Act deals with exchange of Reserved vacancies between SC and ST in case of non-availability of candidates of one category. While the applicability of this provisions in case of appointment by direct recruitment is well understood, a number of cases have been referred to the ST & SC Development Department expressing doubts regarding applicability of exchange of reservation between SC and ST in case of promotional appointments as provided under Section 6 of the ORV Act, 1975. It has also been observed that different Departments have interpreted the provisions differently.

The matter was, therefore, examined in consultation with the Law Department and the Advocate General, Odisha, Cuttack. ***After careful examination of the provisions of the Law, it is hereby clarified that provisions of Section 6 of the ORV Act, 1975 are applicable in case of appointment by promotions also and exchange of reservation between SC and ST in respect of promotional appointments from Class-III to Class-II Posts, within Class-II posts, from Class-II posts to the lowest rung of class-I is permissible.***

This has been ***concurred in by the Law Department*** *in their U.O.R. No.816/L dated 22.05.2002 and vetted by the Advocate General, Odisha, Cuttack vide their U.O.I. No.417/AG, dated 16.07.2002.*

This may be brought to the notice of all Appointing Authorities working under their administrative control.

Director (ST/SC) & Ex-officio
Additional Secretary to Government"

13.2. Without placing any contrary material against such accepted view expressed by the learned Advocate General as concurred by the Law Department way back in the year 2003, the petitioner-Employment & Technical Education & Training Department, Government of Odisha, in paragraph 4 of the Rejoinder-Affidavit dated 01.05.2014 has stated thus:

> *"The provision made in Section 6 of the ORV Act, 1975 under which Sri Amarendra Mallick (Scheduled Caste) was recommended by the Departmental Promotion Committee for promotion to the post of Employment Officer, against Scheduled Tribe vacancy under the principle of exchange is applicable in the case of direct appointment made to Class-II and above ranks and not in the promotion matter. Copy of Letter No.7986, dated 07.11.1998 of the Odisha Public Service Commission is enclosed herewith and marked as Annexure-3 for kind perusal of the Hon'ble Court.*
>
> *The observation of OPSC was also confirmed by the Welfare Department followed by Law Department as follows:*
>
> *Welfare Department*
>
> *'In case of non-availability of Scheduled Caste & Scheduled Tribe candidates even after exchange of reservation, the remaining vacancies shall be filled up as per provision 2 to Section 7 of the ORV Act, 1975 read with Rule 5(3) of ORV Rules, 1976.'*
>
> *Law Department*
>
> *'*** So, the observation of the OPSC at para-4 in their Letter No.7986/PSC dated 07.11.1998 is found to be correct.' ***"*

13.3. In the Rejoinder-Affidavit without clarifying the position with respect to the concurrence made by the Law Department to the opinion rendered by the learned Advocate General in the year 2003 and the Department concerned, i.e., Scheduled Tribe and Scheduled Caste Department, having issued letter in the year 2003, the Employment & Technical Education & Training Department could not have asserted by way of affidavit sworn to before this Court that what transpired from the opinion of the Law Department in the year 1998 was correct view. It is observed that the Letter dated 03.04.2003 was communicated by the Scheduled Tribe and Scheduled Caste Development Department to all Departments of the Government of Odisha and all the Heads of Departments including the OPSC. This is strong indicator to say that the Government of Odisha has accepted and propagated that the provisions of Section 6 of the ORV Act, 1975 are applicable in case of appointment by promotion.

13.4. It is submitted by the Additional Government Advocate that the OPSC has not questioned the propriety of the Order dated 17.02.2012 of the learned Odisha Administrative Tribunal, Bhubaneswar. From this it is patent that the OPSC-opposite party No.2 is not aggrieved by said decision of the learned Tribunal. It is, thus, obvious that the view circulated by the Scheduled Tribe and Scheduled Caste Development Department has been accepted, adapted and followed by all the Departments including the OPSC.

13.5. Under the above premises, this Court is of the firm opinion that the Departments of the Government of Odisha could not take different stand at different times. All the Departments of the Government of Odisha must speak in one voice.

13.6. It may be worth referring to certain decisions as regards the proposition that different Departments of the same State Government cannot speak in different voices.

A. *Shree Sanyeeji Ispat Pvt. Ltd. Vrs. State of Assam,(2006) 147 STC 146 (Gau):*

*"86. *** The Government cannot speak in different voices. As long as the industrial policy remains what it is and the same is not changed, the benefits promised thereunder cannot be taken away by another department of the Government by taking resort to its statutory powers. If the granting of sales tax exemption to the industry set up in the specified area is not in public interest, nothing stops the Government from modifying its own industrial policy and/or withdraw the incentives. When the State Government does not change its policy, which it has announced, its Finance Department cannot, in exercise of its statutory powers, act in a manner, which would run contrary to the Government's own policy."*

B. *Central Warehousing Corporation Vrs. Adani Ports Special Economic Zone Limited, (2022) 9 SCR 1003:*

"32. It is further to be noted that, though the Ministry of C&I has been taking a stand that the delineation/ denotification was not permissible, another Ministry of the Union of India has been taking a contrary stand.

****

50. Before we part with the judgment, an important issue has invited our concern. The stands taken by two ministries of the Union of India are diagonally opposite to each other. On one hand, the Ministry of C&I has held that the delineation/denotification as sought by the appellant-CWC is not permissible in law as could be seen from the Minutes of the Meeting dated 17th January 2017. Not only that, after the order passed by the High Court, the appellant-CWC had again applied on 17th August 2021 for either delineating the area from APSEZL or, in the alternate, to grant waiver/exemption to it from complying with the conditions/obligations applicable to SEZ Units. However, the specified officer of APSEZL, vide communication dated 7th September 2021, has rejected the said prayer on the ground that there is no provision in the SEZ Act and Rules which empowers the authority to grant such a waiver.

*51. On the other hand, the Ministry of CAF&PD has taken a stand that such a delineation/ denotification is permissible in law and has also stated that there are precedents for doing so. *** It is also a stand of the Ministry of CAF&PD that shifting of the warehouses to the alternate locations would be against the interest of the appellant-CWC as well as public revenue.*

52. ***We are of the considered view that it does not augur well for the Union of India to speak in two contradictory voices. The two departments of the Union of India cannot be permitted to take stands which are diagonally opposite****. We may gainfully refer to the following observations made by a three- Judges Bench of this Court in the case of Lloyd Electric and Engineering Limited Vrs. State of Himachal Pradesh, (2016) 1 SCC 560:*

> *"14. **The State Government cannot speak in two voices**. Once the Cabinet takes a policy decision to extend its 2004 Industrial Policy in the matter of CST concession to the eligible units beyond 31.03.2009, up to 31.03.2013, and the Notification dated 29.05.2009, accordingly, having been issued by the Department concerned viz. Department of Industries, thereafter, the Excise and Taxation Department cannot take a different stand. What is given by the right hand cannot be taken by the left hand. **The Government shall speak only in one voice. It has only one policy**. The departments are to implement the government policy and not their own policy***'*
>
> *53. We, therefore, impress upon the Union of India to evolve a mechanism to ensure that whenever such conflicting stands are taken by different departments, they should be resolved at the Governmental level itself.*
>
> *54. We, therefore, direct the Registry to furnish a copy of this judgment to the learned Attorney General for India to use his good offices and do the needful."*

13.7. Two contradictory stands, one that Section 6 of the ORV Act "is applicable in the case of direct appointment made to Class-II and above ranks and not in the promotion matters" *vide* Letter No.7986/PSC, dated 07.11.1998 (Annexure-3 to the Rejoinder-Affidavit of the petitioner) cannot co-exist with that of the other as contained in Letter No.21429/Emp.I (A)- 50/2002/SSD, dated 03.04.2003 to the effect that "provisions of Section 6 of the ORV Act, 1975 are applicable in case of appointment by promotions also and exchange of reservation between Scheduled Caste and Scheduled Tribe in respect of promotional appointments from Class-III to Class-II posts, within Class-II posts, from Class-II posts to the lowest rung of Class-I is permissible".

13.8. As has already been held that Section 6 of the ORV Act has application to the present context and that Section 7 *ibid*. does not attract on the facts and in the circumstances of the case at hand, this Court would, therefore, prefer to confirm the latter view circulated to all the Departments of the Government and all the Heads of Departments including the OPSC. In such view of the matter, the interpretation put forth by the learned Odisha Administrative Tribunal, Bhubaneswar suffers no fallacy.

DECISION AND CONCLUSION:

14. Since the Departmental Promotion Committee in its Meeting held in 1997 found the Applicant-Amarendra Mallick eligible and suitable for promotion against reserved vacancy meant for Scheduled Tribe, as there was non-availability of Officer belonging to Scheduled Tribe community, and consequent thereto, he joined in the post of DEO on 16.07.1997, there is no infirmity in the conclusion arrived at vide Order dated 17.02.2012 passed by Odisha Administrative Tribunal, Bhubaneswar in O.A. No.490 of 2000. This Court, hence, finds the conclusion of the learned Odisha Administrative Tribunal, Bhubaneswar, that "In the instant case the Applicant, a Scheduled Caste candidate has been available and found suitable by the Departmental Promotion Committee for promotion. Government accepted the

recommendation of Departmental Promotion Committee and gave the Applicant promotion on ad hoc basis in accordance with Section 6 of the Act", is in consonance with the decision of the Government of Odisha in Scheduled Tribe and Scheduled Caste Development Department vide Letter No.21429-Emp.I (A)-50/2002/SSD, dated 03.04.2003 (Annexure-A/1 enclosed to Counter-Affidavit dated 03.02.2014 filed by Amarendra Mallick). Hence, present circumstance does not warrant interference in said decision of the Odisha Administrative Tribunal, Bhubaneswar in exercise of jurisdiction vested on this Court under Article 227 of the Constitution of India.

15. In view of the discussions made above and for the reasons stated hitherto, this Court is, therefore, inclined to uphold the decision of the Odisha Administrative Tribunal, Bhubaneswar vide Order dated 17.02.2012.

16. As a consequence of the above, since the Applicant- Amarendra Mallick is dead, he is to be given notional promotion from the date he joined in the promotional post of DEO, i.e., 16.07.1997. His seniority is to be reckoned from the said date of joining with all service benefits. He is entitled to get pay as is available for the said post at the relevant point of time. It is clarified that from the date of his reversion to the post of Junior Employment Officer, i.e., 16.02.2000 till his death his pay is to be fixed at notional rate as is applicable for the post of District Employment Officer. Accordingly, pecuniary benefit is to be extended to his family-opposite party Nos.1(a) to 1(c).

17. In the result, the writ petition, sans merit, is dismissed with the above observations and directions.

18. The parties are left to bear their own costs.

—— o ——

2023 (III) ILR – CUT - 374

ARINDAM SINHA, J.

W.P.(C) NO. 325 OF 2014

NAROTTAM MALLICK @ NAIK ....Petitioner

-V-

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

CONSTITUTION OF INDIA, 1950 – Article 226 – The state level scrutiny committee gave a finding that petitioner had faked his caste identity – The petitioner has been dismissed from service pursuant to order passed by the SLSC – There is nothing on record to show that petitioner entered into government service on the basis of his caste

certificate – Whether the impugned report of SLSC and order of dismissal is sustainable? – Held, No – Reason indicated. (Para-10)

For Petitioner : Mr. Susanta Ku. Mishra

For Opp. Parties :Ms. Suman Pattanayak, AGA

JUDGMENT Date of Judgment: 29.08.2023

ARINDAM SINHA, J.

1. The writ petition was heard on several occasions. Today it has been called on for final hearing, upon State having filed additional affidavit dated 28th August, 2023. Mr. Mishra, learned advocate appears on behalf of petitioner while Ms. Pattanayak, learned advocate, Additional Government Advocate, for State.

2. Petitioner's challenge is against final order dated 27th July, 2013 of the State Level Scrutiny Committee (SLSC). On behalf of petitioner it was pointed out that by impugned order there was no cancellation of caste certificate but instead, finding that petitioner had faked his caste identity. There is no dispute that petitioner obtained a caste certificate on 26th December, 1980 from the then Member of Legislative Assembly (MLA), certifying him to belong to a Scheduled Tribe (ST). On query from Court Mr. Mishra demonstrated that Orissa Caste Certificate (for Scheduled Castes and Scheduled Tribes) Rules, 1980 came into force as directed by circular dated 2nd December, 1980, 'at once'. As aforesaid, the caste certificate stood issued by the MLA later, on 26th December, 1980.

3. Facts are that petitioner was appointed as 'Orderly Peon' in General Administrative (GA) Department on 17th September, 1986. He entered government service on 20th September, 1986. For purpose of the writ petition, petitioner obtained documents upon making query under Right to Information Act, 2005 and they have been disclosed. There is nothing on record to show that petitioner entered government service on basis of his caste certificate dated 26th December, 1980, issued by the MLA. On behalf of petitioner it was demonstrated, office order dated 28th March, 2011 issued by Government of Orissa Parliamentary Affairs Department, was purportedly on basis of allegation of mention in his service roll that he belongs to ST 'Kandha'. On thereby having been directed by letter dated 8th January, 2008 to produce his caste certificate, petitioner produced said caste certificate dated 26th December, 1980.

4. Counter and rejoinder stood filed and the writ petition was heard on 18th July, 2023. In that hearing, office order dated 28th March, 2011 was perused. It appears, report was made to Revenue and Disaster Management Department on letter dated 4th January, 2008 that petitioner belongs to ST category (Kandha) as indicated in his service roll and his caste certificate is not available in the department. Also perused were documents disclosed by petitioner and those annexed

to the counter and rejoinder. Nothing on the record was found to show petitioner was given appointment on 17th September, 1986 based on him belonging to a Scheduled Tribe. It was, therefore, not clear how there came to be indication in the service roll that petitioner belongs to ST category (Kandha).

5. The circular handed up directed all administrative officers that Orissa Caste Certificate (for Scheduled Castes and Scheduled Tribes) Rules, 1980 had come into force immediately with issuance of it on 2nd December, 1980. There is nothing disclosed in the counter to show there was a notification to inform the public that the rules had come into force and were in operation. Unless State is able to demonstrate that elected members of the State Legislature were notified as no longer competent to issue caste certificates, it cannot place reliance on the circular for at once effectiveness of the 1980 Rules as on 2nd December, 1980 to merely contend that the MLA had issued the caste certificate without authority. More so, the Rules of 1980 is law under article 13 of the Constitution but not one that was made by legislation, involving the MLAs. In any event, the Rules empowering cancellation is only in respect of a caste certificate issued thereunder. So it is not surprising that the SLSC said petitioner had faked his caste identity.

6. State, after having filed counter had prayed for leave to file additional affidavit, to disclose the service roll indicating petitioner belongs to ST category (Kandha). On subsequent date of hearing (21st August, 2023), on behalf of State it was submitted that two additional affidavits, both dated 16th August, 2023, had been filed. One was on behalf of opposite party nos. 1 to 3 and the other, on behalf of opposite party no.4. This was because originally petitioner was appointed by GA Department. Service roll disclosed by the additional affidavits were those produced by the subsequent departments. State thereafter again sought further adjournment for the GA Department to produce the service book/record of petitioner's appointment but could not produce the same. Here it is necessary to reproduce below paragraph-3 from order dated 21st August, 2023 made after hearing that day.

> *"3. Paragraph 6 from order dated 18th July, 2023 is reproduced below.*
>
> *"6. Adjournment granted is peremptory for State to produce by the records or file additional affidavit, disclosing the service roll on indication that petitioner belongs to ST category (Kandha).* ***It is made clear that the indication cannot merely be an endorsement but has to be backed up by some basis.*** *"* *(emphasis supplied)*
>
> *There is apparent discrepancy appearing from handwriting of the endorsement made on the service roll. State has been obtaining adjournment after adjournment on pretext of producing the record. It has not been produced. Petitioner cannot be faulted for opposing the prayer for adjournment."*

State, then filed yet another affidavit dated 28th August, 2023.

7. Today Ms. Pattanayak relies on continuation paga-2 of communication no.8455 dated 4th December, 1997 disclosed by said affidavit dated 28th August,

2023 saying, inter alia, petitioner had been promoted temporarily in post of 'Jamadar' to office of Minister, Revenue from earlier post of Peon in the same office. She points out, petitioner is stated to belong to ST as indicated in the communication, against his name. Mr. Mishra in response draws attention to additional affidavit dated 16th August, 2023 filed by opposite party nos. 1 to 3 to submit, referred letter no.8453 dated 4th December, 1997 in said letter no.8455 also dated 4th December, 1997 has been disclosed therein. There is no reference to his client belonging to ST category in the letter. Text of letter no.8453 dated 4th December, 1997, as appearing from the affidavit is reproduced below.

> *"As per recommendation of D.P.C. held on 24.11.97 Shri Narottam Mallick, Peon is here by promoted temporarily to the post of Jamadar in the scale of pay of Rs.775-12-87-14-1025/- with usual DA and other allowances sanctioned from time to time by Govt."*

8. There is no material on record to show that petitioner entered into government service claiming to be or having used his caste certificate issued by the MLA. Thus, Court is confronted with petitioner's grievance and claim for relief on contention he has been dismissed from service pursuant to impugned final order made by the SLSC, on purported finding that he had a fake caste identity as opposed to a fake caste certificate.

9. There was submission made on behalf of State that the SLSC had verified petitioner's caste to find he did not belong to ST category (Kandha). The writ Court should not interfere with such finding. It is one on verification of facts. A consequence would be that petitioner and after him his heirs would then claim to belong to ST category (Kandha) and obtain advantage of reservation in future. The SLSC had found from the land records, petitioner's father and his brothers had been mentioned therein to belong to caste 'Pano'.

10. Court is convinced the Rules of 1980 do not provide for verification of caste certificates issued by an MLA, the issuance permissible prior to coming effect of the Rules. Competent authorities to issue caste certificates and those to verify them have been clearly provided for in the Rules. Hence, impugned final order proceeds on basis of petitioner having faked his caste identity. This finding, however, is not supported by corresponding finding that petitioner faked his identity in obtaining government service as would appear from the record. Petitioner as aforesaid, was given appointment as 'Orderly Peon' on 17th September, 1986 and had entered into government service on 20th September, 1986. The appointment letter and petitioner entering government service are borne out by documents on record. Said documents do not indicate petitioner obtained the service on reservation, claiming to belong to ST category (Kandha). In the circumstances, impugned final order bearing penal consequences against petitioner does not appear to be based on relevant evidence/material. Omission to mention in the appointment documents that petitioner belongs to a reserved category makes it clear, petitioner did not get his

appointment as such. That would relegate petitioner to belong to a caste in the general category. As such, his heirs cannot get reservation by claiming to belong to ST category (Kandha). This Court on not being presented with cogent material to demonstrate petitioner had obtained government service on reservation for members of, inter alia, ST category (Kandha), impugned final order cannot be sustained on judicial review, inspite of petitioner, obviously wrongfully, having obtained his said caste certificate.

11. Impugned final order and all consequent orders are set aside and quashed. The writ petition is allowed and disposed of.

—— o ——

2023 (III) ILR – CUT - 378

ARINDAM SINHA, J & SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 27284 OF 2017

M/s. SHREERAM TRADERS ....Petitioner

-V-

THE COMMISSIONER OF COMMERCIAL TAXES, ORISSA & ORS. ....Opp Parties

ORISSA VALUE ADDED TAX ACT, 2004 – Section 65(1) r/w Rule 73 of OVAT Rule, 2005 – There is no prescription in the rule regarding the procedure, in which the statement is to be furnished – Whether the impugned order of the authority by imposing the penalty on petitioner for non filing of the statement is sustainable? – Held, No – Reason indicated. (Para 8-10)

Case Law Relied on and Referred to :-

1. W.P.(C) No.27285 of 2017 : M/s. Bhadrak Timber Depot Vs. The Commissioner of Commercial Taxes, Odisha & Ors.

For Petitioner : Mr. Gouri Mohan Rath

For Opp. Parties : Mr. Diganta Das, Addl. Standing Counsel

JUDGMENT Date of Judgment: 31.08.2023

ARINDAM SINHA, J.

1. Mr. Rath, learned advocate appears on behalf of petitioner-dealer and Mr. Das, learned advocate, Additional Standing Counsel for the department.

2. The writ petition was moved on 7th July, 2023. Submission on behalf of petitioner was that he is not liable to get his accounts audited under sub-section (1) of section 65 in Orissa Value Added Tax Act, 2004. Sub-section (1-a) (since

omitted) required a dealer, such as petitioner, to furnish a statement of closing stock-in-trade held at end of the year in the prescribed manner to the Commissioner, within a period of three months from date of expiry of that year. Sub-section (33) in section 2 gives meaning of prescribed as prescribed by rules. There is no rule prescribed for the manner, in which the statement is to be furnished. In the circumstances, impugned is order dated 6th March, 2017 made by the Joint Commissioner of Sales Tax confirming imposition penalty of Rs.42,700/- on petitioner for not filing the statement.

3. On hearing petitioner we had formulated a question for the department to answer. We reproduce below paragraph-3 from our order dated 7th July, 2023.

> *"3. The department will be heard on whether there can be imposition of penalty on finding of omission to file the statement, where there is no prescription regarding manner in which it is to be filed."*

4. Today Mr. Rath relies on interim **order dated 17th January, 2023** made in the connected writ petition in **W.P.(C) no.27285 of 2017 (M/s. Bhadrak Timber Depot v. The Commissioner of Commercial Taxes, Odisha & others)**. He submits, coordinate Bench was pleased to protect his client in the interim by said order.

5. Mr. Das submits, first, sub-section (1) in section 65 is to be looked at. True it is that it relates to a dealer, who must have his accounts audited. However, the provision has two parts. One is regarding the dealer having his accounts audited and the other, on filing particulars of his business in the prescribed form. Pursuant to the second part in the provision there was made rule 73 in Orissa Value Added Tax Rules, 2005.

6. He submits, rule 73 provides for filing of stock statement under the second part of the provision in section 65(1). Furthermore, the enclosure to be added in the form of certificate, as certified by the chartered accountant is again a separate part, covering those dealers who do not need to have their accounts audited. This is because the enclosure part is certification by the dealer himself.

7. We reproduce below paragraph-1 from **order dated 17th January, 2023** (supra). It contains reason for issuance of interim protection to petitioner in a connected writ petition.

> *"1. Learned counsel for the Petitioner states that the challenge to the impugned order dated 6th March, 2017 passed by the Joint Commissioner of Sales Taxes, Balasore Range, Balasore, dismissing the Petitioner's revision petition is essentially on the ground that the manner of furnishing the details of the stock held by the dealer as required under Section 65(1-a) of the Odisha Value Added Tax Act, 2004 (for short "the OVAT Act") was not indicated in Rule 73 of the OVAT Rules, 2005 or anywhere else. Therefore, the Petitioner was not in a position to comply with the provision. It is accordingly submitted that the penalty under Section 65(2) of the OVAT Act was not justified."*

8. On perusal of section 65 we have not been able to find the distinction of separate parts therein, as applicable to a dealer who has to have his accounts audited and those who do not. Heading of the section is 'accounts to be audited in certain case'. The cases have been provided to be that of a dealer, whose gross turnover exceeds of Rs.40 lakhs or any other amount as the Commissioner may specify by notification in the Commercial Taxes Gazette. Therefore, there are two cases where a dealer must have accounts audited. First, where his turnover exceeds Rs.40 lakhs and second, where it exceeds any amount as the Commissioner may have specified by notification in the Commercial Taxes Gazette. Petitioner has urged he is a dealer, who does not need to have his accounts audited. There is no dispute on that.

9. Moving on to rule 73, again the heading is 'certificate to be furnished by the accountant'. The accountant can be no other that the chartered accountant, who audits the dealer's account. The form of certificate given in the rule says audit report under section 65. In the circumstances, we are unable to look at the form of the certificate and from there extract the enclosure, for it to be made applicable to dealers who are not required to have their accounts audited.

10. For reasons aforesaid, impugned order dated 6th March, 2017 cannot be sustained. There can be no penalty for violation, when there is no prescription on how the requisition is to be complied with. Impugned order is set aside and quashed.

11. The writ petition is allowed and disposed of.

—— o ——

2023 (III) ILR – CUT - 380

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

JCRLA NO. 52 OF 2012

SURA @ SURESH NAIK ....Appellant

-V-

STATE OF ODISHA ....Respondent

(A) INDIAN PENAL CODE, 1860 – Sections 300,302, 304 Part (II) – Appellant was convicted and sentenced to undergo imprisonment for life for commission of offence under section 302 of the Indian Penal Code – The prosecution witnesses have not been able to provide information as to whether there was any kind of existing quarrel between the two parties – The I.O has admitted during his evidence that his investigation reveals that just prior to assault there was push and pull between the accused and deceased while they were taking liquor – Whether the act of appellant was pre-mediated and with an intention to cause the death of the deceased? – Held, No – When the attack was not pre-mediated and not with an intention to cause death,

even if the injury inflicted was a serious one, it by itself may not be decisive but is one of the relevant factors 300 IPC. The appellant is guilt of commission of the offence U/s. 304 part 1 and not under Sec 302 of IPC. (Para 20-26)

(B) CRIMINAL TRIAL – Testimony of witness – Whether minor discrepancy discredit the testimony of the witness – Held, No – Reason indicated with reference to case law. (Para 16-19)

Case Laws Relied on and Referred to :-

1. (2002) 23 OCR 547 : Kanistha Barik Vs. State.
2. 95 (2003) CLT 477 : Basu Harijana Vs. State of Orissa.
3. (2000) 8 SCC 457 : Narayan Chetanram Chaudhary & Anr. Vs. State of Maharashtra.
4. 1999 Supp(4) SCR 286 : State of Himachal Pradesh Vs. Lekh Raj & Anr.
5. (1974) (3) SCC 767 : Ousu Varghese Vs. State of Kerala.
6. (1981) SCC (Crl.) 676 : Jagdish Vs. State of Madhya Pradesh.
7. (1981) (2) SCC 752 : State of Rajasthan Vs. Kalki & Anr.
8. 2003 AIR 660 SC : State of Uttar Pradesh Vs. Jagdeo.
9. AIR 1958 SC 465 : Virsa Singh Vs.State of Punjab.
10. (2005) (9) SCC 71 : Shankar Narayan Bhadolkar Vs. State of Maharashtra.
11. AIR 1995 SC 2466 : State of Punjab Vs. Tejinder Singh & Anr.

For Appellant : Mr. B.K. Ragada

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

JUDGMENT Date of Hearing:06.07.2023 : Date of Judgment:24.07.2023

Dr. S.K. PANIGRAHI, J.

1. In this JCRLA, the convict/Appellant (Suresh Naik) challenges the judgment of conviction and order of sentence dated 04.12.2009 passed by the learned Ad hoc Additional Sessions Judge (FTC), Athagarh in Sessions Trial No.244 of 2007, whereby the Appellant was convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs.2,000/- in default to undergo further R.I. for six months for commission of offence under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as "the I.P.C." for brevity).

I. CASE OF THE PROSECUTION:

2. The case of the prosecution is that on 02.08.2006, the informant (P.W.3) who is the resident of village Sagara under Narasinghpur P.S. in the district of Cuttack lodged a written report before the OIC Narasinghpur to the effect that on that day at about 7 pm, his younger brother (deceased) was present in the house of his elder brother. Subsequently, Suresh Naik (accused) and Sarat Kumar Naik who are brothers assaulted the deceased by means of a 'thenga' on his head. The prosecution has mentioned that this altercation bore out of previous enmity. Thereafter, they threw him in injured condition and fled. Subsequently, the informant brought the injured to Narasinghpur hospital and after first aid shifted him

to SCBMCH, Cuttack, when he succumbed to his injuries. Based on this written report, PS case No.79/06 was registered and after completion of investigation, charge-sheet was submitted against the present accused and another.

3. After the charge was framed, the trial was completed by the Learned Ad hoc Addl. Sessions Judge (FTC), Athagarh and the Appellant was convicted under Section 302 of IPC and sentenced to undergo imprisonment for life. Hence, this appeal.

II. SUBMISSION OF THE APPELLANT:

4. Learned Counsel for the Appellant strenuously argued that the appellant is innocent. The plea of the defence is one of complete denial and false implication. The specific case/plea of the defence as it borne out from the statement of the accused under Section 313 of the Cr.PC. is that he (accused) is in no way connected or concerned with the death of the deceased. He had further deposed that he cannot say who has killed the deceased, however, he was not involved in the incident.

5. Learned Counsel has submitted that the doctor who has conducted the Post-mortem examination has not been examined which acts as a major discrepancy in the case of the prosecution. Additionally, there are major contradictions in the statements of P.W.1, 2, and 4 who have proclaimed to be the eye witnesses of the occurrence.

6. Learned Counsel further contended that if at all, the accused should be charged, it should be under culpable homicide not amounting to murder. He submitted that P.W.11 has stated in their respective deposition that there was quarrel between the accused and the deceased on the spot and both had consumed liquor. Therefore, the attack on the deceased by the accused was not premeditated, rather, it was sudden and in the spur of the moment.

III. SUBMISSIONS OF THE STATE/ RESPONDENT

7. The prosecution in order to bring home the charges has examined as many as 12 witnesses. Among the prosecution witnesses, P.W.3 is the informant and one among the elder brothers of the deceased and a post occurrence witness as well. P.W.2 is the mother of the deceased and an eye witness to the occurrence, P.W.1 and P.W.4 are also eye witnesses to the occurrence, P.W.5 is a post occurrence witness and P.W.6 is a resident of the spot village. P.W.8 is the doctor of Narasinghpur hospital who provided first aid to the deceased on 02.08.2006. P.W.12 is the CMO of SCBMCH, Cuttack, P.W.11 is the preliminary I.O. and P.W.10 is the I.O.

8. Learned Counsel for the State submitted that in the post mortem report (Ext.15), the doctor has clearly stated that, the nature of death suffered by the deceased is homicidal one and possible by blow by hard and blunt object and the cause of death is due to coma as a result of injuries to the head and brain and the injuries are sufficient to cause death in the ordinary course of nature.

9. Learned Counsel for the State submitted that from the unassailed testimony of the eye witnesses i.e. P.Ws.1, 2 and 4 which finds ample corroboration with each other coupled with the medical evidence i.e. the evidence of the doctor (P.W.1), it can be safely concluded that, none else but the accused is the author of the injuries found on the body of the deceased.

IV. COURT'S REASONING AND ANALYSIS:

10. Heard both the parties and went through the judgement of the Trial Court. After extensively perusing the documents adduced by the prosecution and the depositions of the witnesses, this Court is of the view that there are three points of determination in the present case:

> ***i. Whether the death of the deceased is homicidal in nature?***
>
> ***ii. Whether the prosecution has managed to prove beyond reasonable doubt that the act of the appellant led to the death of the deceased?***
>
> ***iii. Whether the act of the appellant was premeditated and with an intention to cause the death of the deceased?***

V. Whether the death of the deceased is homicidal in nature?

11. As established by the learned Trial Court, it is the consistent evidence of P.Ws.1 to 5 that the deceased had sustained injuries and was taken to Narasinghpur hospital and from Narasinghpur hospital he was referred to SCB MCH, Cuttack which also corroborated by P.W.8, who has provided the first aid at Narasinghpur hospital to the deceased, so also by P.W.12 the CMO of SCB MCH, Cuttack.

12. In Ext 15 it is mentioned that all the injuries are ante- mortem in nature and possible by blow by hard and blunt object and the cause of death is due to coma as a result of injuries to the head and brain and the injuries are sufficient to cause death in the ordinary course of nature. In the post mortem report of the deceased, Ext.15, it has further been reported that there is:

> (i) One contusion of size 22cm x 1cm found on the left side chest wall.
>
> (ii) One contusion of size 15cm x 1cm found at a distance of 6 cm from injury no.1 towards its right and parallel to it
>
> (iii) One contusion of size 20 cm x 1cm found on the back,
>
> (iv) One stitched wound placed anterior/posterior on the top of head having length of 6 cm.
>
> (v) One stitched would similarly situated 4 cm behind and to right of the other head injury having length of 3 cm.

13. In this regard, learned counsel for the Appellant has contended that the doctor who prepared the post mortem report has not been cross-examined by the prosecution which evidently makes the case of the prosecution weak. However, in ***Kanistha Barik v. State***[1] and ***Basu Harijana v. State of Orissa***[2], this Court has

1. (2002) 23 OCR 547 2. 95 (2003) CLT 477

iterated that if the attendance of the doctor who has conducted the P.M. examination could not be procured for his evidence his report can be admitted into evidence under Section 32 of the Evidence Act. Therefore, reliance can be placed on the post mortem report (Ext.15) even though the doctor was not examined by the prosecution.

VI. Whether the prosecution has managed to prove beyond reasonable doubt that the act of the appellant led to the death of the deceased?

14. The case of the prosecution mainly rests upon the testimony of eyewitnesses i.e., P.W.1, 2 and 4. P.W.1 has deposed that the present accused has dealt 2 to 3 blows by means of a bamboo 'thenga' to the deceased while his elder brother was instigating. P.W.2 has also deposed that the present accused was assaulting by a bamboo thenga while his elder brother was instigating when she arrived. P.W.4 has corroborated the statement of the P.W.1 and P.W.2. He has further deposed that the accused persons left the spot only after his intervention. He further deposed categorically that the accused Sura assaulted on head. The consistent evidence of P.Ws.1, 2 and 4 is that in the presence of his elder brother, the accused assaulted the deceased by means of bamboo thenga when the deceased was lying below the verandah of Arjuna Naik.

15. P.W.2. has deposed that the deceased sustained bleeding injury on the back of his neck including the area adjacent to lower part of head and swelling injury on his chest. This deposition has been corroborated by P.W.4 wherein he has deposed that that the deceased sustained injuries on the back side of his head as well as on the upper part of his head and chest.

16. P.W.4 has deposed during his cross-examination that when he arrived at the spot he found P.W.1, the appellant, his elder brother and P.W.2. However, he has not stated before the I.O. that he had seen P.W.1 in the place of occurrence. Therefore, there are minor contradictions in the statements of the P.Ws. However, this minor discrepancy does not discredit the testimony of the witness considering that these do not pertain to any material particulars of the facts of the incident. It has been well established by law that only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. In the case of ***Narayan Chetanram Chaudhary & Anr. v. State of Maharashtra***[3], the Supreme Court observed:

> *"Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person."*

3. (2000) 8 SCC 457

Similarly, in ***State of Himachal Pradesh v. Lekh Raj & Anr***[4]., dealing with discrepancies, contradictions and omissions, the Supreme Court held:

> *"Discrepancy has to be distinguished from contradiction. Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. The normal course of the human conduct would be that while narrating a particular incidence there may occur minor discrepancies, such discrepancies in law may render credential to the depositions. Parrot like statements are disfavoured by the courts. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which such witness was making the statement. This Court in Ousu Varghese v. State of Kerala*[5] *held that minor variations in the accounts of the witnesses are often the hallmark of the truth of their testimony. In Jagdish vs. State of Madhya Pradesh*[6] *this Court held that when the discrepancies were comparatively of a minor character and did not go to the root of the prosecution story, they need not be given undue importance. Mere congruity or consistency is not the sole test of truth in the depositions. This Court again in State of Rajasthan vs. Kalki & Anr*[7]*. held that in the depositions of witnesses there are always normal discrepancy, however, honest and truthful they may be. Such discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person."*

17. It is pertinent to mention that both the eye-witnesses i.e. P.Ws.1, 2 and 4 have fully corroborated the facts of the case, the involvement of the appellant and the occurrence of the event. In this regard, the contention of the learned defence counsel with respect to non-reliability of prosecution witness does not stand. This Court is of the opinion that it is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise.

18. This Court is of the opinion that the Trial Court has rightly relied on the deposition of the P.W.2 even after the said person being directly related to the deceased. P.W.2 is the mother of the deceased. It is pertinent to note that the deposition of P.W.2 has been corroborated by eye-witnesses P.W.1 and 4 who are not related to the deceased and the post-mortem report. It is well settled by the Supreme Court that in cases where there is a relation between the witness and the deceased, it is the duty of the court to scrutinize the evidence with proper caution. In the case of ***State of Uttar Pradesh v. Jagdeo***[8], the court held that the testimony of the witness cannot be discarded on the ground that the witness is connected to the deceased if the evidence given by him is consistent and supported with other witnesses.

4. 1999 Supp(4) SCR 286 , **5**. (1974) (3) SCC 767 , **6**. (1981) SCC (Crl.) 676
7. (1981) (2) SCC 752 , **8**. 2003 AIR 660 SC

19. In this regard, the Trial Court concluded that the post mortem report prepared by the doctor corroborated through the evidence of P.Ws.1, 2 and 4 coupled with the plea of the defence i.e. no dispute to the homicidal nature of death of the deceased points to the irresistible conclusion that, the nature of death suffered by the deceased is neither accidental nor suicidal, rather the same is purely homicidal one. Therefore, this Court is of the view that the prosecution has been able to prove beyond reasonable doubt that the act of the appellant has led to the death of the deceased.

VIII. Whether the act of the appellant was premeditated and with an intention to cause the death of the deceased?

20. With regards to the second issue, the prosecution witnesses i.e. P.Ws 1 to 5 have not been able to provide information as to whether there was any kind of existing quarrel between the two parties. In addition to this, the prosecution has not established that the act of the accused shall not fall under the Exception 4 of Section 300 of IPC. The exception provides that that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

21. P.W.11, the preliminary I.O. has admitted during his evidence that his investigation reveals that just prior to the assault on Surendra there was push and pull on the verandah of Arjuna Naik in between accused and the deceased while they were taking liquor. Furthermore, P.W.1 has deposed in his examination in chief that in the evening of the occurrence day he himself, the deceased, the accused alongwith Sanjaya Naik Narayan Senapati and Sudhakara Jena sat on the verandah of Arjuna of their village in order to take liquor. While in an inebriated state. The deceased asked the appellant to provide more liquor on his denial both engaged in a scuffle. During cross-examination his evidence was that when they were taking liquor it would be at about 6 to 7 P.M. This has been corroborated by P.W.1. Therefore, the occurrence has originated while the consumption of liquor was going on and the deceased and the accused were almost intoxicated.

22. In this regard, it has been well established by law that culpable homicide becomes murder if the case comes under any one of the clauses out of the four defined in section 300 of the I.P.C. and the same becomes punishable under Section 302 of the I.P.C. But the culpable homicide is not murder if the case falls within any one of the exceptions out of five of the said Section 300 of the I.P.C. and then the same becomes culpable homicide not amounting to murder and punishable under Section 304 of the I.P.C., but not under Section 302 of the I.P.C.

23. However, if an injury is inflicted with the knowledge and intention that it is likely to cause death, but with no intention to cause death the offence would fall within the definition of Section 304-I IPC and not under Section 302 IPC. In this

regard, the Supreme Court in ***Virsa Singh v. State of Punjab***[9] as also in ***Shankar Narayan Bhadolkar v. State of Maharashtra***[10]***,*** opined :

> *"Applying the principles of law, as noticed hereinafter, I am of the considered opinion, that the offence committed by the appellants does not fall within the definition of Section 300 of the IPC, nor does it fall within the definition of offence, punishable under Section 304II of the Indian Penal Code. In my considered opinion, the learned trial Court rightly held that the nature of the offence, falls within the definition of Section 304-I of the IPC Section 304 deals with situations, where culpable homicide does not amount to murder, i.e. does not fall within the definition of murder, as contained in Section 300 of the IPC. Section 304 is sub-divided into two parts. If an injury is inflicted with the knowledge and intention that it is likely to cause death, but with no intention to cause death the offence would fall within the definition of Section 304-I, however, if there is no intention to cause such an injury, but there is knowledge that such an injury can cause death, the offence would fall within the definition of Section 304-II. Thus, is intention. If intention to cause such an injury as is likely to cause death, is established, the offence would fall under Part-I but where no such intention is established and only knowledge that the injury is likely to cause death, it would fall under Part-II."*
>
> *"However, the nature of the injury, the weapon of offence, the intention and knowledge of the assailants, in my considered opinion, clearly places the offence as one under Section 304-I of the IPC. Appellant No.1 inflicted the injury with knowledge and intention that the injury, if inflicted is likely to cause death, but with no intention to cause death. However, as from the facts and circumstances of the present case, and the fact that it was a sudden fight, a single blow inflicted with the reverse side of a Kassi, it cannot be stated that he had an intention to cause death, as required to make out an offence under Section 300 of the IPC."*

24. Reliance has also been placed on the decision of the Supreme Court in the case of ***State of Punjab v. Tejinder Singh & Anr***[11]***.*** In this case, two persons inflicted Gandasa blows on the deceased. The altercation had already taken place four days prior to the incident over the boundary line of the plots of the parties. The accused persons came heavily armed shouting that the deceased should not be spared at a point of time when his wife had brought breakfast for him and he had gone to hand pump to bring water in a pitcher. It was even in the aforementioned situation, this Court held:

> *"In view of our above findings we have now to ascertain whether for their such acts A-1 and A-2 are liable to be convicted under Section 302 read with Section 34, IPC. It appears from the evidence of PW-4 and PW-5 that the deceased was assaulted both with the sharp edge and blunt edge of the gandasas and the nature of injuries also so indicates. If really the appellants had intended to commit murder, they would not have certainly used the blunt edge when the task could have been expedited and assured with the sharp edge. Then again we find that except one injury on the head, all other injuries were on non-vital parts of the body. Post-mortem report further shows that even the injury on the head was only muscle deep. Taking these facts into consideration we are of the opinion that the offence committed by the appellant is one under Section 304 (Part I), IPC and not under Section 302, IPC."*

25. In the present case, it has been clearly established by the prosecution that the accused inflicted a serious injury on the deceased. This has been established owing to the deposition of the three eye-witnesses P.W.1, 2 and 4; due corroboration of the

9. AIR 1958 SC 465 , **10**. (2005) (9) SCC 71 & **11**. AIR 1995 SC 2466

medical report (Ext.15) submitted by the medical officer. The prosecution has further established that the injury was inflicted upon the deceased with the knowledge and intention that it is likely to cause death. However, he has not been able to prove whether the attack was premeditated and with an intention to cause death. Therefore, even if the injury inflicted was a serious one, it by itself may not be decisive but is one of the relevant factors in regards to the application of fourthly of Section 300. Application of the said provisions must be made keeping in mind the fact situation emanating therefrom and the legal principles noticed hereinbefore.

26. For the reasons aforementioned, we are of the opinion that the appellant is guilty of commission of the offence under Section 304, Part-I and not Section 302 IPC thereof.

27. Therefore, we allow the appeal in part. Accordingly, the conviction and sentence to undergo imprisonment for life and to pay a fine of Rs.2,000/- in default to undergo further R.I. for six months for commission of offence under Section 302 of the I.P.C. recorded by the learned Ad hoc Additional Sessions Judge (FTC), Athagarh in Sessions Trial No.244 of 2007, as per the judgment of conviction and order of sentence dated 04.12.2009 are hereby set aside and modified the conviction under Section 304, Part-I of the Penal Code and sentenced to undergo R.I. for 10 years. The period of detention already undergone by the appellant during investigation, the trial as an U.T.P. and during the pendency of the appeal be set off under Section 428 of the Cr.P.C.

28. Accordingly, this JCRLA is allowed in part.

—— o ——

2023 (III) ILR – CUT- 388

D. DASH, J.

RSA NO. 59 OF 2014

SUJAYA SHANKAR SINGH DEO ………Appellant

.V.

SMT. PUSPA KUMARI DEVI & ORS. ……….Respondents

PROPERTY LAW – The vendor of the plaintiff had the alienable right over the suit property – The vendor have executed the registered sale deed in the year 1983 – Neither the defendants nor their predecessor-in-interest have challenged the same on any specific ground by filing suit except questioning the authority of the vendor which has been negated by the court below – The defendant for the first time in the present appeal stated that it is a created document – Whether the submission of defendants acceptable at this stage? – Held, No – The

finding of the First Appellate Court that the plaintiff has the right title and interest over the suit property and as such entitled to recover the possession of the suit land from the defendants has to hold the field.
(Para-10)

For Appellant : Mr. S.K. Samantaray

For Respondents : Mr. A.P. Bose

JUDGMENT Date of Judgment: 10.08.2023

D.DASH, J.

1. The Appellant, by filing this Appeal, under Section-100 of the Code of Civil Procedure, 1908 (for short, 'the Code') has assailed the judgment and decree passed by the learned Additional District Judge, Kalahandi, Bhawanipatna in RFA No.3/54 of 2010-2013.

The Respondent No.1 as the Plaintiff filed the suit for recovery of the suit property from one Prasanna Kumar Singh, who had been arraigned as the sole Defendant and for permanent injunction restraining him not to enter upon the suit property.

During pendency of the suit, the sole Defendant having died, his legal representatives have been brought on record as Defendant No.1 (A) to 1 (E). The Trial Court dismissed the suit filed by the present Respondent No.1 (Plaintiff). Being aggrieved, by the said judgment and decree passed by the Trial Court dismissing the suit, the present Respondent No.1 as the unsuccessful Plaintiff being non-suited had carried the Appeal under section 96 of the Code. The First Appellate Court has allowed the Appeal The judgment and decree passed by the learned Civil Judge (Sr. Division), Bhawanipatna in Civil Suit No.7 of 2003 dismissing the suit have been set aside and the present Respondent No.1 who was the Appellant before the First Appellate Court and the Plaintiff in the Trial Court has been favoured with a decree directing this Appellant and Respondent Nos.2 to 5 (Defendants) to deliver vacant possession of the suit property to the Respondent No.1 (Plaintiff) and pay damage of Rs.200/- per month from the date of the suit till delivery 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 Trial Court.

3. Plaintiff's case is that she is a Paradanasin lady and has executed a general power of attorney in favour of her husband authorizing him to take all such step safeguarding the interest of the Plaintiff. The Plaintiff is the lawful owner in respect of the suit properties described in schedule 'A' and 'B' of the plaint which was under Khata No.619, Plot No.3351-Ac.0.016 dec. (697 sq. ft.), Plot No.3352-Ac.0.033 dec (1437 sq. ft.) and Plot No.3353-Ac.0.139 dec. (6055 sq. ft.) as per the settlement of the year 1955-56 situated near Manikeswari High School Chowk,

Bhawanipatna corresponding to the entries made in Yaddast No.283 (Unit No.7). The Plaintiff had purchased the said property from Prafulla Kumari Devi, W/o. Late Purusottam Singh of Bhawanipatna by Registered Sale Deed No.2176 dated 23.09.1983 for a consideration of Rs.20,000/- The Plaintiff having purchased the said property remained in exclusive possession of the same by residing in the suit house with her family standing over it and the vendor who was her mother-in-law also continued to stay with them. The Plaintiff had let out some portion of the house on rent to Orissa Forest Corporation Ltd. with effect from 01.02.1991 till 16.05.1992. The said house thereafter was given on rent to the Branch Office of M/s. Casion Finance and Investment Pvt. Ltd. for a period of three years from 01.07.1992 under an agreement. The tenant having vacated the suit property, the Plaintiff remained in exclusive possession of the same till 1996. She thereafter shifted to the newly constructed house of her son situated near Jayaprakash Evening College, Bhawanipatna. The Plaintiff, accordingly, kept the suit house under lock and key as there was dire need of massive repair of that house. The Plaintiff had kept some house hold materials therein. It is stated that the residence of the original Defendants is adjacent to the suit property and taking advantage of the temporary absence of the Plaintiff, the Defendant trespassed over the suit property with his family members and caused damage to the suit house leading to heavy finance loss of the Plaintiff. It was said to have happened on 14.01.2003 when the Plaintiff was at Bonai and taking advantage of her absence, the original Defendant and his family members did all said unauthorized acts. Hence, the Plaintiff filed the suit seeking the relief as afore-stated.

4. The Defendant while traversing the plaint averments has categorically stated that said Prafulla Kumar Devi had no capacity to sale the suit property and it is the Plaintiff who had managed to create that document which is thus not binding on him. It is further claimed that the Defendant is in all along in possession of the suit property for which there was no occasion for the Plaintiff to let out the same or to keep the same under lock and key. It is further stated that the question of causing any damage of the said suit house by the Defendant does not arise.

5. The Trial Court on the above rival pleadings, framed 12 issues,which run as under:-

> "(a) Has the Plaintiff any cause of action to bring the suit?
>
> (b) Is the suit maintainable in this form?
>
> (c) Is the Registered Sale Deed No.2176, dated 24.09.1983 executed by vendor, Prafulla Kumari Devi in favour of Plaintiff is genuine for consideration and has been acted upon?
>
> (d) Has the Plaintiff got exclusive right, title, interest andpossession over the suit land/properly?
>
> (e) Are the Defendants in forcible possession of the suit land/property?
>
> (f) If the Plaintiff entitled to the claimed damages?
>
> (g) To what relief if any, the Plaintiff is entitled to?"

6. The Trial Court, upon examination of the evidence let in by the parties in the touchstone of the pleadings and their appreciation at its level while answering the issues having pointed out the following reasons has dismissed the suit. The reasons are:-

> a) The testimony of P.W.1 was found not acceptable in absence of corroboration as well as in absence of explanation in non-examination of power of attorney holder.
>
> b) The alleged registered Sale Deed No.2176 dtd.24.9.1983 in respect of the suit property having not been formally proved,though a certified copy thereof was produced vide Ext.2 without lying foundation for proving such secondary evidence.
>
> c) The vender of the alleged registered Sale Deed having no alienable title and possession in respect of suit property to transfer the same to the plaintiff.
>
> d) The contents of Ext.2 having been contained no term that there was delivery of possession and in absence of any such legal prove regarding delivery of possession from vender to the vendee (plaintiff), no title is passed on strength of the same.
>
> e) Plaintiff has not come to the court with clean hands as she filed the suit on 30.1.2003 though she claims having dispossessed in the year 1996 and such delay having not been explained by her.

7. In the First Appeal filed by the Plaintiff, it has been held that the Plaintiff has established her claim over the suit property as its owner and was in possession of the same. The First Appellate Court, upon examination of the evidence on record has also held that the Plaintiff being the rightful owner of the property was in possession of the same and the Defendants have trespassed and as such the possession of the suit property by them is without any legal sanction and the Plaintiff is entitled to recover the possession of the suit property from them.

One of the legal representatives of the original Defendant has now filed this Second Appeal arraigning the Plaintiff and other legal representatives of original Defendant as the Respondents.

8. The following substantial question of law stands for being answered:-

> "Whether in view of the judgment and decree passed in Title Suit No.21/1991 when the Plaintiff has been held to have purchased the suit property from Prafulla Kumari Devi by registered sale deed for valuable consideration and that sale deed having not been challenged by the Defendants; the judgment and decree of the First Appellate Court decreeing the suit have to sustain.

9. Heard learned counsel for the Appellant and learned counsel for the Respondent No.1 at length. I have carefully read the judgments and decrees passed by the courts below.

10. The Plaintiff claims to have purchased the suit land from her motherin- law (vendor) by registered sale deed dated 23.09.1983 (Ext.7), the Defendants have not challenged the same at any earlier point of time except attacking the same in this suit. The sole Defendant as the Plaintiff had filed Title Suit No.21 of 1991 against

his co-sharers including Prafulla Kumari Devi, the vendor of the Plaintiff claiming partition of their joint family property which included the suit land. The suit had been dismissed ex parte with a finding therein that the property involved in the present suit is the exclusive property of Prafulla Kumari Devi which facts stand undisputed. The Yaddast document (Ext.9) reflects the said sale transaction in favour of the Plaintiff and that has also been recorded in the record of right of Bhawanipatna Nazul under Khata No.619 (Ext.12) showing the suit property in the name of the Plaintiffs-Vendor. That apart, the documents Ext.4 to Ext.6 which have been proved by the Plaintiff would show that a portion of the suit house had been let out by the Plaintiff. So with all those documents of title, the Defendants have not been able to establish any sort of rival claim over the suit property when the claim of their predecessor-in-interest, i.e., original Defendant that it is the joint family property liable for partition has been negated in the suit filed by him.

In that view of the matter, when the vendor of the Plaintiff had the alienable right over the property and she having executed the registered sale deed under Ext.7 neither the Defendants or their predecessor-ininterest have challenged the same on any specific ground by filing suit except questioning the authority as above which has been negated and it is only here they for the first time say that it is a created document; the finding of the First Appellate Court that the Plaintiff has the right, title and interest over the suit property and as such entitled to recover the possession of the suit land from the Defendants has to hold the field.

The First Appellate Court, therefore, is found to have rightly decreed the suit granting the reliefs as stated therein to the Plaintiff. The substantial questions of law are accordingly answered, which leads for dismissal of the Appeal.

11. In the wake of aforesaid, the Appeal stands dismissed. No order as to cost.

—— o ——

2023 (III) ILR – CUT- 392

D.DASH, J.

CRLREV NO. 423 OF 2023

RASHMI RANJAN PAL @ AJU ....Petitioner

-V-

STATE OF ODISHA ....Opp. Party

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 227 – Discharge – Basic principle the court should follow while deciding an application for discharge – Discussed with reference to case laws.

(Para 8-11)

(B) INDIAN PENAL CODE, 1860 – Section 212 – Necessary ingredients which are to be established by the prosecution to bring home the guilt of an offence U/s. 212 of code – Enumerated.

(Para 15-18)

(C) INDIAN PENAL CODE, 1860 – Section 52-A – Harbour – Definition and implication – Discussed.

Case Laws Relied on and Referred to :-

1. AIR 1977 SC 2018: State of Bihar Vs. Ramesh Singh.
2. (2012) 9 SCC 460 : Amit Kapoor Vs. Ramesh Chander.
3. (2000) 6 SCC 338 : State of M.P. Vs. Mohanlal Soni.
4. (2020) 2 SCC 768 : M.E. Shivalinga Murthy Vs. Central Bureau of Investigation, Bengaluru.
5. (2012) 2 SCC 398 : P. Vijayan Vs. State of Kerala & Anr.
6. (1999) 2 SCC 288 : Sanjiv Kumar Vs State.

For Petitioner : Mr. D.P. Dhal, Sr. Adv. & Associates.
Mr. S. Mohapatra, A.K.Parida, A. Pradhan
& A.Ray, P.K. Mallick & Ms. Shradhanjali Sahu

For Respondent : Mr. S.K. Nayak, Addl. Govt. Adv.

JUDGMENT Date of Hearing : 22.08.2023 : Date of Judgment : 04.09.2023

D. DASH, J.

The Petitioner, by filing this Revision has called in question the legality and propriety of an order dated 01.08.2023 passed by the Presiding Officer, Special Court (S.C. & S.T.), Balasore, in Special Case No.36/121 of 2023. By said order, the Trial Court has rejected the application filed by the Petitioner arraigned as an accused in the above case for his discharge under section 227 of the Code of Criminal Procedure, 1973 (for short, 'the Code').

2. Basing upon the written report of one Kartik Singh that on 20.02.2023 morning accused Chandan Kumar Rana having come to their house had thrown acid upon his daughters and their children attempting to cause their death; Sahadevkhunta P.S. Case No.56 of 2023 for commission of offences under section 452/326-A/307 of the Indian Penal Code, 1860 (for short, 'the IPC') was registered against said Chandan Kumar Rana being arraigned the sole accused. In course of time, victim Banita Singh @ Rana having succumbed to the injuries sustained on account of that act of throwing of the acid upon her by that accused Chandan, offence under section 302 of the IPC came to be added.

3. The Investigating Officer (I.O.) on completion of investigation submitted the Final Form placing seven (7) persons arraigning them as the accused to face the Trial for commission of the offences under sections 452/326-A/302/212/120-B of the IPC, section 3(2)(v) of S.C./S.T. (POA) Act. This Petitioner is one among those, in total, seven (7).

4. Mr.D.P. Dhal, learned Senior Counsel submitted that keeping in view the contentions raised for discharge of the Petitioner (accused), the impugned order containing the discussion as made at paragraph-5 being gone through would clearly show that there is total non-application of mind and the Trial Court having not even viewing the materials projected against this Petitioner (accused) for facing the Trial with other accused persons on their face value and in their proper prospective has abruptly jumped into a conclusion that the application filed by this Petitioner (accused) for his discharge does not merit consideration.

He next submitted that the Trial Court upon discussion of the materials collected in course of investigation has not even said that for commission of what offence/offences, there arises the presumption as against this Petitioner (accused) so as to be charged and face the Trial, which, according to him, was imperative on the part of the Trial Court as this Petitioner (accused) firstly contended that there is absolutely no material worth the name as against him to be arraigned as an accused; secondly, that except generally stating that he is a friend of the brother of the sister of the principal accused which too has been stated by the sole witness in a confused manner, incapable of even drawal of any inference to that effect; there is nothing to bring him in the entire crime scenario as alleged.

It was submitted that accepting the materials on record as to what two accused persons and one witness namely, Prabesh Pal have stated, by no stretch of imagination, it can be presumed that this Petitioner (accused) had helped the principal accused Chandan in providing him a lift after he committed the principal offences joining accused namely, Prakash Pal, so as to be presumed to have committed the offence under section 212 of the IPC by harboring accused Chandan, who with other arraigned accused persons, except the present Petitioner (accused) is alleged to have committed the offences under section 452/326-A/302/120-B/212 of the IPC, section 3(2)(V) SC.ST (POA) Act at this juncture, he stated that there is no person named Prabesh Pal in that village Deuli Panchaghanta and it's a creation for the purpose which cannot be lost sight of. He then placing the materials on record contended that none when has even stated the name of this Petitioner (accused) in performing any role in the entire crime episode as placed in the Final Form, there surfaces no ground to presume that this Petitioner (accused) has committed any such offences to stand be charged and face the trial. He then contended that by merely raising too remote a suspicion which according to him is uncalled for, in the worst case, the Petitioner (accused) without being placed in the same pedestal like other accused persons, may stand charged for commission of offence under section-212 of the IPC only He submitted that the Trial Court has not touched upon that aspect even though has noted about those materials i.e. the statement of one witness and then two co-accused persons which are per se not acceptable.

5. Mr. S.K. Nayak, learned Additional Government Advocate submitted that at this stage of framing the charge, the Court is not required to embark upon an

exercise of weighment of the materials on record to find out as to whether a conviction can be secured or not. He thus submitted that when the involvement of this Petitioner (accused) is found from the statement of the witness Prabesh Chandra Pal receiving support from the statements of the co-accused persons, namely, Chandan Rana and his wife, Rashmita Pal, the Trial Court is justified in repelling the move of the Petitioner (accused) for his discharge.

6. This Court is in the seisin of the revision filed by the Petitioners in questioning the sustainability of an order passed by the trial court, refusing thereby to discharge the Petitioner (accused) in putting an end to the criminal trial in so far as he is concerned. At this juncture, before proceeding to dwell upon the contention as stated in the foregoing paragraph, it would be apt to take note of the settled principles of law in the matter of consideration of the application filed by the accused persons seeking their discharge in the criminal case.

7. The principles of law are too well settled that while answering the question of framing the charges, a duty is cast upon the Court to consider the record of the case and documents submitted therein. In that exercise, if the decision is to discharge the accused under section 227 of the Code of Criminal Procedure (in short, 'the Code'), the Court is called upon to give a definite opinion for said discharge. Meaning thereby, that if the Court considers that there is no sufficient ground for proceeding against the accused, it shall discharge the accused after recording the reasons for doing so. The language of section 227 of the Code makes it clear that the Court cannot proceed merely on presumption and therefore, the word 'considers' finds place therein.

The next parameter is that if after considering the record of the case and the documents submitted there with and hearing in that behalf, the Court exercises the power to frame charges against the accused under section 228 of the Code, said view is tentative. Meaning thereby, that if the Court is of the opinion that there is ground for even presuming that the accused has committed an offence, he shall frame the charge in writing.

8. It has been held in case of *State of Bihar Vrs. Ramesh Singh*; AIR 1977 SC 2018 that at this initial stage, truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged upon their critical analysis. It is not obligatory at the stage to consider in any detail and weigh in a sensitive balance whether the facts if proved would be incompatible with the innocence of the accused or not.

9. In case of *Amit Kapoor Vrs. Ramesh Chander*; (2012) 9 SCC 460, it has been held that at the stage of framing the charges, the court is not concerned with the proof, when upon careful perusal of the materials placed, there arises strong suspicion in the mind of the Court that the accused has committed the offence, which if put to trial could prove him guilty, the Court would be justified in

proceeding with the trial by framing the charge. Here however the rule of caution comes into play that mere suspicion is not enough and the suspicion founded upon the materials on record must be of strength persuading the court to form a prima facie opinion justifying the trial as those when proved may lead to a result in favour of the prosecution.

10. The crystallized judicial view is that at the stage of framing charge, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused and the Court for the purpose is not required to appreciate the evidence to conclude whether the materials produced are sufficient or not for convicting the accused. Ref.:- *State of M.P. Vrs. Mohanlal Soni*; (2000) 6 SCC 338.

11. In the recent case in *M.E. Shivalinga Murthy Vrs. Central Bureau of Investigation, Bengaluru*; (2020) 2 SCC 768, cited by the learned Additional Standing Counsel, Vigilance, the Hon'ble Apex Court referring to the earlier decisions including the one in case of *P. Vijayan Vrs. State of Kerala and Another*; (2012) 2 SCC 398 have discerned the following principles:-

> (i) if two views are possible and one of them gives rise to suspicion only as distinguished from grave suspicion, the trial Judge would be empowered to discharge the accused;
>
> (ii) the Trial Judge is not a mere Post Office to frame the charge at the instance off the prosecution;
>
> (iii) the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding. Evidence would consist of the statements recorded by the Police or the documents produced before the Court;
>
> (iv) if the evidence, which the Prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed offence, then, there will be no sufficient ground for proceeding with the trial;
>
> (v) it is open to the accused to explain away the materials giving rise to the grave suspicion;
>
> (vi) the court has to consider the board probabilities, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This, however, would not entitle the court to make a roving inquiry into the pros and cons;
>
> (vii) at the time of framing of the charges, the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution, has to be accepted as true;
>
> (viii) there must exist some materials for entertaining the strong suspicion which can form the basis for drawing up a charge and refusing to discharge the accused.

The defence version not based upon, deriving no support from the materials or documents placed by the prosecution is not to be looked into at the stage when the accused seeks discharge. The 'record of the case' used in section 227 of the Code is to be understood as the documents and articles, if any produced by the prosecution.

12. In the backdrop of the above, it becomes necessary to address the rival contentions with reference to the materials placed on record being gone through.

In the F.I.R., it is stated that accused-Chandan in the morning hour threw acid upon the daughters and grand children of the Informant. One of the victims since succumbed to the said acid attack, the case turned to one under section 302 of the IPC. The incident having taken place on 20.02.2023, this Petitioner in course of investigation was arrested on 01.03.2023 and on completion of investigation; Final Form came to be submitted on 16.06.2023. The Special Court took cognizance of the offences under section-452/326-A/307/302/120-B/212 of the IPC and section-3(2)(v) of the SC & ST (PoA) Act.

13. On going through the F.I.R. and all other documents coming into being in course of investigation, it is seen that principal accused, namely Chandan Kumar Rana @ Tubulu has stated in his statement recorded under section-161 of the Code of Criminal Procedure during interrogation that after committing the principal offences, when he informed his wife namely, Rashmita Pal @ Rana, the co-accused that as per the agreement, he had executed everything in committing the offences, his wife (accused-Rashmita) instructed him to be there at Nuagaon Main Road as she had sent her brother (brother-in-law of accused-Chandan) and his friend to take him and accordingly, after sometime, the brother-in-law of accused-Chandan and his friend took him to Dantun Railway Station and left him there. Above the statement of this accused-Chandan directly points at his brother-in-law (brother of accused Rashmita) i.e. accused Pintu @ Prakash Pal the other one not by name and simply designating him as the friend of his brother-in law, accused Pintu @ Prakash Pal.

The other accused Rashmita Pal @ Rana who is the wife of principal accused-Chandan has stated to have sent her brother, accused Pintu@ Prakash Pal and his friend namely Aju @ Rashmi Ranjan Pal, the present Petitioner (accused). So, when accused Chandan is not disclosing the name of that friend of accused, Pintu @ Prakash Pal, his wife i.e. accused-Rashmita is stating the name of this Petitioner (accused). Her statement is however silent that when she sent them in a bike to give her husband, accused-Chandan a lift, she had told about all the happenings or even the reasons of their deputation and the purpose to be achieved. This being the state of affair in the statement of the above two accused persons, the only other material against the Petitioner-accused is the statement of one Prabesh Chandra Pal. His statement recorded under section-161 of the Cr.P.C. is that accused Rashmita Pal @ Rana had sent her brother namely, Rashmi Ranjan Pal (present Petitioner) and another boy of her village to bring accused-Chandan from Balasore. Undeniably, the present Petitioner is not the brother of accused Rashmita. He has been described as such by this witness-Prabesh, when accused Rashmita states to have sent her brother who is accused-Pintu @ Prakash Pal. Be that as it may, witness-Prabesh has disclosed name of Rashmi Ranjan Pal, (present Petitioner) to have been sent by accused-Rashmita to give a lift her husband (accused-Chandan)

on the bike. So, when the name of the present Petitioner emerges in the statement of Prabesh, at this premature stage of consideration of charge, it would not be permissible to totally eschew his statement from the arena of consideration, taking a cue from the fact that this present Petitioner namely, Rashmi Ranjan Pal is not the brother of accused Rashmita and her brother is accused, Pintu @ Prakash Pal. With such statement of Prabesh although the statements of co-accused persons are not admissible in evidence yet it may so happen that if the prosecution establishes the role of the present Petitioner to that extent as stated, then the statements of the co-accused persons may lend some support to strengthen.

The contention raised during hearing in reiteration of the stand taken in the Revision petition that such a person named by Prabesh Chandra Pal is not there in the village Deuli Panchaghanta under Jaleswar Police Station and so it has been just created in course of investigation for obvious reason, is however a matter to be dwelt upon during trial if so comes up.

Thus, it is found that when one witness namely, Prabesh is implicating the Petitioner by name to have been sent by accused Rashmita to bring accused-Chandan from Balasore and the statements of co-accused namely, Chandan remains that his brother-in-law with his friend having come to give him the lift after commission of the offences, had given the lift and the other accused Rashmita is also naming this Petitioner (accused) to have been sent by her with her brother, accused Pintu @ Prakash, no other witness cited in the Final Form for their examination are implicating this Petitioner (accused) in any other manner. With all these materials as discussed, it is found that the Trial Court in its order while disposing the application under section 227 of the Cr.P.C. filed by the present Petitioner (accused) is silent that the materials on record give rise to a presumption of commission of which of the offences of which the cognizance had been taken, by this Petitioner (accused) to stand charged and face the Trial. This omission is certainly an error to be taken note of and warrants due rectification. The Trial Court in such situation basing upon the materials available on record and consideration of the same on their face value without making deeper examination was certainly under legal obligation to indicate that for commission of which of the offence(s), there arises the presumption as against this Petitioner (accused).

14. The materials against this Petitioner (accused) as discussed in the foregoing paragraph, thus are to be effect that he had lent his hand with another accused in shifting accused-Chandan from one place to another giving him a lift as directed by accused, Rashmita. It is thus indirectly said to help accused-Chandan to avoid the process of law for the offence committed by him. Since no material is available to show that this Petitioner (accused) was one of the parties in hatching the conspiracy with other accused persons for commission of the principal offences.

15. At this stage, thus it becomes necessary to note the ingredients which are to be established by the prosecution to bring home the guilt of an accused for an offence under Sec. 212, IPC. Section 212, IPC reads as follows:-

> "Whenever an offence has been committed, whoever harbours or conceals a person whom he knows or has reason to believe to be the offender, with the intention of screening him from legal punishment, Shall, if the offence is punishable with death, he punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine, and if the offence is punishable with imprisonment for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine, and if the offence is punishable with imprisonment which may extend to one year, and not to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both....."

16. A reading of this Section 212, IPC would disclose that three things have to be proved by the prosecution, viz., (i) there must be an offender, and (ii) the offender should have already committed an offence and (iii) the person accused of under this Section should have harboured the offender knowing that he is an offender.

17. An 'Accessory after the fact' is sought to be punished under this section. An accessory after the fact is one who having knowledge of the commission of a felony by another receives, relieves, comforts or assists the felon. This section requires (1) commission of an offence, (2) harbouring or concealing the person knowing or believing him to be the offender, (3) such harbouring etc. must be with the intention of screening the offender from legal punishment. To attract the provisions of sec. 212 of the IPC; it is necessary to establish the commission of an offence, harbouring or concealing the person known or believed to be the offender; and such concealment must be with the intention of screening him from legal punishment- *Sanjiv Kumar V State*; (1999) 2 SCC 288.

18. Nowhere in section 212 of the IPC, it is stated that the person concealed should be convicted for an offence. Even if the main offender leaves unpunished by the Court, the object of the provision under section 212 of the IPC requires that the person who has concealed or harboured the offender whom he believes and knows has committed the offence shall not be left unpunished if the other ingredients are established. The criminality lies in the act of concealment committed with the knowledge or belief that the person who is harboured or concealed is the offender and also with the criminal intention of screening him from legal punishment.

19. Section 26 of the Indian Penal Code defines 'reason to believe' which reads as follows:-

> "A person is said to have 'reason to believe' a thing, if he has sufficient cause to believe that thing but not otherwise."

So, the person accused of harbouring an offender must have a knowledge or must have reason to believe that the person harboured or concealed has committed an offence. The word 'harbour' as a noun ordinarily means a place to shelter ships from the violence of the sea, and where ships are brought for commercial purposes to load and unload goods. In criminal law, 'to harbour' means to give the offender a shelter. S. 52A of the IPC defines 'harbour' as follows:-

> "Except in section 157, and in Section 130 in the case in which the harbour is given by the wife or husband of the person harboured, the word 'harbour' includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means or conveyance, or assisting a person by any means, whether of the same kind as those enumerated in this section or not, to evade apprehension."

The word 'harbour' is defined as follows in Law Lexicon of P. Ramanatha Aiyer, Second edition as under:-

> "In construing a statute making the harbouring or concealing of an offender a crime, it was said that the word 'harbour' is defined by Worcester 'To entertain; to shelter; to rescue; to receive clandestinely and without lawful authority'. By Webster; 'To shelter; to rescue; to secure; to secrete, as to harbour a thief. The word in statute only apply when the person is harboured or concealed with knowledge that he is an offender."

The word 'harbouring' is defined as follows:-

> "Harbouring" means a fraudulent concealment, and hence, where slaves or prisoners ran away, and were found in the possession of defendant, who openly maintained them, and gave notice to plaintiff that he would do so until they were recovered by law there was no harbouring."

The word 'to harbour' is defined as follows :

> "One harbours that which ought not to find room anywhere; one shelters that which cannot find security elsewhere; one lodges that which wants a resting place. Thieves, traitors, conspirators, are harboured by those who have an interest in securing them from detection; either the wicked or the unfortunate may be sheltered from the evil with which they are threatened; travelers are lodged as occasion may require."

There should be a positive act by the person charged to harbour or conceal a person whom he knows or has reason to believe to be the offender.

20. Adverting to the case at hand even though it is found that the statement of that witness-Prabesh is not on the score that this Petitioner (accused) knew about the commission of offence by the accused-Chandan; Rashmita and others and then he had extended his helping hands with the accused, Pintu @ Prakash Pal who is the brother of accused and brother-in-law of accused-Rashmita and Chandan respectively; that in my considered view is to be gone into during Trial upon appreciation of evidence as would be placed therein and not at this stage of framing of the charge which is too premature.

21. In the wake of aforesaid, while concurring with the view taken by the Trial Court that it is not a fit case for clean discharge of this Petitioner (accused) and thereby put him completely out of the arena of the criminal Trial running on the alleged facts and circumstances; this Court in the absence of any such clear mention by the Trial Court in its order as to for commission of what offence/s, this Petitioner (accused) would stand charged and tried and for the flawed omission to so state; feels inclined to supply the same by holding that a prima facie case stands against this Petitioner (accused) for being charged and face Trial for commission of the only offence punishable under section 212 of the IPC for having harboured / concealed said accused-Chandan knowing or having reason to believe at the time of said habouring that accused-Chandan had committed the said offences under section-452/326-A/307/302/417/494/120-B of the IPC, section 3(2)(v) of S.C. & S.T. (POA) Act.

The Petitioner (accused) would now stand charged as above to face the trial.

23. The CRLREV is accordingly disposed of.

It is needless to observe that whatever have been said and expressed hereinbefore for the limited purpose of consideration for framing of charge would have no influence during Trial.

—— o ——

2023 (III) ILR – CUT- 401

D.DASH, J & A.C. BEHERA, J.

CRLA NO.156 OF 2016

NAGESU SABAR ……...Appellant

-V-

STATE OF ODISHA ………Respondent

(A) CRIMINAL TRIAL – Commission of offences U/Ss. 302 & 379 of the IPC – Trial Court convicted the accused on the basis of circumstantial evidence – The Trial Court has disbelieved the evidence of solitary eyewitness by holding her to be not truthful witness but accepted the seizure of mobile phone set pursuant to the statement of the accused while on police custody – Whether mere recovery of mobile phone-set is enough to hold the accused to be the perpetrator of crime? – Held, No. (Para-29)

(B) THE INDIAN EVIDENCE ACT, 1872 – Section 27 – Recovery of weapon of offence – Necessary conditions for applicability of the section – Explained with reference to case law. (Para 22 to 27)

Case Laws Relied on and Referred to :-

1. (2012) 4 SCC 124 : Sampath Kumar Vs. Inspector of Police, Krishnagiri.
2. AIR 1947 PC 67 : Pulukuri Kottaya & Ors. Vs. Emperor.

For Appellants : Mr. Basudev Pujari, S.K. Dash, S.K.Tripathy

For Respondent : Mr. P.K. Mohanty, Addl. Standing Counsel.

JUDGMENT Date of Hearing :05.09.2023 : Date of Judgment: 14.09.2023

D.DASH, J.

The Appellant by filing this Appeal has assailed the judgment of conviction and order of sentence dated 27th January, 2016 passed by the learned Sessions Judge, Gajapati, Parlakhemundi in Sessions Trial Case No.61 of 2014 arising out of G.R. Case No.301 of 2014 corresponding to Kasinagar P.S. Case No.55 of 2014 of the file of learned Sub-Divisional Judicial Magistrate (S.D.J.M.), Parlakhemundi.

The Appellant (accused) thereunder has been convicted for commission of offence under section-302/379 of the Indian Penal Code, 1860 (for short called as the IPC). Accordingly, the Appellant (accused) has been sentenced to undergo imprisonment for life and pay fine of Rs.10,000/- in default to undergo rigorous imprisonment for a period of one year for the offence under section-302 of the IPC and undergo rigorous imprisonment for one year for the offence under section-379 of the IPC with the stipulation that the substantive sentences would run concurrently.

2. Prosecution case is that in the intervening night of 6/7.06.2014, the accused in a drunken state having gone to the house of his father-in-law namely, Aauti Sabar stabbed him and caused his death, when he sleeping. It is further stated that the accused having thus committed the murder of Aauti Sabar, left the house immediately.

One Bisingi Sabar (P.W.1) having lodged a written report narrating the incident before the Inspector-In-Charge (IIC) of Kasinagar Police Station, the same was treated as F.I.R. and upon registration of the case, the IIC directed one Sub-Inspector (S.I.) of Police attached to that Police Station to take up investigation.

3. The Investigating Officer (I.O.-P.w.27) then examined the Informant (P.W.1). He visited the spot i.e. house of the deceased Aauti Sabar and prepared the spot map, Ext.11. He held the inquest over the dead body of Aauti in presence of witnesses and prepared the report, (Ext.2). He also examined some other witnesses at the spot. The dead body of Aauti was sent for postmortem examination. The I.O. (P.w.27) seized some incriminating articles such as the blood stained earth and one Kati fitted with wooden handle under seizure list, Ext.3. The I.O. (P.W.27) thereafter

arrested the accused who then is stated to have led the I.O. (P.W.27) and others to his house in giving recovery of a mobile phone set pursuant to the statement made by him before the I.O. (P.w.27), which was seized under seizure list, Ext.5. The incriminating articles were sent for chemical examination through Court.

On completion of investigation, the Final Form was submitted placing the accused to face the trial for commission of offence under section-302/379 of the IPC.

4. Learned S.D.J.M., Parlakhemundi, having received the Final Form as above, took cognizance of the said offences and after observing formalities, committed the case to the Court of Sessions for Trial. That is how the Trial commenced by framing the charge for the said offences against the accused persons.

5. In the Trial, the prosecution has examined in total, twenty eight (28) witnesses. Out of whom, as already stated P.W.1, who had lodged the F.I.R. (Ext.1) and is the Informant is younger brother of the deceased-Aauti Sabar; whereas P.W.2 is the brother of P.W.1 and P.W.3 is their father -Aauti. P.Ws. 4, 5, 9, 10, 11, 12, 13 and 18 are the independent witnesses. The two wives of the deceased are P.Ws. 6 and 8. P.W.6 is the second wife of the deceased whereas P.W.8 is the first wife. The wife of the accused has come to the witness box as P.W.7. The two witnesses to the recovery of the mobile phone said to have been made at the instance of the accused pursuant to his statement given before the I.O. (P.W.27) and its seizure are P.Ws. 14 and 15. P.Ws.16 and 17 are the witnesses to the seizures of incriminating articles in course of investigation. The Doctor, who had conducted postmortem examination over the dead body of the deceased, is P.W.23; whereas P.W.24 is the other Doctor, who had collected the nail clippings and blood of the accused. The I.O. has come to the witness box at the end as P.W.27.

6. The prosecution besides leading evidence by examining the above witnesses has also proved several documents which have been admitted in evidence and marked Exts.1 to 12. Important of those are; the F.I.R. (Ext.1), inquest report (Ext. 2), postmortem report (Ext.8), chemical examiner's report (Ext.12), the spot map (Ext.11). The statement of the accused pursuant to which the mobile phone set was said to have been seized which was recorded under section 27 of the Evidence Act has been admitted in evidence and marked as Ext.4.

7. The accused having taken the plea of complete denial and false implication has however not led any evidence in support of the same.

8. The Trial Court on examination of the evidence let in by the prosecution and upon their evaluation has finally found that the charges against the accused for commission of offences under section -302/379 of the IPC have been established beyond reasonable doubt. Accordingly, the accused having been convicted for commission of those offences has been sentenced as aforestated.

9. Mr. B. Pujari, learned Senior Counsel for the Appellant (accused) without disputing the nature of death of Aauti Sabar to be homicidal contended that the finding of conviction of the accused returned by the Trial Court is based on no evidence. He submitted that the Trial Court when has disbelieved the evidence of solitary eye witness, the second wife of the deceased (P.W.6) by holding her to be not a truthful witness; in the absence of any such incriminating circumstances emerging from evidence in making the chain of events so complete in ruling out all the hypothesis other than the guilt of this accused, simply accepting the seizure of mobile phone set pursuant to the statement of the accused while in police custody which could not have been taken as the base has fallen in grave error in holding the accused to be the perpetrator of crime. He further submitted that the evidence of the prosecution coming from the lips of P.W.27 and other two witnesses P.Ws. 14 and 15, do not satisfy the tests laid down for their admissibility and acceptability. It was also submitted that the accused being the son-in-law of the deceased even if for a moment, it is said that the mobile phone set of the deceased was with the accused in his house, in the absence of any other evidence to connect said mobile phone set in any way with the commission of offence, the said recovery even accepting to be at the instance of the accused is not at all incriminating. Placing the discussion of the evidence made by the Trial Court as well as the circumstances which according to the Trial Court are incriminating, he contended that the impugned judgment of conviction on a bare reading without even looking at the depositions of the prosecution witnesses and accepting what have been noted by the Trial Court, does not stand to minimum legal scrutiny.

10. Mr. P.K. Mohanty, learned Additional Standing Counsel submitted that the evidence of P.W.6 who is the second wife of the deceased, when taken together with the other circumstances emanating from the evidence let in by the prosecution, the finding of guilt against the accused as has been returned by the Trial Court is not liable to be interfered with.

11. Keeping in view the submissions made; we have carefully read the judgment passed by the Trial Court and have extensively travelled through the evidence adduced by the prosecution witnesses i.e. P.Ws. 1 to 28. The documents admitted in evidence and marked Exts.1 to 12 from the side of the prosecution have been perused.

12. The nature of death of Aauti Sabar (deceased) to be homicidal is seen to have not been challenged during Trial and that has also been the situation before us.

Be that as it may, we find the evidence of the Doctor (P.W.23) that during postmortem examination, he had noticed a penetrated wound of the size of 7cm x 3cm on chest besides left side of sternum in the third space and it was cutting adjacent ribs. These injuries are said to be antemortem in nature and might have been caused by sharp cutting weapon. His evidence is that very categorically that the

death was due to such injuries to the vital organ of the body causing severe haemorrhage. Whatever has been stated by P.W.23, those findings appear in his report Ext.8 to which there is no challenge to those findings. Above being the evidence of the Doctor (P.W.23), we too find the evidence of P.W.27, the I.O. who during inquest has noticed such injuries on the chest of the deceased and reflected in his report, Ext.2. That has also been the statement of other witnesses who have seen the deceased lying dead with such injuries on his chest. In view of the above, unchallenged evidence on record, we are left with no option but to hold with the prosecution through acceptable evidence has established that Aauti met a homicidal death.

13. Having said as above, in order to address the rival submission and ascertain the sustainability of the finding of guilt against the accused as has been returned by the Trial Court, we at the outset feel inclined to take note of some of the discussions made by the Trial Court in its judgment.

14. The Trial Court having re-produced the evidence of almost all the witnesses examined from the side of the prosecution at paragraph-6, 7, 8 and 9, has of course at paragraph-10 noted as to what is the point for determination. But then at one stage, the conclusion of the Trial Court is worth reading which we are tempted to reproduce herein below:-

> "The entire case of the prosecution rests upon the circumstantial evidence like confessional statement given by the accused during police custody U/s.27 of the Evidence Act and recovery of the mobile set of the deceased as per seizure list Exts. 4 and 5."

This shows that the two circumstances which in its language; (i) the confessional statement of accused recorded under section-27 of the Evidence Act; and (ii) the recovery of the mobile set as per the seizure list which it culled out from the evidence for answering whether those are duly proved and of so whether those are incriminating in holding that the chain of events is complete is ruling out all the hypothesis other than the guilt of the accused are ruled out to say that in all human probability the accused is the perpetrator of the crime.

It be stated here that the statement of the accused which becomes admissible in evidence to the extent as permitted under section 27 of the Evidence Act, thereby creating an excepted sub-category only is never said or taken as the confessional statement of the accused. The confessional statement before the Police is wholly admissible. This appears that the Trial Court has carried on wholly erroneous idea in mind as regards the provision contained in section-25, and 27 of the Evidence Act.

15. The Trial Court has next proceeded to say:-

> "Now let us scrutinize the other evidence on record i.e. the evidence of P.Ws.-6, Smt. Laxmi Sabar but she is not truthful witness as at the first instance she has stated that, she has been the accused stabbing her husband but during her cross-examination, she could

> not withstand cross-examination and from her evidence, it is forthcoming that she has not seen the actual assault made by the accused on her husband."

The Trial Court here appears to have assigned no such specific reason to say so which though was the absolute requirement.

16. Having said above, in the next sentence the Trial Court has stated as follows:-

> "I have already discussed earlier that this case clearly falls under the circumstantial evidence and there was no eye witness/ (**to the**) occurrence as the occurrence was /(**had**) taken place in the mid night on the roof of the house of the deceased at village."

17. Adverting to the evidence let in by the prosecution, we find that during Trial, the second wife of the deceased P.W.6 has been projected as an eye witness. The evidence of P.W.6 has been disbelieved by the Trial Court in branding her as not a truthful witness which as already stated suffers from the vice of non-assignment of any reason/s.

Be that as it may, having gone through the evidence of P.W.6, we find that she has stated that in the occurrence night, the accused returned to the house in a drunken state and by going upstairs, stabbed her husband, while he (husband) was sleeping with her. Thereafter, she says that accused fled away. So, she claims that when the stab was given by the accused, she was sleeping by the side of her husband. But it is found that, this important part as to the role of the accused in that night terming him to be the perpetrator of the crime or in other words, the author of the fatal injuries caused upon the deceased as is stated by her to have been seen, was not in her statement given during investigation as has been pointed out by the defence by drawing the attention of the witnesses during her cross-examination which she has however denied. It is however heartening to note that the defence has failed in its duty during examination of the I.O.(P.W.27) to prove said omission which according to us is a material contradiction.

In such situation, in order to prevent failure of justice for the fault of the defence Counsel and simultaneously, that of the Trial Court; in order to cross-check when we perused the statement of the witness (P.W.6) recorded by the I.O. (P.W.27) under section-161 of the Cr.P.C., we find that this P.W.-6 had not stated so at that time. Therefore, her introduction in the Trial in respect of such an important happening directly implicating the accused in stabbing would be highly unsafe to be relied upon. At this juncture, we must state that when the learned Counsel defending the accused has utterly failed in his duty being not careful, equally, the Trial Court has acted as mute spectator, although it had the duty in that regard to be vigilant and watchful.

That apart, the evidence of P.W.6 in directly implicating the accused to have stabbed his father-in-law (deceased) is not safe to be relied upon for the reason that when we find that P.W.1 has said to have lodged F.I.R (Ext.1) and it had been so

written thereof hearing about the murder of his brother, he with some of the villagers had been to his house where P.W.6 was very much present. It has however been stated in the F.I.R.(Ext.1) that some unknown culprit has committed the murder of Aauti in further mentioning that they were suspecting that accused since he was frequently quarreling with Aauti. That shows that it was not disclosed by P.W.6 before P.W.1 or others that this accused stabbed his father-in-law to her seeing when she was sleeping by the side. Although the Trial Court has assigned no such reason/s to discard the evidence of P.W.6 from consideration, for the above reasons supplied by us, we have no disagreement with the conclusion of the Trial Court that P.W.6 is not a truthful witness and her evidence to that effect thus would be hazardous to be accepted to fasten the liability of murder upon the accused.

18. The evidence of sole eye witness being pushed out of the arena of consideration, we are unable to find out from the evidence on record as to how the circumstances which have been pointed out by the Trial Court are enough to come to an irresistible conclusion with regard to the guilt of the accused overruling all the hypothesis other than the guilt of the accused.

The first circumstance pointed out by the Trial Court is the confessional statement of the accused before the I.O. (P.W.27) and others. It pains us to say that the same being wholly in admissible in evidence for being taken as the confession of the accused; the Trial Court repeatedly has so noted and relied upon as the confession.

19. We find that the Trial Court being totally oblivious of the provision of section-27 of the Evidence Act has gone to say so, as has been written by the I.O.(P.W.27) on that Ext.4 and deposed.

20. The evidence of the I.O.(P.W.27) is as under:-

> "I arrested the accused, recorded his statement U/s.27 of the Evidence Act vide Ext.4 (marked) and Ext.4/3 is my signature and the accused confessed his guilt of committing the murder of the deceased during police custody and the accused led the police party to give discovery of the mobile phone and gave recovery of the same from his house which I seized in presence of the witnesses as per seizure list vide Ext.5 (marked) and Ext.5/3 is my signature."

The recording of the evidence itself appears to be highly faulty. The Trial Court was to record the version as to what he did and what response he got.

21. The two witnesses to the above development after the arrest of the accused are P.W.14 and 15.

P.W.14 has stated:-

> "After receiving the report from the informant, police arrived at the house of the deceased and in presence of the villagers and me the accused confessed his guilt by telling the villagers that he committed the murder of his father-in-law and took away the

mobile phone of the deceased. The confessional statement of the accused recorded U/s.27 of the Evidence Act by the police vide Ext.4 and Ext.4/1 is my signature. Thereafter the accused let the police party and the witnesses to the place of recovery and gave recovery of one mobile phone of the deceased, his wearing apparels which were seized by the I.O. as per the seizure list vide Ext.5 and Ext.5/1 is my signature."

P.W.15 has stated:-

"After receiving the report from the informant, police arrived at the house of the deceased and in presence of the villagers and me the accused confessed his guilt by telling the villagers that he committed the murder of his father-in-law and took away the mobile phone of the deceased. The confessional statement of the accused recorded U/s. 27 of the Evidence Act by the police vide Ext.4 (marked) and Ext.4/2 is my signature. Thereafter the accused led the police party and the witnesses to the place of recovery and gave recovery of one mobile phone of the deceased, his wearing apparels which were seized by the I.O. as per the seizure list vide Ext.5 (marked) and Ext.5/2 is my signature."

All these above recording of evidence are not only faulty but also contrary to the legal provision.

22. The very heading of section 27 of the Evidence Act is "How much information received from accused may be proved", which carves out an exception to the provision contained in section-25 of the Evidence Act.

The section reads as under:-

"Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that none of them have deposed the exact statement said to have been made by the accused herein which ultimately led to the discovery of a fact relevant under section 27 of the Evidence Act.

23. In the aforesaid context, we may refer to and rely upon the decision of the Hon'ble Apex Court in the case of *Murli and Another v. State of Rajasthan;* (2009) 9 SCC 417, held as under:-

"34. The contents of the panchnama are not the substantive evidence. The law is settled on that issue. What is substantive evidence is what has been stated by the panchas or the person concerned in the witness box…………"

24. The conditions necessary for the applicability of section 27 of the Act are broadly as under:-

(1) Discovery of fact in consequence of an information received from accused;
(2) Discovery of such fact to be deposed to;
(3) The accused must be in police custody when he gave information; and
(4) So much of information as relates distinctly to the fact thereby discovered is admissible – *Mohmed Inayatullah v. The State of Maharashtra*: AIR (1976) SC 483.

Two conditions for application: –

(1) information must be such as has caused discovery of the fact; and

(2) information must relate distinctly to the fact discovered *Earabhadrappa v. State of Karnataka*: AIR (1983) SC 446.

25. The scope and ambit of section 27 of the Evidence Act were illuminatingly stated in *Pulukuri Kottaya and Others v. Emperor*; AIR 1947 PC 67, which have become *locus classicus*, in the following words:

> "10. ….It is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

26. Keeping in view the above and as per our discussion of evidence in the forgoing paragraph, the answer stands that the evidence on record do not at all successfully pass through the tests under the provision of section 27 of the Evidence Act for their admissible or acceptability.

27. In the case of *Sampath Kumar v. Inspector of Police, Krishnagiri;* (2012) 4 SCC 124, decided on 02.03.2012, this Court held as under:

> "29. In *N.J. Suraj v. State*; [(2004) 11 SCC 346: 2004 SCC (Cri) Supp 85] the prosecution case was based entirely upon circumstantial evidence and a motive. Having discussed the circumstances relied upon by the prosecution, this Court rejected the motive which was the only remaining circumstance relied upon by the prosecution stating that the presence of a motive was not enough for supporting a conviction, for it is well settled that the chain of circumstances should be such as to lead to an irresistible conclusion, that is incompatible with the innocence of the accused.
>
> 30. To the same effect is the decision of the top Court in *Santosh Kumar Singh v. State*; [(2010) 9 SCC 747: (2010) 3 SCC (Cri) 1469] and *Rukia Begum v. State of Karnataka*; [(2011) 4 SCC 779 : (2011) 2 SCC (Cri) 488 : AIR 2011 SC 1585] where this Court held that motive alone in the absence of any other circumstantial evidence would not be sufficient to convict the appellant. Reference may also be made to the decision of the Hon'ble Apex Court in *Sunil Rai v. UT, Chandigarh*; [(2011) 12 SCC 258 : (2012) 1 SCC (Cri) 543 : AIR 2011 SC 2545] . The Hon'ble Apex Court explained the legal position as follows: (Sunil Rai case [(2011) 12 SCC 258 : (2012) 1 SCC (Cri) 543 : AIR 2011 SC 2545] , SCC p. 266, paras 3132)
>
> "31. … In any event, motive alone can hardly be a ground for conviction.

32. On the materials on record, there may be some suspicion against the accused, but as is often said, suspicion, howsoever strong, cannot take the place of proof."

31. Suffice it to say although, according to the appellants the question of the appellant Velu having the motive to harm the deceased Senthil for falling in love with his sister, Usha did not survive once the family had decided to offer Usha in matrimony to the deceased Senthil. Yet even assuming that the appellant Velu had not reconciled to the idea of Usha getting married to the deceased Senthil, all that can be said was that the appellant Velu had a motive for physically harming the deceased. That may be an important circumstance in a case based on circumstantial evidence but cannot take the place of conclusive proof that the person concerned was the author of the crime. One could even say that the presence of motive in the facts and circumstances of the case creates a strong suspicion against the appellant but suspicion, howsoever strong, also cannot be a substitute for proof of the guilt of the accused beyond reasonable doubt."

28. In view of the above, even if it is believed that the accused had the motive to commit the crime, the same may be a circumstance in a case based on circumstantial evidence but cannot take the place of conclusive proof that the person concerned was the author of the crime. One could even say that the presence of motive in the facts and circumstances of the case creates a strong suspicion against the accused but suspicion, howsoever strong, cannot be the substitute for proof of the guilt of the accused beyond reasonable doubt.

29. All these above, show as to how the Trial Court has faulted in accepting the evidence of P.W.27, 14 and 15 in saying that the accused had confessed his guilt before them and also what have been indicated in Exts. 4 and 5, the statement of the accused and the relevant seizure list. the statement of the accused even if believed to have been made before P.W.27 (I.O.) and others while in police custody in leading them to this house in giving recovery of the articles so seized; the same is only passable to service to say about the place from which the articles were produced and the knowledge of the accused as to that and the information given must relate to that.

30. The other circumstance is that the accused was threatening the deceased to take away his life as has been stated by the wife of the accused i.e. P.W.7 and another is the seizure of the mobile phone from the house of the accused which according to us make no sense in view of the admitted relationship between the accused and the deceased and also without any sort of other evidence to connect the said mobile set with the commission of offence of murder of Aauti. At this stage, we too mark the sorry state of affairs with the judgment of the Trial Court when we go through paragraph-11 of its judgment. Having noted the argument of the learned Public Prosecutor, the following conclusion has been arrived at:-

"Perused the said reported judgment of the Hon'ble Apex Court and I found/(**find**) that the circumstances placed from the side of the prosecution as per Exts.4 & 5 clearly proves /(**prove**) against the accused and those circumstances are conclusive in nature. So the prosecution in the instant case completed the chain for which the circumstantial evidence adduced before this Court is to be accepted."

Ext. 4 is the said statement of the accused, which we have already discussed and Ext.5 is the relevant seizure list. We are really at a loss understand as to how basing on the same a conclusion has been reached by the Trial Court in holding the accused guilty of commission of offence under section-302 of the IPC for being visited with the sense of imprisonment for life.

In view of the aforesaid, we are constrained to accept the statement of the learned Counsel for the Appellant (accused) that the finding of guilt against the accused as had been returned by the Trial Court is based on no evidence on record. Accordingly, we hold that the finding of the Trial Court holding the accused guilty for commission of the offence under section-302/379 of the IPC cannot be sustained. Therefore, we are of the view that the judgment of conviction and the order of sentence impugned in this Appeal are liable to be set aside.

31. In the wake of aforesaid, the Appeal stands allowed. The judgment of conviction and order of sentence dated 27th January, 2016 passed by the learned Sessions Judge, Gajapati, Parlakhemundi in Sessions Trial No.61 of 2014 are hereby set aside.

Since the Appellant (accused) namely,Nagesu Sabar is on bail; his bail bonds shall stand discharged.

—— o ——

2023 (III) ILR – CUT- 411

BISWANATH RATH, J.

W.P.(C) NO.18057 OF 2014

M/s. MILAN DEVELOPERS & BUILDERS PVT. LTD. ……..Petitioner(s)

-V-

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

RES-JUDICATA – Previous set of dispute was against the vendor and vendor's vendor of the petitioner involving the same land – Present dispute is against the petitioner – Whether the same proceeding is hit by principle of Res-Judicata ? – Held, Yes. (Para-15)

Case Laws Relied on and Referred to :-

1. AIR 1985 Orissa 74 : Hrudananda Panda & anr. Vs. Dhirendra Behura.
2. AIR 2003 SC 718 : Abdul Rahman Vs. Prasony Bai & Anr.
3. AIR 1983 SC 1239 : Mansram Vs. S.P.Pathak.
4. (2009) 11 SCC 53 : Ajab Singh & Ors. Vs. Antram & Ors.
5. AIR Online 2022 Ori. 444: Batakrushna Sahoo Vs. Commissioner, Consolidation, Odisha.

6. AIR Online 2022 Ori. 489 : Baikunthanath Nayak Vs. State of Orissa & Ors.
7. 2022 SCC Online Ori. 4039 : Anugraha Narayan Pattnaik Vs. State of Odisha & Ors.

For Petitioners : M/s. B.Baug, M.R.Baug, R. R. Sethi & P.C.P.Das

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

JUDGMENT Date of Hearing : 18.07.2023 & Date of Judgment: 27.07.2023

BISWANATH RATH, J.

1. The writ petition involves the following prayer :-

> Under the facts and circumstances stated above, this Hon'ble Court may be graciously pleased to admit this writ application and issue a 'Rule-Nisi' calling upon the Opposite Parties to show cause as to why the impugned order dated 13.05.2013 passed by the Member, Board of Revenue, Odisha, Cuttack (Annexure-9) and the impugned order dated 01.06.2013 passed by the Additional Sub-collector-cum-Additional Settlement Officer, Puri in OSS Case No.394 of 2012 (Annexure-10) shall not be quashed and thereafter as to why the Opposite Parties shall not be directed to record the suit land in favour of the petitioner;
>
> A N D
>
> If the Opposite parties or any of them fail to show cause or shows insufficient cause make the said rule absolute
>
> A N D
>
> Pass such other order/orders and/or writ/writs as this Hon'ble Court may deem fit and proper'
>
> And for this act of your kindness, the petitioner shall ever pray."

2. Background involving the case is that a piece of land in Mouza-Khalakata, Tahasil-Gop in the district of Puri in not final Khata No.263/Ka in not final Plot No.1203/1545 measuring an area of Ac.20,00 acres corresponding to part of Sabik Plot No.916(P), Sabik Khata No.102/186, Area Ac.21.76 decimals is the suit land. As per the Sabik record of right of 1927-28 settlement corresponds to part of sabik Plot No.916 with full area of Ac.230.92 decimals stood in Anabadi khata in the name of the ex-intermediary Sadhu Charan Chand under Touzi No.526. The said ex-intermediary Sadhu Charan Chand in the year 1934 relinquished his right, title and interest over Plot No.916 through registered "Nadabi Patra" vide Deed No.532 dated 19.02.1934 to Dhaneswar Routray and six others, who became the intermediaries in respect of the said land. Out of them, four co-intermediaries relinquished/transferred their right and title over their portion out of said land through R.S.D. No.1316 dated 30.04.1935, R.S.D. No.1202 dated 16.04.1937 and R.S.D. No.1678 dated 22.05.1934 respectively to Dhaneswar Routray and others. Dependent on above sale transactions, the land in question was mutated in favour of said new intermediaries, who all continued in khas possession of the aforesaid land. While the matter stood thus, on his request, Upendra Paikray inducted himself as a tenant in respect of the suit land whereby tenancy right was created under an unregistered permanent lease deed (Hat Patta) dated 16.04.1939 and the said permanent lease deed was duly

executed by the ex-intermediaries in respect of an area of Ac.21.76 decimals under Sabik Plot No.916 (Part) in Sabik Khata No.102 in favour of Upendra Paikray for agriculture purposes. It is while the matter stood thus,Upendra Paikray re-claimed the suit land, cultivated the same,continued in cultivating possession thereof and used to pay rent to the ex-intermediaries till the date of vesting of the intermediary interest in the State in the year 1953, as claimed became directly a tenant under the deeming provision under Section 8(1) of the O.E.A. Act. It is averred that prior to the date of vesting and on the date of vesting, the lessee Upendra Paikray was in possession of the suit land as a tenant thereby remaining in cultivating possession as a tenant for more than the statutory period of 12 years commencing from 16.04.1939 and became an occupancy rayat in respect of the suit land. It is further averred that on vesting of the Estate under the O.E.A. Act in the State in the year 1953, the ex-intermediaries submitted raffa/ek-padia in respect of the suit land in favour of the tenant Upendra Paikray and thereafter said Upendra Paikray continued in possession of the suit land. Upendra Paikray used to pay rent to the local Tahasil on the basis of which tenancy ledger was opened in favour of Upendra Paikray. While continuing in peaceful, uninterrupted, continuous and open possession of the suit schedule land as true owner thereof, Upendra Paikray for his legal necessity sold the suit land to one Suresh Chandra Khatei vide R.S.D.No.7355 dated 03.08.1966 for due consideration and handed over the possession thereof to Suresh Chandra Khatei, who continued in possession thereof and paid rent in the name of Upendra Paikray. Further case of the petitioner is that during Hal Settlement Operation in the suit area, Suresh Chandra Khatei filed an application/objection for recording the suit land, i.e., his purchased land in his favour. The Settlement Authorities after due enquiry directed recording of the suit land in favour of Suresh Chandra Khatei in the Khanapuri stage and accordingly draft R.O.R. vide Annexure-1 was prepared in his name involving Hal Plot No.1203 measuring an area of Ac.22.00 decimals.On doubting the genuineness of the Hath Patta, the Tahasildar in the year 1981 initiated Revenue Misc. Case No.836/1981 in order to enquire the genuineness of the Hath Patta and after due enquiry, he found that the unregistered lease deed (Hath Patta) dated 16.04.1939 is genuine and the suit land was leased out in the said unregistered lease deed in favour of Upendra Paikray, Son of Jadumani Paikray. While the matter stood thus, the Collector, Puri representing State of Odisha filed an appeal bearing Settlement Appeal No.5626 of 1987 for getting the suit land recorded in favour of the State Government by deleting the name of Suresh Chandra Khatei from the draft R.O.R. of the suit land involved. After hearing the appeal, the Additional Settlement Officer, Puri by order dated 08.10.1987 dismissed the appeal preferred by the State. After dismissal of the appeal, the Collector, Puri filed Revision Case No.80 of 1989 before the Commissioner, Land Records and Settlement, Orissa, Cuttack. After hearing the parties, the Revisional Authority vide its order dated 19.03.1990 held that unregistered lease deed dated 16.04.1939 is genuine and the Ek-padia and creation of tenancy ledger are also genuine and Upendra Kumar Paikray was continuing as tenant, who has rightfully transferred/sold the suit land to Suresh

Chandra Khatei, who on his purchase has acquired valid title over the same and Government had no right over the same, which order has not been challenged by the State and the same has attended its finality. The further case of the petitioner is that while Suresh Chandra Khatei was continuing in possession of the suit land, for his legal necessity, he transferred the same by way of R.S.D.No.623 dated 01.06.1996 for due consideration to the present petitioner, who after purchase of the suit land constructed the boundary wall around it. After execution of the aforesaid R.S.D. dated 01.06.1996, the present petitioner applied for recording of his name in the R.O.R. thereby deleting the name of his vendor, Suresh Chandra Khatei, which was registered as Appeal Case No.251 of 2000. After hearing the appeal, the Appellate Authority, Additional Settlement Officer, Puri by its order dated 30.05.2000 directed to record the suit land in favour of the petitioner and thereafter the name of the petitioner has been recorded in the not final R.O.R. under Khata No.263 vide Hal Plot No.1203/1545 measuring an area of ac.20.00 acres.

3. Further case of the petitioner is that soon after purchase of the land involved, the petitioner decided to construct a Hotel over the land and thus applied to the Puri-Konark Development Authority for getting information regarding the useability of the suit land purchased by him. The Puri-Konark Development Authority intimated the petitioner that the suit land has come within the Tourism Use zone as per the I.D.T. in the area and in this Zone uses like Residential, Hotels, Lodging, Reception Centre, Offices Park, Bus terminal, Passenger shed place, Banks P & T shops, Swimming Pool, Staff quarters, Museum and other Tourist oriented facilities are permissible but construction can be carried on the land only after obtaining prior permission from the competent authority, i.e., Puri-Konark Development Authority. In the meantime, the petitioner finding some forest growths/produce over the land involved, applied the Divisional Forest Officer, Puri Division for removal of the same, who in turn by its letter dated 18.05.2000 wrote to the Tahasildar, Nimapara to know the status and kisam of the suit land and whether the suit land comes under ceiling surplus or not? Whether any dispute/litigation is pending or not? whether the land was a leasehold land or not ? and if the same is free from all encumbrances and litigations. After receipt of the same, the Tahasildar, Nimapara, vide letter dated 29.05.2000 only after entering into detailed enquiry replied the Divisional Forest Officer, Puri Division, that the petitioner is the absolute owner of the suit land and the same is free from all encumbrances and litigations and the land is not ceiling surplus land. Thereafter the petitioner obtaining due permission and approval of plan from the Puri-Konark Development Authority constructed a single storied building measuring near about 1800 Sq.fts by spending not less than Rs.10 lakhs. It is further pleaded that while the matter stood thus, the Collector, Puri and Superintendent of Police, Puri all of a sudden on 07.01.2011 came to the suit land with Bulldozer, Police Force and other staffs and forcibly demolished the boundary wall and the building of the petitioner in spite of protest of the staffs of the petitioner, who were present on the date in the suit land. However,

the above officials after coming to the title in favour of the Petitioner already accrued left the place.

4. It is in spite of the settlement, the Commissioner, Land Records & Settlement, Cuttack in disposal of R.P. Case No.80/1989 on 19.3.1990 at Annexure-2 at the instance of the Collector, Puri with clear holding that the suit schedule land is absolutely the private property of the Vendor of the Petitioner and his Vendor's Vendor, such revisional order attended finality. State of Orissa through its Collector, Puri filed OSS Case No.394 of 2012 under the provision of Section 32 of the OSS Act, 1958 on the File of the Member, Board of Revenue almost twelve years after passing of the order in the Appeal under the Mutation Manual allowed, vide order dated 30.5.2000 along with an Application for condonation of delay, vide Annexure-7 & 8 as well. The Petitioner alleged, the Member, Board of Revenue without issuing notice to the Petitioner or the Managing Director of the Petitioner-Company in absence of any order on the condonation of delay, vide order dated 13.5.2013 entertaining the Revision involved set aside the order passed by the Appellate Authority in Appeal Case No.251 of 2000 and remanded the matter to the Settlement Officer, Puri to treat the proceeding as an Appeal under Section 22 of the OSS Act. This order dated 13.5.2013 is appended to the Writ Petition as Annexure-9. It is pursuant to the aforesaid remand order again there has been no issuing of notice to the Petitioner or its Managing Director and the Additional Settlement Officer, Puri by its order dated 1.6.2013 illegally allowed the Appeal and declared the State being in the ownership of the land. This order finds place at Annexure-10 to the Writ Petition.

5. Bringing the Writ Petition, Mr.Baug, learned counsel for the Petitioner assails the impugned order, vide Annexure-10 on the following grounds :-

> "A) The order passed by the Commissioner, Land Records and Settlement, Odisha, Cuttack under Section 32 of the OSS Act, 1958 on dated 19.03.1990 in R.P. Case No.80 of 1989 vide Annexure-2 has become final, the same having not been assailed by the State or the Collector. Law does not permit filing of successive revision petitions under Section 32 of the OSS Act on the same fact between the same parties and for the same land. When the matter relating to the genuineness of the Hat Patta, the creation of tenancy ledger has been found to be genuine by the Commissioner, Land Records and Settlement, Odisha, Cuttack vide Annexure-2, the same cannot be re-opened once again by the Member, Board of Revenue in another OSS Case filed under Section 32 of the said Act 22-23 years after passing the order under Annexure-2 and the plea of fraud, manipulation under no circumstances can be taken in 2013 again, vide Annexure-7 and 8 and order under Annexure-9 which was also taken in R.P. Case No.80 of 1989 (Annexure-2). The principle of Res judicata is applicable to the Revenue Authorities which is a Revenue Court. The contested decision of Revenue Court amounts to Res judicata on the same issue and between the parties in Civil Court. On the said point, the following decisions are relied upon :-
>
> 1) AIR 1985 Orissa (Para-6 & 8) …Flag-A

2) AIR 2003 SC 718 (Para-10-2nd sub-para of quoted person, para-11, para-24 towards last)….Flag-B

Thus, the impugned order under Annexure-9 being barred by Res judicata in the face of the order under Annexure-2, the order under Annexure-9 and the consequential order under Annexure-10 are liable to be quashed.

The crucial point which is missed to be taken into consideration by the Member, Board of Revenue under Annexure-9 as well as the Addl. Sub-Collector-cum-Addl. Settlement Officer, Puri under Annexure-10 that the Appeal Case No.251 of 2000 was filed by the petitioner in the nature of a mutation proceeding, only to delete the name of his vendor from the draft ROR vide Annexure-1 and to insert his name in his place by virtue of his purchase under Annexure-3. In the said case, save and except to delete the name of Suresh Chandra Khatei, the vendor of the petitioner and to insert the name of the petitioner, nothing was adjudicated. Hence, the decision of the Member, Board of Revenue under Annexure-9 and the consequential order passed by the Addl. Sub-Collector, cum-Addl. Tahasildar, Puri that fraud has been practiced, principle of natural justice has been violated etc. do not come to play while sitting in revision with regard to the order passed in Appeal Case No.251 of 2000 under Annexure-4. The finding of the Member, Board of Revenue under Annexure-9 with regard to fraud, manipulation of fraud, violation of principle of natural justice etc. are completely beyond the record and the order in Appeal Case No.251 of 2000 which amply speaks the non-application of mind by the Member, Board of Revenue while passing the order under Annexure-9. Similarly, the Addl. Sub-Collector-cum-Addl. Settlement Officer, Puri although has been directed to decide the matter afresh in accordance with law after setting aside the order in Appeal Case No.251 of 2000 (Annexure-4) under no circumstances can go to adjudicate the plea of fraud, manipulation of records etc. which was not the issue in Appeal Case No.251 of 2000. Further, it is most pertinent to state and mention here that the order passed under Annexure-4 in Appeal Case No.251 of 2000 is passed by the Addl. Settlement Officer, Puri and the order under Annexure-10 is also passed by the Addl. Settlement Officer, Puri having coordinate/equal jurisdiction. Thus, the Addl. Settlement Officer, Puri under Annexure-10 under no circumstances can comment or sit in appeal against the order passed in Appeal Case No.251 of 2000 vide Annexure-4. It is humbly stated and reiterated that both the Member, Board of Revenue, the Opposite Party No.6 as well as the Addl. Sub-Collector-cum-Addl. Settlement Officer, Puri, the Opposite Party No.5 while passing the impugned orders under Annexure-9 & 10 have forgotten the main issue that the Appeal Case No.251 of 2000 was filed by the petitioner in the nature of mutation case. The ekpadia and tenancy ledger was not opened in favour of the petitioner, but it was opened in the name of Upendra Paikaray, the vendor of the vendor of the petitioner. Neither the said Upendra Paikaray nor the vendor of the present petitioner – Suresh Chandra Khatei were parties under Annexure-7 at all. Thus, they were not parties before the Member, Board of Revenue while passing the impugned order under Annexure-9 as well as before the Addl. Sub-Collectorcum-Addl. Settlement Officer, Puri while passing the impugned consequential order under Annexure-10.

Behind their back, the right accrued in favour of Upendra Paikaray and Suresh Chandra Khatei cannot be taken away at all directing to record the suit land in favour of the State Government in their absence vide Annexure-9 and 10.

The fact that the allegation of fraud, manipulation of forgery of tenancy ledger etc. was very much taken before the Commissioner, Land Records and Settlement, Odisha, Cuttack under Annexure-2 and those were concluded finally by decision/judgment dated

19.03.1990 vide Annexure-2 as the same was never assailed by the State. Thus, the impugned orders under Annexure-9 and 10 are completely arbitrary, perverse and those are liable to be quashed.

B) Admittedly and undisputedly, the State filed OSS Case No.394 of 2012 under Section 32 of the OSS Act along with an application for condonation of delay of more than twelve years vide Anenxure-7 and 8 on 4.10.2012. The Member, Board of Revenue (Opposite Party No.6) without condoning the delay admitted the revision and set-aside the impugned order on the first day of his order dated 13.05.2013 (Annexure-9).

It is humbly stated that Section 34 of the OSS Act speaks to the following effect :-

"34. Limitation of applications- Subject to the provisions of the next following section, every appeal presented and application made after the period of limitation specified therefor shall be dismissed although limitation has not been set up as a defence."

Further, by virtue of Section 35 of the said Act, Limitation Act except Sections 6, 7, 8, 9, 19 and 20 applies to all appeals and applications mentioned in Section 34 of the OSS Act. Section 34 of the OSS Act is paramateria provision to Section 3 of the Limitation Act. Law is well settled that unless the delay is condoned, the Appellate/Revisional authority does not get jurisdiction to hear the concerned appeal/revision on merit. But, if without condoning the delay, the appeal/revision is decided on merit, the same would be without jurisdiction and a nullity in law. In the present case in hand, the Member, Board of Revenue under Annexure-9 has not condoned the delay at all nor has considered the limitation petition at all but has allowed the revision on merit. Thus, the Member, Board of Revenue in passing the impugned order under Annexure-9 has acted without jurisdiction and the same is a nullity. Consequently, the consequential order passed by the Addl. Settlement Officer, Puri, the Opposite Party No.5 under Annexure-10 is also not sustainable in law and the same is liable to be quashed.

C) The State once filed the revision under Section 32 of the OSS Act in 1990 vide R.P. Case No.80 of 1989 before the Commissioner, Land Records and Settlement, Odisha, Cuttack for correction of the suit land in its favour and to delete the name of Suresh Chandra Khatei, the vendor of the petitioner from the draft ROR (Anexure-1). In the said revision, as stated above, the pela of fraud and manipulation/forgery of tenancy ledger was taken. But, the Commissioner, Land Records and Settlement, Odisha, Cuttack after hearing, repelled all the submissions of the State and dismissed the revision by order dated 19.03.1990 (Annexure-2) and the same has attained finality. But, challenging the order in Appeal Case No.251 of 2000 dated 30.05.2000 again invoking the jurisdiction of the Member, Board of Revenue under Section 32 of the OSS Act, the revision application was filed in 2012 under Annexure-5 agitating the same issue which was adjudicated after detailed hearing of the parties under Annexure-2. Thus, filing of repeated revisions by the State agitating the same issue between the same parties concerning the same land is nothing but an abuse of process of law and the same should not be allowed to stand and continue. Consequently, the orders passed under Annexure-9 and 10 are liable to be quashed. On this point, the following decision is relied upon :-

(1) AIR 2003 S.C. 718 (Para-31)….Flag-B

Hence, the impugned orders under Annexure-9 and 10 may be quashed and the Opposite Parties, more particularly the opposite party no.5 or the Collector may be directed to restore the ROR of the suit land in favour of the petitioner within a fixed period and, accordingly, the writ petition may be allowed."

6. Mr.Baug, learned counsel for the Petitioner in the process of raising application of principle of res judicata to the case at hand, further the revisional proceeding involving as an off suit of the Appeal proceeding decided involved herein is hit by the provision of the limitation prescribed under the OSS Act itself, further on the premises the attempt of the State hit by estoppel and that there has been involvement of ex parte order in disposal of the proceedings, vide Annexure-9 & 10 sought this Court in taking out both the orders at Annexure-9 & 10. Mr.Baug, learned counsel for the Petitioner also took this Court to the decisions in ***Hrudananda Panda & anr. Vrs. Dhirendra Behura : AIR 1985 Orissa 74 and Abdul Rahman vrs. Prasony Bai & anr. : AIR 2003 SC 718.*** Reading through all these decisions, learned counsel for the Petitioner attempted to convince the Court that the impugned order is absolutely illegal and not sustainable in the eye of law, and while claiming the action of State is in clear abuse of process, requested this Court for interfering with the impugned order and setting aside the same, further also interfering and setting aside the consequential order also thereby declaring the Petitioner is the rightful owner of the property.

7. There is also filing of a detailed written note of submission by the learned counsel for the Petitioner.

8. This matter is seriously contested by Mr.Sonak Mishra, learned Additional Standing Counsel for the State, who in his attempt to justify the impugned order at Annexure-10 emanated from the direction, vide Annexure-9 answering on the question of locus standi of the Petitioner contended, looking to the Parties position in Annexure-10, the Company herein would not have brought fresh litigation for the Company herein as a separate legal entity. On the question of res judicata submitted by the learned counsel for the Petitioner, Mr.Sonak Mishra, learned Additional Standing Counsel did not dispute that the property involved in the earlier proceeding as well as in the subsequent proceeding remaining same and the earlier proceedings were all through filed and undertaken by the Vendor and Vendor's of the Vendor again involving the very same property further also in the contest of the State remaining in all such stages as a Party to all such proceedings. Looking to the second round of litigation right from the mutation application at the instance of the present Petitioner contended, for the change in the Parties' position in both the sets of proceedings, there is no question of applying the principle of res judicata to the case at hand. Mr.Mishra, learned Additional Standing Counsel further taking serious objection to the Writ Petition for the stage approaching this Court contended, for there is revisional remedy available under Section 32 of the OSS Act, the Petitioner directly approached this Court against the impugned order in the present Writ Petition is not maintainable. Mr.Mishra here also took this Court to the grounds taken in detail by the contesting O.Ps. through their written note of submission taken on Record. Mr.Mishra, however, did not have the scope to dispute that both the proceedings vide Annexure-9 & 10 decided ex parte in noninclusion of the Petitioner though it has been directly affected by both the above orders.

9. Main thrust of submission of Mr.Sonak Mishra, learned Additional Standing Counsel appears to be the earlier round of litigation rested merely on Hata Pata prima facie seems to be a fabricated and fraudulent document. It is on the premises that such Pata remains void ab initio and there cannot be foundation on the right of the Petitioner or its Vendor or even Vendor's Vendor derived through such void document, Mr.Mishra, learned Additional Standing Counsel also contended, for involvement of a fraud attempt by the Vendor of the Petitioner, the second round of litigation is well justified. In the last limb of submission, Mr.Mishra contended on the merger of the land in the State of Orissa for the provision in the OEA Act land involved herein stood merged in the State long since and such dispute cannot be re-opened. It is in the above premises, Mr.Sonak Mishra, learned Additional Standing Counsel while taking this Court to the observations and findings in the order at Annexure-9 as well as the impugned order at Annexure-10 contended, there has been right adjudication and direction by the Competent Authority and in the process, there is no scope for entertaining the Writ Petition, which should be dismissed on the footing of no merit involved therein.

10. From the factual narrations through the pleadings and the submissions herein, this Court finds the following undisputed facts :-

The disputed land situates in Mouza-Khalakata, Tahasil-Gop in the district of Puri, vide not final Khata No.263/Ka in not final Plot No.1203/1545 measuring an area of Ac.20.00 acres corresponding to part of Sabik Plot No.916(P), Sabik Khata No.102/86, area Ac.21.76 decimals remains as suit land. As per Sabik Record of Rights1927-28 settlement corresponds to part of Sabik Plot No.916 with full area of Ac.230.92 decimals stood in Anabadi Khata in the name of the exintermediary, Sadhu Charan Chand. The ex-intermediary, Sadhu Charan Chand in 1934 relinquished his right, title and interest over Plot No.916 through registered "Nadabi Patra", vide Deed No.532 dated 19.02.1934 to Dhaneswar Routray and six others, who became the intermediaries in respect of the suit land. Out of them, four co-intermediaries relinquished/transferred their right and title over their portion out of said land through R.S.D. No.1316 dated 30.04.1935, R.S.D. No.1202 dated 16.04.1937 and R.S.D. No.1678 dated 22.05.1934 respectively to Dhaneswar Routray and others. It is in view of above sale transaction, land involved in the Sale Deed was also mutated in favour of the new intermediaries, who all continued in Khas possession involving the land involved herein. It is while the matter stood thus, Upendra Paikray inducted himself as a tenant in respect of the suit land thereby there was creation of a tenancy right under an un-registered permanent lease (Hat Pata) dated 16.4.1939. This permanent lease was duly executed by the ex-intermediaries for an area Ac.21.76 decimals under Sabik Plot No.916(Part) in Sabik Khata No.102 in favour of Upendra Paikray for agricultural purposes. It is when Upendra Paikray was in enjoyment of the suit land re-claiming the suit land, he used to pay rent to exintermediaries till the date of vesting of the intermediary interest in the State in the State. For the provision under Section 8(1) of the O.E.A. Act, there is creation of

deemed tenancy in favour of Upendra Paikray. In the meantime, Upendra Paikray also remained in possession of the suit land for more than 12 years commencing from 16.4.1939 and otherwise became an occupancy rayat. It here appears, after the O.E.A. Act came into operation, the ex-intermediaries submitted Raffa/Ek- Padia in respect of the suit land in favour of the tenant, Upendra Paikray. Upendra Paikray remaining in possession of the suit land for his legal necessity sold the suit land to one Suresh Chandra Khatei, vide R.S.D. No.7355 dated 3.8.1966 on due consideration and handed over the possession to said Suresh Chandra Khatei. In the meantime, Hal Settlement Operation taking place for recording the suit land in his favour. In the consideration process, Settlement Authorities entered into due enquiry and gave direction to record the suit land in favour of Suresh Chandra Khatei in the Khanapuri stage. Accordingly there was preparation of R.O.R. vide Annexure-1 in the name of Suresh Chandra Khatei itself. While the matter stood thus, State raised doubt in the genuineness of Hata Pata in the year 1981 through the Tahasildar initiated Revenue Misc. Case No.836/1981. After entering into due enquiry, there is clear finding that the un-registered lease deed (Hata Pata) dated 16.4.1939 is genuine and there has been leasing out of the suit land available by virtue of an un-registered lease deed in favour of Upendra Paikray.

The Collector being aggrieved by such order has brought Settlement Appeal No.5626/1987 to bring back the land to the fold of the Government. This Appeal was dismissed on 8.10.1987.The Collector preferred Revision Case No.80/1989 before the Commissioner, Land Records and Settlement, Orissa, Cuttack. This Revision was dismissed on merit by order 19.3.1990 creating any right, title and interest in favour of Suresh Chandra Khatei. The second round of litigation through Appeal Case No.251/2000 is an outcome of sale by Suresh Chandra Khatei to the present Petitioner by way of R.S.D. No.623 dated 1.6.1996. This matter was disposed of allowing the Appeal by order dated 30.5.2000 remained un-challenged until and unless there was filing of the Revision in the year 2012. There is also clear material that both proceedings, vide Annexure-9 & 10 however involved the Petitioner, which undisputedly prejudiced and affected by all such orders.

11. For both sides referring to different provisions from the Orissa Estates Abolition Act, 1951, the Orissa Survey & Settlement Act, 1958 and certain Rules therein to support their case and finds relevant for the case purpose, this Court takes down the provisions as follows :-

The provision at Section-8(1) of the Orissa Estates Abolition Act, 1951 reads hereunder :-

> "8. Continuity of tenure of tenants – (1) Any person who immediately before the date of vesting of an estate in the State Government was in possession of any holding as a tenant under an Intermediary shall, on and from the date of vesting, be deemed to be a tenant of the State Government and such person shall hold the land in the same rights and subject to the same restrictions and liabilities as he was entitled or subject to, immediately before the date of vesting."

The provision at Section 25 of the Odisha Survey & Settlement Act, 1958 reads hereunder :-

> "25. Revision by the Board of Revenue - The Board of Revenue may, in any case –
>
> (a) of its own motion, at any time after the date of final publication under (Section 23) or
>
> (b) on application made within one year from the said date] direct the revision of the rent so settled, but not so as to affect any order passed by a Civil Court under Section 42 :"

The provisions at Rules-92, 95 read with Rules-42, 109, 111 & 112 of Chapter-IV (Appeals, Revision and Reviews) of the Odisha Mutation Manual read hereunder :-

> "92. Under Rule 42, an appeal from any final order of the Tahasildar shall lie - (a) to the SDO or RDO if the original order was made by any other Officer below the rank of the SDO or RDO and (b) to the Collector of the District if the original order was made by the SDO or the RDO.
>
> 95. According to Clause (b) of Rule 42 an appeal must be presented within thirty days from the date of the order appealed against. For calculating this period the day on which the judgment complained of was pronounced and the time actually taken for obtaining a copy of the order appealed against shall be excluded.
>
> 42. Objection petitions in response to the general notice or individual notice are required under Rule 40 to be filed within thirty days from the date of service. Every such petition shall bear Court-fee stamp worth one rupee. All objection petitions shall be entered in a register called Mutation Case Objection Petition Register. The proforma of the register is given in Appendix-13.
>
> 111. Under Sec. 32 of the Act, the Board of Revenue have powers, with or without petition, to call for and revise any proceedings before any Officer from whose decision no appeal lies. The fact that the Board of Revenue have been vested with this power of revision of any proceedings at any time does not mean that any party to a mutation proceeding can, as a matter of course, move the Board for changing an order passed by a subordinate authority. The statutory rule does not provide for a second appeal or revision after the first appeal and in the absence of such a specific provision the general powers conferred by Sec. 32 cannot be invoked to utilise the Board of Revenue as a Court of second appeal. Powers of control and supervision by the superior authority are discretionary and the authorities exercising such powers are not ordinarily disposed to interfere except in the following classes of cases, namely:
>
> (a) where a subordinate officer has improperly refused to exercise a jurisdiction vested in him, or
>
> (b) where such officer in the exercise of the jurisdiction has failed in his duty or has contravened some express provision of law affecting the decision on the merits, and where such contravention has produced a serious miscarriage of justice, or
>
> (c) generally where it is necessary for the purpose of preventing gross abuse or gross injustice.
>
> 112. In the absence of any time limit as to submission of an application for revision by the Board, the same may be preferred within ninety days from the date of the order in the lower Court, deducting the time for getting the copy of judgment. The Board has however a discretion to admit an application for revision preferred after one month."

12. Considering the rival contentions of the Parties, this Court finds, the moot questions require to be determined here as follows :-

A. For the factual scenario involving both the proceedings, since the earlier set of disputes involving the land also engaged in the subsequent set of disputes and also involving Vendor and Vendor's Vendor of the Petitioner herein, if the subsequent proceeding is hit by principle of res judicata ?

B. If the proceeding at hand is hit for the Petitioner herein having no locus standi to pursue such litigation ?

C. If the present proceeding is barred by limitation and for the alternative remedy against the impugned order ?

D. Since there already involved an allegation that the Hata Pata being fabricated and fraudulent in the earlier set of proceedings, if such a ground is available to be considered in the second round of proceeding involved herein ?

E. Once the earlier set of proceedings contested and adjudicated involving same land and the ultimate decision arrived by the Revisional Authority's in confirmation of the order of the Original Authority and the order of the Appellate Authority, if the subsequent set of proceedings is permissible in the eye of law ?

F. If the order of the Revenue Authority in the earlier set of proceedings binds the Authorities deciding the second set of proceeding ?

13. It is coming to the serious allegation of the Petitioner on application of principle of res judicata to the second set of proceeding coupled with the question framed herein, if the order of the Revisional Authority in the previous round of litigation binds the subsequent proceeding on further coming to consider the objection of the State Government on the entertainability of Revision. For there is specific allegation of fraud played by the parties involved, this Court on perusal of the earlier Revision Petition Case No.80/1989 finds, the Revision involved herein had the following allegations :-

"6. From the Appellate order of the Additional Settlement Officer, it is seen that he has gone into the questions among others, as to

(i) Whether the 'Hath Patta' is genuine and if not whether it is a valid document for creation of a tenancy right;

(ii) Whether the respondent (the present opposite party No.3) was occupying the land peacefully till his appeal decision;

(iii) Whether the lease was for Ac.2.76 or for Ac.21.76 dec."

14. In answering question no.i indicated herein above, the Revisional Authority recorded the submission of the learned Additional Standing Counsel appearing for the Petitioner in Revision Petition Case No.80 of 1989 as follows :-

"3.The learned Additional Standing Counsel appearing for the petitioner said that admittedly Shri Dhaneswar Rautray was an ex-intermediary and the impugned lands got vested in the State in 1953. On the basis of the Jamabandi filed by the ex- Intermediary, the Tenants' Ledger was prepared (there is thus little contradiction in the plaint which at

> paragraph 3 mentions that the ex-Intermediary did not submit the Jamabandi after vesting whereas in paragraph 4 of the plaint it has been acknowledged that the Tenants' Ledger was prepared for this village "Khalkata" on the basis of Jamabandi furnished by the ex-Intermediary). However, while preparing the Tenants' Ledger the name of the opposite party was manipulated to be included in the Tenants' Ledger for an area of Ac.21.76 decs. The petitioner's view is that even in the Jamabandi of the village which has been filed in another R.P. Case No.151/89 on similar matter, there has been erasures/the ink had been washed away, on the quantum of land. Actually the quantum of land should be much less viz. Ac.2.76 and not Ac.21.76. The petitioner's case is that on the basis of such wrong recording made in the Tenants' Ledger in collusion with the Tahasil staff, the opposite party managed to pay rent for the enhanced area of Ac.21.76 dec. in 1959 and went on paying the same till 1981 when the illegality came to be detected. Another argument preferred is that the Tenants' Ledger entries have not been attested by any Authority as required under the Tahasil Manual. However, in the appeal case, the Additional Settlement Officer relied on this fabricated Tenants' Ledger and dismissed the appeal, the learned Additional Standing Counsel contended. Since the Tahasil authorities who are to recognise the lease, had themselves preferred the Appeal, this means they became doubtful about its genuineness, argued the Additional Standing Counsel. As regards vesting of the impugned lands, he submitted that at the time of vesting, all lands vest in Government free from all encumbrances, but a tenant under any ex-Intermediary shall be deemed to be a tenant under the State Government under Section 8(1) of the O.E.A. Act."

Answering the question taken note herein above required to be answered in the Revision Petition coupled with the submission of the State Counsel has also been taken note herein above. The Revisional Authority in earlier disposal of the Revision came to its finding at Paragraph-7 as follows :-

> "7. After examining the details, the Additional Settlement Officer has concluded that the 'Hath Patta' was a valid document to create agricultural tenancy. Secondly, the Additional Settlement Officer has said that Ex.A viz. "Ek-Padia" produced before him showed that the second digit had been erased. So he placed reliance on Tenants Leger where the figure is A.21.76 dec. He has also taken into consideration the objection of the Additional Tahasildar that this entry in Tenants' Ledger was not attested as required under Rule 21 of the Manual of Tahasil Accounts. By the Revenue Supervisor or the Tahasildar, but concluded that for the negligence in duties by the Tahasildar the respondent cannot suffer. Moreover he observed that for the last 33 years the entries in that Tenants' Ledger have not been attested. Thirdly, regarding possession, he has deduced from the documents examined by him as also the letter of the Tahasildar, Nimapara dated 16.03.82 addressed to the A.D.M., Puri that Shri Upendra Paikray, after being inducted as a tenant remained in possession from 18.4.39 to 02.08.66. Thereafter, after purchasing the land from Upendra Paikray, the opposite party No.3 remained in possession from 03.08.66 till date. He has also come to the finding that at no stage, the revenue authorities had taken any action under section 5(i) of the O.E.A. Act to cancel the lease or arrange eviction of the respondent from the disputed land. As regards alleged fraudulent entry in the said Jamabandi or in the Tenants' Ledger, these are documents which have remained in the custody in the Tahasil Office. Hence it is for that office to find out under what circumstances such fraudulent entries have been made and if so what corrective actions have to be taken. No evidence has been adduced that any

enquiry had at all been made to fix responsibilities for such fraudulent entries if at all these have been made."

15. Perusal of the appellate order as well as revisional order, this Court finds, there has been already threadbare consideration on the fraud aspect that too being raised by the State Authorities in both the Appellate and Revisional Forums in the first round of litigation.Such findings and observations therein remain unchallenged. This Court, therefore, has no hesitation to accept the submission of Mr.Baug, learned counsel for the Petitioner there is clear operation of res judicata on such issue, further the orders in the first round of litigation also binds all parties herein and further the revisional order, which is impugned herein, is clearly an abuse of process of law and untenable in the eye of law. Further since fraud aspect already gone into the earlier round of litigation involved up to Revision level, the order in earlier Revision undoubtedly remains binding on such Authorities.

This Court in the circumstance answering the questions framed at Nos.A, D & E observes, not only there is application of res judicata to the second set of proceeding but since there already involved a Revision commenced from the stage of original proceeding under the provision of the OSS Act, for the subsequent set of proceeding emanated from the move of the Petitioner herein on the further preparation of R.O.R. on the basis of sale transaction from the Vendor of the Petitioner, question as to whether there is fraudulent action in the preparation Hata Pata etc. could not have been again a subject matter either in the subsequent revision or the appellate order, vide Annexure-9 & 10 respectively. This Court while answering the issues at A, D, E & F in favour of the Petitioner herein here observes, both the proceedings, vide Annexure-9 & 10 appear to be not only ex parte but also in clear abuse of process and both such orders are declared invalid and inoperative and are also set aside.

16. Coming back to the Petitioner's contesting, the subsequent Revision also hit for being grossly barred by time and State contesting the Writ Petition barred for non-exercise of alternate remedy as framed vide question No.C herein above, this Court here finds from the narrations made herein above and the pleadings and submissions involved herein, undisputedly, the first round of litigation ended in the revisional order, vide Annexure-2 on 19.3.1990. The sale between Suresh Chandra Khatoi, the Vendor and M/s.Milan Developers & Builders Pvt. Ltd, the present Petitioner took place upon the Parties entering into a Registered Sale Deed No.623 dated 1.6.1996. The sale transaction was in the involvement of the present Petitioner. Similarly, the Appeal proceeding under the Mutation Manual read with the OSS Act, vide Appeal Case No.251/2000 involves the very same property transacted, vide Annexure-3. For there is necessity in bringing in a request for preparation of corrected Record of Rights in terms of the sale deed surfaced subsequently, this was merely an innocuous proceeding only entering into preparation of corrected Record of Rights. Proceeding involving such outcome had

no chance to enter into any conflict whatsoever. Here this Court finds, the Revision has been brought by the State of Odisha in the year 2012 undisputedly involving the impugned order passed in the Appeal in the year 2000. There is no dispute at Bar that this Revision was brought clearly after twelve years. This Court deciding the limitation aspect in preferring the Revision under the Revenue law and taking cue from the decisions of the Hon'ble apex Court in ***Mansram vrs. S.P.Pathak :*** AIR 1983 SC 1239 and ***Ajab Singh & ors. Vrs. Antram & ors.*** : (2009) 11 SCC 53 and further decision of this Court in ***Batakrushna Sahoo vrs. Commissioner, Consolidation, Odisha :*** AIR Online 2022 Ori. 444, has no hesitation to hold that the Revision herein not only grossly barred by time but there was no scope to bring the fraud aspect in the subsequent Appeal proceeding. The further Revision and Appeal since as an outcome of abuse of process, there was no need for availing the alternate remedy of Revision. Further for the Writ Petition already admitted and for serious question of law discussed herein being answered in favour of the Petitioner and for legal support to the case of the Petitioner though the law of land taken support herein, there is otherwise also no scope in asking the Petitioner to route through Revision. For the Revision herein was not maintainable in the eye of law, the consequential order, if any, through Annexure-10 also remains unsustainable. Through the last sale deed, it becomes clear that the Petitioner herein was justified in bringing the litigation requesting for preparation of a fresh Record of Rights only. The question 'C' is answered in favour of the Petitioner.

17. Coming back to the question of bindingness of the order of the Revenue Authority on the Authorities exercising power under the Mutation Manual read with the OSS Act, this Court finds through the decisions in ***Baikunthanath Nayak vrs. State of Orissa & ors.*** : AIR Online 2022 Ori. 489 and ***Anugraha Narayan Pattnaik vrs. State of Odisha & ors.*** : 2022 SCC Online Ori. 4039 fully support the stand of the Petitioner. This also answers question 'F' but in favour of the Petitioner.

18. To add to this, this Court also likes to bring here that for the provision at Section 8 of the Orissa Estates Abolition Act, 1951 taken note at Paragraph-11, this Court finds, for the clear provision at Section 8 of the Orissa Estates Abolition Act, 1951, the Petitioner's Vendor's Vendor already a rayati continuing involving the disputed property is deemed to be a rayat on vesting the property of the State of Odisha and remains to be the absolute owner of such property validating all such transactions taking place thereafter. State at all was suffering should have been careful at the time of vesting, further so many proceedings on such issue taken up on self-same issue and Revisional decision passed earlier remaining unchallenged, there is no otherwise scope to re-open such disputes. This Court thus finds, the attempt of the State Counsel also hit under the aforesaid provision.

19. This Court in the circumstance interferes in both the orders at Annexure-9 and 10 and sets aside the both and directs restoration of the Record of Rights involving the disputed land in favour of the Petitioner forthwith.

20. The Writ Petition succeeds. No cost.

2023 (III) ILR – CUT- 426

BISWANATH RATH, J & M.S. SAHOO, J.

MATA NO. 3 OF 2019

SMT. URMILLA SAHU & ORS. ……..Appellants

-V-

SRI SANTOSH KUMAR SAHU ……..Respondent

HINDU MINORITY AND GUARDIANSHIP ACT, 1956 – Section 6 – Principle of law relating to custody of child – Discussed with reference to case laws. (Para 18-30)

Case Laws Relied on and Referred to :-

1. (2008)9 SCC 413 : 2008 AIR SCW 5769 : Nil Ratan Kundu & Anr. Vs. Abhijit Kundu & Anr.
2. AIR 2009 (SC) 2821: Smt. Anjali Kapoor Vs. Rajib Baijal.
3. (2021) 12 SCC 289 : Smriti Madan Kansagra Vs. Perry Kansagra.

For Appellants : Mr. R.K. Mohapatra

For Respondent : Mr. N. Jujharsingh

JUDGMENT Date of Hearing: 19.07.2023 : Date of Judgment: 25.08.2023

M.S. SAHOO, J.

1. By filling the present appeal under Section 19 of the Family Courts Act,1984 the appellants have challenged the judgment and order dated 21.11.2018 passed by the learned Judge, Family Court, Berhampur in Civil Proceeding-C.P. No.271 of 2015.

The said proceeding was filed under Section 6 of the Hindu Minority and Guardianship Act, 1956 (hereinafter the 'Act, 1956' for short) by the present respondent-father of the minor girl child (name of the girl is being withheld), seeking custody of the girl child who has been staying with her maternal grandmother and maternal uncles, in particular the respondent no.2 and his wife.

The appellants herein are the respondents before the learned trial court; appellant no.1 is the maternal grandmother of the minor child; respondent nos.2 to 6 before the learned trial court are the appellant nos.2 to 6 in the present appeal are the maternal uncles of the child.

2. The operative portion of the order passed by the learned Judge, Family Court is quoted herein:

> *"The case, be and the same, is decreed on contest,but without costs.*
>
> *The petitioner is hereby declared as the natural Guardian of the child …*

The respondents are directed to hand over the child to the petitioner within one month of this order, failing which the petitioner has liberty to bring the child to his custody through the process of the Court.

The petitioner is also directed to allow the respondents to see the child as and when they required the same."

The facts in brief :

3. As per the pleadings of the parties before the learned court below that is also reflected in the impugned judgment, the undisputed facts leading to the Civil Proceeding before the learned Judge, Family Court and thereafter filing of the present appeal are: that on 19.04.2009 the daughter of the present appellant no.1 late Sasmita Sahu married respondent as per Hindu rites and customs. On 08.03.2010, the girl whose custody is the subjectmatter of dispute was born from their wedlock. [The true copy of the Birth Certificate was exhibited and marked as Ext."2' in the proceeding before the learned trial court]. On 28.09.2011, the wife of present respondent namely, Sasmita Sahu died, allegedly, by committing suicide in the house of the present respondent (True copy of the Death Certificate was exhibited and marked as Ext.3 in the learned trial court). It is further contended that on 28.09.2011,due to unnatural death of Sasmita Sahu, U.D. Case No.27 of 2011 was registered at Bada Bazar Police Station, Berhampur on receipt of a Medico Legal Case Report from Medical Out-Post, Berhampur and on 15.05.2015, Police submitted its Final Report vide F.F. No.27 dated 15.05.2015.

3.1 Further it has been stated by the parties that visualizing the future prospect and maintenance of the minor girl child, it was unanimously decided amongst the family members and other local gentries known to both the parties, to let the child remain in the custody of present appellants, who are maternal grandmother and maternal uncles of the girl child, in terms of a written document dated 04.10.2011, by incorporating some terms and conditions therein. [The true copy of the agreement dated 14.10.2011 was exhibited and marked as Exhibit-A in the proceeding before the learned trial court.] It is further contended that since 28.09.2011, minor girl child is residing with her maternal grandmother and maternal uncles.

Exhibits before the learned Family Court:

4. Before the learned trial court that the respondent-petitioner and his sister were examined as P.Ws.1 & 2 respectively.The petitioner exhibited three documents such as Ext.1-Birth Certificate of the deceased mother of the child, Ext.2-Birth Certificate of the minor girl and Ext.3-Death Certificate of the mother of the child. The present appellant no.1 as D.W.2 was examined and appellant no.2 as D.W.1. Defendants exhibited three documents such as Ext.A-photo copy of the agreement dated 14.10.2011, Ext.B-photo copy of Gift Deed dated 22.05.2013 and Ext. C-photo copy of school progress report of minor girl.

Statements in evidence before the learned Family Court :

5. It is stated that the present respondent has never visited his in-law's houses after the death of his wife i.e., the mother of the minor daughter so also has never paid a single farthing in favour of his daughter till date. This fact is established from the evidence of present respondent, who was examined as P.W.1 in the proceeding before the lower court, more particularly it is found at the last portion of para-4 of the cross-examination of P.W.1 (respondent), recorded on 23.08.2017 by the learned trial court.

It is further contended that evidence of present appellant nos.1 and 2 as D.W.2 & 1 before the learned trial court would go to show that the minor girl child has been residing with her maternal grandparents and maternal uncles since 04.10.2011 after her mother's death and the respondent-father has not complied with the terms of the agreement-Ext.A.

Submissions of the appellants :

6. Heard Mr. Rajesh Kumar Mohapatra, learned counsel for the appellants and the submissions are summarized herein:

The girl child is residing and grown up with her matrimonial grandmother particularly with appellant no.2, his wife and their two sons leading a happy and comfortable life with all facilities required for her growth and well being.

6.1 The child at present is prosecuting her studies in Class-VIII, in the Government Girls High School, Berhampur and she is doing well in her studies under the care and guidance of the appellants [School Progress Report is marked as Ext.C before learned Family Court]. After death of the mother of the child at the house of the respondent, respondent has never visited the girl child nor has ever paid a single farthing in favour of his daughter. Such fact is established from the paragraph-4 of the crossexamination of the respondent dated 23.08.2017 as P.W.1. The terms of agreement for welfare of the girl child dated 14.10.2011 (Ext.A) has not been complied with by the respondent. The appellants have complied the terms of agreement in the interest of the girl child by executing a gift deed giving land Ac.0.023, dated 22.05.2013 (Ext.B).

6.2 It has not been the case of the respondent-petitioner before the learned Judge, Family Court that there has been any lack of care for the minor child, any ill-treatment meted out to her by the adoptive parents with whom she is staying for the last about thirteen years since when she was aged about 18 months. As per the pleadings of the respondent-petitioner and evidence, there is no material to show any difficulties for the girl child like illtreatment, lack of care, lack of education, lack of proper upbringing to require any change of custody.

6.3 As per the law laid down by the Hon'ble apex Court in ***Nil Ratan Kundu and another v. Abhijit Kundu and another : (2008)9 SCC 413 : 2008 AIR SCW 5769***, "positive test" that such custody would be in the welfare of the child is material and it is on that basis, the learned Judge, Family Court should have exercised the power to refuse transfer of the custody of the minor from the maternal uncle and aunt in favour of the father. It is further submitted that as per the law down in ***Nil Ratan Kundu*** (supra) 'negative test' that the father is "not unfit" or disqualified to have custody of his daughter, is not relevant.

Submissions on behalf of the respondent-petitioner

7. Heard Mr. Nilakantha Jujharsingh, learned counsel for the respondent-petitioner and his submissions are noted herein :

The background facts as noted above, the exhibits and the evidence before the learned Judge, Family Court in the Civil Proceeding No. 271 of 2015 remain undisputed. The learned counsel for the respondent reiterated the said facts fairly, not entering into dispute over the same.

7.1 However, defending the judgment and order of the learned Judge, Family Court it is submitted that the respondent-petitioner approached the appellants on several occasions to return the minor daughter to his custody. The respondent-petitioner being the father as well as the natural guardian of the girl child not having been successful in getting custody, filed application under Section 6 of the Act, 1956 seeking custody of the child. It was not disputed by the present appellants having custody of the child, in the proceeding before the learned Judge, Family Court that the respondent-petitioner is the father/natural guardian of the minor girl child.

7.2 It is further submitted by the learned counsel for the respondent that the judgment and order passed by the learned Judge, Family Court is just and proper and is not liable to be interfered with by this Court in appeal.

Case law relied on by the appellants :

8. ***Nil Ratan Kundu and another v. Abhijit Kundu and another : (2008)9 SCC 413 : 2008 AIR SCW 5769;***

Smt. Anjali Kapoor v. Rajib Baijal : AIR 2009 (SC) 2821.

Case law relied on by the respondent-petitioner

9. ***Smriti Madan Kansagra v. Perry Kansagra : (2021) 12 SCC 289.***

Issues framed by the learned trial court :

10. Based on the pleadings and contentions raised before it, the learned trial court had framed the following issues :

> *"Considering the rival contention of the parties, the following issues are coped up for determination :*

(i) Whether the petitioner deserved to get custody of his minor daughter … ?

(ii) Whether the respondents have any right to keep the child with them ?

(iii) What arrangement would serve the best interest of the child … ?"

[Name of the child not mentioned in thequoted portion]

The above issues have been answered by the learned court in favour of the respondent-petitioner as quoted in paragraph-2 above, giving rise to the challenge by the appellants-respondents.

Analysis by this Court and Conclusion :

The learned counsel for the parties have filed the written notes of submission after exchanging copies of the same. We have gone through the written notes of submissions and the available lower court records.

11. Sections, 6, 7, 8 and 13 of Hindu Minority and Guardianship Act, 1956 since relevant are quoted herein for reference :

"6. Natural guardians of a Hindu minor.—The natural guardians of a Hindu minor; in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—

(a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;

(c) in the case of a married girl—the husband:Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi). Explanation.—In this section, the expressions "father" and "mother" do not include a stepfather and a step-mother.

7. Natural guardianship of adopted son.—The natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother.

8. Powers of natural guardian.—(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the court,—

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor; or

(b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or subsection (2), is voidable at the instance of the minor or any person claiming under him.

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in subsection (2) except in case of necessity or for an evident advantage to the minor.

(5) The Guardians and Wards Act, 1890 (8 of 1890),shall apply to and in respect of an application for obtaining the permission of the court under sub-section (2) in all respects as if it were an application for obtaining the permission of the court under section 29 of that Act, and in particular—

(a) proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of section 4A thereof;

(b) the court shall observe the procedure and have the powers specified in sub-sections (2), (3) and (4) of section 31 of that Act; and

(c) an appeal shall lie from an order of the court refusing permission to the natural guardian to do any of the Acts mentioned in sub-section (2) of this section to the court to which appeals ordinarily lie from the decisions of that court.

(6) In this section, "Court" means the city civil court or a district court or a court empowered under section 4A of the Guardians and Wards Act, 1890 (8 of 1890), within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such court, means the court within the local limits of whose jurisdiction any portion of the property is situate.

xx xx xx

13. Welfare of minor to be paramount consideration.—(1) In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor."

[Emphasis supplied]

Section 6 as quoted above defines natural guardian and in our considered opinion, Section 13 of the Act, 1956 makes the legislative intent abundantly clear that while deciding guardianship of a minor, the welfare of minor shall be the paramount consideration for a court.

Interaction of this Court with the minor girl child, the appellant no.2 and the respondent-petitioner :

12. In view of the fact that the minor girl child is aged about 14 years, being old enough to form an intelligent preference or judgment, in order to ascertain her wishes as to with whom she wants to stay, this Court after deliberations with the learned counsel appearing for the parties, with consent of the parties, directed for presence of the minor girl child along with appellant no.2 and his wife with whom she is presently staying and also directed for the presence of the respondent-

petitioner along with his wife. Regarding the interaction with the girl child, appellant no.2 and his wife, respondent no.2 and his wife which took place on 19.07.2023, this Court passed the order as quoted herein :

"Order No.13 dated 19.07.2023

> *1. Learned counsel for the parties were heard on 10.07.2023 and after hearing was concluded, the matter was posted for pronouncement of judgment.*
>
> *2. Thereafter on perusal of the case brief it was felt that certain further clarifications are necessary particularly the child whose custody is subject-matter of the present dispute, being 14 years of age, it was felt that interaction with child was necessary to arrive at a just conclusion. Accordingly the matter was directed to be listed on 12.07.2023 by order dated 11.07.2023.*
>
> *3. On 12.07.2023 learned counsel for the parties being present were heard at some length and it was directed the minor girl along with the persons in whose custody she is living at present, i.e.,Shri Krushna Chandra Sahu (Appellant no.2) being maternal uncle and his wife being the maternal aunt, should remain present on 14.07.2023 for having interaction with the Court.Respondent along with his wife present was also asked to remain present on the said date on 14.07.2023.*
>
> *4. On 14.07.2023 a prayer was made on behalf of the respondent that since the respondent is observing the obsequies after he unfortunately lost his mother, the matter may be adjourned to another date. The parties agreed for listing the matter on 19.07.2023.*
>
> *5. Today on 19th July the matter is taken up in chambers. The girl (whose name is not being mentioned), interacted with the Court in chambers in extenso. She is found to be well aware and conscious of the surroundings, intelligent and perceptive for her age, her date of birth being 8.3.2010. She narrated that she is studying in Class-IX in Govt. Girls School, Berhampur. She referred to the respondent no.2 as 'Baba' and wife of respondent as 'Maa'. Further she stated her brothers to be Uddhaba and Laxminarayan who are sons of respondent no.2. She stated that recently on her attaining puberty, a function was arranged as is the custom, by her parents, i.e., appellant no.2 and his wife. She referred to appellant no.1 as 'Jejema' (paternal grandmother). She stated that she goes to school by cycle with her friends as her father (Baba Appellant No.2) is busy in his shop. She enjoys her time with friends, her class teacher being Sushri Maam.*
>
> *This Court after being sure about her ability to understand asked the girl child whether she is having any kind of difficulty in leading her life as compared to others of her age, she was very clear and unequivocal in her statement before the Court that she leads a comfortable life, goes to school, enjoys food particularly biryani, enjoys time with her siblings and they had a very nice time in her last birthday.*
>
> *The girl-child also clearly and unequivocally stated that she does not know who is the respondent and how she is related to the respondent.*
>
> *6. Shri Santosh Kumar Sahu appellant no.2 and his wife were called for interaction with the Court in chambers. After the interaction with the girl child was over and after she left, appellant no.2 and his wife were called. They produced their adhar cards to identify themselves before interaction. After interacting with them this Court found them to be deeply attached to the girl child as they adopted her as their daughter when she*

was 16-18 months old when the mother of the girl child, i.e., sister of the respondent no.2 met with unnatural death.

The contents of the interaction with the girl child was not disclosed to both appellant no.2 and his wife.

7. This Court interacted with the appellant and his wife separately. The wife of the appellant no.2 stated that they have got married since last three years and she is aware of the past of the appellant no.2 and particularly the unnatural death of the first wife of the appellant no.2 and the incident thereafter. The appellant no.2 stated that he being scared does not ever got to meet the girl child who is staying with her maternal uncle since the age of about 18 months till today. *[Emphasis supplied]*

xx xx xx"

13. In ***Nil Ratan Kundu*** (*supra*) the appellants-Nil Ratan and his wife were the maternal grandfather and grandmother respectively of a minor boy, father and mother of their deceased daughter (mother of the boy). The respondent-Abhijit is the father of the boy, i.e., husband of the deceased. From the wedlock of the daughter of the appellants and Abhijit, the boy was born. There was allegations of neglect and torture against the respondent-Abhijit towards his wife. The respondent's wife, i.e., the mother of the minor died unnaturally. A case was registered for offence punishable under Sections 498-A and 304 of the Indian Penal Code, 1860. The minor boy was found in sick condition at the residence of the respondent- Abhijit, when he was aged about five years and his custody was handed over on 18.04.2004 to the maternal grandparents. After investigation, the police filed charge-sheet against the respondent and the criminal case was pending.

14. Apparently, the facts of the case in ***Nil Ratan Kundu*** (supra) and facts of the case at hand, have some striking similarities. The difference being that the unnatural death of the mother was not investigated in detail by the police in the case at hand, there was an agreement between the parties not to lodge any complaint by the appellants herein against the respondent, the police gave final form without proceeding to further investigate the matter. The agreement was by interference of the local gentries. The other difference being the minor boy was taken to custody of the maternal grandparents at the age of five years, whereas in the case at hand the baby girl was kept in custody of the maternal grandmother and in particular the maternal uncle(Respondent No.2) and his wife(aunt) from her infancy i.e. when she was about 18 months old.

15. It is beyond the scope of the litigation and the consequent adjudication by the learned Family Court and the litigation before this Court in appeal, to enter into the question of validity of "agreement" regarding not to support any prosecution against the respondent after the unnatural death of his wife.

However, it has to be taken note that the agreement contains the condition that the custody of the minor girl child shall be with the maternal grandmother and maternal uncles, the father would pay for the upbringing and the welfare of the

child. The father shall gift his property situated at a place "Kodala" by way of registered conveyance deed in favour of his daughter.

16. From the evidence presented before the learned court below, it is apparent that the respondent has not been able to comply his part of the agreement regarding making payments for the welfare and upbringing of the child and to transfer the property in the name of the child. In fact the evidence of the respondent-petitioner indicates that he has not been able to do so. It was not disputed before the learned Judge, Family Court that the respondentpetitioner handed over the custody of the infant-baby to the maternal uncle and the maternal grandmother in the prevailing circumstances, i.e. when the mother of the child died unnaturally when the child was about eighteen months old.

17. To grant custody of the minor to the natural father, learned trial court has observed at paragraph-11 of the impugned judgment that *"petitioner, being the father of the child, is her natural guardian. He has not married second time. Had he not possessed any love, affection or belongingness towards his daughter he would have married again and have children."*

However, during interaction of this Court with the respondent and his wife they have stated that they are married since about the year 2016. The date of argument of the hearing of the C.P. before the Family Court was 12.11.2018 and the date of judgment is 21.11.2018.

17.1 The other factors that weighed in the mind of the learned court below to grant custody of the child are further indicated in paragraphs-11 & 12 of the judgment and are quoted herein :

> *"11. xx xx Besides that, if the stand and version of petitioner is to believe, he waited to get back his daughter on the assurance of the respondents, as he had no pressing voice owing the suicidal death of his wife.*
>
> *On the other hand, the respondents measurably failed to prove the facts and circumstances of execution of the agreement (Ext.A), which is a Xerox copy. The contention of the said agreement does not reveal any culpability of present petitioner in playing any role in the untimely death of his wife nor the post-mortem report of Sasmita Sahu is filed before the Court.*
>
> *12. Coming into the status of the respondents for discussion, it is learnt that the respondent no.1 is an old widow lady. The other respondent having their own families, having respective children. No doubt the child has been residing with the respondents since the death of her mother, but in passage of time, when the respondents have to deal with their own family burden, they might not able to take proper care of the child and her future prospective will be doomed.*
>
> *On the other hand, the petitioner is alone having a sound income. the child is his only child and he is quite capable of taking her care. On the other word, the child is the only substance for the living of the petitioner. It is a fact that, the child is about eight (8) years old and she has some rational knowledge. She has also some bank deposits and*

owns a piece of landed property, being gifted to her by her maternal uncle Krushna Chandra Sahu (Ext.B). Her maternal uncles are around her, even if she stayed with her father (petitioner)."

18. It would be apt to quote the observations and the principles of law laid down by the Hon'ble Supreme Court in ***Nil Ratan Kundu*** (supra):

52. In our judgment, the law relating to custody of a child is fairly well settled and it is this : in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents.In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor.

xx xx xx

54. The approach of both the courts is not in accordance with law and consistent with the view taken by this Court in several cases. For instance, both the courts noted that the appellants (maternal grandparents) are giving "all love and affection" to Antariksh, but that does not mean that Antariksh will not get similar love and affection from his father. It was also observed that the appellants no doubt got Antariksh admitted to a well-reputed school (St. Xavier's Collegiate School, Kolkata), but it could not be said that the father will not take personal care of his son. Both the courts also emphasised that the father has the right to get custody of Antariksh and he has not invoked any disqualification provided by the 1956 Act.

55. We are unable to appreciate the approach of the courts below. This Court in a catena of decisions has held that the controlling consideration governing the custody of children is the welfare of children and not the right of their parents.

[Underlined to Supply Emphasis]

56. In Rosy Jacob [(1973) 1 SCC 840] this Court stated : (SCC p. 854, para 15)

"15. … The contention that if the husband [father] is not unfit to be the guardian of his minor children, then, the question of their welfare does not at all arise is to state the proposition a bit too broadly and may at times be somewhat misleading."

It was also observed that the father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. The father's fitness cannot override considerations of the welfare of the minor children.

57. In our opinion, in such cases, it is not the "negative test" that the father is not "unfit" or disqualified to have custody of his son/daughter that is relevant, but the

"positive test" that such custody would be in the welfare of the minor which is material and it is on that basis that the court should exercise the power to grant or refuse custody of a minor in favour of the father, the mother or any other guardian.

58. Though this Court in Rosy Jacob [(1973) 1 SCC 840] held that children are not mere chattels nor toys, the trial court directed handing over custody of Antariksh "immediately" by removing him from the custody of his maternal grandparents. Similarly, the High Court, which had stayed the order of the trial court during the pendency of appeal, ordered handing over Antariksh to his father within twenty-four hours positively. We may only state that a child is not "property" or "commodity". To repeat, issues relating to custody of minors and tenderaged children have to be handled with love, affection, sentiments and by applying human touch to the problem.

59. At another place, the trial court noted that a criminal case was pending against the father but the pendency of the case did not ipso facto disqualify him to act as the guardian of Antariksh. The court stated, "If ultimately the petitioner (father) is convicted and sentenced in that case, the OPs (maternal grandparents of Antariksh) will have the scope to inform the fact to the court and to pray for change of the court's decision". The court made a "comparative study" and observed that it had "no hesitation" in holding that the present and future of Antariksh would be better secured in the custody of his father. It then stated:

"Antariksh should be, therefore, immediately removed from the custody of OPs (maternal grandparents) to the custody of the petitioner (father)."

60. The appellants herein challenged the decision of the trial court by approaching the High Court. With respect, the High Court also committed the same error by not applying the correct principles and proper test of welfare of minor Antariksh as the paramount consideration. It, no doubt, referred to the principle, but held that the trial court was right in handing over custody of Antariksh to the father.

xx xx xx

65. As already noted, Antariksh was aged six years when the trial court decided the matter. He was, however, not called by the court with a view to ascertain his wishes as to with whom he wanted to stay. The reason given by the trial court was that none of the parties asked for such examination by the court.

66. In our considered opinion, the court was not right.Apart from the statutory provision in the form of subsection (3) of Section 17 of the 1890 Act, such examination also helps the court in performing onerous duty, in exercising discretionary jurisdiction and in deciding the delicate issue of custody of a tender-aged child. Moreover, the final decision rests with the court which is bound to consider all questions and to make an appropriate order keeping in view the welfare of the child. Normally, therefore, in custody cases, wishes of the minor should be ascertained by the court before deciding as to whom the custody should be given.

67. Before about a century, in Besant v. G. Narayaniah [(1913-14) 41 IA 314] , under an agreement, custody of two minor sons was with the mother who was staying in England. The father who was residing in Madras instituted a suit for custody of his sons asserting that he was the natural guardian of the minors and was entitled to have custody of both his sons. The trial court decreed the suit which was confirmed by the High Court. The Judicial Committee of the Privy Council held that under the Hindu Law, the father was the natural guardian of his children during their minority. But it

was stated that the infants did not desire to return to India and no order directing the defendant mother to send minors to India could have been lawfully made by an Indian court. Upholding the contention, allowing the appeal and dismissing the suit, Their Lordships observed that it was open to the plaintiff father to apply to His Majesty's High Court of Justice in England for getting the custody of his sons:

(Emphasis Supplied)

" … If he does so, the interests of the infants will be considered and care will be taken to ascertain their own wishes on all material points." (Besant case [(1913-14) 41 IA 314] , IA p. 324)

Since it was not done, the decree passed by both the courts was liable to be set aside.

(emphasis in original)

68. We may, however, refer at this stage to a submission of the learned counsel for the respondent father. Referring to Thrity [(1982) 2 SCC 544] , the counsel contended that this Court held that the court is not bound to interview the child. In that case, this Court did not interview the minors and did not ascertain their wishes. It was, therefore, submitted that it cannot be said that non-examination of Antariksh or failure to ascertain his wishes by the trial court was illegal or unlawful and vitiated the order.

69. We are unable to agree with the learned counsel. We have closely gone through Thrity [(1982) 2 SCC 544] . Reading the decision as a whole makes it amply clear that on the facts of the case, this Court felt that calling minor children frequently in chamber by Judges was not proper and such interviews really disturbed them rather than giving them respite and relief. This Court reproduced some of the observations of the learned Judges of the High Court who had interviewed the minors. The Court also considered sub-section (3) of Section 17 of the 1890 Act and the power of the court to interview a minor child with a view to consider his/her preferences and observed : (Thrity case [(1982) 2 SCC 544] , SCC p. 568, para 25)

"25. We may, however, point out that there cannot be any manner of doubt as to the court's power of interviewing any minor for ascertaining the wishes of the minor, if the court considers it so necessary for its own satisfaction in dealing with the question relating to the custody of the minor."

xx xx xx

71. In the instant case, on overall consideration we are convinced that the courts below were not right or justified in granting custody of minor Antariksh to Abhijit, the respondent herein without applying relevant and well-settled principle of welfare of the child as the paramount consideration. The trial court ought to have ascertained thewishes of Antariksh as to with whom he wanted to stay.

72. We have called Antariksh in our chamber. To us, he appeared to be quite intelligent. When we asked him whether he wanted to go to his father and to stay with him, he unequivocally refused to go with him or to stay with him. He also stated that he was very happy with his maternal grandparents and would like to continue to stay with them. We are, therefore, of the considered view that it would not be proper on the facts and in the circumstances to give custody of Antariksh to his father, the respondent herein."

[Underlined to supply Emphasis]

19. The principles laid down in ***Nil Ratan Kundu*** (supra) have been reiterated by the Hon'ble Supreme Court in **Tejaswini Gaud v. Shekhar Jagdish Prasad**

Tewari, (2019) 7 SCC 42 : (2019) 3 SCC (Civ) 433 : 2019 SCC OnLine SC 713 at page 56 of SCC :

Welfare of the minor child is the paramount consideration

26. The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.

27. After referring to number of judgments and observing that while dealing with child custody cases, the paramount consideration should be the welfare of the child and due weight should be given to child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings, in Nil Ratan Kundu [Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413], it was held as under : (SCC pp. 427-28, paras 49-52)

"49. In Goverdhan Lal v. Gajendra Kumar [Goverdhan Lal v. Gajendra Kumar, 2001 SCC OnLine Raj 177 : AIR 2002 Raj 148] , the High Court observed that it is true that the father is a natural guardian of a minor child and therefore has a preferential right to claim the custody of his son, but in matters concerning the custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party. Section 6 of the 1956 Act cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child. It was also observed that keeping in mind the welfare of the child as the sole consideration, it would be proper to find out the wishes of the child as to with whom he or she wants to live.

50. Again, in M.K. Hari Govindan v. A.R. Rajaram [M.K. Hari Govindan v. A.R. Rajaram, 2003 SCC OnLine Mad 48 : AIR 2003 Mad 315] , the Court held that custody cases cannot be decided on documents, oral evidence or precedents without reference to "human touch". The human touch is the primary one for the welfare of the minor since the other materials may be created either by the parties themselves or on the advice of counsel to suit their convenience.

51. In Kamla Devi v. State of H.P. [Kamla Devi v. State of H.P., 1986 SCC OnLine HP 10 : AIR 1987 HP 34] the Court observed : (SCC OnLine HP para 13)

'13. … the Court while deciding child custody cases in its inherent and general jurisdiction is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases giving due weight to the circumstances such as a child's ordinary comfort, contentment, intellectual, moral and physical development, his health, education and general maintenance and the favourable surroundings. These cases have to be decided ultimately on the Court's view of the best interests of the child whose welfare requires that he be in custody of one parent or the other.' [Emphasis Supplied]

xx xx xx

28. Reliance was placed upon Gaurav Nagpal [Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 SCC 42 : (2009) 1 SCC (Civ) 1] , where the Supreme Court held as under :

(SCC pp. 52 & 57, paras 32 & 50-51)

"32. In McGrath (Infants), In re [McGrath (Infants), In re, (1893) 1 Ch 143 (CA)] , Lindley, L.J. observed : (Chp. 148)

'… The dominant matter for the consideration of the court is the welfare of the child. But the welfare of the child is not to be measured by money only nor merely physical comfort. The word "welfare" must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well being. Nor can the tie of affection be disregarded.'

*xxx *** xxx*

51. The word "welfare" used in Section 13 of the Acthas to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases. (emphasis in original)

29. Contending that however legitimate the claims of the parties are, they are subject to the interest and welfare of the child, in Rosy Jacob [Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840] , this Court has observed that : (SCC pp. 847 & 855, paras 7 & 15)

"7. … the principle on which the Court should decidethe fitness of the guardian mainly depends on two factors : (i) the father's fitness or otherwise to be the guardian, and (ii) the interests of the minors.

****

15. … The children are not mere chattels : nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them. The approach of the learned Single Judge, in our view, was correct and we agree with him. The Letters Patent Bench on appeal seems to us to have erred [Jacob A. Chakramakkal v. Rosy J. Chakramakkal, 1972 SCC OnLine Mad 90 : (1972) 85 LW 844] in reversing him on grounds which we are unable to appreciate."

30. The learned counsel for the appellants has placed reliance upon G. Eva Mary Elezabath [G. Eva Mary Elezabath v. Jayaraj, 2005 SCC OnLine Mad 472 : AIR 2005 Mad 452] where the custody of the minor child aged one month who had been abandoned by father in church premises immediately on death of his wife was in question. The custody of the child was accordingly handed over to the petitioner thereon who took care of the child for two and half years by the Pastor of the Church. The father snatched the child after two and a half years from the custody of the petitioner. The father of the child who has abandoned the child though a natural guardian therefore was declined the custody.

31. In Kirtikumar Maheshankar Joshi [Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashanker Joshi, (1992) 3 SCC 573 : 1992 SCC (Cri) 778] , the father of the children was facing charge under Section 498-A IPC and the children expressed their

> *willingness to remain with their maternal uncle who was looking after them very well and the children expressed their desire not to go with their father. The Supreme Court found the children intelligent enough to understand their well being and in the circumstances of the case, handed over the custody to the maternal uncle instead of their father.*
>
> *xx xx xx"*

20. By applying the principles of law laid down in ***Nil Ratan Kundu*** (*supra*), particularly paragraph-52, that in selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child; in selecting a guardian,particularly of a minor girl child, this court is exercising *parens partiae* jurisdiction and is expected *nay* bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. When the child is old enough to form an intelligent preference or judgment, this court must consider such preference as well, though the final decision should rest with this court as to what is conclusive to the welfare of the minor.

21. In ***Smriti Madan Kansagra v. Perry Kansagra*, (2021) 12 SCC 289 : (2023) 2 SCC (Civ) 512 : 2020 SCC OnLine SC 887, at page 324 SCC, the principles laid down in Nil Ratan Kundu** (supra) have also been quoted with approval.

22. Having considered the facts of the present case and taking into account the provisions of the Act, 1956 : Sections 6, 7, 8 & 13 and applying the settled principles above, we are of the considered opinion that the judgment and order passed by the learned Family Court is not just and proper on more than one grounds as discussed hereunder.

23. Learned Court has observed that had the father not possessed any love, affection or belongingness towards his daughter, he would have married again and have children. But the fact remains that the father got married in the year around 2016. Whether marriage of the father for the second time would be a germane consideration or not to grant him the custody of the child, would be another question, but the learned court clearly erred in fact, in observing the present marital status of the father : respondent-petitioner.

24. Though it has been the consistent view of the Hon'ble Supreme Court that the custody of the minor children cannot be decided solely by interpreting legal provisions, and the court exercising *paren patriae* jurisdiction is expected to give due weight to a child's ordinary comfort, contentment, education, intellectual development and favourable surroundings, but over and above physical comforts, moral and ethical values cannot be ignored which are essential and indispensable considerations. The learned Family Court has not at all delved into these issues.

25. Though the child is old enough to form an intelligent preference or judgment, the learned Family Court did not endeavour to know/ascertain such preference. Learned Family Court applied the *"negative test"* that the father is not unfit or disqualified to have custody of his daughter which as per paragraph-57 of ***Nil Ratan Kundu*** (supra) is not that relevant to decide/grant custody of child. The learned court did not apply the "positive test" that the custody that the adjudicating court will be granting, would be in the welfare of the minor, which is material to refuse or to grant the custody as sought for. Learned court below approached the issue from a perspective, only by considering right of the father to have custody of the minor child whereas the controlling consideration, as noted in paragraph-55 of *Nil Ratan Kundu* (*supra*) governing the custody of child should have been the welfare of child.

26. Reliance on the decision rendered in ***Smriti Madan Kansagra*** (supra) is of no avail to the respondent-petitioner. In ***Smriti Madan Kansagra*** (supra) the father was seeking custody of his son as against the claim of his wife, the mother of the son. The facts and the surrounding circumstances as well as the wish of the child therein were rather completely opposite to those of the case at hand.

As indicated above by us, ***Smriti Madan Kansagra*** (supra) has also approved and applied the principles enumerated in Nil Ratan Kundu (supra), i.e. the paramount consideration while deciding the custody of a child is welfare of the child and applying such test in the present case, the respondent-petitioner cannot be granted the custody of the child.

27. Apart from ***Nil Ratan Kundu*** (supra) where the father was denied the custody of the child after death of the mother while staying with the father in suspicious circumstances, in a decision reported in ***Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashanker Joshi, (1992) 3 SCC 573***, the Hon'ble Supreme Court granted custody of two minor children to maternal uncle as against the claim of the father. In that case, the mother had died an unnatural death, the father was facing charge under section 498-A of I.P.C., the children were staying with their maternal uncle. Before Hon'ble Supreme Court, both the children expressed their desire to stay with their maternal uncle and not with the father. ***Kirtikumar Maheshankar*** (supra) has been quoted with approval in ***Nil Ratan Kundu*** (supra) at paragraph-46 p.426 of SCC.

Paragraph-46 of **Nil Ratan Kundu** (supra) is quoted herein :

"46. In Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashankar Joshi custody of two minor children was sought by the father as also by the maternal uncle. The mother had died an unnatural death and the father was facing charge under Section 498-A of the Penal Code,1860. The children were staying with their maternal uncle.Before this Court, both the children expressed their desire to stay with their maternal uncle and not with the father. Considering the facts and circumstances, and bearing in mind the case

pending against the father, and rejecting his prayer for custody and granting custody to the maternal uncle, the Court stated : (SCC p.575 para 7)

"7. ... After talking to the children, and assessing their state of mind, we are of the view that it would not be in the interest and welfare of the children to hand over their custody to their father Pradipkumar. We are conscious that the father, being a natural guardian, has a preferential right to the custody of his minor children but keeping in view the facts and circumstances of this case and the wishes of the children, who according to us are intelligent enough to understand their well-being, we are not inclined to hand over the custody of Vishal and Rikta to their father at this stage." [Emphasis Supplied]

28. In ***Athar Hussain v. Syed Siraj Ahmed, (2010) 2 SCC 654 : AIR 2010 SC 1417***, the Hon'ble Supreme Court dealt with an appeal filed by the father of two minor children; a girl and a boy, in a challenge to the order passed by the Hon'ble High Court granting interim custody of the children to the maternal grandparents, the High Court had reversed the judgment of the learned Family Court granting injunction against the appellantfather from interfering with the custody of his children remaining with the respondents-maternal grandparents. The proceeding before the learned Judge, Family Court was initiated under sections 7, 9 & 17 of the Guardians & Wards Act, 1890 by the maternal grandparents seeking relief against the father of the children; not to interfere with the custody of the children and with the property in the name of the minor children.

In ***Athar Hussain*** (supra) dismissing the appeal, by rejecting the contentions of the father regarding unsuitability of the maternal grandparents and their family to have custody of their grand children, the Hon'ble Supreme Court, following the earlier decisions and in particular, applying the principles laid down in ***Nil Ratan Kundu*** (supra) as well as principles contained in Section 13 of the Act, 1956, refused to grant custody of the children to the father, though recognizing the fact that the father is the natural guardian.

29. The paragraphs of the judgment in ***Athar Hussain*** (supra) relevant for consideration in the present appeal are quoted herein (as reported in SCC) :

"29. We have heard the learned counsel for both the parties and examined the impugned order of the High Court and also the orders passed by the Family Court. After considering the materials on record and the impugned order, we are of the view that at this stage the respondents should be given interim custody of the minor children till the disposal of the proceedings filed under Sections 7, 9 and 17 of the Act.

30. Reasons are as follows : Section 12 of the Act empowers courts to "make such order for the temporarycustody and protection of the person or property of the minor as it thinks proper". In matters of custody, as well settled by judicial precedents, the welfare of the children is the sole and single yardstick by which the court shall assess the comparative merit of the parties contesting for the custody. Therefore, while deciding the question of interim custody, we must be guided by the welfare of the children since Section 12 empowers the court to make any order as it deems proper.

31. We are mindful of the fact that, as far as the matter of guardianship is concerned, the prima facie case lies in favour of the father as under Section 19 of the Guardians and Wards Act, unless the father is not fit to be a guardian, the court has no jurisdiction to appoint another guardian. It is also true that the respondents, despite the voluminous allegations levelled against the appellant have not been able to prove that he is not fit to take care of the minor children, nor has the Family Court or the High Court found him so. However, the question of custody is different from the question of guardianship. Father can continue to be the natural guardian of the children; however, the considerations pertaining to the welfare of the child may indicate lawful custody with another friend or relative as serving his/her interest better.

xx xx xx

34. Thus the question of guardianship can be independent of and distinct from that of custody in the facts and circumstances of each case. [Emphasis Supplied]

xx xx xx

37. Stability and consistency in the affairs and routines of children is also an important consideration as was held by this Court in another decision cited by the learned counsel for the appellant in Mausami Moitra Ganguli v. Jayant Ganguli [(2008) 7 SCC 673 : AIR 2008SC 2262] . This Court held : (SCC pp. 679-80, para 24)

"24. … We are convinced that the dislocation of Satyajeet, at this stage, from Allahabad, where he has grown up in sufficiently good surroundings, would not only impede his schooling, it may also cause emotional strain and depression to him."

After taking note of the marked reluctance on the part of the boy to live with his mother, the Court further observed : (Mausami Moitra case [(2008) 7 SCC 673 : AIR 2008 SC 2262] , SCC p. 680, para 26)

"26. Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that the child's interest and welfare will be best served if he continues to be in the custody of the father. In our opinion, for the present, it is not desirable to disturb the custody of Master Satyajeet and, therefore, the order of the High Court giving his exclusive custody to the father with visitation rights to the mother deserves to be maintained."

38. The children have been in the lawful custody of the respondents from October 2007. In Gaurav Nagpal v. Sumedha Nagpal [(2009) 1 SCC 42] , it was argued before this Court by the father of the minor child that the child had been in his custody for a long time and that a sudden change in custody would traumatise the child. This Court did not find favour with this argument. This Court observed that the father of the minor child who retained the custody of the child with him by flouting court orders, even leading to institution of contempt proceedings against him, could not be allowed to take advantage of his own wrong. The case before us stands on a different footing. The custody of the minor children with the respondents is lawful and has the sanction of the order of the High Court granting interim custody of the children in their favour. Hence, the consideration that the custody of the children should not undergo an immediate change prevails. [Emphasis Supplied]

xx xx xx

41. However, the High Court of Rajasthan held that in the light of Section 19 which bars the court from appointing a guardian when the father of the minor is alive and not unfit, the Court could not appoint anymaternal relative as a guardian, even though the

personal law of the minor might give preferential custody in her favour. As is evident, the aforementioned decision concerned appointment of a guardian. No doubt, unless the father is proven to be unfit, the application for guardianship filed by another person cannot be entertained. However, we have already seen that the question of custody was distinct from that of guardianship. As far as matters of custody are concerned, the court is not bound by the bar envisaged under Section 19 of the Act.

xx xx xx

43. A plethora of decisions of this Court endorse the proposition that in matters of custody of children, their welfare shall be the focal point. Once we shift the focus from the rights of the contesting relatives to the welfare of the minor children, the considerations in determining the question of balance of convenience also differ. We take note of the fact that Respondent 3, on record, has stated that she has no intention to get married and her plea that she had resigned from her job as a technical writer to take care of the children remains uncontroverted. We are, hence, convinced that the respondents will be in a position to provide sufficient love and care for the children until the disposal of the guardianship application. [Emphasis Supplied]

30. We had called the child to the chamber and interacted with her. The child appeared to be quite intelligent, conscious of her sorroundings and the attending circumstances and old enough and capable to form an intelligent preference and she stated she is very happy with her *Baba* (maternal uncle) and *Maa* (aunt) and would like to stay with them. On the other hand she did not recognize the respondent-petitioner as how he is related to the child.

31. Following the principles discussed above, some of the factors those have been taken into consideration by us in deciding the custody of the minor girl child are indicated herein :

stability and consistency in the affairs and routines of the child and any dislocation may cause emotional strain to her as she has been with the appellants since the age of 18 months as an infant; marked eagerness in the child to continue to stay with appellant no.2-respondent and his wife and their children (her siblings) and lack of any inclination to go to the custody of respondent-petitioner; no material was brought before the learned Family Judge to change the custody apart from the fact that the respondent being the father is the natural guardian; it is admitted by the respondent that he never had custody of the child since she was an infant of 18 months and the child grew up remaining in custody of maternal grandmother, maternal uncle and their family; and as observed in ***Athar Hussain*** (supra), the consideration that the custody of the child should not undergo an immediate change has to prevail in the facts and circumstances of the case.

32. We are, therefore, of the considered opinion that it would not be proper in the facts and in the circumstances to change the custody of the minor girl and give it to the respondent herein.

33. For the foregoing reasons and discussions, the appeal is allowed setting aside the judgment and order dated 21.11.2018 in C.P. No. 271 of 2015. Application

C.P. No. 271 of 2015 filed by the respondent-petitioner before the learned Judge, Family Court, Berhampur is ordered to be dismissed.

In the facts and circumstances of the case there shall be no order as to costs.

34. *Epilogue :*

Having decided as above regarding the custody of the minor girl child at present, before we part with the judgment, we would like to observe that there is always a hope that there shall be some opportunity for the father to interact with his daughter who is now a minor. We also hope and trust if in future there is any opportunity of interaction between the father and the daughter, the appellants would not stand in the way and in any event the present proceeding was not regarding the "visitation rights" and "contact rights" of the father. It is quite possible that the gulf created between the families after the unfortunate demise of the mother, would be bridged by efflux of time and there would be a thaw in the relationship of the appellants and the respondent, so that there can be some opportunities for the respondent to meet and interact with his daughter. We hope such development would be in the best interest of the child to become a grown up individual having her identity in the society.

—— o ——

2023 (III) ILR – CUT - 445

S.K. SAHOO, J.

JCRLA NO. 31 OF 2020

SUSIL MOHARANA ....Appellant

-V-

STATE OF ODISHA ....Respondent

(A) INDIAN PENAL CODE, 1860 – Sections 324 & 506 Part (II) – Necessary ingredients to attract the offence – Discussed.

(B) INDIAN EVIDENCE ACT, 1872 – Sections 63 & 65 – When a secondary evidence would be admissible in place of an original document – Discussed.

Case Laws Relied on and Referred to :-

1. AIR 1966 SC 1457 : Roman Catholic Mission Vs. State of Madras.
2. (1975) 4 SCC 664 : Ashok Dulichand Vs. Madahavlal Dube.
3. 1989 (1) Crimes73 : Nobel Mohandas Vs. State.
4. (2023)OnLine SCC 951 : Mohammad Wajid and another Vs. State of UP & Ors.

For Appellant : Mr. Jateswar Nayak

For Respondent : Mr. S.S. Mohapatra,ASC

JUDGMENT Date of Hearing & Judgment: 16.08.2023

S.K. SAHOO, J.

1. The appellant Susil Moharana faced trial in the Court of learned Additional Sessions Judge-cum-Special Court, POCSO, Angul in Special (POCSO) Case No.36 of 2014 for offences punishable under sections 341/323/294/324/307/354B/ 506/498A of the Indian Penal Code (hereinafter 'the IPC') and Section 8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter 'the POCSO Act').

The learned trial Court vide judgment and order dated 02.03.2020 acquitted the appellant of the charges under sections 341/294/307/354B of the IPC, however, found him guilty under sections 323/324/506 Part-II/498A of the IPC read with section 8 of the POCSO Act and sentenced him to undergo R.I. for one year for the offence under section 323 of the IPC, R.I. for two years for the offence under section 324 of the IPC, R.I. for five years under section 506-II of the IPC and to undergo R.I. for three years and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo R.I. for further three months under section 498-A of the IPC and R.I. for four years and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo R.I. for three months under section 8 of the POCSO Act and all the sentences were directed to run concurrently.

The Prosecution Case:

The prosecution case as per the first information report (hereinafter 'the F.I.R.') lodged by one Sangita Moharana (P.W.2) before the I.I.C., Angul Police Station on 15.03.2014 that her marriage was solemnized with the appellant five years prior to the date of lodging of the F.I.R. and at the time of marriage, there was a demand of Rs.50,000/- (rupees fifty thousand) from the bride groom side. The parents of P.W.2 could not fulfill such demand on account of financial difficulty for which subsequent to the marriage, the appellant used to torture P.W.2 physically and mentally. Nearly two years prior to the date of F.I.R., a dowry torture case was instituted by P.W.2 against the appellant, which was sub-judiced in the learned trial Court. It is further stated in the F.I.R. that while the appellant was in jail, he called P.W.2 for amicable settlement and ultimately, he was released on bail. But after being released on bail, again he started torturing P.W.2 like he was doing previously. The appellant was giving threat that unless the dowry demand was fulfilled, the minor sister of P.W.2 would be raped. On 15.03.2014, in the evening hours, the appellant forcefully took P.W.2 towards her father's place showing a bhujali and further threatened to commit rape of P.W.1, the sister of P.W.2. After reaching at the father's place of P.W.2, the appellant assaulted P.W.2 on different parts of the body

for which she sustained bleeding injuries. At that juncture, when P.W.1 came to the rescue of P.W.2, the appellant embarrassed her for the purpose of committing rape on her. However, at that time, when P.Ws.1 & 2 so also their parents raised hullah, the persons living in the neighbourhood rushed to the spot and upon seeing them, the appellant decamped from the spot. P.W.2 fell down on the ground due to head reeling and while leaving the place, the appellant threatened the family members of his in-laws. It is stated in the F.I.R. that Abhaya Behera (P.W.5) and one Sisira Moharana and others have seen the occurrence.

On the basis of such F.I.R., Angul P.S. Case No.155 dated 15.03.2014 was registered against the appellant under sections 341/323/324/354B/307/294/506/498A of the IPC and section 8 of the POCSO Act. The I.I.C., Angul Police Station entrusted P.W.12 Sabita Patra, the Sub-Inspector of Police, Angul Police Station to take up investigation of the case. During the course of investigation, P.W.12 examined the informant and witnesses, sent injury requisition to the Medical Officer, D.H.H., Angul, visited the spot, prepared the spot map, seized the H.S.C. certificate on production by the father of the victim as per seizure list vide Ext.7 and gave the same in the zima of the father of the victim, seized one joint photograph and affidavit under seizure list Ext.3, received the injury reports of both the victims, i.e., P.W.1 and P.W.2. The statements of the victims were recorded under section 164 of the Cr.P.C., the dowry articles were seized from the house of the appellant and it was given in the zima of P.W.2 as per zimanama Ext.5. On completion of the investigation, P.W.12 submitted the charge sheet on 13.05.2014 under sections 341/323/354B/307/294/506/498A of the I.P.C. read with section 4 of the Dowry Prohibition Act, 1961 and section 8 of the POCSO Act.

Witnesses & Exhibits:

During course of the trial, in order to prove its case,the prosecution examined as many as thirteen witnesses.

P.W.1 is the victim in this case who has stated that on the date of occurrence, the appellant came to her house dragging the informant and demanded Rs.50,000/- (rupees fifty thousand) as dowry and when her family members did not agree, the appellant assaulted the informant by means of a bhujali. When she came to the rescue the informant, the appellant embarrassed her and attempted to commit rape.

P.W.2 Sangita Moharana, who is the wife of the appellant, is the informant in this case, who narrated about the occurrence and supported the prosecution case.

P.W.3, Sailabala Sahu is the mother of the victim (P.W.1) and the informant (P.W.2) who stated that at the time of marriage of P.W.2 with the appellant, Rs.50,000/- was demanded by the appellant, but due to poor financial condition, she could not fulfill the demand of the appellant and had given assurance to pay the same later on. For that reason, the appellant started torturing P.W.2 and assaulted her.

P.W.4 Sarthak Sahu is the father of the informant (P.W.2) and the victim (P.W.1) who narrated the unfortunate event that unfolded on the fateful day and he has supported the prosecution case.

P.W.5 Abhaya Behera stated that once he had seen the appellant dragging the informant by holding her tuft and abusing her in filthy languages and threating her to kill her.

P.W.6 Prasanna Mohapatra is a co-villager of the informant and the appellant and he is a witness to the seizure of household articles which the informant had brought with her at the time of her marriage.

P.W.7 Dharanidhar Dehury is the priest of Maa Budhi Thakurani Temple who stated that he had performed the marriage of the appellant with the informant (P.W.2) in the said temple.

P.W.8 Sri Ashok Kumar Moharana was declared hostile.

P.W.9 Bichitra Mohapatra was working as a labourer who stated that the occurrence took place in the year 2014 and the appellant assaulted his wife (P.W.2) for which F.I.R. was lodged at the police station. He also stated that the police recovered the dowry articles from the house of the appellant in his presence and prepared the seizure list vide Ext.9.

P.W.10 Bimala Moharana and P.W.11 Jasoda Moharana stated to have heard a quarrel between the informant (P.W.2) and the victim (P.W.1).

P.W.12 Sabita Patra was posted as the Sub Inspector of Police at the Angul Police Station. She is the Investigating Officer of this case.

P.W.13 Dr. Anup Kumar Mahalik was posted as Paediatric Specialist at D.H.H., Angul who examined the informant (P.W.2) and submitted his report vide Ext.6/3.

The prosecution exhibited thirteen numbers of documents. Ext.1 is the statement of the victim recorded under section 164 of the Cr.P.C., Ext.2 is the F.I.R., Ext.3 is the seizure list of the affidavit relating to marriage, Ext.4 is the zimanama of the affidavit, Ext.5 is the zimanama of the house hold articles, Ext.6/3 is the medical report of the victim, Ext.7 is the seizure list of the original Board Certificate, Ext.8 is the zimanama of original H.S.C. Certificate, Ext.9 is the seizure list of the household articles, Ext.10 is the spot map, Ext.11 is the requisition-cum-injury report, Ext.12 is the requisition for medical examination of the appellant and Ext.13 is the prayer to record the statement of the victim under section 164 of the Cr.P.C.

The defence plea of the appellant is one of complete denial. No witness was examined on behalf of the defence.

Findings of the Trial Court:

The learned trial Court, after assessing the oral and documentary evidence on record, has been pleased to hold that the age of the victim was 17 years 9 months and 27 days as on the date of occurrence and as such she was a minor. The learned trial Court further held that in view of the statutory presumption that has been provided under section 29 of the POCSO Act, when the commission of offences under sections 3, 5, 7 & 9 are alleged against a person, the Special Court shall presume that such person has committed the offences unless the contrary is proved. The defence has taken some pleas but has not been able to shatter the statutory presumption. Accordingly, the learned trial Court acquitted the appellant of the charges under sections 341/294/307/354B of the IPC and found him guilty under the offences already stated and imposed punishment accordingly.

Contentions of the parties:

Mr. Jateswar Nayak, learned counsel for the appellant contended that even though the appellant has been found guilty under section 8 of the POCSO Act and sentenced to undergo R.I. for a period of four years, however, there is no clinching evidence on record regarding the date of birth of the victim. While deposing in the learned trial Court on 05.10.2016 she stated her age to be 20 years. Similarly, he contended, though it is the prosecution case that original H.S.C. Certificate was seized by the I.O. and the same was handed over to the father of P.W.2 but the original certificate was not produced in the learned trial Court during trial. It is further argued that basing on the photocopy of the H.S.C. certificate, wherein the date of birth of the victim has been mentioned to be 18.05.1996, the Court has come to the conclusion that the victim was 17 years 9 months and 27 days as on the date of occurrence and she was a minor girl. Learned counsel further argued that though according to P.W.1 and P.W.2, the weapon of offence was bhujali and P.W.2 stated that she was assaulted by bhujali by the appellant for which she sustained cut injuries, but the doctor (P.W.13) has noticed only two simple injuries on the person of P.W.2 and further stated that the injuries are possible by hard and blunt object which falsified the prosecution case that weapon of assault was bhujali. Learned counsel further submitted that there is no clinching material to attract the ingredients of the offence under section 506 Part-II of the IPC. Therefore, he pleaded that it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Sidharth Shankar Mohapatra, learned Additional Standing Counsel appearing for the State, on the other hand,supported the impugned judgment and contended that the evidence of P.W.1 is getting corroboration from the evidence of P.W.2 and there is no delay in lodging the F.I.R. and the medical evidence also supported the prosecution case. Learned counsel further submitted that the I.O. (P.W.12) searched for the weapon of offence but she could not get the same for which the weapon of offence could not be seized during investigation or produced during trial. Learned counsel further submitted that the acts committed by the

appellant on his wife (P.W.2) and sister-in-law (P.W.1) constitute the offences under which he was found guilty and therefore, there is no scope of interference in the appeal and it should be dismissed.

From perusal of the trial Court record, it appears that the appellant was remanded to judicial custody for the first time on 16.03.2014 and he was released from custody on bail on 11.03.2015. Again, he was taken into judicial custody on 25.08.2015 and released on bail on 27.09.2019. Then, he was again taken into custody on 06.12.2019 and while he was in custody, the judgment was pronounced on 02.03.2020 and he was not granted bail during pendency of the appeal. Further, he has already undergone the substantive sentence of six years and three months out of five years of substantive sentence imposed on him. Even if, the default sentence is taken into account, it seems that the period has already been undergone by the appellant.

Age of the victim:

Coming to the age of the victim (P.W.1), there is no dispute that even though the original H.S.C. certificate was seized during the course of investigation and it was given in the zima of the father of P.W.2, but the same was not produced in the learned trial Court during trial. Only a photocopy of the HSC certificate of P.W.1 was available on record and merely on that basis, the learned trial Court has come to the conclusion that the victim was 17 years 9 months and 27 days at the time of occurrence and thus, she was a minor.

If the original H.S.C. certificate was seized and given in the zima of P.W.4 vide Ext.8, it is not known as to why the Public Prosecutor did not call for the same to prove during trial. Section 63 of the Indian Evidence Act, inter alia, states that secondary evidence includes copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies. Section 65(a) of the Evidence Act says that secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it. Section 65(c) provides that when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time then the secondary evidence may be given.

A Constitution Bench of the Hon'ble Supreme Court in the case **Roman Catholic Mission -Vrs.- State of Madras reported in AIR 1966 Supreme Court 1457** has held that when original document was not produced before the Court at any time nor any foundation was laid for the right to give secondary evidence, in such case, copies of the original document cannot be taken into consideration.

While discussing the evidentiary value of a secondary evidence in the form of a photostat copy, the Apex Court in the case of **Ashok Dulichand v. Madahavlal Dube reported in (1975) 4 Supreme Court Cases 664** has observed the following:

> "14. After hearing the learned counsel for the parties, we are of the opinion that the order of the High Court in this respect calls for no interference. According to clause (a) of section 65 of the Indian Evidence Act, secondary evidence may be given of the existence,condition or contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it. Clauses (b) to (g) of section 65 specify some other contingencies wherein secondary evidence relating to a document may be given, but we are not concerned with those clauses as it is the common case of the parties that the present case is not covered by those clauses. In order to bring his case within the purview of clause (a) of section 65, the appellant filed applications on July 4, 1973, before respondent No. 1 was examined as a witness,praying that the said respondent be ordered to produce the original manuscript of which,according to the appellant, he had filed photostat copy. Prayer was also made by the appellant that in case respondent No. 1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was, however, nowhere stated in the affidavitthat the original document of which the photostat copy had been filed by the appellant was in the possession of respondent No. 1. There was also no other material on the record to indicate that the original document was in the possession of respondent No. 1. The appellant further failed to explain as to what were the circumstances under which the photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent No. 1 in his affidavit denied being in possession of or having anything to do with such a document. The photostat copy appeared to the High Court to be not above suspicion. In view of all the circumstances, the High Court came to the conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the photostat copy. We find no infirmity in the above order of the High Court as might justify interference by this Court."
>
> **(Emphasis supplied)**

In the case in hand, though the original H.S.C. certificate was available with P.W.4, who has taken the same in zima, it was not produced and a photocopy thereof was placed before the Court without assigning any reason as to why the original copy cannot be produced. Further, there was no argument to the effect that any situation has arisen for which production of the original copy can be dispensed with as per section 65 of the Evidence Act. No foundation has been laid for leading secondary evidence. Therefore, having due regard for the aforementioned statutory provisions as well as precedents, I am of the humble view that photocopies of the H.S.C. certificate of the victim could not have been taken into account by the learned trial Court as an evidence, especially when it is proved that the original certificate was in the possession of P.W.4. Also, in view of the oral evidence of the victim, it is difficult to say that the victim (P.W.1) was a child in view of the definition under section 2(d) of the POCSO Act which states that "child" means any person below the age of eighteen years.

Whether section 8 of the POCSO Act is attracted:

Section 8 of the POCSO Act prescribes punishment for sexual assault and sexual assault has been defined under section 7 of the POCSO Act. The overt act which has been mentioned therein has to be committed by the accused on a 'child' in order to attract the ingredients of the offence and since the prosecution has failed to establish that the victim (P.W.1) was a 'child' as on the date of occurrence, in my humble view the ingredients of the offence under section 8 of the POCSO Act is not attracted and therefore, the appellant is entitled to be acquitted of such charge.

Whether section 324 of the I.P.C. is attracted:

So far as offence under section 324 of the I.P.C. is concerned, the offence would be attracted only if it is caused by dangerous weapon or means voluntary on a person. No doubt, P.W.1 and P.W.2 have stated that the weapon which was used by the appellant for assaulting P.W.2 was bhujali which falls within the ambit of 'dangerous weapon', but evidence of P.W.2 indicates that the appellant has assaulted her by means of a bhujali for which she sustained cut injuries on her hand and arm. It is pertinent to note that in the F.I.R. it was mentioned that the appellant assaulted by bhujali on the head, left hand, back and thigh of P.W.2 and caused serious injuries. The doctor (P.W.13) noticed only two injuries on person of P.W.2, i.e. lacerated injury of size 1 inch x ¼ inch x ¼ inch present over right parietal region and abrasion of size ¼ inch x ¼ inch on the back of left elbow joint. He opined that all the injuries are simple in nature and might have been caused by hard and blunt object. The doctor also opined that all the injuries are possible on fall. Therefore, the evidence of P.W.2 that she was assaulted by a sharp cutting weapon like bhujali and cut injuries were caused on her person is being contradicted by the medical evidence adduced by P.W.13. No question has been put to the doctor (P.W.13) by the prosecution whether those two injuries are possible by bhujali if sharp sides were used. In view of the discrepancies between the ocular evidence of P.W.2 and the medical evidence adduced by P.W.13 and the medical examination report which has been marked as Ext.6/3, I am of the humble view that the prosecution has failed to establish the charge under section 324 of the I.P.C.

Whether offence under section 506 part II is made out:

Coming to the charge under section 506, part II of the I.P.C. To attract culpability under this provision, it must be proved that the threat given by the appellant shall cause death or grievous hurt or to cause destruction of any property by fire, or to cause an offence punishable with death or a imprisonment for life or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman. In the case of ***Nobel Mohandas -vrs.- State*** reported in 1989 (1) Crimes 73, it has been held that to attract the offence under section 506 part II, which is rather a grave offence punishable with imprisonment which may extend to seven years, the threat should be a real one and not just a mere word when the person uttering it does not exactly mean what he says and also when the person at

whom threat is launched does not feel threatened actually. The threat must be with intention to cause alarm to the complainant or to cause that person to do or omit to do any work. Mere expression of any words without any intention to cause alarm would not be sufficient to attract the gravamen of the offence under the provision.

Recently, while discussing the condition precedent for attracting culpability under section 506 of the I.P.C., the Hon'ble Supreme Court in the case of **Mohammad Wajid and another -Vrs.- State of UP and others reported in (2023) OnLine Supreme Court Cases 951** held as follows:

> "A bare perusal of Section 506 of the IPC makes it clear that a part of it relates to criminal intimidation. Before an offence of criminal intimidation is made out, it must be established that the accused had an intention to cause alarm to the complainant."

Keeping these principles in view, it is found that P.W.1 only stated that the appellant had come to their house and dragged P.W.2 and after committing some overt act, he left the place after threatening. What was exactly stated to by the appellant is not there in the evidence of P.W.1. P.W.2, stated that on the date of occurrence, the appellant assaulted her and told her that he would murder her, then he dragged her to her father's place and some overt acts have been committed by him there and when the villagers came to the spot, the appellant left the place. In other words, evidence of P.W.2 is silent that at her father's place, any threat was given to her by the appellant. P.W.3 and P.W.4, the mother and the father of the victim respectively have stated that the appellant threatened to kill P.W.2 and to take P.W.1 with him. However, the actual words stated by P.W.3 and P.W.4 so far as the criminal intimidation part is concerned is not getting corroboration from P.W.1 and P.W.2. Therefore, it is difficult to sustain the conviction of the appellant under section 506-II of the I.P.C.

Coming to the offence under section 498-A of the I.P.C., from the evidence of the victim (P.W.2) as well as her parents, P.Ws.3 & 4, it appears that there was a demand of Rs.50,000/- by the appellant at the time of marriage which could not be fulfilled on account of poor financial condition for which the P.W.2 was subjected to torture by the appellant and she was frequently assaulted. P.W.1 has also corroborated such evidence and stated about the demand made by the appellant and assault on P.W.2 by the appellant. For proving an offence under section 498-A of the I.P.C., the prosecution is required to prove that there was harassment of the woman with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

In view of the available evidence on record, I am of the humble view that prosecution has successfully proved the charges under section 498-A/323 of the IPC against the appellant. Therefore, while acquitting the appellant of the charges under sections 324/506 Part II of the I.P.C. so also section 8 of the PCOSO Act for the reasons already assigned, the conviction of the appellant under sections 498-A/323

of the I.P.C. stands confirmed. The punishment imposed by the learned trial Court for such offences cannot be said to be on the higher side, which is accordingly confirmed. Since the appellant has already undergone the sentence imposed under these two offences, he be set at liberty forthwith if his detention is not required in any case.

A copy of this order along with a copy of the judgment shall be communicated to the learned trial Court for compliance.

The Jail Criminal Appeal is partly allowed.

Before parting with the case, I would like to put on record my appreciation to Mr. Jateswar Nayak, learned counsel for the appellant for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned counsel shall be entitled to his professional fees, which is fixed at Rs.7,500/- (rupees seven thousand five hundred only). This Court also appreciates the valuable help and assistance provided by Mr. Sidharth Shankar Mohapatra, learned Additional Standing Counsel.

—— o ——

2023 (III) ILR – CUT - 454

S.K. SAHOO, J.

GCRLA NO. 29 OF 2018

STATE OF ODISHA (G.A. VIGILANCE) ....Appellant

-V-

SANJUBALA ROUT ....Respondent

CODE OF CRIMINAL PROCEDURE, 1973 – Section 378 – Offences punishable U/s.13(2) r/w section 13(1)(d) and section 7 of the Prevention of Corruption Act, 1988 – The learned trial court found the appellant not guilty and acquitted her – The state of odisha G.A Vigilance has preferred appeal against acquittal – Principles governing appeal against acquittal – Discussed.

Case Laws Relied on and Referred to :-

1. (2023) 4 SCC 731 : Neeraj Dutta Vs. State (Government of NCT of Delhi)
2. (2017) 68 OCR 795 : Satyananda Pani Vs. State of Orissa (Vig.)
3. (2011) 50 OCR 189 : State of Orissa Vs. Dr. Biswanath Hota.
4. (2009) 6 SCC 587 : A. Subair Vs. State of Kerala.
5. (1976) 4 SCC 233 : Rabindra Kumar Dey Vs. State of Orissa

For Appellant : Mr. Sangram Das, Standing Counsel (Vig.)

For Respondent : Mr. S.C. Mekap

JUDGMENT Date of Hearing & Judgment: 17.08.2023

S.K. SAHOO, J.

The respondent Sanjubala Rout faced trial in the Court of learned Special Judge, Vigilance, Bhubaneswar in T.R. Case No.26 of 2011 for offences punishable under section 13(2) read with section 13(1)(d) and section 7 of the Prevention of Corruption Act, 1988 (hereinafter "P.C. Act") on the accusation that she being a public servant functioning as Auxiliary Nurse Midwife (hereinafter 'A.N.M.') at Manikagoda Primary Health Centre (hereafter 'the hospital'), on 25.09.2010 by corrupt and illegal means or otherwise abusing her position as a public servant demanded a pecuniary advantage to the extent of Rs.400/- (rupees four hundred) from the complainant Mehbub Hussain Khan (P.W.3) for releasing the cheque amounting to Rs.1,400/- (rupees one thousand four hundred) in favour of his wife Laila Begum under Janani Surakhya Yojana (hereinafter 'J.S.Y.') as Laila Begum had given birth to a male child on 07.09.2010 in the hospital and that she (respondent) accepted Rs.400/- (rupees four hundred) from P.W.3 as gratification other than legal remuneration as a motive for releasing the cheque amounting to Rs.1,400/-(rupees one thousand four hundred) in favour of Laila Begum.

The learned trial Court vide impugned judgment and order dated 28.12.2016 found the appellant not guilty under section 13(2) read with section 13(1)(d) and section 7 of the P.C. Act and acquitted her of all the charges.

The State of Odisha, G.A. Vigilance has preferred this appeal challenging the aforesaid judgment and order of acquittal.

The Prosecution Case:

The prosecution case, in short, is that Laila Begum gave birth to a male child in the hospital on 07.09.2010. P.W.1 Dr. Nausad Alli Khan was assisted by the respondent in the delivery of the child. The State Government had floated a scheme i.e. J.S.Y. and Laila Begum was supposed to receive a cheque of Rs. Rs.1,400/- (rupees one thousand four hundred) after giving birth to a child in the Government hospital. It is the prosecution case that the said cheque was not issued by the respondent who was in charge of it and there was a demand of Rs.500/- (rupees five hundred) for delivery of the service she rendered and Rs.50/- (rupees five) for the issuance of cheque. Since the P.W.3 expressed his inability to meet such demand, the demand amount was reduced from Rs.500/- (rupees five hundred) to Rs.400/- (rupees four hundred) and the respondent made it clear that without fulfillment of such demand, the said cheque could not be issued. P.W.3 repeatedly approached the respondent for such purpose and ultimately on 24.09.2010, P.W.3 agreed to pay the illegal demand of Rs.400/- (rupees four hundred) to the respondent which was to be made on 25.09.2010 and accordingly, the written report (Ext.11) was made by P.W.3 before the Vigilance D.S.P., Khurda and the case was registered as Bhubaneswar Vigilance P.S. Case No.57 dated 24.09.2010 under section 7 of the

P.C. Act against the respondent and the S.P., Vigilance, Bhubaneswar entrusted Shri Biswanath Mishra (P.W.9), who was working as D.S.P., Vigilance, Khurda squad under Bhubaneswar Vigilance division to lay the trap for detection of the case against the respondent and also to take up investigation of the case.

P.W.9 examined the complainant (P.W.3) and made requisition to Principal, School of Horticulture, Khurda in respect of two Class-II and Class-III employees respectively for secret assembly as witnesses in the trap. On the same day, at about 4.35 p.m. on the direction of the Principal, Gobind Chandra Lenka (P.W.8), Asst. Horticulture Officer and Mohit Kumar Das (P.W.7), Junior Clerk of the said office attended Vigilance Office, Khurda and they were directed to appear in the Vigilance Office, Khurda on 25.09.2010 at 6.30 a.m. P.W.9 along with other official staff and P.W.7 and P.W.8 assembled in the office chamber of P.W.9 at Khurda on the date and time fixed, where P.W.3 was introduced to the other group members and he narrated the allegations against the appellant. P.W.3 produced Rs.400/- (rupees four thousand) in four hundred-rupee denominations before P.W.9. The constable Amulya Ratna Beero (P.W.6) prepared the sodium carbonate solution in a clean glass bowl and inserted his finger in it but the colour of the solution did not change. Thereafter he processed the said currency notes with phenolphthalein powder and when he inserted his finger in the sodium carbonate solution, it turned to pink. The currency notes were wrapped with a white paper and were handed over to P.W.3. The pink colour solution was preserved in a bottle which was properly labeled and sealed being signed by the witnesses and complainant (P.W.3) and marked as Ext. D for identification. Personal search of the complainant was taken and found he has nothing except the alleged cash which was handed over to him by the vigilance officials. Thereafter P.W.3 was instructed to deliver the money to the respondent only on her demand. The numbers of the tainted notes were noted down in the preparation report, witness Gobinda Chandra Lenka (P.W.8) was directed to accompany the P.W.3 to the respondent to overhear the conversation between P.W.3 and the respondent and after transaction was over, to give the signal by rubbing his forehead and accordingly, preparation report (Ext.12) was prepared wherein the signatures of the witnesses and P.W.3 were taken. The preparation was over by 9.15 a.m. and then the trap party members left for village Manikagoda where they reached at 11.15 a.m. P.W.3 and his wife along with P.W.8 proceeded little ahead of the trap party members to the hospital and near the hospital, the trap party members took their respective positions and P.W.3, his wife and P.W.8 went inside the hospital. When P.W.3 and his wife entered into the room of the respondent, the latter asked P.W.3 whether he had brought the cash and when P.W.3 answered in affirmative, the respondent demanded the cash and tainted G.C. notes were handed over to the respondent. The respondent accepted the cash in her right hand and kept it in her left hand and then opened the register and told the wife of P.W.3 to put her signature on the reverse of the cheque stating that his wife should obtain the signature of the doctor. The wife of P.W.3 put her signature in the required register

in token on receipt of the cheque and then both came out. The respondent also came out from the sub-centre and came to the hospital. P.W.8 had already conveyed the pre-arranged signal to the vigilance personnel for which the witnesses immediately rushed into the hospital. P.W.9 challenged the respondent to have accepted the bribe of Rs.400/-(rupees four hundred) from P.W.3. The respondent got nervous and fumbled and then admitted to have accepted and showed the cash which was still there in her left hand. Thereafter, the appellant was again taken to the sub-centre by the vigilance police. In the sub-centre, being instructed by P.W.9, Mohit Das (P.W.7) took the amount from the respondent, compared the numbers and denominations which were noted in the copy of the preparation report marked as Ext.12 and declared tallied. Then, the right hand wash and the left hand wash of the respondent with the chemical solution were taken separately and the same were preserved in two separate bottles. The bottles were properly sealed and signatures of the witnesses including P.W.3 were obtained on the paper slips affixed on those bottles. The seizure lists were prepared, cheque was seized, detection report (Ext.14) was prepared and a copy of the detection report was handed over to the respondent in which she put her signature. On completion of the entire detection formalities, the statement of P.W.8 was recorded before the Magistrate. P.W.10, the Inspector of Vigilance, Khurda Unit under Bhubaneswar Vigilance division took over the charge of investigation of the case from P.W.9 on 25.09.2010. During investigation of this case, he examined the P.W.3 at Khurda Vigilance Office and on 11.10.2010, the statements of P.W.3 and overhearing witness (P.W.8) were recorded by J.M.S.C., Bhubaneswar under section 164 Cr.P.C. and on the same day, the four glass bottles marked as Ext. R, L, W and D were sent to the Director, S.F.S.L., Rasulgarh, Bhubaneswar for chemical examination and opinion. Some more witnesses were examined by the I.O. On 16.12.2010, he made requisition to Medical Officer, Manikagoda P.H.C. for supply of the documents relating to J.S.Y. scheme and admission and discharge of the wife of P.W.3 and supply the cheque of Rs.1,400/- (rupees one thousand four hundred). The chemical examination report (Ext.17) from the S.F.S.L. was received by P.W.10 which indicated phenolphthalein was detected in the sodium carbonate solution in the four glass bottles. P.W.10 held pre-sanction discussion with P.W.4, C.D.M.O., Khurda by producing the F.I.R. and other relevant documents. On 31.03.2011, P.W.10 received the sanction order (Ext.16) from P.W.4 for prosecution of the respondent and on completion of investigation, P.W.10 has submitted charge sheet against the respondent under section 13(2) read with section 13(1)(d) and section 7 of the P.C. Act.

Defence Plea:

The defence plea of the respondent was one of denial and it was pleaded that on 07.09.2010, the wife of P.W.3 could not produce the mother child health card (M.C.H.) and on 25.09.2010, P.W.3 along with his wife came to the hospital and received the cheque from the respondent after production of M.C.H. It is further pleaded that from 07.09.2010 till 25.09.2010, neither P.W.3 nor his wife had come

to the hospital to receive the cheque and after issuance of cheque, when the respondent had been to the washroom, P.W.3 placed the tainted G.C. notes on her table and after she returned from the wash room, on seeing such money, while the respondent was carrying the same to P.W.1 to show him, at that point of time, she was apprehended with the money by the vigilance officials and a false case has been foisted against her.

Prosecution Witnesses, Exhibited Documents & Material Objects:

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

P.W.1 Dr. Nausad Alli Khan was posted as the Medical Officer of the hospital and he stated that the respondent assisted him in the delivery of the wife of P.W.3 on 07.09.2010. He further stated that the financial benefit to such pregnant woman of Rs.1,400/- (one thousand four hundred) in shape of cheque was prepared by the respondent under the J.S.Y. scheme.

P.W.2 Rabindra Kumar Panda was the Officer in-charge of Vigilance P.S., Bhubaneswar. On the written report of the P.W.3, the S.P., Vigilance, Bhubaneswar directed him to register the case and accordingly, he registered the case and P.W.9 was directed to take up the investigation of the case. He proved the F.I.R. vide Ext.11.

P.W.3 Mehbub Hussain Khan is the complainant of this case. He stated about the demand, acceptance and recovery of bribe money from the respondent.

P.W.4 Dr. Baidyanath Nayak was posted as the C.D.M.O., Khurda who accorded sanction for prosecution of the respondent as per the requisition of the S.P., Vigilance and proved the sanction order vide Ext.16.

P.W.5 Surendra Pradhan was the Scientific Officer of S.F.S.L., Bhubaneswar, who examined the exhibits of the case and proved the chemical examination report vide Ext.17.

P.W.6 Amulya Ratna Beero was working as a Constable attached to Vigilance Unit, Khurda. He handed over the plain paper F.I.R. to the S.P., Vigilance, Bhubaneswar on 24.09.2010. He further stated to have witnessed the demonstration regarding reaction of phenolphthalein powder in his office unit. He further stated that he smeared some phenolphthalein powder with four numbers of one hundred rupees currency notes and prepared another sodium carbonate solution with plain water and kept the solution in a bottle and sealed the same.

P.W.7 Mohit Kumar Das was working as Junior Clerk in the office of Principal, School of Horticulture, Khurda who accompanied the raiding party and a witness to the detection report (Ext.14).

P.W.8 Govinda Chandra Lenka was working as Asst. Horticulture Officer in the School of Horticulture, Khurda and he acted as an overhearing witness and he is also a witness to the detection report (Ext.14).

P.W.9 Biswanath Mishra was working as D.S.P., Vigilance, Khurda squad under Bhubaneswar Vigilance Division. On 24.09.2010 he received one written report (Ext.11) from P.W.3. He further submitted that on the same day, he forwarded the report to the S.P., Vigilance, Bhubaneswar for registration of the case and as per the direction of S.P., he laid the trap. He stated about the preparation report, recovery of tainted notes from the left hand of the respondent and also about the preparation of detection report. He arrested the respondent, released on bail and handed over the charge of investigation to P.W.10.

P.W.10 Ashok Kumar Mohanty was the Inspector, Vigilance, Khurda Unit under Bhubaneswar Vigilance Division, who is the Investigating Officer of the case and on completion of investigation, he submitted charge sheet against the respondent.

The prosecution exhibited twenty-five documents. Ext.1 is the letter of P.W.1, Ext.2 is the J.S.Y. Card, Ext.3 is the true copy of appointment letter of the respondent, Ext.4 is the true copy of joining report of the respondent, Ext.5 is the attested copy of the extract of indoor register, Ext.6 is the attested copy of bed head ticket, Ext.7 is the attested copy of outdoor patient register, Ext.8 is the xerox copy of guideline of J.S.Y., Ext.9 is the xerox copy of another guideline, Ext.10 is the disbursement register of Manikagoda P.H.C., Ext.11 is the F.I.R., Ext.12 is the preparation report, Ext.13 is the seizure list, Ext.14 is the detection report, Ext.15 is the statement of the P.W.3 recorded under section 164 Cr.P.C., Ext.16 is the sanction order, Ext.17 is the chemical examination report, Ext.18, Ext.19, Ext.20 and Ext.21 are the seizure lists, Ext.22 is the zimanama, Ext.23 is the facsimile seal, Ext.24 is the spot map and Ext.25 is the 164 Cr.P.C. statement of P.W.8

The material objects i.e. glass bottles containing sodium carbonate solutions which have been marked as M.O.I to M.O.IV and the seized four numbers of one hundred rupees G.C. notes have been marked as M.O.V on behalf of the prosecution.

Defence Witness and Exhibited Documents:

The respondent examined one witness as D.W.1, namely, Bikram Nayak who was a sweeper attached to Manikagoda P.H.C. and stated that one Soudamini and the respondent were not pulling well relating to allotment of government quarters occupied by the respondent. He further stated that on 25.09.2010, P.W.3 and his wife came to the Manikagoda P.H.C. to take the cheque and at that time, the respondent was attending the meeting in the room of the P.W.1. Thereafter he disclosed before P.W.1 and respondent that the P.W.3 and his wife had come to receive the cheque. The respondent came and handed over the cheque to Laila

Begum and then he himself returned to the hospital. He further stated that again when he went to call the respondent, he found nobody in the Centre, however the mobile of the respondent was on the table and under the mobile, there was some cash and the respondent came out of the toilet. Thereafter, he informed the respondent to attend the meeting as required by the M.O. and she brought the phone and the cash in her left hand and came to the M.O. (P.W.1) and at that time, the Vigilance Officials reached her and trapped the respondent.

The defence exhibited four documents. Ext. A is the attendance register for the month of September 2010, Ext. B is the R.I.T. letter No.898 dated 13.08.2015 in respect of transfer of Soudamini Dei to Daleisahi C.H.C., Bankoi, Khurda, Ext. C is the certificate issued by H. & F.W. Department, Govt. of Orissa and Ext. D is the Certificate of appreciation issued by U.G.P.H.C., Biswanathpur, Kalahandi.

Findings of the trial Court:

The learned trial Court after analysing the oral as well as documentary evidence on record, has been pleased to hold that from the evidence of P.W.1, the Medical Officer of Manikagoda P.H.C., it revealed that the beneficiary could not take the cheque at the time of discharge from the hospital on 07.09.2010 i.e. on the date of delivery as she failed to produce the xerox copy of the mother child health card which was required to be produced as per the guidelines of J.S.Y. scheme and P.W.1 has further stated that till 25.09.2010, the wife of the P.W.3 along with her child had not come to the hospital to collect the cheque by submitting the xerox copy of the mother child health card and the said fact is also admitted by P.W.3 in his cross-examination. It was further held that P.W.3 has not come to the Court in clean hand and he has suppressed the fact of not supplying the required documents which was the cause for not granting the cheque earlier and in such circumstances, the plea of the P.W.3 that the cheque was issued on fulfillment of demand of money cannot be accepted. The learned trial Court further held that if the wife of P.W.3 was harassed by the respondent for non-issuance of the cheque, then why she did not bring this fact to the notice of P.W.1, the Medical Officer which created suspicion regarding the case of the prosecution. It was further held that it was not understood as to at what time, the demand of illegal gratification was made by the respondent, more so, the evidence of P.W.1, the Medical Officer showed that the respondent was all along with him at the time of delivery and therefore, the pre-demand of bribe by the respondent to P.W.3 is also not substantiated and the deal of Rs.400/-(rupees four hundred) between the parties is not clear and it is hard to believe the same. It was further held that the evidence of P.W.7 throws doubt on the case of P.W.3 inasmuch as asking for money to buy sweets on the happy occasion of birth of a son cannot be treated as demand for illegal gratification and from the evidence of I.O. (P.W.10), it was found that he had not led his investigation to find out whether the allegation of the P.W.3 was true which created suspicion in respect of the allegation of the P.W.3. It was further held that there was no reason as to why the respondent was not trapped in the sub-centre itself and the vigilance officials waited for her to

come to the doctor (P.W.1) which created doubt on the genuineness of the trap. The learned trial Court further held that the plea of the defence appeared to have force that finding the money on her table, when the respondent rushed to P.W.1, she was trapped by the vigilance officials. The trap became more suspicious when the evidence of P.W.7 come out to show that right hand wash with sodium carbonate solution did not turn to pink colour but her left hand wash with the said solution turned to pink, though there is evidence that the respondent had received money in her right hand and then transferred the same to her left hand. The learned trial Court further held that the plea of the defence that since the respondent had some ill-feeling with one of her colleagues Soudamini Mallick relating to the allotment of quarters who was close to Zulfikar Alli, at the instance of that Zulfikar Alli, P.W.3 had foisted a false case cannot be ruled out. It was further held that the wife of P.W.3, the beneficiary under J.S.Y. scheme and the actual person to receive the monetary assistance was not examined by the I.O. (P.W.10) during investigation or by the prosecution during trial and no reason was advanced as to why she was kept away from the witness box and accordingly, the learned trial Court held that the prosecution has not proved its case beyond all reasonable doubt and acquitted the respondent of all the charges.

Contentions of parties:

Mr. Sangram Das, learned Standing Counsel for the Vigilance Department challenging the impugned judgment and order of acquittal of the respondent contended that the demand, acceptance and recovery of the tainted money have been proved by the prosecution by cogent evidence and number of witnesses have deposed regarding the same and the chemical examination report also substantiate that phenolphthalein was detected in the Sodium Carbonate solution contained in the glass bottles in which the hand washes of the respondent was taken. He further submitted that the learned trial Court should not have acquitted the appellant of all the charges. Learned counsel further argued that the defence plea is not acceptable and money was recovered while it was held by the respondent in her left hand and therefore, the plea taken that while she had been to washroom, the notes were placed below her mobile phone which she detected and was carrying the same to P.W.1 when she was trapped, is not acceptable. Learned counsel further submitted that in view of the ratio laid down by the Hon'ble Supreme Court in the case of **Neeraj Dutta -Vrs.- State (Government of NCT of Delhi) reported in (2023) 4 Supreme Court Cases 731**, the presumption of fact with regard to demand and acceptance or obtainment of an illegal gratification may be made by the Court by way of an inference when the foundational facts are proved on record. Thus, on the basis of the materials on record, the Court can raise a presumption of fact while considering whether the factum of demand has been proved by the prosecution or not. It was further held that in the absence of evidence of complainant either oral or documentary, it is permissible to draw an inferential deduction of culpability of a public servant under sections 7 and 13(1)(d) read with section 13(2) of the P.C. Act

based on other evidence, including circumstantial evidence, adduced by the prosecution. It is argued that the reasonings given by the learned trial Court are perverse and faulty and therefore, the same should be set aside and the respondent be convicted under the offences charged.

Mr. S.C. Mekap, learned counsel for the respondent, on the other hand, submitted that the learned trial Court after assessing the evidence on record has assigned cogent reasons for acquitting the respondent of all the charges and it cannot be said that the reasons are perverse or there is any error of record in arriving at such findings. Learned counsel relied upon on the decisions of this Court in the case of **Satyananda Pani -Vrs.- State of Orissa (Vig.) reported in (2017) 68 Orissa Criminal Reports 795, State of Orissa -Vrs.- Dr. Biswanath Hota reported in (2011) 50 Orissa Criminal Reports 189** and **A. Subair -Vrs.- State of Kerala reported in (2009) 6 Supreme Court Cases 587** and argued that the evidence of the complainant should be corroborated in material particulars and mere receipt of the amount by the accused is not sufficient to fasten guilt, in absence of clinching evidence with regard to demand and acceptance of the amount as illegal gratification. Learned counsel further argued that there are evidence on record to show that since the date of delivery, neither the complainant (P.W.3) nor his wife had approached the respondent to receive the cheque. The wife of P.W.3 was supposed to receive the financial benefit of Rs.1,400/- (Rupees one thousand four hundred) for delivery of her child in the Government hospital under J.S.Y. scheme on producing mother child health card which was done only on 25.09.2010 and immediately on receipt of the said card, the signature of the wife of P.W.3 was taken on the relevant register and the cheque of Rs.1,400/- (Rupees one thousand four hundred) was handed over to the her and thus there was no prior occasion for demanding money. Learned counsel further argued that the defence plea which was advanced by the respondent has also been proved by preponderance of probability and in support of the defence plea, one witness has been examined. Therefore, it is argued that in a case of this nature, it would not be proper in interfering with the impugned judgment and order of acquittal of the respondent of all the charges and therefore, the GCRLA should be dismissed.

Principles governing appeal against acquittal:

Law is well settled that an order of acquittal should not be disturbed in an appeal under section 378 of the Cr.P.C. unless it is perverse or unreasonable and there must be strong and compelling reasons in order to interfere with the same. The Appellate Court has to consider whether the trial Court's view can be termed as a possible one, particularly when evidence on record has been analyzed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. The law presumes double presumption in favour of the accused after a due adjudication by the trial Court. The Appellate Court has to be relatively slow in reversing the order of the trial Court rendering acquittal. The presumption in favour of the accused does not get weakened but only strengthened. Such a double

presumption that enures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters. When two views are possible, the one taken by the trial Court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. An Appellate Court shall not expect the trial Court to act in a particular way depending upon the sensitivity of the case, rather it should be appreciated if a trial court decides a case on its own merit despite its sensitivity. The findings of fact recorded by a Court can be held to be perverse, if the findings have been arrived at by ignoring or excluding relevant materials or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is against the weight of evidence, or if the finding so outrageously defies logic as to suffer from the vice of irrationality.

Analysis of evidence:

The evidence of P.W.1, the Medical Officer indicates that the beneficiary, who is the wife of P.W.3, could not get the cheque at the time of her discharge from the hospital on 07.09.2010 as she failed to produce the mother child health card which was required to be produced as per the guidelines of the J.S.Y. scheme. It is further revealed from his evidence that from the date of delivery of the child till 25.09.2010, neither the mother of the child nor P.W.3 had come to the hospital to collect the cheque by submitting the copy of the mother child health card. P.W.3 has also stated in his cross-examination that during the evening hours on 07.09.2010, he took his wife to one Ranjita Das, the head nurse and at the time of discharge, P.W.1, the respondent and one Asha-karmi were present and he has further stated that since his wife was taking care of the new born baby, he could not come outside to make the complaint before any authority. Therefore, the evidence of P.W.1 that the wife of the P.W.3 did not come to hospital until 25.09.2010 gets corroboration from the evidence of nonetheless than the P.W.3 himself. The essential document i.e., the mother child health card was not produced to get the benefits under J.S.Y. and it was produced only on 25.09.2010 and the same has been marked as Ext.2 which revealed that on 25.09.2010, the wife of P.W.3 had received the cheque of Rs.1,400/-(Rupees one thousand four hundred) under the J.S.Y. scheme vide cheque no.571510. It further revealed from the evidence of the Medical Officer (P.W.1) that the respondent was all along with him at the time of delivery and thereafter she was also present when the wife of P.W.3 was discharged from the hospital. The evidence of P.W.1 is completely silent about any demand raised by the respondent on 07.09.2010. Therefore, the learned trial Court is quite justified in holding that the pre-demand of bribe by the respondent to P.W.3 has not been proved.

An official witness has been examined on behalf of the prosecution as P.W.7 who stated that the P.W.3 disclosed during preparation that the respondent demanded Rs.550/- (rupees five hundred fifty) for sweets to issue the cheque of Rs.1,400/-(rupees one thousand four hundred) under J.S.Y. scheme. Learned trial Court has been pleased to observe that the evidence of P.W.7 throws doubt on the

case of P.W.3, because asking money for sweets on the happy occasion of birth of a son cannot be treated as demand for illegal gratification.

Mr. Das, learned Standing Counsel for the Vigilance Department submitted that though P.W.7 has stated that right hand wash of the respondent did not change its colour but the evidence of P.Ws.8 & 9 is otherwise. They have stated that when the both the hand washes were taken in sodium carbonate solution, it turned pink and the chemical examination report also indicates that the glass bottles in which hand washes in Sodium Carbonate solution were preserved, on chemical analysis found to have contained phenolphthalein.

I find that though P.W.9 stated that brass seal was used for sealing the exhibits which was left in zima of Mohit Das (P.W.7) to produce the same as and when required, but P.W.8 has stated that vigilance people put seals on the sample bottles with the brass seal which they had taken and they kept the brass seal with them. Evidence of P.W.7 is totally silent about keeping any brass seal in zima. Admittedly, no brass seal was produced in Court at any point of time. Therefore, keeping the hand washes of the respondent under proper seal in safe custody prior to its production before the Director, SFSL, Rasulgarh, Bhubaneswar which was made on 11.10.2010 i.e. about two weeks after the trap is a doubtful feature.

Analysis of defence plea:

D.W.1 has stated that on 25.09.2010 at about 11.30 a.m., the complainant (P.W.3) along with his wife had come to receive the cheque and with the permission of P.W.1, the cheque was handed over by the respondent to the wife of P.W.3. When P.W.1 had sent him to call the respondent, he found that nobody was there in the sub-centre and the mobile of the respondent was on the table and under the mobile, there was some cash and at that time, the respondent came out of the toilet. Thereafter the respondent brought her phone and cash in her left hand and was coming to P.W.1 and at that time, the vigilance officials reached near her, disclosed their identity and she was nabbed by them. Therefore, the defence plea gets corroboration from the evidence of D.W.1.

While judging the veracity of witnesses, there cannot be any different yardstick for judging the prosecution witnesses or defence witnesses and the defence witnesses are to be given equal treatment as the prosecution witnesses. The defence was not supposed to establish his defence plea by proving it beyond all reasonable doubts like the prosecution rather it is required to prove its plea by preponderance of probabilities. 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. The prosecution has a bounden duty to lead an impenetrable chain of evidence suggesting the guilt of the accused and it must stand on its own leg without borrowing credence from falsity of defence evidence. 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.

The Hon'ble Supreme Court in the case of **Rabindra Kumar Dey –Vrs.- State of Orissa reported in (1976) 4 Supreme Court Cases 233** while enunciating the duty of the prosecution has held as follows:

> "While the Courts below have enunciated the law correctly, they seem to have applied it wrongly by overlooking the mode and nature of proof that is required of the appellant. A perusal of the oral and documentary evidence led by the parties goes to show that the Courts not only sought the strictest possible proof from the appellant regarding the explanation given by him, but went to the extent of misplacing the onus on the accused to prove even the prosecution case by rejecting the admissions made by the prosecution witnesses and by not relying on the documents which were in power and possession of the prosecution itself on the speculative assumption that they were brought into existence by the accused through the aid of the officers. Furthermore, the Courts below have failed to consider that once the appellant gives a reasonable and probable explanation, it is for the prosecution to prove affirmatively that the explanation is absolutely false. In a criminal trial, it is not at all obligatory on the accused to produce evidence in support of his defence and for the purpose of proving his version he can rely on the admissions made by the prosecution witnesses or on the documents filed by the prosecution. In these circumstances, the Court has to probe and consider the materials relied upon by the defence instead of raising an adverse inference against the accused, for not producing evidence in support of his defence, because as we have already stated that the prosecution cannot derive any strength or support from the weakness of the defence case. The prosecution has to stand on its own legs, and if it fails to prove its case beyond reasonable doubt, the entire edifice of the prosecution would crumble down. Thus it would appear to us that both the Courts below have made an absolutely wrong approach in deciding the truth of the defence version and have not followed principles laid down by this Court in judging the case of the accused."

Conclusion:

The seizure of the J.S.Y. card of Laila Begum, the wife of P.W.3 vide Ext.2 and its attested copy vide seizure list Ext.21 and the disbursement register substantiate that the document which was required for disbursement of the amount under J.S.Y. scheme was only produced on 25.09.2010 and accordingly, the cheque of Rs.1,400/- (rupees one thousand four hundred) was issued in favour of Laila Begum on that very day. The cheque number and signature of Laila Begum with the date 25.09.2010 appearing on the relevant document substantiate the same. Therefore, when the demand aspect is a doubtful feature and the reason which has been assigned by the defence for non-payment of the cheque in question to the wife of P.W.3 is also getting corroboration from the evidence of the prosecution witnesses and the learned trial Court has vividly assigned the reasons for acquitting the respondent of the charges under section 13(2) read with section 13(1)(d) and section 7 of the P.C. Act, it cannot be said that the reasons are fallacious or based on no evidence on record or any perversity is there in the approach of the learned trial Court in arriving at such findings.

In view of the foregoing discussions, I am of the considered opinion that it cannot be said that the conclusion arrived at by the learned trial Court is not possible or it is unreasonable. There is no perversity or illegality in the impugned judgment. The learned trial Judge has not ignored any material evidence on record and after assessing it carefully, he has reached at the conclusion and has given benefit of doubt to the respondent. Therefore, it is not a fit case where the impugned judgment and order of acquittal is to be interfered with.

Accordingly, the GCRLA being devoid of merits stands dismissed.

The trial Court records with a copy of this judgment be sent down to the concerned Court forthwith for information.

—— o ——

2023 (III) ILR – CUT – 466

S.K. SAHOO, J.

JCRLA NO. 33 OF 2020

SUKUMAR GOUDA ....Appellant

-V-

STATE OF ODISHA ....Respondent

INDIAN PENAL CODE, 1860 – Sections 376(3)/376(2)(n) – Whether non-conducting of the DNA test to determine the paternity aspect of the child which the victim has given birth, can be a ground to disbelieve the evidence of the victim – Held, No – If the version of the prosecutrix is believed, basic truth in her evidence is ascertainable and if it is found to be credible and consistent, the same would form the basis of conviction – Conducting DNA test is not a sine quanon in cases of rape as such tests are merely incidental to determine the culpability of an accused for commission of crime.

For Appellant : Ms. Manasi Dash, Amicus Curiae

For Respondent : Mr. Priyabrata Tripathy, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment: 30.08.2023

S.K. SAHOO, J.

Today is Raksha Bandhan, 2023 which is a special day to celebrate the bond between the siblings to express love and gratitude for each other. Brothers pledge to protect their sisters, love and cherish them, and shower them with presents while sisters tie ‘Rakhi’ on their brothers’ wrists, place tilak on their foreheads, and pray for their prosperity and long lives. It is said that “brothers and sisters are as close as

hands and feet." A brother for a sister is a protector, confidant and a lifelong friend. They share a unique bond that nothing can replace. A sister is a treasure beyond measure for the brother whereas a brother is a hero in disguise and a role model for the sister. Can anyone forget that beautiful song from Hindi film "**Chhoti Bahen**" (1959) in the voice of Nightingale of India Late Lata Mangeshkar *"Bhaiya Mere Rakhi Ke Bandhan Ko Nibhana, Bhaiya Mere Choti Bahen Ko Na Bhulana"*.

It is both shocking as well as ironical to hear this case and render the judgment on 'Raksha Bandhan' day, on which day a brother takes the solemn pledge not only to protect his sister but also to nurture her till his last breath. Here is a case where the accusation has been levelled against an elder brother to have committed rape on her own sister when she was hardly fourteen years of age and to have made her pregnant for which she delivered a girl child at Swadhar Home, Malkangiri.

The appellant Sukumar Gouda faced the trial in the Court of learned Addl. Sessions Judge -cum- Special Judge, Malkangiri in T.R. Case No.15 of 2019 for commission of offences punishable under sections 376(3)/376(2)(n) of the Indian Penal Code (hereinafter 'I.P.C.') on the accusation that in between 01.05.2018 to 10.05.2019 at village Raghuramguda, he committed rape on the minor victim girl, who was under sixteen years of age repeatedly, for the offence under section 506 of the I.P.C. on the accusation that he committed criminal intimidation by threatening the minor victim girl to do away her life and also for the offence under section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter 'POCSO Act') on the accusation that he committed aggravated penetrative sexual assault on the victim girl.

Learned trial Court vide impugned judgment and order dated 22.01.2020 found the appellant guilty and sentenced him to undergo rigorous imprisonment for a period of twenty years and to pay a fine of Rs.40,000/- (rupees forty thousand), in default, to undergo rigorous imprisonment for a further period of two years for the offence under section 6 of the POCSO Act and sentenced to undergo rigorous imprisonment for a period of two years for the offence under section 506 of the I.P.C. and the sentences were directed to run concurrently, however no separate sentence was awarded for the offence under sections 376(3)/376(2)(n) of the I.P.C. in view of section 42 of the POCSO Act.

Prosecution Case:

On 13.05.2019, the victim (P.W.6) who was aged about fourteen years, lodged the first information report (Ext.11) before the Inspector in-charge of Malkangiri police station and accordingly, Malkangiri P.S. Case No.105 dated 13.05.2019 was registered under sections 376(3)/376(2)(n)/506 of the I.P.C. and section 6 of the POCSO Act against the appellant.

It is the case of the prosecution as per the F.I.R. that since last one year prior to the lodging of the F.I.R., the appellant who is her elder brother was frequently

committing sexual intercourse with her in absence of the other family members by threatening her with dire consequence. Out of fear, the victim could not disclose about the same before anyone. Two months prior to the lodging the of the F.I.R., her monthly menstruation was stopped for which she disclosed about the same before her friend Pinki Bhumia (P.W.16) who took her to Anganwadi Didi and the victim was interrogated there and she was asked to come on the next day. On the next day, when the victim again approached the Anganwadi Didi with P.W.16, she asked her about her health condition and the victim disclosed before Didi about the misdeeds of the appellant in committing rape on her repeatedly. The Anganwadi Didi tested her twice with the medical kits available with her to determine pregnancy and after the tests, it was confirmed that the victim had become pregnant. With the help of Childline member, C.D.P.O., Malkangiri and others, the victim was taken from her home to Swadhar Home, Malkangiri where she stayed.

After registration of the case, Inspector in-charge of Malkangiri Police Station directed Santoshi Barik (P.W.26), Sub-Inspector of Police attached to Malkangiri police station to take up investigation of the case and accordingly, P.W.26 examined the informant -cum- victim (P.W.6) and other witnesses, seized the wearing apparels of the victim under seizure list marked as Ext.4, sent her for medical examination to D.H.H., Malkangiri. The appellant was arrested and his wearing apparels were seized under seizure list marked as Ext.7. The I.O. sent the appellant to D.H.H., Malkangiri for examination and opinion. The biological samples of the victim along with command certificate being produced by P.W.2 were seized under seizure list Ext.5. One command certificate along with the biological samples of the appellant was seized on production by P.W.4 under seizure list Ext.8, whereafter the appellant was forwarded to the Court. On 15.05.2019, the I.O. made prayer to the Court to record the statement of the victim under section 164 Cr.P.C. which was accordingly recorded by the learned J.M.F.C., Malkangiri which is marked as Ext.12. Thereafter she visited the spot i.e. the house of the victim and prepared the spot map (Ext.18). She gave intimation to C.W.C., Malkangiri and D.C.P.O., Malkangiri for welfare and rehabilitation of the victim. She also made prayer to the Secretary, D.L.S.A., Malkangiri for payment of compensation to the victim under Victim Compensation Scheme. She also made prayer to the Court to send the seized wearing apparels of both the victim and the appellant along with their biological samples to Deputy Director, R.F.S.L., Berhampur for chemical examination and opinion. The I.O. received the medical examination reports of the appellant so also the victim from D.H.H., Malkangiri which were marked as Ext.10 and Ext.13 respectively. On 21.06.2019, she seized the school admission register of Mukaguda Govt. Primary School on production by the Headmaster of the school under seizure list Ext.14 where the victim was once prosecuting her studies and the school admission register indicated the date of birth of the victim to be 05.08.2005. The original school admission register was left in the zima of the Headmaster of the school under a zimanama after keeping the Xerox copy of the relevant portion of the

register which is marked as Ext.15 and on completion of investigation, on 11.07.2019, the I.O. (P.W.26) submitted the charge sheet against the appellant under section 376(3)/376(2) (n)/506 of the I.P.C. and section 6 of the POCSO Act.

After submission of charge sheet, the learned trial Court framed charges against the appellant and since the appellant refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

Prosecution Witnesses and Documents Exhibited by the Prosecution:

In order to prove its case, the prosecution examined twenty seven witnesses.

P.W.1 Mamata Sahu was the constable attached to Malkangiri police station, who is a witness to the seizure of command certificate and receipt of R.F.S.L. under seizure list Ext.1, seizure of wearing apparels of the victim as per seizure list Ext.4 and biological samples of the victim as per seizure list Ext.5.

P.W.2 Seemarani Biswas is a witness to the seizure of wearing apparels of the victim as per seizure list Ext.4 and biological samples of the victim as per seizure list Ext.5.

P.W.3 Binod Kumar Moharana was the constable attached to Malkangiri police station, who is a witness to the seizure of command certificate and receipt of R.F.S.L. as per seizure list Ext.1.

P.W.4 Narasingh Majhi was the constable attached to Malkangiri police station, who is a witness to the seizure of wearing apparels of the appellant as per seizure list Ext.7 and biological samples of the appellant along with one command certificate as per seizure list Ext.8.

P.W.5 Dr. Surama Kumari Behera, O. & G. Specialist, District Headquarters Hospital, Malkangiri, examined the victim on police requisition on 13.05.2019 and found the victim to be capable of sexual intercourse and there were old tears in her hymen and further found the victim to be pregnant about nineteen weeks and six days. She also collected the biological samples of the victim. She proved her report marked as Ext.10.

P.W.6 is the victim, who supported the prosecution case and she also stated about the seizure of her wearing apparels as per seizure list Ext.4.

P.W.7 Sambaru Gouda is the father of the victim as well as the appellant, who stated that victim disclosed before him that the appellant committed rape on her for which she became pregnant and out of shame, she was not disclosing about the same.

P.W.8 Sambari Bhumia was the mother of Pinki (P.W.16), who was the best friend of the victim and she stated to have detected pregnancy of the victim by

touching her belly and further stated that the victim disclosed before her that she became pregnant through the appellant and accordingly, she advised the victim to go to Anganwadi Didi of the village.

P.W.9 Kalidas Sagaria is the scribe of the first information report.

P.W.10 Sani Kope was working as Anganwadi Worker at Raghuramguda Anganwadi Centre and she stated about testing of urine of the victim by pregnancy testing kits, which was found to be positive and she further stated about the disclosure made by the victim regarding forcible sexual intercourse on her by the appellant.

P.W.11 Gurubari Singh was the health worker, who also stated like P.W.10 about the pregnancy test of the victim conducted with the testing kits found to be positive and the victim's disclosure about the commission of rape on her by the appellant.

P.W.12 Gurubari Sarabu was working as Asha Karmi of Mukaguda and Raghuramguda and she stated similarly like P.Ws.10 and 11.

P.W.13 Subarna Gouda stated about the disclosure made by the victim regarding commission of rape on her by the appellant on a number of occasions in absence of her father.

P.W.14 Damuni Kope was the Helper in the Anganwadi Centre, Raghuramguda, who stated similarly like P.Ws.10, 11 and 12.

P.W.15 Rupa Bhumia stated about the pregnancy test conducted of the victim which was found to be positive.

P.W.16 Pinki Bhumia was the friend of the victim, who stated about the disclosure made by the victim before her regarding commission of rape on her forcibly by the appellant, which led her to become pregnant. She also disclosed about the pregnancy test of the victim conducted at Anganwadi Centre, which was found to be positive.

P.W.17 Bithika Baidya was the Counselor of Swadhar Home, Malkangiri, who stated that during counseling the victim disclosed about the appellant keeping physical relationship with her and threatening her not to disclose the matter before anyone. She further stated that when the victim was found to be pregnant after the test was conducted at Anganwadi Centre, Raghuramguda as per the direction of C.W.C., Malkangiri, the victim was kept at Swadhar Home, Malkangiri.

P.W.18 Laxman Majhi was the constable attached to Malkangiri police station, who is a witness to the seizure of biological samples of the victim as per seizure list Ext.5 and biological samples of the appellant and one command certificate as per seizure list Ext.8.

P.W.19 Sudeshana Rout was the Protection Officer, who stated that after the victim was rescued from her village coming to know about her pregnancy by the appellant, she was produced before Child Welfare Committee, Malkangiri and the Chairperson of C.W.C. reported the matter at Malkangiri police station.

P.W.20 Jyotish Kumar Pati was the Coordinator, Child line, who stated about the rescue of the victim from her village and disclosure made by the victim regarding commission of rape on her by the appellant.

P.W.21 Rupendra Nayak was the Team Leader of Sub-Centre Child line, K.Guma also stated about the rescue of the victim from village Raghuramguda and her disclosure made regarding commission of rape on her by the appellant.

P.W.22 Dr. Narayan Prasad Patra was the Medical Officer attached to D.H.H., Malkangiri, who examined the appellant on police requisition on 19.05.2019 and found that he was capable of committing sexual intercourse. He collected biological samples of the appellant and proved his report marked as Ext.13.

P.W.23 Biswanath Betty was the Headmaster of Mukaguda Government Primary School, who proved the school admission register where the victim was prosecuting her studies and the date of birth of the victim mentioned in such register to be 05.08.2005.

P.W.24 Ganga Baka is a witness to the seizure of school admission register of Mukaguda Government Primary School from the Headmaster of that school under seizure list Ext.14.

P.W.25 Laxmi Mathapadia was the teacher of Mukaguda Government Primary School, who also proved the seizure of the school admission register as per seizure list Ext.14 and taking of zima of such register by the Headmaster as per zimanama Ext.15.

P.W.26 Santoshi Barik was the S.I. of Police, Malkangiri police station, who is the investigating officer of the case and she submitted charge sheet on completion of investigation.

P.W.27 Kailash Chandra Mohanty was the constable attached to Malkangiri police station, who is a witness to seizure list Ext.1, Ext.7 and Ext.8.

The prosecution exhibited twenty five documents. Ext.1, Ext.4, Ext.5, Ext.7, Ext.8 and Ext.14 are the seizure lists, Ext.2, Ext.6 and Ext.9 are the command certificates, Ext.3 is the receipt of R.F.S.L., Ext.10 and Ext.13 are the medical reports, Ext.11 is the first information report, Ext.12 is the statement of the victim under section 164 Cr.P.C., Ext.15 is the zimanama, Ext.16 and Ext.17 are the medical requisitions, Ext.18 is the spot map, Ext.19 is the intimation given to C.W.C., Malkangiri, Ext.20 is the intimation given to D.C.P.O., Malkangiri, Ext.21

is the prayer to the Secretary, D.L.S.A., Malkangiri for victim compensation, Ext.22 is the prayer petition to send the exhibits to Deputy Direction, R.F.S.L., Berhampur, Ext.23 is the requisition to Headmaster, Government Primary School, Mukaguda, Ext.24 is the forwarding letter of sending exhibits to Deputy Director, R.F.S.L., Berhampur and Ext.25 is the original admission register (Vol.II).

Defence Plea and Defence Witness:

The defence plea of the appellant is one of complete denial and it was suggested to the victim that the appellant had not made any sexual intercourse with her and that she became pregnant through others.

The appellant examined himself as D.W.1 and stated that he had not raped the victim nor threatened her at any point of time.

Findings of the Trial Court:

The learned trial Court, after assessing the oral and documentary evidence on record, has been pleased to hold that the prosecution has not proved the chemical examination report of R.F.S.L., Berhampur, though the same is available in the record. The learned trial Court further held that the evidence of the victim taken together with the evidence of P.W.23, the Headmaster, Mukaguda Govt. Primary School, Medical Officer (P.W.5) and the facts mentioned in Ext.12, 14 and 25, it is proved that during the period of occurrence, the victim was minor aged about fourteen years i.e. below sixteen years. It was further held that the evidence of the victim is corroborated by the evidence of her friend (P.W.16) and the evidence of the victim regarding her pregnancy is corroborated by the medical evidence. It was further held that the evidence of the victim taken together with her friend Pinki Bhumia (P.W.16) and others also with the medical officers, it is proved that the appellant committed forcible sexual intercourse with the victim time and again with a threatening to kill her in the event the matter was disclosed before anyone and caused her pregnancy and that the victim became the mother of the female child due to the forcible sexual intercourse by the appellant.The learned trial Court disbelieved the evidence of D.W.1 (the appellant himself) and held that there is nothing to disbelieve that the victim gave birth to a female child while she was at Swadhar Home, Malkangiri and that the female child was born out of the physical relationship made by the appellant on the victim. The learned trial Court turned down the contentions raised by the learned defence counsel regarding delay in lodging the F.I.R. and held that delay in lodging has been sufficiently explained by the prosecution and moreover, in a case of sexual assault, delay in lodging of F.I.R. cannot be a ground to reject the accusation of rape. It was further held that non-conducting of D.N.A. test in respect of the new born baby of the victim will not hit at the root of the prosecution case. It was further held that in view of sections 29 and 30 of the POCSO Act, 2012, the Court shall presume the existence of culpable mental state to draw presumption regarding commission of offence as alleged by the

prosecution. While concluding, the learned trial Court observed that the appellant was sexually potent and he has committed rape on the victim who is nonetheless that his own younger sister repeatedly with a threatening to kill her in the event the matter is disclosed before anyone and caused her pregnancy and later on she gave birth to a female child and therefore, it was held that the prosecution has successfully brought home the charge under sections 376(3)/376(2)(n)/506 of the I.P.C. read with section 6 of the POCSO Act.

When the matter was taken up on 16.08.2023, this Court after going through the evidence on record so also the 164 Cr.P.C. statement of the victim asked learned counsel for the State to obtain instruction about the status of the victim, her child so also the marital life of the appellant. It was further directed to obtain instruction whether the victim has been paid any compensation or not and if so, what is the amount of such compensation.

Today, the learned counsel for the State has produced the written instruction received from the Inspector in-charge of Model P.S., Malkangiri dated 24.08.2023 wherein it is mentioned that the victim had married to a person and staying in the house of the her in-laws and the child of the victim has been produced before Specialized Adoption Agency (S.A.A.), Koraput for care and protection and the victim has received compensation from D.L.S.A., Malkangiri of Rs.4,00,000/- (rupees four lakhs) on 09.07.2020. The written instruction is taken on record.

Contentions of the Parties:

Ms. Manasi Dash, learned counsel who was engaged as advocate for the appellant as per order of this Court dated 07.01.2021 contended that the victim being examined as P.W.6 failed to say about the name of her school where she was prosecuting her studies and no one else has stated about the same and therefore, proving of the school admission register of Mukaguda Govt. Primary School by P.W.23, the Headmaster of the school wherein the date of birth of the victim was mentioned is no way helpful to the prosecution. Learned counsel further submitted that neither the victim (P.W.6) nor her father (P.W.7) has stated about the date of birth of the victim and even though it is the case of the prosecution that on account of the repeated sexual intercourse committed by the appellant on the victim, she became pregnant and gave birth to a female child but no D.N.A. test has been conducted to determine the paternity aspect. Learned counsel further argued that the victim was working as a maid servant in different houses of her village as stated by her father and therefore, somebody else making her pregnant cannot be ruled out and in order to eliminate the same, the prosecution was duty bound to prove the D.N.A. test report which has not been done. Learned counsel further argued that the victim could not say the date when the appellant kept physical relationship with her for the first time and last. Inordinate delay in lodging of the F.I.R. has not been explained by the prosecution and therefore, it is a fit case where the benefit of doubt should be extended in favour of the appellant.

Mr. Priyabrata Tripathy, learned Additional Standing Counsel, on the other hand, supported the impugned judgment and contended that in view of the relationship between the victim and the appellant and when the victim was a minor girl and the appellant had threatened her with dire consequences not to disclose the matter before anybody, in such a scenario the non-disclosure of commission of rape by the victim on her at the first instance before anybody and the delay in lodging the F.I.R. are not factors to dislodge the prosecution case particularly when the mother of the victim is dead who could have been the first person before whom disclosure about such heinous offence would have been made. It is argued that the victim has categorically stated as to how since one year prior to the occurrence, the appellant was keeping physical relationship with her forcibly and committing sexual intercourse and threatening her to kill for which she became pregnant which was detected when the tests were conducted at the Anganwadi Centre by using medical kits. It is further argued that the evidence of the victim has remained unshaken in the cross-examination. The evidence of the victim is corroborated by the evidence of her friend (P.W.16), her father (P.W.7) and others before whom she disclosed against the appellant to have committed rape on her repeatedly. The doctor (P.W.5), who examined the victim on 13.05.2019 on police requisition also found that her hymen had old tears and the victim was pregnant about nineteen weeks and six days at that time. The evidence has come on record that the victim was staying in Swadhar Home, Malkangiri after her pregnancy was detected with the help of CDPO, Malkangiri and Child Welfare Committee member of Malkangiri where she delivered a female child. It is further argued that the chance of false implication of the appellant who is none else than the elder brother of the victim is completely ruled out and the defence plea that since she was working as a maid servant in the village, she was made pregnant by others and the evidence of D.W.1 has been rightly disbelieved by the learned trial Court. The narration made in the first information report by the victim about the occurrence and her statement recorded under section 164 of Cr.P.C. by the learned J.M.F.C., Malkangiri and her evidence in Court is consistent and the learned trial Court has rightly found the appellant guilty of the offences charged and therefore, the Jail Criminal Appeal should be dismissed.

Analysis of Evidence:

Adverting to the contentions of the learned counsel for the respective parties, it is not disputed that the appellant Sukumar Gouda is the elder brother of the victim which is established not only through the evidence of the victim herself, who examined as P.W.6, by her father (P.W.7). The appellant being examined as D.W.1 has also admitted that the victim is his own younger sister.

Age of the Victim:

Coming to the age of the victim, the victim has stated in her cross-examination that she was reading in the village school and has read up to Class-V

but could not say about the name of her school. No suggestion has been given to the victim in the cross-examination that she had never gone to any school for study purpose. The Headmaster of Mukaguda Government Primary School being examined as P.W.23 has stated that P.W.26, the S.I. of Malkangiri police station seized the school admission register as per seizure list Ext.14 and gave the same in zima as per zimanama Ext.15 and he further stated that he knew the victim who was admitted in the school on 18.04.2011 and as per the school admission register, her date of birth was 05.08.2005. The original school admission register wherein the date of birth and date of admission was mentioned has been marked as Ext.25. Nothing has been brought out in the cross-examination of P.W.23. Therefore, the combined reading of the evidence of P.W.6, the victim and P.W.23, the Headmaster, there is nothing to doubt that the victim was prosecuting her studies in Mukaguda Government Primary School where her date of birth was mentioned in the school admission register as 05.08.2005 and that she left her studies in Class-V.

Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 which deals with presumption and determination of age of a person by the Committee or Board, states that in the process of such age determination, the date of birth certificate from the school or the matriculation or equivalent certificate from the concerned examination Board, if available, is to be first taken into account and in absence thereof, the birth certificate given by the corporation or a municipal authority or a panchayat is to be considered and in absence of any of such documents, the age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board. In view of the settled principle of law for determination of age of the victim also, the same principle is to be adopted. Therefore, if the date of birth of the victim as mentioned in the school admission register of the Mukaguda Government Primary School is taken as 05.08.2005, then as on the date of occurrence, the victim was aged about 14 years and therefore, the learned trial Court has rightly held that the prosecution has proved that on the date of incident, the victim was minor and aged about 14 years i.e., below 16 years.

Analysis of victim's evidence:

The victim being examined as P.W.6 has stated her age to be fourteen years on the date of her deposition which was recorded on 14.10.2019. The learned trial Court put some questions to her and recorded the answers and from the questions put and answers given, the learned trial Court was of the opinion that the victim was giving rational answers and therefore, she was held to be competent to give evidence and accordingly, her evidence was recorded. The victim (P.W.6) stated that the appellant is her elder brother and one year prior to the occurrence, the appellant was keeping physical relationship with her forcibly and further stated that on the date of occurrence, the appellant committed sexual intercourse with her forcibly and when she told the appellant to disclose the matter before her father, the appellant

threatened her to kill in the event the matter got disclosed before her father and out of fear, she remained silent. She further stated that due to physical relationship, she became pregnant for two months and she disclosed the matter before her friend Pinki Bhumia (P.W.16) and then P.W.16 took her near her elder mother and disclosed about her pregnancy. Then P.W.16 took her to the Anganwadi Didi, who tested twice with pregnancy testing kit and found her pregnancy positive. She further stated that the Anganwadi Didi informed the matter to C.D.P.O., Malkangiri and Child Welfare Committee members of Malkangiri, who took her to the Swadhar Home, Malkangiri and at Swadhar Home, she gave birth to a female child. She further stated that her statement was recorded under section 164 of the Cr.P.C. which she proved as Ext.12 and she also proved the seizure of her wearing apparels as per seizure list Ext.4 and also the F.I.R. marked as Ext.11. In the cross-examination, the victim (P.W.6) stated that the appellant was a driver and he used to stay outside the village, but he used to come to visit to his house and he was a married person and her sister-in-law, the wife of the appellant was residing in her parental house situated in village Lamtaguda. She further stated that the appellant used to take liquor and he did not maintain the family whereas her father was maintaining the family. Of course, she stated that she could say about the dates, when the appellant kept physical relationship with her for the first time and last time, but in my humble view, the same cannot be a factor to disbelieve her evidence. On going through 164 of the Cr.P.C. statement of the victim also, it appears that her statement is consistent with what she had deposed in the Court during trial. She specifically denied the suggestion given by the learned defence counsel that the appellant had not made any sexual intercourse with her and that she became pregnant through others. The victim stated that Pinki Bhumia (P.W.16) was her best friend.

P.W.16 has stated that the victim disclosed before her that her menstruation had stopped and coming to know about the same, she along with the victim went near a DURANI, who is a person knew about pregnancy, and belonged to their village and that DURANI by touching the belly of the victim could come know that the victim was pregnant. Then the victim disclosed that the appellant made sexual intercourse with her forcibly for which she became pregnant. She further stated that the DURANI advised her to go to the Anganwadi centre to take tablet for abortion of her pregnancy. Accordingly, she along with the victim came to the Anganwadi Centre where the Anganwadi Didi, Anganwadi helper and Raupa Bhumia were present there. The pregnancy test of the victim was conducted through pregnancy test kits and it was found her pregnancy to be positive. P.W.16 further stated that the victim disclosed that the appellant made sexual intercourse with her forcibly with a threatening to kill her in the event the matter was disclosed before anyone. In the cross-examination, P.W.16 admitted that the victim was working as a maid servant in the house of different persons after leaving study. She denied the suggestion that the victim became pregnant through other persons than the appellant. Nothing has been brought in the cross-examination of P.W.16 to disbelieve her evidence.

Therefore, the evidence of the victim (P.W.6) gets corroboration from the evidence of her friend (P.W.16).

P.W.7 is none else than the father of appellant as well as the victim and he came about know the pregnancy of the victim from the victim herself and he stated that the victim was not disclosing about the matter out of shame. Therefore, the evidence of P.W.7 also corroborates the evidence of the victim (P.W.6) and P.W.16.

The Anganwadi Worker being examined as P.W.10, Health Worker being examined as P.W.11, Asha Karmi being examined as P.W.12 have also stated that the pregnancy test of the victim was conducted with the medical kits and it was found to be positive and that they came to know from the victim that the appellant kept physical relationship with the victim forcibly against her will for which she became pregnant.

The doctor (P.W.5), who examined the victim on police requisition has also stated about the detecting the pregnancy of the victim to be 19 months and 6 weeks at the time of examination on 13.05.2019.

All these evidence clearly indicate that on account of repeated forcible sexual intercourse by the appellant, the victim (P.W.6) became pregnant and she did not disclose the matter earlier because of threat given by the appellant and when the pregnancy aspect was detected after due examination in the Anganwadi Centre, the victim disclosed before others and she was taken to Swadhar Home, Malkanagiri where she gave birth to a female child. The age of the victim has also been proved to be fourteen years.

The contention of delay in lodging the first information report in a case of this nature particularly in view of the relationship between the parties has been rightly turned down by the learned trial Court as it is very natural keeping in view the victim's future and the prestige of the family, the family members take time to lodge the F.I.R. in such type of cases.

It is well settled law that if the version of the prosecutrix is believed, basic truth in her evidence is ascertainable and if it is found to be credible and consistent, the same would form the basis of conviction. Corroboration is not a sine qua non for a conviction in a rape case. The evidence of a victim of sexual assault stands at par with the evidence of an injured witness and is entitled to great weight, absence of corroboration notwithstanding. If the evidence of the victim does not suffer from any basic infirmity and the 'probabilities factor' does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration, except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming.

On careful analysis of the evidence of the victim, it has created an impression on my mind that she is a reliable and truthful witness. Her testimony

suffers from no infirmity or blemish whatsoever. I have no hesitation in acting upon her testimony alone without looking for any 'corroboration', however, in this case there are ample corroboration available on the record to lend further credence to the testimony of the victim.

D.N.A. Test Not Sine Qua Non In Rape Cases:

Non-conducting of the D.N.A. test to determine the paternity aspect of the female child which the victim gave birth to, in my humble view, cannot be a ground to disbelieve the evidence of the victim and other prosecution witnesses through which the charges have been established. Conducting D.N.A. test is not a sine qua non in cases of rape as such tests are merely incidental to determine the culpability of an accused for commission of crime.

Chemical Examination Report Not Proved:

It is strange that even though the chemical examination report is available on record, but the same has not been proved by the prosecution as the learned trial Court has observed in the impugned judgment. The duty of the Presiding Judge of a criminal trial is not to watch the proceedings as a spectator or a recording machine but he has to participate in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth and see that vital documents are not left out to be exhibited. A Public Prosecutor has a wider set of duties than to merely ensure that the accused is punished. The duties include ensuring fair play in the proceedings, to see all relevant facts are brought before the Court to have an effective determination of truth and justice for all the parties including the victims. It must be noted that these duties do not allow the Prosecutor to be lax in any of his duties as against the accused. The Court must ensure that the Prosecutor is doing his duties with utmost level of efficiency and fair play. In a criminal trial, the investigating officer, the Prosecutor and the Court play a very important role. The Court's prime duty is to find out the truth. The investigating officer, the Prosecutor and the Court must work in sync and ensure that the guilty are punished by bringing on record adequate credible legal evidence. The criminal Court must be alert and it must watch the actions of the Public Prosecutor carefully.

Conclusion:

In view of the forgoing discussions, I am of the humble view that the learned trial Court has rightly held that the prosecution has successfully brought home the charges against the appellant under sections 376(3)/376(2)(n)/506 of the I.P.C. read with section 6 of the POCSO Act. The sentence imposed for the offence under section 6 of the POCSO Act is the minimum sentence provided for such offence. The punishment awarded for the offence under section 506 of the IPC cannot be said to be on a higher side under any stretch of imagination as such offence was repeatedly committed whenever rape was committed in giving threat to the victim.

Accordingly, the Jail Criminal Appeal being devoid of merit stands dismissed.

Trial Court records with a copy of this judgment be sent down to the concerned Court forthwith for information.

Before parting with the case, I would like to put on record my appreciation to Ms. Manasi Dash, learned counsel for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned counsel shall be entitled to his professional fees, which is fixed at Rs.7,500/- (rupees seven thousand five hundred only). This Court also appreciates the valuable help and assistance provided by Mr. Priyabrata Tripathy, learned Additional Standing Counsel.

—— o ——

2023 (III) ILR – CUT - 479

K.R. MOHAPATRA, J.

W.P.(C) NO. 25015 OF 2012

M/s. NETRINE CONFECTIONARY LTD.,
ANDHRA PRADESH ……..Petitioner

-V-

SMT. K. RENUKA ……..Opp. Party

CODE OF CIVIL PROCEDURE, 1908 – Section 21 – Objection to jurisdiction – When the suit is ripe for trial and it is posted for evidence of the plaintiff, the petitioner filed the petition to decide the issue of territorial jurisdiction of Learned trial Court – The Learned trial Court rejected the application – Whether the order of rejection is sustainable? – Held, Yes – Adjudication of issue of territorial jurisdiction of the Court will certainly be a piece-meal trial of the suit as rightly held by learned trial Court. (Para 11)

Case Laws Relied on and Referred to :-

1. AIR 2004 SC 2154 : New Moga Transport Company Vs. United India Insurance Co. & Ors.
2. (2013) 9 SCC 32 : Swastik Gases Private Limited Vs. Indian Oil Corporation Ltd.

For Petitioner : Mr. Kalyan Pattnaik

For Opp. Party : Mr. S.S. Rao, Sr. Adv.
Mr. Brahmananda Tripathy

JUDGMENT Date of Judgment : 08.09.2023

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Order dated 11th October, 2012 (Annexure-5) passed by learned 1st Additional Civil Judge (Senior Division), Cuttack in Civil Suit No. 175 of 2008 is under challenge in this writ petition, whereby an application filed by the Defendant No.1-Petitioner to hold that the said Court lacks territorial jurisdiction to try the suit, was dismissed.

3. Opposite Party as Plaintiff filed the suit for realization of Rs.11,78,000/- from the Defendant-Petitioner along with an interest at the rate of 12% per annum. The Defendant No.1-Petitioner filed written statement denying its liability to pay the amount. The Petitioner also filed an application (Annexure-3) to decide the issue of territorial jurisdiction of learned trial Court to try the suit at the threshold on the ground that Clause-26 of the agreement, which was mutually agreed upon by the parties and basing upon which the suit is filed, clearly stipulates that *'all disputes that may arise with regard to this agreement shall be subject to Chittor (A.P.) Court jurisdiction only.'* Thus, learned trial Court lacks jurisdiction to try the suit. Learned trial Court without deciding the issue at the threshold held that the issue of territorial jurisdiction can be taken up simultaneously along with other issues in the suit for effective adjudication. It, accordingly, rejected the petition filed by the Defendant-Petitioner vide order under Annexure-5. Assailing the said order, this writ petition has been filed.

4. Mr. Pattnaik, learned counsel for the Petitioner submitted that the suit is filed by the Opposite Party for realization of money, which is allegedly due to her as per the terms and condition of the agreement, as aforesaid. Thus, the present dispute arose from the agreement and hence, only competent civil Court at Chittor (A.P.) has territorial jurisdiction to try the suit. As such, learned Civil Judge (Senior Division), Cuttack has no jurisdiction to try the suit. This material aspect could not be appreciated by learned trial Court. It is his submission that no evidence is required to be adduced by the parties for adjudication of the issue of territorial jurisdiction in the instant case. As such, learned trial Court has committed gross error of law in not considering the issue of territorial jurisdiction of the Court to try the suit at the threshold. He, therefore, prayed for setting aside the order under Annexure-5 and remit the matter to learned trial Court to adjudicate the issue of territorial jurisdiction of that Court to try the suit at the threshold. In support of his submission, Mr. Pattnaik, learned counsel relied upon the case of ***New Moga Transport Company -v- United India Insurance Co. and others***, reported in AIR 2004 SC 2154, wherein it is held as under:-

> ***"14.*** *By a long series of decisions it has been held that where two courts or more have jurisdiction under CPC to try a suit or proceeding, an agreement between the parties that the dispute between them shall be tried in any one of such courts is not contrary to*

public policy and in no way contravenes Section 28 of the Indian Contract Act, 1872. Therefore, if on the facts of a given case more than one court has jurisdiction, parties by their consent may limit the jurisdiction to one of the two courts. But by an agreement parties cannot confer jurisdiction on a court which otherwise does not have jurisdiction to deal with a matter. [See Hakam Singh v. Gammon (India) Ltd. [(1971) 1 SCC 286: AIR 1971 SC 740] and Shriram CityUnion Finance Corpn. Ltd. v. Rama Mishra [(2002) 9 SCC 613: AIR 2002 SC 2402].

xxx xxx xxx xxx

19. *The intention of the parties can be culled out from use of the expressions "only", "alone", "exclusive" and the like with reference to a particular court. But the intention to exclude a court's jurisdiction should be reflected in clear, unambiguous, explicit and specific terms. In such case only the accepted notions of contract would bind the parties. ………"*

5. He also relied upon the case of ***Swastik Gases Private Limited –v- Indian Oil Corporation Limited*** reported in (2013) 9 SCC 32, wherein it is held as under;

"32. *……… The intention of the parties—by having Clause 18 in the agreement—is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the maxim expressio unius est exclusio alterius comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner.*

xxx xxx xxxx xxxx

37. *In my opinion, the very existence of the exclusion of jurisdiction clause in the agreement would be rendered meaningless were it not given its natural and plain meaning. The use of words like "only", "exclusively", "alone" and so on are not necessary to convey the intention of the parties in an exclusion of jurisdiction clause of an agreement. Therefore, I agree with the conclusion that jurisdiction in the subject-matter of the proceedings vested, by agreement, only in the courts in Kolkata.*

xxx xxx xxxx xxxx

40. *There is really no difficulty in interpreting the exclusion clause in the first set of decisions. The clause in these decisions generally uses the word "alone" and, therefore, it is quite obvious that the parties have, by agreement, excluded the jurisdiction of courts other than those mentioned in the agreement……"*

Mr. Patnaik, learned counsel, therefore submitted that the impugned order is not sustainable and is liable to be set aside.

6. Mr. Rao, learned Senior Advocate appearing on behalf of the Opposite Party referred to Section 21 of CPC and submitted that the issue of jurisdiction of the

Court should be raised at the earliest possible opportunity. In the instant suit, the Petitioner has already filed its written statement submitting it to the jurisdiction of learned trial Court. Thus, it is no more available to be raised by the Defendant-Petitioner as the petition under Annexure-3 was filed after the settlement of issues. Thus, learned trial Court has committed no error in rejecting the petition. It is his submission that there is no material on record to come to a conclusion that if the issue of territorial jurisdiction of the Court is not decided at the threshold, it will cause failure of justice. Hence, the writ petition is liable to be dismissed and the Plaintiff-Opposite Party may be permitted to adduce evidence in the suit.

7. Heard learned counsel for the parties and perused the case record as well as the case law placed before this Court.

8. Admittedly, Clause-26 of the agreement executed between the parties clearly stipulates that all disputes arising out of the said agreement will be subject to the jurisdiction of Court at Chittor (A.P.) only. It appears from the agreement at Annexure-2 to the writ petition that it was executed at Chittor (A.P.) on 1st April, 2000 appointing one '*Rasi Trade Syndicate*', a partnership firm as the clearing and forwarding agent of the Defendant-Company. Said Rasi Trade Syndicate ordinarily carries on its business at Cuttack. But, the issue is whether in view of Clause-26 of the agreement the Court at Cuttack should decide the issue of territorial jurisdiction to try the suit at the threshold.

9. Law is no more *res integra,* if two or more Courts have jurisdiction to adjudicate upon a dispute between the parties and by consent both the parties chose one of such Court to decide a dispute between them, then the jurisdiction of all other Court is ousted. Such an agreement is not hit by Section 23 of the Contract Act. The law on this aspect has already been settled in the above-mentioned case law.

10. In the instant case, the petition under Annexure-3 was filed at a stage when the suit was posted for evidence of the Plaintiff, as a last chance, i.e., on 6th August, 2010. Written statement filed by the Defendant No.1- Petitioner is not available in the case record. There is also no other material on record to hold that the issue of territorial jurisdiction of the Court was raised at the earliest possible opportunity. The Petitioner also failed to make out a case that non-consideration of the issue of territorial jurisdiction would result in failure of justice as provided under Section 21 CPC. It is, more so, because learned trial Court held that the issue of territorial jurisdiction of the said Court will be considered along with other issues. Adjudication of issue of territorial jurisdiction may require scrutiny of evidence on record, as held by learned trial Court.

11. When the suit is ripe for trial and it is posted for evidence of the Plaintiff, adjudication of the issue of territorial jurisdiction of the Court will certainly be a piece-meal trial of the suit, as rightly held by learned trial Court.

12. Hence, this Court is not inclined to interfere with the impugned order under Annexure-5. As the suit is of the year, 2008, learned trial Court should make all endeavor to see that the suit is disposed of at the earliest. No unnecessary/long adjournment shall be granted to any of the parties to the suit. Parties shall co-operate with learned trial Court for early disposal of the suit. Learned trial Court is also at liberty to take coercive measure in accordance with law, if any of the parties does not co-operate with it.

13. The writ petition is, accordingly, dismissed. But, there shall be no order as to cost.

14. Interim order dated 14th February, 2013 passed in Misc. Case No. 21542 of 2012 stands vacated.

—— o ——

2023 (III) ILR – CUT - 483

K.R. MOHAPATRA, J.

W.P.(C) NO. 9100 OF 2022

Dr. NURSINGHA CHARAN SARANGI ....Petitioner

-V-

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

CONSTITUTION OF INDIA, 1950 – Article 226 – Bias – Petitioner has filed present writ petition seeking the prayer to quash/set aside the nomination of Opp. Party No. 3 as a member of selection committee for the purpose of conferring Vyasakabi Fakirmohan Odia Bhasa Samman, 2020 on the ground of Bias, because Opp. Party no 3 is the life member of Utkal Sahitya Samaj – Held, in absence of any material or scrap of paper to show that the opposite party no. 3 had influenced the selection committee for conferment of the award, the nomination can not be quashed as the decision/recommendation of the selection committee was manned by the experts in the field. (Para 23)

Case Laws Relied on and Referred to :-

1. AIR 1970 SC 150 : A.K. Kraipak & Ors. Vs. Union of India & Ors.
2. (W.P.(C) No.39640 of 2021 : Dr. Priyaranjan Maral & Ors. Vs. State of Odisha & Ors.
3. (1999) 2 SCC 193 : Utkal University Vs. Dr. Nrusingha Charan Sarangi & Ors.
4. AIR 1976 SC 2428 : Dr. G. Sarana Vs. University of Lucknow & Ors.

For Petitioner : M/s. Sameer Kumar Das, P.K. Behera & N. Jena

For Opp. Parties : Mr. Swayambhu Mishra, Addl. Standing Counsel
M/s. B.P. Tripathy, S.R. Pati & Ramdas Achary
M/s. Kshirod Kumar Rout, J. Naik, S.K. Rout,
S.K. Bhuyan & A. Jamal

JUDGMENT Date of Judgment :11.09.2023

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2**.** The Petitioner in this writ petition seeks to quash and set aside the appointment/nomination of Opposite Party No.3, namely, Prof. Udayanath Sahu, as a member of selection committee for the purpose of conferring *'Vyasakabi Fakirmohan Odia Bhasa Samman-2020'* (for brevity 'the Award') and direct the State Government and its authorities to publish the decision of selection committee taken earlier for conferment of the Award. In the alternative, the Petitioner prayed for constitution of a new selection committee and to confer the award within a stipulated period.

3. Factual backdrop of the case is that pursuant to an advertisement issued by the Government of Odisha on 18th December, 2020 (Annexure-1) for conferment of the Award, the Petitioner and Opposite Party No.4 along with others submitted their applications in the prescribed format. On receipt of the applications, the Government of Odisha constituted a selection committee.

4. Grievance of the Petitioner in this writ petition is with regard to nomination of Opposite Party No.3, namely, Prof. Udayanath Sahu, as a member of selection committee. It is his allegation that the Opposite Party No.3 is a life member of 'Utkal Sahitya Samaj'-Opposite Party No.4, who has been conferred with the award. The Opposite Party No.3 should not have been the judge of his own cause. Thus, the entire selection process for conferment of the award is vitiated.

5. Mr. Das, learned counsel for the Petitioner submits that although several grounds have been taken in the writ petition, but the Petitioner confines its case only on the ground as stated above. It is submitted that initially four eminent persons in the field of Odia language and literature were nominated to be the members of selection committee. However, two of such members of selection committee, namely, Dr. Sitakanta Mohapatra and Dr. Rama Chandra Behera, did not want to continue as such.Thus, two other members, namely, Prof. Udayanath Sahu (Opposite Party No.3) and Shri Alekha Charan Padihari, were nominated in their place, which is clear from the letter dated 8th December, 2021 (Annexure-6) issued by the Director and Additional Secretary in the Department of Odia Language Literature and Culture, Government of Odisha, Bhubaneswar. Subsequently, Dr. Rajkishore Mishra also opted out from the selection committee.Again, Dr. Shanghamitra Mishra, also expressed her inability to continue in the selection committee. However, Prof. Udayanath Sahu-Opposite Party No.3 and Shri Alekha Charan Padihari continued to be the members of the said selection committee.

6. When the matter stood thus, the Petitioner received a caveat petition issued by learned counsel appearing for Opposite Party No.4, namely, Utkal Sahitya Samaj. After going through the caveat petition, more particularly the averments made in

para-4 of the said petition, the Petitioner came to learn that Utkal Sahitya Samaj-Opposite Party No.4 has been selected to receive the award. Mr. Das, learned counsel also referred to paragraph-4 of the caveat petition (Annexure-8), which reads as under:

> "*4. That, for the year 2021, as learnt, the Govt. in Department of Odia language, literature & culture has selected "Utkal Sahitya Samaj", a century old and the premier literary organization of the State of Odisha to be honoured with such award".*

7. As such, the Petitioner enquired about the matter and surprised to learn that the Opposite Party No.4, namely, Utkal Sahitya Samaj, was aware of the result even before the award was officially declared. It is submitted that the Opposite Party No.3 being the life member of Opposite Party No.4 must have disclosed the same to it.

8. It is further submitted that the Opposite Party Nos.1 and 2 in their counter affidavit have specifically averred that the Government had no knowledge that Prof. Udayanath Sahu (Opposite Party No.3) was the life member of Utkal Sahitya Samaj-Opposite Party No.4. It was also stated in their counter affidavit that had it been known to the Government, constitution of the committee would have been changed. However, the State Government in order to save their scheme and defend their action has averred that the Opposite Party No.3 was not an applicant for the award and he was not the sole member of the selection committee.

9. Since undisputedly the Opposite Party No.3 was a life member of Opposite Party No.4-Utkal Sahitya Samaj, the entire selection process is vitiated and became void. Law is well settled that *'one cannot be a judge of his own cause'*. As such, participation of Opposite Party No.3 in the process of selection of the award vitiates the entire proceeding.

10. Mr. Das, learned counsel for the Petitioner also relied upon the decision in the case of ***A.K. Kraipak and others –v- Union of India and others***, reported in AIR 1970 SC 150, wherein it is held that one cannot be the judge of his own cause, as there is a reasonable likelihood of bias. But, unfortunately the Opposite Party No.3 suppressed the same to the State Government. Only after filing of the writ petition, the State Government became aware of such fact. It is his submission that although the award was made public by the State Government only on 19th April, 2022, but the Opposite Party No.4-awardee made it public on 24th January, 2022 by filing a caveat petition.

11. The Petitioner also relied upon the case of ***Dr. Priyaranjan Maral and others –v- State of Odisha and others*** (W.P.(C) No.39640 of 2021 disposed of on 11th July, 2022) stating that an identical issue came up for consideration therein with regard to selection of Assistant Professor by the O.P.S.C., where the Ph.D guides of some of the selected candidates were the subject experts. Considering the matter in detail, this Court set aside the selection process.

12. Mr. Das, learned counsel for the Petitioner further submitted that initially it was decided to confer the award in favour of the Petitioner and one Antaryami Mishra jointly, but, for the reasons best known, such a decision was altered and the Opposite Party No.4 was conferred with the award. He, therefore, submits that the entire selection process for conferment of the award is vitiated and is not sustainable. Hence, the same should be set aside. He also referring to Annexure-A/2 of the counter affidavit filed by the State Government submitted that the Petitioner along with Shri Antaryami Mishra should be jointly conferred with the award.

13. Mr. Mishra, learned Additional Standing Counsel appearing for Opposite Party Nos.1 and 2 made a detail submission on the basis of the counter affidavit filed by the State Government. He has also produced photocopies of the relevant records of the selection process for conferment of the award in a sealed cover for perusal of the Court. It is his submission that the State Government had no knowledge of the fact that the Opposite Party No.3 is a life member of Opposite Party No.4. Opposite Party No.3 never disclosed the same. However, Opposite Party No.3 was not the sole member of the selection committee. There were other three members in the selection committee, which unanimously selected the Opposite Party No.4 to be the recipient of the award. It is further submitted that no individual member had the opportunity to influence the collective decision of the committee. It can also be verified from the record produced before the Court. Previously, the selection committee recommended that the award should be conferred on two individuals including the Petitioner which did not include the Opposite Party No.4. But the said recommendation was turned down by the State Government. There is also no material on record to arrive at a conclusion that the Opposite Party No.3 has influenced the decision of the selection committee.

14. Mr. Mishra, learned Additional Standing Counsel also made elaborate submission with regard to competency of the members of the selection committee and their backgrounds on Odia language, literature and culture. It is also submitted that the Petitioner along with one Shri Antaryami Mishra were recommended by the selection committee for conferment of the award jointly. However, the Government in Odia Language, Literature and Culture Department desired that it should be given either to one individual or to one institution instead of awarding it jointly. Therefore, the selection committee again met on 19th January, 2022. Although the Petitioner was aware of the fact that Utkal Sahitya Samaj-Opposite Party No.4 is an applicant for the award and Opposite Party No.3 is a life member of said Opposite Party No.4, but he neither objected to the same nor disclosed it at any time before filing of this writ petition. Rather the Petitioner participated in the selection process. Hence, he cannot challenge the result thereof being not selected for the award. It is further submitted that apart from two non-official members, namely, Prof. Udayanath Sahu-Opposite Party No.3 and Shri Alekh Charan Padihari, there were two other official members in the said committee, namely, Additional Chief Secretary to Government and Director-cum-Additional Secretary to Government in

the Department of Odia Language, Literature and Culture, Odisha, Bhubaneswar to have a fair selection. Thus, there was no requirement to select any other member for that purpose, as alleged by the Petitioner.

15. In support of his contention, Mr. Mishra, learned Additional Standing Counsel relied upon the decision in the case of ***Utkal University –v- Dr. Nrusingha Charan Sarangi and others***, reported in (1999) 2 SCC 193 in which it is held as under:

> "***10.*** *What is more, we fail to see how on account of one of the experts being a member of an organization or being on the Editorial Board of a magazine brought out by that organization, he would necessarily be favourably inclined towards the Editor of that magazine. There is no allegation of any personal relationship between the member of the Selection Committee and the candidate. Not unnaturally, the member concerned of the Selection Committee has taken strong exception to the charge of bias. In his letter addressed to the University dated 10-5-1994, he has pointed out that he was, in fact, more closely connected with the first respondent, Dr Nrusingha Charan Sarangi than the selected candidate. He has pointed out that the first respondent hails from his native place, belongs to the family of his priest and the first respondent has dedicated his book to the said member. All this is prior to the said interview. He has also pointed out that he agreed to be associated with the said Shri Jagannath Gabesana Parishad only because his teacher is one of its founders. Another expert on the Selection Committee, Dr J.B. Mohanty, has also addressed a letter dated 21-1-1994 to the University pointing out that the selected candidate was selected on merit after taking into consideration his academic record, Honours teaching experience, research activities and performance at the interview. The first respondent, although he was given time to file a counter-affidavit here after all these documents were disclosed, has not filed any reply. Allegations of bias must be carefully examined before any selection can be set aside. In the first place, it is the joint responsibility of the entire Selection Committee to select a candidate who is suitable for the post. When experts are appointed to the Committee for selection, the selection should not be lightly set aside unless there is adequate material which would indicate a strong likelihood of bias or show that any member of the Selection Committee had a direct personal interest in appointing any particular candidate. The expert in question, in the present case, had no personal interest in the selection of any particular candidate. It is not even alleged by the first respondent that he had any such personal interest in the selection of the candidate who was selected. The mere fact that the expert as well as one of the candidates were members of the same organization and connected with the magazine brought out by it would not be sufficient, in the facts and circumstances of the present case, to come to a conclusion that the selector had a specific personal interest in the selection of that candidate. The experts, in the present case, are experts in the Oriya language and are men of stature in their field. The candidates who would be considered for selection by the Selection Committee would also be candidates who have some stature or standing in the Oriya language and literature, looking to the nature of the post. Any literary association in this context, or any knowledge about the literary activities of the candidates would not, therefore, necessarily lead to a conclusion of bias. Looking to the circumstances of the present case, it is not possible to come to a conclusion that the Selection Committee was biased in favour of the candidate selected."* (Underlined for emphasis)

16. The Petitioner herein was the first Respondent in the said case. Thus, only because the Opposite Party No.3 is a life member of Opposite Party No.4, it would not *ipso facto* be construed that he had influenced the selection process for the award. He, therefore, prays for dismissal of the writ petition.

17. Mr. Rout, learned counsel for Opposite Party No.4 submits that the Petitioner has no *locus standi* to challenge the selection process.There is no averment in the writ petition to come to a conclusion that had the Opposite Party No.3 been not there in the selection committee, the Petitioner would have been selected for the award. He further submits that the Petitioner being aware of the fact that the Opposite Party No.4 is an applicant and the Opposite Party No.3 is a life member of said Opposite Party No.4 (Utkal Sahitya Samaj), did not raise any objection at any point of time during the entire selection process. Being unsuccessful in the selection process for the award, he has come up with the present writ petition. As such, he being a fence-sitter has no *locus standi* to challenge the selection process. In support of his case, he relied upon the decision in the case of ***Dr. G. Sarana –v- University of Lucknow and others***, reported in AIR 1976 SC 2428. He also relying upon the case law of *Utkal University* (supra) submitted that allegation of bias must be carefully examined before any selection is set aside. In the first place, it is the joint responsibilities of the entire selection committee to select a suitable candidate for the purpose it is constituted so that the selection is not lightly set aside. Unless there is adequate material which would indicate a strong likelihood of bias or it reflects that any member of the selection committee had a direct personal interest, the selection process should not be interfered with. Mere fact that one of the members of the selection committee was the life member of selected institution, would not be sufficient to come to the conclusion that the selector had a specific personal interest in the selection of that institution. It is his submission that the Petitioner was all throughout vigilant about the selection process. He had also tried to influence the selection committee with lewd and sarcastic remarks in the social media. Having failed in all his attempts, the Petitioner has tried to utilize the judicial process for his vested interest. As such, the writ petition is not *bona fide* and is liable to be dismissed with cost.

18. Heard learned counsel for the parties and perused the materials placed before this Court.

19. As submitted by Mr. Das, learned counsel, Petitioner assails the selection process on the sole ground that a person cannot be the judge of his own cause. In support of his case, he also relied upon the ratio in the case of ***A.K. Kraipak and others*** (supra).

20. On a close reading of the writ petition along with written note of submission filed by the Petitioner, it clearly reveals that the Petitioner took exception to the fact that the Opposite Party No.3 being a life member of Opposite Party No.4-Utkal Sahitya Samaj, should not have been part of the selection committee. He has also

stated that the Government of Odisha was in dark about the fact that he is a life member of the organization (Opposite Party No.4-Utkal Sahitya Samaj), who was also the applicant and recipient of the award. He also brought to the notice of the Court to the averments made in the counter affidavit stating that had this fact known to the State Government, it would not have nominated the Opposite Party No.3 as a member of the selection Committee. It is his submission that the same is sacrosanct to hold that the Opposite Party No.3 should not have been a part of the selection process.

21. There is, of course, no material on record to show that the Opposite Party No.3 has shown any favour to Opposite Party No.4 in the entire selection process. It reveals from the record that initially the names of the Petitioner along with one Shri Antaryami Mishra were recommended for the award. However, the Government of Odisha did not accept the same and suggested that it should be given one individual or one institution. As would appear from the minutes of the selection committee dated 19th January, 2022 (Annexure-A/2) that the Opposite Party No.3 suggested that since during last two years, institutions were being selected for the award, it should be conferred on individual. Keeping in mind the suggestion made by the Opposite Party No.3, applications of five institutions and nine individuals were scrutinized and the names of the Petitioner and Shri Antaryami Mishra were recommended for the award.When recommendation made by the selection committee was not accepted, the matter was again placed before the selection committee and one of the members, namely, Dr. Alekha Charan Padihari, suggested that since there are instances of joint conferment of the award on individuals, the Government should be requested to reconsider its decision. But the said suggestion was objected to by the Additional Chief Secretary, who was also a member of the selection committee, stating that examples of other institutions cannot be a ground to request the Government to reconsider the decision. Then Dr. Padhihari suggested conferring the award to an eminent organization/institution. Thereafter, the selection committee unanimously recommended the name of Opposite Party No.4-Utkal Sahitya Samaj for the award stating that since the institution was established in the year, 1903; Vyasakabi Fakir Mohan had been the President of the said institution on two occasions; the institution has published three books on Vyasakabi Fakir Mohan and two books on literature and language and forty books on other subjects of Odia language. From the minutes of the meeting of the selection committee dated 19th January, 2022 (Annexure-A/2), it clearly establishes that the Opposite Party No.3 had not at all influenced the selection committee to recommend the name of Opposite Party No.4 for the award. On the other hand, the name of Opposite Party No.4 was recommended unanimously on the basis of its own literary contribution including its contribution on the publication of books on Vyasakabi Fakir Mohan and its contribution to the Odia language.

22. There can be no quarrel or the question on the ratio decided in the cases of *A.K. Kraipak and others* (supra) and *Dr. Priyaranjan Maral and others* (supra) of

this Court. The principles decided in those cases are applicable to the facts and circumstances of the said case and are of no assistance to the case of the Petitioner. The case law in *Utkal University* (supra) is apt to the instant case. It has discussed the case law on the issue of bias more vividly and held that when experts are appointed to the Committee for selection, the selection should not be lightly set aside unless there is adequate material which would indicate a strong likelihood of bias or show that any member of the Selection Committee had a direct personal interest in appointing any particular member. In the instant case, there is no iota of material to show that the Opposite Party No.3 had any personal interest for conferment of the award of Opposite Party No.4 or he has shown any favour for conferment of such award. There is also no allegation to that effect. Only because the Opposite Party No.3 was a life member of Opposite Party No.4, which is a premier organization of Odia language and has large number of eminent persons having interest in Odia literature, language and culture as its member, it cannot be said that the Opposite Party No.3 has influenced the selection committee for conferment of the award to Opposite Party No.4. As discussed above, from the minutes of the selection committee dated 19th January, 2022 (Annexure-A/2 to the counter affidavit filed by Opposite Party Nos.1 and 2), it is crystal clear that the Opposite Party No.3 was of the opinion that it should be awarded to two individuals. Thus, at no stretch of imagination, it can be said that the Opposite Party No.3 has ever influenced or became the judge of his own cause. Apart from Opposite Party No.3, there were three other members and the selection committee was chaired by the Additional Chief Secretary of Odia Language, Literature and Culture Department, Government of Odisha.

23. In absence of any material or scrap of paper to show that the Opposite Party No.3 had influenced the selection committee for conferment of the award, the decision/recommendation of the selection committee should not be lightly set aside when the selection committee was manned by the experts in the field.

24. Although the Petitioner alleges that he came to know about the conferment of the award from the caveat petition, but from the submission of Mr. Rout, learned counsel for the Opposite Party No.4, it appears that the news regarding conferment of the award to Opposite Party No.4 was published in Odia daily newspaper "*The Samaj*" on 20th January, 2022. At the same time, it cannot be brushed aside that the Petitioner had knowledge about the fact that the Opposite Party No.3 was a member of the selection committee and was a life member of Opposite Party No.4. The aforesaid fact also gets support from the statement of the Petitioner in social media, extracts of which have been annexed to the counter affidavit filed by Opposite Party No.4. At no stage of selection process, the Petitioner had raised any objection to the same. Thus, the Petitioner having participated and being unsuccessful in receiving the award has no *locus standi* to challenge the constitution of the selection committee.

25. Thus, the writ petition fails and is accordingly dismissed.

26. In the circumstances, there shall be no order as to cost.

—— o ——

2023 (III) ILR – CUT - 491

K.R. MOHAPATRA, J.

CMP NO. 353 OF 2016

A. MOHAN ....Petitioner

-V-

BABITA RAM & ORS. ....Opp. Parties

PARTITION ACT, 1893 – Section 4 – There was a dwelling house existing over the suit property and by demolishing the same, mother of the petitioner had an intention to construct a new building for her living – But, due to paucity of funds she could not build the same – Whether the property in question had lost its character of a dwelling house & an application U/s. 4 of the Act is maintainable? – Held, No – Only because the property was being used for some other purpose for a temporary period it would not lose its character of a dwelling house. (Para-10)

Case Laws Relied on and Referred to :-

1. AIR 1976 Ori 62 : Tejpal Khandelwal & Ors. Vs. Mst. Purnima Bai & Ors.
2. AIR 1976 Cal. 288 : Mohiddin Molla Vs. Jitendranath Karmakar & Ors.
3. AIR 2001 SC 61 : Gautam Paul Vs. Debi Rani Paul & Ors.
4. AIR 2006 Pat 112 : Bimla Devi and Ors. Vs. Radhyshaym Patwa & Ors.

For Petitioner : Mr. Dwarika Prasad Mohanty

For Opp. Parties : Mr. Sanjeeb Chakravarty

JUDGMENT Date of Judgment: 26.09.2023

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Order dated 2nd February, 2016 (Annexure-7) passed by learned 1st Additional Civil Judge (Senior Division), Cuttack in Title Suit No.458 of 1991 (Final Decree) is under challenge in this CMP, whereby an application filed by the Plaintiff-Petitioner under Section 4 of the Partition Act, 1893 to exercise the right of preemption, has been rejected.

3. As submitted by Mr. Mohanty, learned counsel for the Petitioner, TS No.458 of 1991 was filed by one Laxmi Dei for partition of the suit property

claiming eight annas share therein. She also prayed for a decree to direct the Defendant Nos.2 and 3 (Opposite Party Nos. 3 and 4) to re-transfer the eight annas share of Defendant No.1 purchased by them under Section 4 of the Partition Act. She also prayed for certain other reliefs, consequential as well as alternative. The suit was preliminarily decreed vide judgment dated 2nd December, 1995 declaring that the Plaintiff and Defendant No.1 have eight annas share each in the suit property. It was also directed that the Plaintiff may exercise her right under Section 4 of the Partition Act to repurchase the suit property from Defendant Nos.2 and 3. Further, Defendant Nos.2 and 3 were also directed to execute a sale deed in favour of the Plaintiff within three months therefrom on receipt of Rs.18,000/- from her and to give delivery of possession of the suit property. Assailing the same, the Defendant Nos.2 and 3 filed Title Appeal No.18 of 1996, which was disposed of vide judgment dated 28th February, 2003 (Annexure-2) confirming the decree with regard to entitlement of eight annas share of each of the Plaintiff and Defendant No.1 over the suit property. But the finding with regard to exercise of power under Section 4 of the Partition Act over the suit house by the Plaintiff was set aside, holding it to be premature.

4. Defendant Nos.2 and 3 are the purchasers of a portion of the suit property from Defendant No.1, namely, A. Chandrabati vide RSD dated 18th June, 1991. The Plaintiff, namely, Laxmi Dei and husband of Defendant No.1, namely, A. Bhaskar Rao are the siblings. When the Plaintiff came to know that Defendant No.1 managed to record her name in the ROR and sold the suit property to Defendant Nos.2 and 3, which was their dwelling house, she filed the suit as aforesaid. In the meantime, Defendant Nos. 2 and 3 sold the suit property to Opposite Party No.1. Thus, the Opposite Party No.1 initiated the Final Decree proceeding for carving out the share of Defendant No.1 and to allot the same in her name.

4.1 After the death of the Plaintiff, the Petitioner being her son was substituted in her place. During pendency of the Final Decree proceeding, the Petitioner filed an application under Section 4 of the Partition Act to exercise his right of preemption to repurchase the property from said Babita Ram-Opposite Party No.1, who purchased the suit property from Defendant Nos.2 and 3. Said application was rejected on the ground that the property in question has lost its character of being a dwelling house by the time the application under Section 4 of the Partition Act was filed. Hence, this CMP has been filed assailing the said order under Annexure-7.

5. Mr. Mohanty, learned counsel for the Petitioner submitted that learned trial Court while passing the preliminary decree and learned appellate Court while pronouncing judgment in TA No.18 of 1996 concurrently held that the suit property was a dwelling house. Further, the Petitioner in his evidence in affidavit at para-7 stated as under:-

> *"7. That originally there were residential houses in the property and my mother was staying thereon with her parents. After demolishing the same my mother shifted to*

> *another place for her stay and could not arrange sufficient money to construct a building on the suit property. The land was lying vacant and for her sustenance she had allowed one Shohan Lal Chug to run his business in the name and style Haryana Handloom thereon. There is no permanent construction/structure on the suit property and tenant by affixing tin sheds temporarily is doing his business. I am now preparing to make construction of my residential house thereon by removing the temporary tin sheds from the suit property."*

It is thus submitted that there was dwelling house over the suit property and the Petitioner has intention to make construction of his residential house over the suit property. In support of his submission, Mr. Mohanty, learned counsel for the Petitioner relied upon the case law in the case of ***Tejpal Khandelwal and Ors. vs Mst. Purnima Bai and Ors.,*** reported in AIR 1976 Ori 62, wherein it is held as follows:-

> *"11. ….. It is unnecessary to multiply illustrations. Whether a house is a dwelling-house or not is to be determined with reference to the facts and circumstances of each case. The test which is, however, essential is that the house must have been meant for residential purposes though temporarily it might be used for other purposes according to the exigency of circumstances."*

He also relied upon the case of ***Mohiddin Molla Vs. Jitendranath Karmakar And Ors.,*** reported in AIR 1976 Cal. 288, wherein it is held as follows:-

> "*6 In this connection Mr. Motilal has made an attempt to argue that when there is a shop room in the suit premises, the suit property cannot be held as the dwelling house. On this question there can be no doubt that only a minor part of the dwelling house is a shop room. The meaning of the dwelling house in Section 4 of the Partition Act is relevant. The relevant portion of Section 4 of the Partition Act runs as follows:--*
>
> *"Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family, and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit, and direct the sale of such share to such shareholder and may give all necessary and proper directions in that behalf."*
>
> *In this connection we should consider the decision of a Division Bench of this Court in the case of Dulal Chandra Chatterjee v. Gostha Behari Mitra, (AIR 1953 Cal 259). There we find the following:*
>
> *"But assuming that the house concerned must be a residential house of the members of the family owning it. I am altogether unable to agree that any suspension of occupation or, for the matter of fact, the absence of the owners of the house therefrom or an occupation or terminable occupation by tenants, can have the effect of making the house cease to be a dwelling house."*
>
> *Further down we also get .... "the mere grant of a tenancy cannot possibly have the effect of making the house which is otherwise a residential house of the members of the undivided family owning it, cease to be a dwelling house."*
>
> *It is clear, therefore, that to ascertain whether a house is a dwelling house or not, it has got to be considered how the house is being used or for what purpose the house is there.*

> *In the instant case a minor portion of the suit property constitutes a shop. But the admitted fact is that the defendant is the owner of the dwelling house inherited from his father and that his other co-sharers sold their shares to different persons." In my view, therefore, simply because there is a shop in the suit dwelling house it cannot be stated that the character of the dwelling house has been changed. I cannot, therefore, accept the contention of Mr. Motilal that due to the existence of a shop room the character of the suit property as dwelling house has been changed."*

He, therefore, submitted that only because the property in question was being rented out and was being used for running a business, it will not lose its character of being a dwelling house. As the suit house was dilapidated one, mother of the Petitioner (the Plaintiff) demolished the suit house with intention to construct a new one, but due to paucity of funds she could not proceed with the construction and let it out on rent to one Sahon Lal Chug for running Haryana Handloom business. It has only made temporary tin construction to run his business. He further submitted that the Petitioner has also shown his intention to construct his dwelling house thereon on repurchase. Thus, learned trial Court has misdirected itself in holding that the suit property having lost its character of being a dwelling house and protection under Section 4 of the Partition Act is not available to the Petitioner. Although the impugned order is well-discussed one, but learned trial Court failed to appreciate the aforesaid position of law. Hence, he prays for setting aside the impugned order under Annexure-7 and to grant leave to the Petitioner to exercise his right under Section 4 of the Partition Act.

6. Mr. Chakravarty, learned counsel for the contesting Opposite Party No.1 submitted that after disposal of Title Appeal No.18 of 1996, Opposite Party Nos.3 and 4 initiated a final decree proceeding. The Petitioner being the son of the original Plaintiff filed an application under Section 4 of the Partition Act. The said application was initially rejected. Assailing he said order, the Petitioner preferred W.P.(C) No.2320 of 2013 before this Court. The writ petition was disposed of on 13th December, 2015 setting aside the impugned order rejecting the application under Section 4 of the Partition Act remanding the matter to learned trial Court to adjudicate the application under Section 4 of the Partition Act afresh giving opportunity of hearing to the parties. Accordingly, the matter was considered afresh and the impugned order under Annexure-7 has been passed.

6.1 It is his submission that the finding of learned trial Court does not warrant any interference in view of the discussion made therein and finding arrived at. Learned trial Court, also relied upon the case of ***Gautam Paul Vs. Debi Rani Paul and others,*** reported in AIR 2001 SC 61, discussed the provision of Section 4 of the Partition Act for arriving at the conclusion.

6.2 While considering the application under Section 4 of the Partition Act, the Court should keep in mind that the purchaser (in the instant case, Opposite Party No.1) must come forward claiming actual and physical possession. *Secondly,* there must be the existence of dwelling house at the time of filing of an application under

Section 4 of the Partition Act. In the instant case, admittedly, there was no residential house over the suit land at the time of filing of the application under Section 4 of the Partition Act. The case laws relied upon by learned counsel for the Petitioner have no application to the case at hand, as in those cases dwelling house was existing at the time of consideration of petition under Section 4 of the Partition Act. But the house in question was rented out. Thus, this Court as well as Calcutta High Court categorically held that only because the house was used for other purposes for a temporary period, it would not lose its character of a dwelling house. He categorically stated that his mother, namely, the original Plaintiff had demolished the dwelling house and rented the property to one Sohan Lal Chug to run his business, who by making a tin structure was running his business in the name and style *'Haryana Handloom'*. Thus, by no stretch of imagination the protection under Section 4 of the Partition Act is available to the Petitioner as rightly held by learned trial Court. He, therefore, prays for dismissal of the CMP.

7. Mr. Chakravarty, learned counsel for the contesting Opposite Party No.1 also relied upon the case of ***Bimla Devi and Ors. Vs. Radhyshaym Patwa and others*** reported in AIR 2006 Pat 112, wherein it is held as under:-

> *"15. ….. Yet the legislature did not provide that the right for pre-emption could be exercised "in any suit for partition". The legislature only provided for such right when the "transferee sues for partition". The intention of the legislature is clear. There had to be initiation of proceedings or the making of a claim to a partition by the stranger/outsider. This could be by way of initiating a proceeding for partition or even claiming partition in execution. However, a mere assertion of a claim to a share without demanding separation and possession (by the outsider) is not enough to give to the other co-sharers a right of pre-emption. There is a difference between a mere assertion that he has a share and a claiming for possession of that share. So long as the stranger-purchaser does not seek actual division and possession either in the suit or in execution proceedings, it cannot be said that he has suit for partition. The interpretation given by Calcutta, Patna, Nagpur and Orissa High Courts would result in nullifying the express provision of Section 4, which only gives a right when the transferee sues for partition. If that interpretation were to be accepted then in all cases, where there has been a sale of a share to an outsider, a co-sharer could simply file a suit for partition and then claim a right to purchase over that share. Thus even though the outsider may have at no stage, asked for partition and for the delivery of the share to him he would be forced to sell his share. It would give to a co-sharer a right to pre-empt and purchase whenever he/she so desired by the simple expedient of filing a suit for partition. This was not the intent or purpose of Section 4. Thus the view taken by Calcutta Patna, Nagpur and Orissa High Courts in the aforementioned cases, cannot be said to be good law."*

Thus, learned trial Court has committed no error in rejecting the petition under Section 4 of the Partition Act.

8. Heard learned counsel for the parties. Perused the materials on record and case laws placed before this Court.

9. Section 4 of the Partition Act reads as under:-

*"4. **Partition suit by transferee of share in dwelling-house.—***

(1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the court shall follow the procedure prescribed by sub-section (2) of the last foregoing section."

Thus, the following conditions are to be satisfied for entertaining an application under Section 4 of the Partition Act.

i) Dwelling house must belong to an undivided family;

ii) There is a transfer of share in it to a stranger;

iii) The transferee has sued for share in the undivided property and for possession; and

iv) The share holder claims and undertakes to buy the share of the stranger;

10. In the instant case, admittedly, the Petitioner, who is the son of the Plaintiff, in his evidence stated that his mother was staying in the dwelling house. As the dwelling house was in a dilapidated condition, his mother demolished the same and shifted to another place for her stay and intended to reconstruct the house. But she could not arrange money to construct a new building thereon. It shows that the property in question was being used as dwelling house and the mother of the Petitioner had intention to make new construction of a building for her stay. At that juncture, the property was sold to Opposite Party Nos.3 and 4, who in turn sold the property to Opposite Party No.1. It is also deposed by the Petitioner that he would construct the residential building thereon after removing the temporary structure and tin shed from the property after getting possession. It is thus clear that the Petitioner and his mother were although out were treating the property as homestead. For a temporary period, for sustenance of the Plaintiff, the property was let out to one Sohan Lal Chug, who by constructing a temporary tin shed, was running his business. As the property was in the meantime alienated and for the subsequent events, as narrated above, neither the Plaintiff nor the Petitioner could get opportunity to make construction thereon. The evidence of the Petitioner as quoted supra was not challenged by Mr. Chakravarty, learned counsel for Opposite Party No.1. On the other hand, accepting the aforesaid evidence, Mr. Chakravarty, learned counsel for Opposite Party No.1 submitted that the evidence of the Petitioner clearly goes to show that at the time of filing of the petition under Section 4 of the Partition Act there was no dwelling house existing over the suit property. As laid down by this Court as well as Calcutta High Court in the case of ***Tejpal Khandelwal (supra)*** and ***Mohiddin Molla (supra)*** respectively, it is clear that only because the property was being used for some other purpose for a temporary period, it would not lose its

character of being a dwelling house. Fact remains that there was a dwelling house existing over the suit property and by demolishing the same, mother of the Petitioner had an intention to construct a new building thereon for her stay. But due to paucity of funds, she could not build the same. She for a temporary period let out the property to one Sohan Lal Chug to run his business. In view of the ratio in the case laws, as aforesaid, there remains no iota of doubt that the property in question had not lost its character of a dwelling house only because the dwelling house was demolished for construction of a new one and for a temporary period, it was being used for a purpose other than dwelling house.

11. The case law cited by Mr. Chakravarty, learned counsel for the Opposite Party No.1 explains the position of law to maintain an application under Section 4 of the Partition Act. It does not deal with a situation as in the case in hand.

12. As discussed above, the property having not lost its character of a dwelling house, in view of the intervening circumstances in the facts and circumstances of the case, the conclusion arrived at by learned trial Court in the impugned order is not sustainable.

13. In view of the discussions made above, I do not approve such finding. Accordingly, the impugned order under Annexure-7 is set aside and the matter is remitted to learned trial Court for fresh adjudication of the petition under Section 4 of the Partition Act on its own merit keeping in mind the discussion made hereinabove and giving opportunity of hearing to the parties concerned.

14. The CMP is, accordingly, allowed to the aforesaid extent. However, in the facts and circumstances, there shall be no order as to costs.

—— o ——

2023 (III) ILR – CUT - 497

B.P.ROUTRAY, J.

MACA NO. 793 OF 2013

M/s. UNITED INDIA INSURANCE CO.LTD. ………Appellant

-V-

SRI RAM FUKAR MAJHI & ORS. ………Respondents

MOTOR VEHICLE ACT,1988 – Section 167 r/w Employee Compensation Act, 1923 – Whether compensation under both the Acts is permissible? – Held, No.

Case Laws Relied on and Referred to :-

1. 2013(2) TAC 714 (M.P.) : Bharti AXA General Insurance Co.Ltd Vs. Shanti & Ors.
2. (2009) 4 SCC 778 : National Insurance Co.Ltd. Vs. Sebastian K. Jacob.

3. 2002 ACJ 1383(Bombay : Nitin Transport Vs. Maharashtra State Road Corporation.
4. 2013 (Supplementary 2) OLR 681 : Tanulata Pradhan & Anr Vs. Mahendra Prasad & Anr.

For Appellant : Mr. S.Satpathy

For Respondents : Mr. B.B.Singh

JUDGMENT Date of Judgment : 23.08.2023

B. P.ROUTRAY, J.

1. Heard Mr.Satpathy, learned counsel for the Appellant & Mr.Singh, learned counsel for the Respondents.

2. Present appeal by the Insurer is directed against judgment dated 17th May 2013 of 2nd MACT, Cuttack in Misc. Case No.1220 of 1996, wherein compensation to the tune of Rs.1,77,300/- has been granted along with interest @7% per annum with effect from the date of filing of the claim application on account of death of the deceased in the motor-vehicular accident dated 20th October, 1996.

3. Mr. Satpathy submits that same Claimants had preferred W.C. Case No. 76 of 1997 before learned Commissioner for Workmen's under the provisions of Employee's Compensation Act and received compensation amounting Rs.1,63,853/-. The said amount directed by the learned Employee's Commissioner has been satisfied and received by the Claimants. Mr. Satpathy thus submits that present claim application which was filed subsequently under the MV Act is not entertainable.

4. Mr.Singh, learned counsel for the Claimants is unable to dispute the contentions of the Insurer regarding receipt of compensation under the provisions of Employee's Compensation Act. Rather the fact of receipt of compensation by the Claimants in W.C. Case No. 76 of 1997 is admitted. However, Mr.Singh contends that receiving compensation under the Employee's Compensation Act would not stand as a bar to maintain present claim application.

5. It is true that the Claimants in such case where the deceased was a workman and a victim of motor-vehicular accident, has the option to choose either forum as per the provisions contained under Section 167 of MV Act. But he cannot choose both forums to get double compensation. The rationale behind the provision under Section 167 is that, once the same cause of action gives rise claim for damages, it cannot be counted twice for the self same cause. In ***Bharti AXA General Insurance Co.Ltd vrs. Shanti & Ors., 2013(2) TAC 714 (M.P.)***, where the Claimant has approached the Workmen's Compensation Court after receiving the compensation under Section 166 of the MV Act, the Single Judge of Madhya Pradesh High Court with reference to the case of ***National Insurance Co.Ltd. vrs. Sebastian K.Jacob, (2009) 4 SCC 778*** and the decision of Bombay High Court in ***Nitin Transport vrs. Maharashtra State Road Corporation, 2002 ACJ 1383 (Bombay)*** and many other

decisions of different other High Courts, held that second claim application filed by the same Claimants after receiving the award is not maintainable under the MV Act.

6. A person who is a victim of motor-vehicular accident is entitled to claim for compensation under the Employee's Compensation Act if he satisfies the requirements as a workman there under without prejudice to the provisions under the MV Act. But the claim of compensation under both the Acts, instead of either Act, is certainly impermissible to avoid double compensation. This Court in the case of ***Tanulata Pradhan & Anr vrs.Mahendra Prasad & Anr, 2013 (Supplementary 2) OLR 681*** have also observed in the same line.

7. Therefore, in the facts of the present case where admittedly the Claimants have already received the compensation under provisions of the Employee's Compensation Act, their further claim for compensation under the MV Act is not entertainable. Accordingly, it is held that the Claimants are not entitled to get further compensation under the Motor Vehicle Act.

8. The appeal is allowed and the impugned award is set aside.

9. The statutory deposit made by the Appellant with accrued interest thereon shall be refunded to him on proper application.

—— o ——

2023 (III) ILR – CUT - 499

B.P. ROUTRAY, J.

MACA NO.1012 OF 2016

RATNAMANJARI RANA & ORS. ……….Appellants

-V-

LEGAL MANAGER, M/s. IFFCO TOKIO GENERAL ALLIANCE CO. LTD., CUTTACK & ANR. ……….Respondents

COMPENSATION –The contention of claimant that the deceased had income of ₹ 28000/- per month and they filed IT return amounting to ₹ 927/- for the Assessment year 2012-13 – The insurer did not adduce any rebuttal evidence to disbelieve the contention of the claimants with regard to income of the deceased – Effect of – Held, no reason is found to disbelieve the income of the deceased when IT return was filed by the deceased sufficiently before his death, his name shown in the same is bound to be accepted, accordingly compensation modified. (Para 5-6)

Case Law Relied on and Referred to :-

1. 2022 Live Law (SC) 1012 : Smt Anjali & Ors. Vs. Lokendra Rathod & Ors.

For Appellants : Mr. A.K. Otta

For Respondents : Ms. R. Pati

JUDGMENT Date of Judgment : 02.09.2023

B.P. ROUTRAY, J.

1. Heard Mr. A.K. Otta, learned counsel for the claimant – Appellants and Ms. R. Pati, learned counsel for insurer – Respondent No.1.

2. Present appeal by the claimants is directed against the impugned judgment dated 29th August, 2016 of leaned 1st Additional District Judge-cum-1st MACT, Cuttack passed in MAC No.695 of 2013, wherein compensation to the tune of Rs.8,20,000/- along with interest @ 7% per annum from the date of filing of the claim application, i.e. 5th November 2013 has been granted on account of death of deceased Debasis Rana in the motor vehicular accident dated 8th October 2013.

3. Mr. Otta, learned counsel submits on behalf of the Appellants that learned tribunal has failed to appreciate actual income of the deceased at the time of his death and copy of the I.T. return produced to that effect was discarded illegally.

4. The deceased was aged about 30 years on the date of accident. The negligence on the part of the driver of the offending vehicle, i.e. truck bearing registration number OR-21-C-5134 and the liability on the insurer to indemnify the compensation amount, are never disputed. It is the consistent case of the claimants that the deceased was owner of a truck and earning Rs.28,000/- per month. He filed the I.T. return for the Assessment Year 2012-13 showing his income at Rs.3,38,400/- per annum. He has also paid income tax amounting to Rs.927/- for the Assessment Year 2012-13. These documents have been produced under Ext.10 and Ext.11. The copy of the RC book standing in the name of the deceased has also been filed under Ext.12. But the tribunal discarded such contentions of the claimants holding that the claimants have failed to produce copies of I.T. returns for three consecutive years and therefore, their contentions are not believable. Then the tribunal took notional income of the deceased at Rs.5000/- per month. This approach of the tribunal appears erroneous and is disapproved by this court.

5. Admittedly the insurer did not adduce any rebuttal evidence to disbelieve the contention of the claimants with regard to income of the deceased. When the contention of claimants that the deceased had income of Rs.28,000/- per month was left unrebutted, and they filed the IT return in support of the same as well as the copy of RC book of the truck owned by the deceased, no reason is found to disbelieve the same. The Hon'ble Supreme Court in ***Smt Anjali & Ors Vs- Lokendra Rathod & Ors, 2022 Live Law (SC) 1012,*** while dealing with a case of similar nature have held as follows:-

> "9. The Tribunal and the High Court both committed grave error while estimating the deceased's income by disregarding the Income Tax Return of the Deceased. The appellants had filed the Income Tax Return (2009-2010) of the deceased, which reflects the deceased's annual income to be Rs.1,18,261/-, approx. Rs.9,855/- per month. This Court in ***Malarvizhi & Ors. v. United India Insurance Co. Ltd. & Ors., (2020) 4 SCC 228*** has reaffirmed that the Income Tax Return is a statutory document on which reliance be placed, where available, for computation of annual income. In ***Malarvizhi (supra)***, this Court has laid as under:
>
> "10….. We are in agreement with the High Court that the determination must proceed on the basis of the income tax return, where available. The income tax return is a statutory document on which reliance may be placed to determine the annual income of the deceased."
>
> xxxxx xxxxx xxxxx"

6. In the instant case, it is the further contention of the claimants and has been stated by P.W.1, the widow, that the truck owned by the deceased was sold after his death to meet the loan liability in respect of the same. When the I.T. return was filed by the deceased sufficiently before his death, his income shown in the same is bound to be accepted. Accordingly, the income of the deceased is taken at Rs.3,37,473/- per annum (Rs.3,38,400.00 –Rs.927.00). Accordingly the annual loss of dependency with addition of future prospect to the extent of 40% and deduction of 1/4th towards personal expenses, comes to Rs.3,58,023/-. Applying multiplier '16', total loss of dependency becomes Rs.57,28,380/-. Adding general damages to the extent of Rs.70,000/- including consortium to the widow, it is determined at Rs.57,98,380/-, payable along with interest @ 6% per annum.

7. At this stage it is submitted that the amount as directed by the tribunal has already been paid and received by the claimants along with interest. Thus the insurer is liable to pay the differential amount.

8. In the result the appeal is disposed of with a direction to the insurer – Respondent No.1 to deposit the differential compensation of Rs.49,78,380/- (forty-nine lakhs seventy-eight thousand three hundred eighty) before the tribunal along with interest @ 6% per annum from the date of filing of the claim application, i.e. 5th November 2013, within a period of two months from today, where-after the same shall be disbursed in favour of the claimants on such terms and proportion to be decided by learned tribunal.

9. The direction of the tribunal for payment of default interest @ 9% per annum is waived.

10. On deposit of the award amount before learned Tribunal and filing of a receipt evidencing the deposit with refund application before this Court, the statutory deposit made by the Appellant before this Court with accrued interest thereon shall be refunded to the Insurance Company.

11. The copies of evidence and depositions produced by Mr. Otta in course of hearing are kept on record.

2023 (III) ILR – CUT - 502

Dr. S.K. PANIGRAHI, J.

W.P.(C) NO. 49 OF 2022

SANDEEP JAJODIA ………Petitioner

-V-

IDBI BANK LTD. & ORS. ………Opp. Parties

(A) THE INSOLVENCY AND BANKRUPTCY CODE, 2016 – Section 95 r/w Rule 16(d) of the National company Law Tribunal Rules, 2016 – The IDFC Bank filed application U/s. 7 of the code against the corporate Debtor before NCLT Mumbai – The NCLT Cuttack Bench has been formed on 12.07.2018 vide notification being S.O. 3430(E) having territorial Jurisdiction over state of Odisha and state of Chhatisgarh – On 18.08.2021 the NCLT Mumbai transferred the main matter along with all pending application to NCLT Cuttack Bench – Whether the NCLT Mumbai has the Jurisdiction to transfer the pending cases – Held, No – There is no automatic transfer as no such provision is laid down in the Notification, transfer of proceedings would only be made by the president of NCLT in terms of Rule 16(d) of the NCLT Rules, 2016.

(B) CONSTITUTION OF INDIA, 1950 – Articles 226 & 227 r/w section 61 of insolvency and bankruptcy Code, 2016 – Whether writ is maintainable against an order passed U/s. 95 of the Code? – Held, Yes – Section 95 of the code is under part III of IBC, where no appeal lies against the impugned order – So the writ is maintainable.

(C) ALTERNATIVE REMEDY – Whether writ petition is maintainable, when alternative remedy is available? – Held, Yes – When the question involved is one of Jurisdiction – The writ petition is maintainable.

Case Laws Relied on and Referred to :-

1. (2021) 8 SCC 481 : Laxmi Pat Surana Vs. Union Bank of India and Anr.
2. (2019) 9 SCC 158 : Vashdeo R. Bhojwani Vs.Abhyudaya Co-Operative Bank Limited & Anr.
3. 2022 SCC Online SC 847 : Kotak Mahindra Bank Limited Vs. Dilip Bhosale.
4. (2010) 8 SCC 110 : Bank of India Vs.Satyawati Tandon & Ors.
5. (2019) 10 SCC 572 : Gaurav Hargovindbhai Dave Vs. Asset Reconstruction Co. (India) Ltd.
6. (2019) 9 SCC 158 : Vashdeo R. Bhojwani Vs. Abhyudaya Co-operative Bank Limited.
7. WPA 977 of 2021 : Kolkata Municipal Corporation & Anr. Vs. Union of India.
8. FMA 459 of 2021: Kolkata Municipal Corporation & Anr. Vs. Union of India.
9. 2019 SCC OnLine Bom 5609: Kamal K. Singh Vs. Union of India.
10. 2023 SCC OnLine SC 95 : Godrej Sara Lee ltd. Vs.The Excise and Taxation Officer cum- Assessing Authority.
11.(2021) 6 SCC 771: Radha Krishnan Industries Vs. State of Himachal Pradesh.

For Petitioner : Mr. S. Mohanty

For Opp. Parties : Ms. S. Pattnaik
Mr. P.K. Parhi, DSGI

JUDGMENT Date of Hearing:20.07.2023 : Date of Judgment: 27.07.2023

Dr. S.K. PANIGRAHI, J.

1. The Petitioner, in this Writ Petition, has challenged the order dated 22.12.2021 passed by the National Company Law Tribunal, Cuttack Bench, Cuttack (hereinafter referred to as "the NCLT" for brevity) in CP (IB) No.64/CB/2021, whereby the NCLT has admitted the application filed by the Opposite Party No.1 under Section 95 of the Insolvency and Bankruptcy Code, 2016 (as amended) and has appointed the Opposite Party No.2 as Insolvency Resolution Professional.

I. Factual Matrix of the Case:

2. Bereft of unnecessary details, brief facts of the case are that on 19.03.2010, the Opposite Party No.1/ Bank extended a term loan for an amount of Rs.350 crores to M/s. Monnet Power Company Ltd. (hereinafter referred to as "the Corporate Debtor") for setting up a coal-based power plant, as per the terms and condition of a Sanction Letter.

3. Thereafter, on 30.06.2014, the Opposite Party No.1 issued another Sanction letter on the same date, in terms whereof the Corporate Debtor executed a Supplementary Rupee Loan Agreement. The Petitioner being a Managing Director of the Corporate Debtor, executed a deed of guarantee in favour of the Opposite Party No.1 in order to secure the loan amount. It was submitted that the said Guarantee was given under economic coercion and under duress since it was a necessary condition in the Loan Sanction.

4. Admittedly, since 31.07.2015, the Corporate Debtor was unable to service the debts of the Opposite Party No.1. On 20.11.2017, the Opposite Party No.1 issued a notice to the Petitioner invoking personal guarantee and calling upon the Petitioner to pay a sum of Rs.490 crores (approx). In December 2017, the IDFC Bank, another financial creditor of the Corporate Debtor filed a Petition under Section 7 of the IBC against the Corporate Debtor before the NCLT, Mumbai.

5. On 23.02.2018, the NCLT, Mumbai passed an Order admitting the C.P. No. 1696/1 & BC/MB/MAH/2017 filed by the IDFC Bank under Section 7 of the IBC and appointed an Interim Resolution Professional to carry out functions as mentioned in the IBC. Thus, Corporate Insolvency Resolution Process of the Corporate Debtor commenced from the said date.

6. On 12.07.2018, vide notification being S.O.3430(E), the National Company Law Tribunal, Cuttack bench was formed having territorial jurisdiction over State of Odisha and State of Chhattisgarh.

7. However, since no resolution plan was submitted in respect of the Corporate Debtor, the NCLT, Mumbai passed the order dated 23.10.2019 for commencement of liquidation process and appointed the Resolution Professional as the Liquidator of the Corporate Debtor. The Petitioner has submitted that despite the NCLT, Cuttack Bench having been formed on 12.07.2018 pursuant to notification being S.O.3430(E), the NCLT, Mumbai Bench continued to hear the said matter and even passed the order for commencement of Liquidation process on 23.10.2019.

8. On 17.05.2021, the Opposite Party No.1 issued an Insolvency Demand Notice under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019 (hereinafter referred to as "the Rules" for brevity), calling upon the Petitioner to pay an amount of Rs.818,98,71,619/-.

9. On 27.07.2021, the Opposite Party No.1 through the Opposite Party No.2 filed an application under Section 95 of the IBC to initiate Personal Insolvency Resolution Process against the Petitioner before the NCLT, Mumbai. On 10.08.2021, the NCLT, Mumbai in violation of Rule 16(d) of the National Company Law Tribunal Rules, 2016 (hereinafter referred to as "the NCLT Rules, 2016" for brevity) transferred the main matter along with all pending applications to NCLT, Cuttack Bench.

10. On 27.07.2021, the Opposite Party No.1 filed a Petition under Section 95 of the IBC, before the NCLT, Cuttack bench, pursuant to which the NCLT, Cuttack Bench has passed the impugned order dated 22.12.2021. On 02.12.2021, the Petitioner appeared before the NCLT, Cuttack bench. On 14.12.2021, the Petitioner filed a Short Affidavit stating inter alia that the NCLT, Cuttack did not have jurisdiction to entertain the Petition filed by the Opposite Party No.1.

11. On 21.12.2021, the matter was listed before the NCLT, Cuttack whereby both the parties made their submissions that the order dated 10.08.2021 passed by the NCLT, Mumbai was invalid and not in accordance with law. Therefore, the NCLT, Cuttack did not have jurisdiction to entertain the said Petition.

12. On 22.12.2021, the NCLT, Cuttack without appreciating the fact that the order dated 10.08.2021 transferring the case from one Bench to another was invalid and not in accordance with law, passed the impugned order observing that the Petition under Section 95 of the IBC can be entertained by the NCLT, Cuttack and appointed Opposite Party No.2 as the Insolvency Professional. Hence, this Writ Petition.

II. Submissions advanced on behalf of the Petitioner:

13. Learned Counsel for the Petitioner has brought forward the following submissions:

a. The NCLT, Cuttack has failed to appreciate that under Rule 16(d) of the National Company Law Tribunal Rules, 2013 (hereinafter referred to as the "NCLT Rules, 2016") only the President of the National Company Law Tribunal is empowered to "transfer any case from one Bench to other Bench when the circumstances so warrant". In view of the express statutory mandate as contained in Rule 16(d) of the NCLT Rules, 2016, the transfer order dated 10.08.2021 passed by the NCLT, Mumbai is complete without jurisdiction inasmuch as it is in blatant violation of Rule 16(d) of the NCLT Rules, 2016. Therefore, the NCLT, Cuttack Bench having proceeded on the basis of the transfer order dated 10.08.2021, which is by itself is a nullity and suffers from a patent and inherent lack of jurisdiction inasmuch as the vesting of jurisdiction on the NCLT, Cuttack Bench by the NCLT, Mumbai Bench which is vitiated in violation of Rule 16(d) of the NCLT Rules, 2016.

b. The NCLT, Cuttack has failed to appreciate that transfer order dated 10.08.2021 is a complete nullity given that the same is against the provision contained in Rule 16(d) of the NCLT Rules, 2016. The NCLT, Mumbai has, therefore, proceeded without jurisdiction in passing the transfer order dated 10.08.2021.Therefore, the NCLT, Mumbai was completely *coram non judice* and the transfer order dated 10.08.2021 is *non est* in law. The proceeding before the NCLT, Cuttack Bench itself is *non est* since it proceeds on the basis of a *coram non judice* transfer order dated 10.08.2021.

c. The NCLT, Cuttack has failed to appreciate that the transfer order dated 10.08.2021 being against the express provision contained in Rule 16(d) of the NCLT Rules, 2016 which is bad in law inasmuch as it suffers from a patent and inherent lack of jurisdiction, as the NCLT Rules, 2016 does not confer any such jurisdiction. The NCLT, Mumbai to transfer any case from one Bench to another, which has been exclusively conferred only on the President, NCLT, Principal Bench. Therefore, the NCLT, Cuttack Bench also suffers from a patent and inherent lack of jurisdiction in passing the impugned Order dated 22.12.2021.

d. Even though no resolution plan was submitted in respect of the Corporate Debtor, the NCLT, Mumbai on 23.10.2019 passed the order for commencement of Liquidation process and appointed the Resolution Professional as the Liquidator of the Corporate Debtor. Despite the NCLT, Cuttack Bench having been formed on 12.07.2018 pursuant to notification being S.O.3430(E), the NCLT, Mumbai Bench continued to hear the said matter and even passed the Order for commencement of Liquidation process on 23.10.2019.

e. The impugned order dated 22.12.2021 passed by the NCLT, Cuttack is ex facie illegal and without jurisdiction. In view of Rule 16(d) of the NCLT Rules, 2016, the NCLT, Cuttack is in gross disregard of the said statutory provision in holding that, "*in pursuance of the formation of NCLT Cuttack Bench having territorial jurisdiction over the State of Odisha and State of Chhattisgarh general notification*

was issued to transfer the pending cases pertaining to State of Chhattisgarh from Mumbai Bench and cases pertaining to State of Odisha from Kolkata Bench to new constituted Cuttack Bench. Thus, the transfer order was passed by the Mumbai-Bench because of cessation of territorial jurisdiction instead it had not passed any order usurping the power of President hence the objection raised on the Opp. Party side questioning the power of transfer ordered by the Mumbai-Bench in this regard is unsustainable".

f. The NCLT, Cuttack had no jurisdiction to conclude that the NCLT, Mumbai had jurisdiction to pass the order dated 10.08.2021 in view of Rule 16(d) of the NCLT Rules, 2016.

g. The NCLT, Cuttack has erred in passing the impugned order dated 22.12.2021 inasmuch as it ignored the fact that the limitation in respect of the claim sought to be raised by the Opposite Party No.1 herein started on the date of default (i.e. 30.06.2015) of the principal borrower, Monnet Power Company Limited. Therefore, the limitation in respect of the said claim has expired. In this regard, the Supreme Court of India in ***Laxmi Pat Surana v. Union Bank of India and Anr***[1]., has held as follows:

> *"**43**. Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action under Section 7 IBC. However, Section 7 comes into play when the corporate debtor commits "default". Section 7, consciously uses the expression "default"- not the date of notifying the loan account of the corporate person as NPA. Further, the expression "default" has been defined in Section 3(12) to mean non-payment of "debt" when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor), would get triggered the moment the principal borrower commits default due to non-payment of debt."*

h. The impugned order dated 22.12.2021 passed by the NCLT, Cuttack Bench is liable to be set aside in view of the judgment of the Supreme Court in ***Vashdeo R. Bhojwani v. Abhyudaya Co-Operative Bank Limited & Anr***[2]**.** inasmuch as the purported "default" by the Petitioner herein, is not a continuing one and limitation with respect to it started to run on the date of default (i.e., 30.06.2015) of the principal borrower, Monnet Power Company Limited. Therefore, the limitation in respect of the said claim has expired.

i. The impugned order dated 22.12.2021 passed by the NCLT, Cuttack Bench is completely erroneous inasmuch as the NCLT, Cuttack has proceeded to appoint the Resolution Professional and empowered it to exercise powers under Section 99 of the IBC without even conducting a preliminary examination on the question of the claims being barred by limitation, which was vehemently urged by the counsel for the Petitioner before the NCLT, Cuttack Bench.

1. (2001) 8 SCC 481, **2**. (2019 9 SCC 158

j. The impugned order dated 22.12.2021 suffers from complete non-application of mind inasmuch as in proceeding with the Opposite Party No.1's petition under Section 95 of the IBC. The NCLT, Cuttack has failed to consider that grave civil consequences follow on admission of the personal insolvency proceedings under Chapter III of the IBC against an individual inter alia imposition of statutory moratorium under Section 96 of the IBC, which directly impinges upon the Petitioner's fundamental rights under Articles 14, 19 and 21 of the Constitution of India.

k. The NCLT Cuttack has gone beyond the pleadings of the Petition filed before it inasmuch as there was no mention of the transfer order passed by the NCLT, Mumbai in the said Petition. The NCLT, Cuttack has passed the impugned order dated 22.12.2021 without dealing with the submissions made by the Petitioner in his Affidavit dated 14.12.2021.

III. Submissions on behalf of Opposite Party No.1:

14. Learned counsel for the Opposite Party No.1 submitted that the Petitioner in this Writ Petition has challenged the impugned order on three grounds i.e. (i) question to jurisdiction (ii) question to limitation and (iii) existence of alternative remedy. He has brought forward the following submissions:

a. With regard to question to jurisdiction, learned counsel for the Opposite Party No.1 submitted that the Petitioner has objected to the jurisdiction of the NCLT in transferring the case instituted by another financial creditor-IDFC Bank against the corporate debtor to NCLT, Cuttack Bench. Pertaining to such objection, he submitted that the Notification dated 12.07.2018, issued by the Ministry of Corporate Affairs (MCA), NCLT, Cuttack was commissioned and the jurisdiction of cases arising out of State of Chhattisgarh was transferred to NCLT, Cuttack. In view of such notification by MCA and NCLT, Cuttack, the NCLT, Mumbai passed the order dated 10.08.2021 transferring all such cases to NCLT, Cuttack. The notification issued by MCA in 2018 is very clear on the point of jurisdiction. Thus, the transfer order passed by NCLT, Mumbai was made due to the cessation of territorial jurisdiction of NCLT, Mumbai and is well within the realms of legality.

b. It was submitted that the case which got transferred from NCLT, Mumbai to NCLT, Cuttack was between Monnet Power Company Ltd i.e., the Corporate Debtor and IDFC Bank which is another Financial Creditor. The Opposite Party No.1 had no role to play in such proceeding. Further, the application under Section-95 of the IBC moved by the Opposite Party No.1 before the NCLT, Cuttack is a fresh application and filed in the individual capacity of Opposite Party No.1 as a financial creditor against the personal guarantor to the corporate debtor. It has only been clubbed together with the transferred case by the NCLT, Cuttack by exercising its powers vested under Section-60(2) of IBC, 2016. Section-60(2) of IBC, 2016 has been quoted herein below:

"60. Adjudicating Authority for corporate persons. –

(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or 1 [liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor] shall be filed before the National Company Law Tribunal."

c. The petitioner if aggrieved by such transfer or order of liquidation passed by the NCLT, Mumbai in a case against the corporate debtor should have pursued his remedy by filing an objection before NCLT, Mumbai. However, he has challenged it here after the Opposite Party No.1 moved individually before the NCLT, Cuttack, whereas the Opposite Party No.1 is in no way related to the case which was transferred. It is peculiar that, although the Petitioner contended that the jurisdiction of NCLT, Mumbai in transferring the case instituted by another Financial Creditor-IDFC Bank to NCLT, Cuttack is untenable, but the Petitioner has failed to challenge the same in its prayer in the present Writ Petition. It has no where avowed the veracity of the transfer order in the prayer of the present Writ Petition.

d. Further, if the Petitioner was aggrieved by such transfer order dated 10.08.2021 he could have moved an objection petition before the NCLT, Mumbai. However, he did not do so and raised an objection to such transfer only after the Opposite Party No.1 moved before the NCLT, Cuttack by way of filing an application under Section 95 of the IBC, 2016. This implicates nothing but the delaying and mala fide tactics resorted to by the Petitioner.

e. Furthermore, the challenge to transfer order does not relate to the application under Section 95 of IBC, 2016 moved before the NCLT, Cuttack by the Opposite Party No.1 because it is an individual petition filed by the Opposite Party No.1 after the commencement of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019.

f. Additionally, the most iterated averment raised in the Writ Petition is that the transfer order is valetudinarian because in accordance to Rule-16(d) of NCLT Rules, 2016, it is the president who has the authority to transfer petitions from one bench to other. The said provisions have been quoted herein below:

"16. Functions of the President.- In addition to the general powers provided in the Act and in these rules the President shall exercise the following powers, namely:-"(d) transfer any case from one Bench to other Bench when the circumstances so warrant."

g. Reliance has been placed by the petitioner on Rule-16(d) of NCLT Rules, 2016, but the same is not applicable to the present case because there is a statutory notification dated 12.07.2018 issued by the Ministry of Corporate Affairs constituting the NCLT, Cuttack Bench. A bare perusal of the afore quoted provision

would go to show that it is telltale that it is not applicable to the present case and that the transfer order has been made due to the cessation of territorial jurisdiction and not be usurping the power of the President granted under Rule-16(d), NCLT Rules, 2016.

h. With regard to the question to limitation by the Petitioner, it was submitted by the counsel for the Opposite Party No.1 that the Petitioner has raised an objection on the period of limitation against the action of the Opposite Party No.1 in moving the NCLT, Cuttack by virtue of the Application under Section 95 application of IBC.

i. Pertaining to such objection he submitted that the question of limitation is a mixed question of fact and law. The loan agreement was executed between the corporate debtor Monnet Power Company Ltd. and the Opposite Party No.1. When the corporate debtor failed in making the payments, the Opposite Party No.1 issued notice to the Petitioner invoking personal guarantee for the payment to the tune of Rs.490,41,59,589.00. Thereafter, the Opposite Party No.1 moved before the DRT, New Delhi vide O.A No.418 of 2019. The Opposite Party No.1 resorted to the route of moving before the DRT, New Delhi because the Petitioner i.e., the personal guarantor to the loan agreement executed between Monnet Power Company Ltd. and the Opposite Party No.1 did not come under the ambit of IBC, 2016. It was only in 2019 that the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019 came into force and the scope of Personal Guarantor was brought under the purview of IBC, 2016 by insertion of Section-2(e) in the code. The said provision has been quoted herein below:

> *"2. Application. The provisions of this Code shall apply to (e) personal guarantors to corporate debtors;"*

j. The said Rules came into force on 01.12.2019. After personal guarantors were brought under the purview of IBC, 2016, the Opposite Party No.1 withdrew the application filed before the DRT, New Delhi and moved the NCLT, Cuttack on 27.07.2021.

k. Article-137 of Limitation Act, 1963 provides for a limitation period for any application for which no period of limitation is provided in any of the Articles in the Schedule to the Limitation Act. It provides for a period of limitation of 3 years from the date when the right to apply accrues. The said provision has been quoted herein below:

> *"PART II OTHER APPLICATION 137. Any other application for which no period of limitation is provided elsewhere in this Division/Three years/ When the right to apply accrues."*

l. The Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules,

2019 came into force on 01.12.2019. The Opposite Party No.1 moved before the NCLT, Cuttack on 27.07.2021 under Section-95 of IBC, 2016 and also issued a demand notice prior to that on 17.05.2021 under Rule-7(1) of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019. This indicates that while the right accrued in 2019, the Opposite Party moved before the NCLT, Cuttack in 2021, which is well within the 3 year limitation stipulated under the Limitation Act, 1963.

m. Furthermore, according to Section-238A of IBC, 2016, the provision of limitation act will be applicable to the proceedings before NCLT as far as the case may be. The provision is quoted herein below:

> *"238A. Limitation. The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be."*

n. Additionally, the question of limitation has already been dealt by the NCLT, Cuttack in its order dated 22.10.2021 and the NCLT, Cuttack Bench has already allowed the application under Section-95 moved by the Opposite Party No.1 by considering the coming into force of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019.

o. So far as the existence of alternative remedy is concerned, he submitted that the Petitioner has nugatorily filed this Writ Petition because of the fact that there is existence of an alternative remedy prescribed by the statute. Section-61 of the IBC, 2016 stipulates that:

> *"**61.Appeals and Appellate Authority***
>
> *(1) Notwithstanding anything to the contrary contained under the Companies Act 2013 (18 of 2013), any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.*
>
> *(2) Every appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal:*
>
> *Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days.*
>
> *(3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:*
>
> *(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;*
>
> *(ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;*

(iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;

(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or

(v) the resolution plan does not comply with any other criteria specified by the Board. 1[(4) An appeal against a liquidation order passed under section 33, or sub-section (4) of section 54L, or sub-section (4) of section 54N, may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order.

(5) An appeal against an order for initiation of corporate insolvency resolution process passed under sub-section (2) of section 54-0, may be filed on grounds of material irregularity or fraud committed in relation to such an order."

p. It is clear from the aforesaid that a party aggrieved by an order of the NCLT, Cuttack is to statutorily approach the NCLAT for filling an appeal. Nevertheless, the petitioner under the garb of a Writ Petition has filed an appeal against the order of the NCLT, Cuttack.

q. Therefore, in the presence of a statutorily alternative remedy, a petition under Article 226 of the Constitution of India is not tenable in law. In the case of ***Kotak Mahindra Bank Limited vs. Dilip Bhosale***[3], the apex Court has succinctly reiterated that:

"8. Before parting with the order, we would like to observe that this Court is consistent of the view and can be noticed from the judgment in United ***Bank of India vs. Satyawati Tandon & Ors***[4]*., that when a remedy under the statute is available and in the instant case which indeed was availed by the respondent/borrower, filing of a writ petition under Article 226 of the Constitution is to be discouraged by the High Court."*

r. In such view of the matter, he submitted that the Petitioner could have moved the NCLAT challenging the order dated 22.10.2021 passed by the NCLT, Cuttack in admitting the application under Section 95 of the IBC filed by the Opposite Party No.1 and appointing the IRP. Also, the Petitioner could have filed an objection before the NCLT, Mumbai challenging its order of liquidation dated 23.10.2019 and order of transfer dated 10.08.2021. Moreover, the debt amount is to the tune of Rs.8,189,871,619.31. The Petitioner has filed the present Writ Petition with the sole motive of delaying the proceedings before the NCLT, Cuttack.

IV. Court's Reasoning and Analysis:

15. The present Writ Petition arises out of a proceeding i.e. C.P. No.64/CB/2021 instituted by the Opposite Party No.1 against the Writ Petitioner before the NCLT, Cuttack Bench under Section 95 of the IBC and the impugned Order dated 22.12.2021 has been passed by the NCLT, Cuttack Bench in the said proceeding appointing the Opposite Party No.2 as the Resolution Professional. The present proceedings are not Recovery Proceedings. The same are Insolvency Proceedings.

3. 2022 SCC Online SC 847, **4**. (2010) 8 SCC 110

16. It was contended by the Petitioner that the Opposite Party No.1 Bank has issued a Demand Notice (Form-B) dated 17th May, 2021 under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019. Admittedly, according to the Bank, the alleged default has occurred on 31st July, 2015, whereas, the Section 95 petition was filed by the Bank on 8th September, 2021. As such, the insolvency proceeding is ex-facie barred by the Laws of Limitation.

17. It is well settled proposition of law that the right to sue accrues only on and from the date of default and the insolvency proceeding can only be filed within three years from the date of default as per Article 137 of the Limitation Act, 1963, which is applicable to the I.B.C. by virtue of Section 238A of the said Code. The intent of the said Code could not have been to give a new lease of life to debts, which are already time-barred. In any case, respondents had an option to initiate Insolvency Proceedings under the applicable Insolvency Enactment (Provincial Insolvency Act) during the Limitation period post 31st July 2015. The contention of the Opposite Party No.1/ Bank that the time of limitation would begin running for the purpose of limitation only on and from 1st December, 2019, when Section 95 has come into force vide Notification dated 15th November, 2019, is erroneous and misconceived as it goes against the object of the Code. Further, if accepted, this would tantamount to reviving a cause which is time barred. In this regard, the ratio decided by the Supreme Court in the case of ***Gaurav Hargovindbhai Dave v. Asset Reconstruction Co. (India) Ltd***[5]. In the said Judgment, the Court has held:

"xx xx xx xx xx xx xx

> *Having heard the counsel for both sides, what is apparent is that Article 62 is out of the way on the ground that it would only apply to suits. The present case being "an application" which is filed under Section 7, would fall only within the residuary Article 137. As rightly pointed out by the counsel appearing on behalf of the appellant, time, therefore, begins to run on 21-7-2011, as a result of which the application filed under Section 7 would clearly be time-barred. So far as Mr Banerjee's reliance on para 11 of B.K. Educational Services (P) Ltd. [B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates, (2019) 11 SCC 633], suffice it to say that the Report of the Insolvency Law Committee [Ed.: Report of the Insolvency Law Committee (March, 2018), Ministry of Corporate Affairs, Government of India] itself stated that the intent of the Code could not have been to give a new lease of life to debts which are already time-barred.*

xx xx xx xx xx."

18. In ***Vashdeo R. Bhojwani v. Abhyudaya Co-operative Bank Limited***[6], the apex Court has held as follows:

> *"1. In the facts of the present case, at the relevant time, a default of Rs 6.7 crores was found as against Respondent 2. Respondent 2 had been declared an NPA by Abhyudaya Cooperative Bank Limited on 23-12-1999. Ultimately, a recovery certificate dated 24-12-2001 was issued for this amount. A Section 7 petition was filed by Respondent 1 on*

5. (2019) 10 SCC 572, **6.** (2019) 9 SCC 158

21-7-2017 before NCLT claiming that this amount together with interest, which kept ticking from 1998, was payable to the respondent as the loan granted to Respondent 2 had originally been assigned, and, thanks to a merger with another Cooperative Bank in 2006, the respondent became a Financial Creditor to whom these moneys were owed. A petition under Section 7 was admitted on 5-3-2018 by NCLT, stating that as the default continued, no period of limitation would attach and the petition would, therefore, have to be admitted.

2. An appeal filed to NCLAT resulted in a dismissal on 5-9-2018 [Trust House Commerce Centre (P) Ltd. v. Abhyudaya Coop. Bank Ltd., 2018 SCC OnLine NCLAT 698], stating that since the cause of action in the present case was continuing, no limitation period would attach. It was further held that the recovery certificate of 2001 plainly shows that there is a default and that there is no statable defence.

3. Having heard the counsel for both parties, we are of the view that this is a case covered by our recent judgment in B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates [B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates, (2019) 11 SCC 633], para 42 of which reads as follows: (SCC p. 664)

"42. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application."

4. In order to get out of the clutches of para 27, it is urged that Section 23 of the Limitation Act would apply as a result of which limitation would be saved in the present case. This contention is effectively answered by a judgment of three Judges of this Court in Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan (Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan, 1959 Supp (2) SCR 476: AIR 1959 SC 798]. In this case, this Court held as follows: (SCR p. 496: AIR p. 807, para 31)

"31.... In dealing with this argument it is necessary to bear in mind that Section 23 refers not to a continuing right but to a continuing wrong. It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues then the act constitutes a continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury. It is only in regard to acts which can be properly characterised as continuing wrongs that Section 23 can be invoked. Thus considered it is difficult to hold that the trustees' act in denying altogether the alleged rights of the Guravs as hereditary worshippers and in claiming and obtaining possession from them by their suit in 1922 was a continuing wrong. The decree obtained by the trustees in the said litigation had injured effectively and completely the appellants' rights though the damage caused by the said decree subsequently continued."

Following this judgment, it is clear that when the recovery certificate dated 24-12-2001 was issued, this certificate injured effectively and completely the appellant's rights as a result of which limitation would have begun ticking.

5. (Ed.: Para 5 corrected vide Official Corrigendum No. F.3/Ed.B.J./125/2019 dated 14-1-2020.] This being the case, and the claim in the present suit being time-barred, there is no debt that is due and payable in law. We allow the appeal and set aside the orders of NCLT and Nclat [Trust House Commerce Centre (P) Ltd. v. Abhyudaya Coop. Bank Ltd., 2018 SCC OnLine NCLAT 698]. There will be no order as to costs."

19. In the present case, the principal borrower is a company, named Monnet Power Company Limited. Order of Admission dated 23rd February, 2018 which was passed by the NCLT, Mumbai Bench as the Registered Office of Monnet is in the State of Chhattisgarh.

20. By the Notification dated 12th July, 2018 filed by Union of India/Ministry of Corporate Affairs, the NCLT, Cuttack Bench was constituted with effect from 15th July, 2018 having territorial jurisdiction over the State of Odisha and Chhattisgarh. There was no provision for Transfer of pending proceedings in the said Notification (2018 Notification). Thus, the insolvency proceeding against Monnet was not transferred to NCLT, Cuttack right after its constitution/formation.

21. The NCLT, Mumbai Bench retained jurisdiction and also passed the order of Liquidation on 23rd October, 2019. It is relevant to mention that as per Section 60(2) of the IBC, 2016, it is Mumbai Bench only which could have entertained the Petition under Section 95 of IBC, 2016 as Guarantor of Corporate Debtor (Monnet Power Company Limited). Provisions of Section 60(2) IBC, 2016 is reproduced herein below:-

"Section 60 (2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor shall be filed before the National Company Law Tribunal."

22. There is no transfer provision promulgated by the MCA for transfer of proceeding from one Bench to another Bench of NCLT except for Rule 16(d) of National Company Law Tribunal Rules, 2016 which provides as under:

"Functions of the President- In addition to the general powers provided in the Act and in these rules the President shall exercise the following powers, namely:- (d) transfer any case from one Bench to other Bench when the circumstances so warrant,"

23. As per the said provision, only the President of the NCLT has the power to transfer proceeding from one Bench of NCLT to another. The Notification of 12th July, 2018 is applicable so far as the new proceedings are concerned, however, with regard to the pending proceedings, there is no automatic transfer as no such provision is laid down thereunder. Since the Notification of 12th July, 2018 does not

have any transfer provision for the pending proceeding, transfer of proceedings would only be made by the President of NCLT in terms of Rule 16(d) of the NCLT Rules, 2016.

24. The NCLT, Mumbai Bench could not have passed the order of transfer dated 10.08.2021 transferring the insolvency proceeding of Monnet to Cuttack Bench. Therefore, the submission of the Opposite Party No.1/ Bank that the transfer order dated 10.08.2021 passed by the NCLT, Mumbai Bench was not challenged in an appeal, is devoid of any merit. The question of the NCLT, Cuttack Bench not having jurisdiction to entertain the proceeding under Section 95 was raised by the Writ Petitioner in his reply affidavit. However, the same was not considered by the NCLT, Cuttack Bench. Thus, the order and the proceeding before the NCLT, Cuttack Bench are liable to be quashed.

25. Another contention of the Opposite Party No.1/ Bank was that the Writ Petitioner ought to have filed an appeal under Section 61 of the Code challenging the impugned order. Such contention is completely misconceived as the Order was passed under Section 95 of the Code, which is under Part-III of IBC. Section 61 appeal provision is under Part II IBC. No appeal lies against the impugned order. Therefore, no alternative remedy is available to the Writ Petitioner. In any event, alternative remedy is not an absolute bar to file writ petition. Writ petition is maintainable even if efficacious alternative remedy is available if question involved is one of jurisdiction. For the aforesaid proposition, the following judgments can be relied on: ***Kolkata Municipal Corporation & Anr. v. Union of India*[7], *Kolkata Municipal Corporation & Anr. v. Union of India*[8]**, ***Kamal K. Singh v. Union of India*[9]**, G***odrej Sara Lee ltd. v. The Excise and Taxation Officer cum- Assessing Authority*[10]**, ***Radha Krishnan Industries v. State of Himachal Pradesh*[11]**.

26. In light of the aforesaid discussion and having regard to the present position of law, this Court is inclined to allow the prayer of the Petitioner. Accordingly, the impugned order dated 22.12.2021 passed by the NCLT, Cuttack Bench in CP(IB) No.64/2021 is set aside.

27. The Writ Petition is, accordingly, disposed of.

7. WPA 977 OF 2021, **8**. FMA 459 OF 2021, **9**.2019 SCC On line Bom 5609
10. 2023 Scc On Line SC 95, 11. (2021 6 SCC 771

—— o ——

2023 (III) ILR – CUT- 516

SAVITRI RATHO, J.

CRLMC NO. 3006 OF 2023

LAXMIDHAR SWAIN & ORS. ..……..Petitioners

-V-

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

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 323, 482 – Whether the court of sessions can pass order for trial/hearing of two or more cases pending before it, one after the other on the same day, if they are found to be "case" and "counter case" or "cross case" – Held, yes – Applying the same principle as exercised by the magistrate in exercise of power U/s. 323 Cr.P.C, the court of session can also pass such order as this will prevent conflicting-Judgments from being delivered and would therefore be in the interest of Justice. (Para-6)

Case Laws Relied on and Referred to :-

1. 2007 (II) OLR 742 : Danda Naik and three Ors. Vs. State of Orissa.
2. 1990 Supp SCC 145 : Nathilal & Ors. Vs. State of Uttar Pradesh & Ors.
3. (2001) 2 SCC 688 : Sudhir Vs. State of Madhya Pradesh.
4. (2003) 9 SCC 426 : State of Madhya Pradesh Vs. Mishrilal.
5. (2010) 10 SCC 123: Pal @ Palla Vs. State of Uttar Pradesh.
6. 2011 SCC Online Karn 2394 : State of Karnataka Vs.Hosakeri Ningappa.

For Petitioners : Mr. B.S. Das

For Opp. Parties : Mr. S.S. Mohapatra, A.S.C.

JUDGMENT Date of Judgment :08.09.2023

SAVITRI RATHO, J.

1. This application under Section 482 Cr.P.C. has been filed by the petitioners challenging the order dated 03.06.2023 passed by the learned Assistant Sessions Judge, Soro in S.T. Case No.12 of 2022 corresponding to C.T. Case No.674 of 2019. By the said order, the learned Assistant Sessions Judge has allowed the prayer of the opposite parties No. 2 to 4 and fixed the hearing of S.T case No. 12 of 2022 and S.T case No.3 of 2022 on the same day.

2. Mr. B.S. Das, learned counsel for the petitioners has drawn my attention to the observation in the order wherein it is stated that the prayer of the petitioner has been allowed and submits that the two cases do not relate to the same occurrence and even if they relate to the same occurrence they cannot be tried together as the accused persons and witnesses in the two cases are different petitioners. He has also submitted that the trial court could not have passed such an order as it was only the magistrate who could have directed for the same while committing the cases. He

relies on the decision in the case of ***Danda Naik and three others vs. State of Orissa*** reported in ***2007 (II) OLR 742***, to buttress his submissions.

3. Mr S.S. Mohapatra learned Additional Standing Counsel submits that since the occurrences in both the cases have taken place on the same day, time and place and investigated by the same I.O., to prevent conflicting decisions, it would be proper if they are heard on the same day by the same Judge. No possible prejudice would be caused to the petitioners, so this application has no merit and should be dismissed.

4. Perusal of the FIR in Khaira P.S case No.141 of 2019 (Annexure-1) reveals that the occurrence had taken place on 03.08.2019 at Badanuagaon between 9.00 pm to 9.30 pm and FIR was registered at 21.10 hrs on the same day (night) on the information of Gajendra Behera against Laxmidhara Swain, Ghanashyam Swain and Mana Swain (petitioners), under Sections - 341,294,307,323,324,506/ 34 I.P.C.

On a perusal of the FIR in Khaira P.S case no.142 of 2019 (Annexure-2), I find that the occurrence had taken place on 03.08.2019 at Badanuagaon between 9.00 pm to 9.30 pm and FIR was registered at 21.20 hrs on the same day (night) on the information of Manmath Swain against Gajendra Behera, Balaram Behera and Jagannath Behera (opposite parties No.2 to 4) under Sections -294,307, 323,324,341/34 I.P.C.

Therefore the contention of the learned counsel that the occurrences in the two case cases have not taken place in the same place and time and do not relate to the same incident is not correct.

5. Coming to the second contention of the learned counsel that prejudice which will be caused to the petitioners if the two cases are tried together, it would be apposite to refer to the decisions of the Supreme Court and this Court on this aspect. In the case of ***Nathilal & others vs. State of Uttar Pradesh and others : 1990 Supp SCC 145***, the Supreme Court has pointed out the procedure to be followed by the trial court in the event of cross-cases by observing as follows:

> *"2. We think that the fair procedure to adopt in a matter like the present where there are cross- cases, is to direct that the same learned Judge must try both the cross-cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross-case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross-case cannot be looked into. Nor can the Judge be influenced by whatever is argued in the cross-case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross-case. But both the judgments must be pronounced by the same learned Judge one after the other."*

The Supreme Court in the case of ***Sudhir vs. State of Madhya Pradesh : (2001) 2 SCC 688*** has held as follows :

> *"It is a salutary practice, when two criminal cases relate to the same incident; they are tried and disposed of by the same Court by pronouncing judgments on the same day. Such two different versions of the same incident resulting in two criminal cases are compendiously called "case and counter case" by some High Courts and "crosscases" by some other High Courts.*
>
> *Where one of the two cases (relating to the same incident) is charge-sheeted or complained of, involves offences or offence exclusively triable by a Court of Sessions, but none of the offences involved in the other case is exclusively triable by the Sessions Court, the Magistrate has no escape from committing the former case to the Sessions Court as provided in Section 209 CrPC. Though, the next case cannot be committed in accordance with Section 209 of the Code, the Magistrate has, nevertheless, power to commit the case to the Court of Session. Section 323 is incorporated in CrPC to meet similar cases also."*

In the case of ***State of Madhya Pradesh vs. Mishrilal*** reported in ***(2003) 9 SCC 426***, after referring to the decision of the Supreme Court in the case of ***Nathi Lal*** (supra), the Supreme Court has held as follows :

> *"8. In the instant case, it is undisputed, that the investigating officer submitted the challan on the basis of the complaint lodged by the accused Mishrilal in respect of the same incident. It would have been just fair and proper to decide both the cases together by the same court in view of the guidelines devised by this Court in Nathilal's case (supra). The cross- cases should be tried together by the same court irrespective of the nature of the offence involved. The rational behind this is to avoid the conflicting judgments over the same incident because if cross cases are allowed to be tried by two courts separately there is likelihood of conflicting judgments"…..*

This Court in the case of ***Danda Naik*** (supra), has held as follows :

> *"18. This is an old and accepted principles of criminal jurisprudence that the case and the counter case should be tried together by the same Judge for the ends of justice. Reference in this connection may be made to a decision of the Madras High Court in the case of* **Thota Ramakrishnayya and others vs.The State reported in AIR 1954 Madras 442***. In that case the learned Judge after examining various decisions of different High Courts held that where there is a fight between two rival factions which gives rise to complaint and counter complaint it is a generally recognised rule that both cases should be tried together by the same judge in quick succession ,This salutary principle of criminal law has been laid down by the earned judge in paragraph 39 of the said judgment"….*

In the case of ***Pal @ Palla vs State of Uttar Pradesh : (2010) 10 SCC 123***, the order of the High Court confirming the order passed by the Magistrate clubbing a complaint case and a case on a police report regarding the same incident where the accused were different, to be tried together in one trial was challenged. The Supreme Court set aside the orders and directed for holding two separate trials by the same Presiding Officer but together in order to avoid conflict in the decisions. Paragraphs 30 and 31 of the decision which are relevant are extracted below:

30. The facts of the case also warrant that the two trials should be conducted by the same Presiding Officer in order to avoid conflict of decisions. As was observed in ***Harjinder Singh****'s case (supra) clubbing and consolidating the two cases, one on a police challan and the other on a complaint,if the prosecution versions in the two cases are materially different, contradictory and mutually exclusive, should not be consolidated but should be tried together with the evidence in the two cases being recorded separately, so that both the cases could be disposed of simultaneously.*

31. Although, the High Court has relied on the provisions of Section 210 of the Code in directing that the two cases be clubbed together, in our view, the fact situation does not really attract the provisions contemplated in the said section. On the other hand, as indicated hereinabove, the trial court,in the unusual facts of the case, is required to hear the two cases together, though separately, and take evidence separately, except in respect of all witnesses who would not be affected either by the provisions of Article 20(2) of the Constitution or Section 300 Cr.P.C."

6. In view of the above pronouncements, it is no longer *res integra* that when a Magistrate conducting the inquiry or before whom the charge sheet (s) is/are filed, finds that two or more cases relate to the same occurrence which have taken place at the same place and time or in close proximity, he/she should inquire into the cases or try them together, one after the other. If it is found that one of the cases is triable by the Court of Sessions, while the other involves Magistrate triable offences, the latter case should be committed to the Court of Sessions in exercise of power provided under Section 323 of the Cr.P.C., so that both the cases can be tried by the same Judge. Applying the same principle, the Court of Sessions can also pass order for trying/hearing two or more cases pending before it, one after the other on the same day if they are found to be "case" and "counter case" or "cross case", as this will prevent conflicting judgments from being delivered and would therefore be in the interest of justice.

7. An interesting development in the law is the decision of the Karnataka High court in the case of ***State of Karnataka vs. Hosakeri Ningappa : 2011 SCC Online Karn 2394***, where the Full Bench of the Karnataka High Court has held that in crosscriminal cases the investigation should be conducted by one investigation officer and cases/trials conducted by two different Public Prosecutors.

8. In view of the aforesaid discussion, I am not impressed with the contentions raised by the learned counsel for the petitioners. As the learned Trial Court has not directed for holding one trial in the two cases but has directed for posting both the trials on the same date, there is no illegality in the said order. As the cases will be tried by the same Judge on the same day, one after the other, no prejudice will be caused to the petitioners. On the other hand, this will prevent conflict in the decisions in the two cases and would therefore be in the interest of justice. The impugned order therefore does not call for interference.

9. With the aforesaid observations, the CRLMC is disposed of.

—— o ——

2023 (III) ILR – CUT - 520

SAVITRI RATHO, J.

CRLMC NO. 3516 OF 2023

JAYANTA BEHERA & ORS. ……..Petitioners

-V-

STATE OF ODISHA ……..Opp. Party

THE INDIAN EVIDENCE ACT, 1872 – Section 45-A – Whether the voice recording could be confronted to prosecution witness without a certificate of an expert U/s. 45 of the Act? – Held, No.

For Petitioners : Mr. Samarendra Mohanty

For Opp. Party : Mr. S.S. Pradhan, A.G.A

ORDER Date of Order:13.09.2023

SAVITRI RATHO, J.

1. This application under section 482 of the Code of Criminal Procedure has been filed by the petitioners, challenging the order dated 31.07.2023 passed by the learned Addl. District and Sessions Judge, Athagarh in S.T. Case No. 223 of 2013 rejecting the application filed for displaying the voice recordings of the deceased and her brother Naba Das contained in M.O.I and M.O.II before the witness. The petitioners are facing trial for commission of offences under Sections 498-A/304-B/306/34 of Indian Penal Code (IPC) and Section 4 of the Dowry Prohibition Act (D.P. Act).

2. The prosecution case in brief is that the marriage of Jhully daughter of the informant had been solemnized with petitioner No.1-Jayanta Behera on 08.06.2012 as per Hindu rites and customs. Dowry had been given at the time of marriage but a few days after the marriage, the petitioners demanded more dowry and started torturing the deceased. They did not allow the deceased to go to her paternal house on any occasion or festival. She died as a result of consuming poison.

3. The I.O. submitted charge sheet against the petitioners under Sections 498-A/304-B/306/34 of IPC and Section 3 and 4 of the D.P. Act. and they are facing trial for the same offences. The mobile phone of petitioner No. 1 Jayanta with its sim card had been seized during investigation and given in his zima till they were produced in Court on the date when the I.O. was examined as a witness.

4. Mr. S. Mohanty, learned counsel for the petitioners submits that M.O.I and M.O.II are the mobile phone and SIM card of the petitioner No.1 Jayanta Behera which had been seized during investigation.Naba Kishore Das brother of the accused had scolded her over phone before her death and the conversation is recorded in the said mobile and sim card. Hence the audio recording contained in the M.Os. were

necessary to be played before Naba Kishore Das when he was examined in Court on 21.07.2023 for the purpose of cross examination for which the application had been filed. The said application was not heard on that day but was adjourned for filing of objection and hearing and rejected on 31.07.2023 on erroneous grounds. As the mobile phone and sim card had been marked as exhibits, there was no necessity of examination by an expert. So the impugned order is liable for interference.

5. Mr. S.S. Pradhan, learned Addl. Government Advocate submits that the impugned order suffers from no infirmity and calls for no interference as the petitioners did not got the voice recordings in M.O.I and M.O.II examined by an expert in spite of being granted opportunity by the trial Court to do so by order dated 08.12.2015. The mobile phone and sim card had remained in the zima of petitioner No.1 Jayanta Behera till they were produced in Court on the date of examination of the I.O and marked as M.O.I and M.O.II in the trial. Therefore in the absence of examination by an expert the voice recordings contained in M.O.I and M.O.II, cannot be utilized for cross examination of a witness more so when the witness has denied talking with the deceased over telephone from Surat, before her death.

6. From a perusal of the orders passed in S.T. Case No.223 of 2013, it appears that a petition under Section 39 and 45 (A) of the Evidence Act had been filed by the defence on 18.11.2014 when the examination of prosecution witnesses was going on. The prosecution evidence was closed on 08.12.2015. On the same day, the learned trial Court directed the defence to take step for examination of M.O.I and M.O.II by expert and posted the case to 04.12.2016 for defence evidence.

7. It appears from a perusal of the impugned order dated 31.07.2023 that no step were taken by the defence counsel for examination of the voice recordings. On 11.01.2016, the accused persons were examined under Section 313 of the Cr.P.C. and the case was adjourned to 12.01.2016 for defence evidence. On 25.01.2016, the evidence from the side of defence was closed. When the case was posted for argument, an application under Section 311 Cr.P.C. was filed by the prosecution for examination of Naba Kishore Das, brother of the deceased as a witness. It was allowed on 09.03.2016 by the learned Addl. Sessions Judge, Athagarh. The said order was challenged by the defence in this Court in CRLMC No. 891 of 2016. Pursuant to interim order passed by this Court, the trial remain stayed till the case was disposed of on 14.10.2022. Pursuant to the said order Naba Kishore Das has been examined as P.W.21 by the prosecution on 21.07.2023 and has been cross-examined by the learned defence counsel on the same day and discharged. (He has been referred to as P.W.20 in a few places in the impugned order.)

8. Perusal of order dated 31.07.2023 reveals that the learned Addl. Sessions Judge observed that M.O.I and M.O.II are the keypad mobile and SIM card which was seized by the I.O. during investigation on production of the accused and those were handed over to the accused in zima and they were produced in the Court on the

day the I.O. was examined in Court and marked as M.O.I and M.O.II on behalf of the prosecution and the seizure list does not disclose the details of the M.O.I and M.O.II seized by the I.O. and the I.O. has stated during his evidence that he has not displayed the conversation recorded in the alleged mobile. As the Court has already given scope to the defence for taking step for assistance of expert on that aspect and instead of taking step, the defence closed their evidence and since the witness in his examination has straightway denied the suggestion of the defence that he had any conversation with the deceased over the mobile phone of the accused, the application of the petitioners has been rejected. The learned trial Court has also observed that it is not possible for the Court to collect evidence for the defence.

9. Perusal of the deposition of P.W.21 Naba Kishore Das reveals that he has stated that he was in Surat at the time of death of the deceased and returned almost six months after her death and was not talking with the deceased when he was in Surat. During cross-examination by the defence he has denied abusing and cautioning the deceased.

10. When M.O.I and M.O.II had remained in the zima (interim custody) of the accused before being produced in Court, a certificate of an expert under Section – 45 (A) of the Evidence Act was necessary before the voice recording could be confronted to P.W.21. Inspite of order dated 08.12.2015, without getting the M.Os examined by an expert, prayer had been made for displaying the voice recording in M.O.I and M.O.II to P.W.21 in the open court.

11. In view of the above discussion, I do not find any infirmity or illegality in the impugned order, so as to interfere with it in exercise of power under Section 482 of the Cr.P.C.

12. The CRLMC is accordingly dismissed.

—— o ——

2023 (III) ILR – CUT- 522

R.K. PATTANAIK, J.

M.S.A. NO. 2 OF 2014

RAGHUNATH JEW THAKUR ....Appellant

-V-

THE COMMISSIONER OF ENDOWMENTS, ODISHA, BHUBANESWAR & ANR. ....Respondents

ODISHA HINDU RELIGIOUS ENDOWMENT ACT, 1951 – Section 41 – Determination of a deity to be a private or public deity – Duty of commissioner – Enumerated with reference to case law. (Para-11)

Case Laws Relied on and Referred to :-

1. 2009 (Supp.-II) OLR (NOC) 922 : Benudhar Hota & Ors. Vs. Jagannath Nayak & Ors.
2. AIR 1970 SC 2025 : G.S. Mahalaxmi Vs. Shah Ram Chandra Das.
3. AIR 1924 PC 44 : Lakshmana Vs. Subramania.

For Appellant : Mr. Anupam Rath

For Respondents: Mr. Amit Kumar Nath

JUDGMENT Date of Judgment : 02.09.2023

R.K. PATTANAIK, J.

1. Instant appeal under Section 44(2) of the Odisha Hindu Religious Endowment Act, 1951 (herein after referred to as OHRE Act) is at the behest of the appellant assailing the correctness, legality and judicial propriety of the impugned judgment in F.A. No. 11 of 2010 passed by the learned Commissioner of Endowments, Odisha and also the decision in O.A. Case No. 38 of 2006 under Section 41 of the OHRE Act on the grounds inter alia that the same are not tenable in law.

2. The appellant questioned the findings of the learned courts below on the following grounds, such as, the learned Lower Appellate Court failed to appreciate the evidence on record which is consistent to show that there was no involvement and interference by the public in any manner whatsoever vis-à-vis the management of the deity which is not a public religious institution and hence, no such inference could have been drawn as the subject being a public deity; furthermore, when there is evidence on record to the effect that the immovable properties of the deity were purchased by its founder so on and so forth. The appellant also challenged the finding that by long passage of time, the properties of the deity have become public religious endowment is not in conformity with the provisions of OHRE Act rather runs contrary to the very object of the law and hence, therefore, the impugned judgment in appeal so also the decision in O.A. Case No. 38 of 2006 deserve to be interfered with as there has been complete non-application of judicial mind.

3. In fact, the appellant approached the learned Additional Assistant Commissioner of Endowment, Cuttack Zone, Cuttack invoking jurisdiction under Section 41 of the OHRE Act for a declaration that the Marfatdar to be holding the office of Shree Raghunath Jew Thakur in private capacity. In the said proceeding, evidence was received from the appellant. Considering the evidence on record, the learned Additional Assistant Commissioner of Endowment, Cuttack Zone, Cuttack held that Shree Raghunath Jew Thakur is a public deity and the properties to be public religious Endowments. In other words, the relief so prayed for by the appellant was denied and as such, the application under Section 41 of the OHRE Act was dismissed. As against the judgment dated 3rd July, 2010 in O.A. Case No. 38 of 2006, the appellant preferred appeal which was disposed of by the impugned judgment dated 21st December, 2013 in F.A. No. 11 of 2010. The appeal so filed by

the appellant was allowed in part with a declaration that the case institution and the deity is a public deity with the appellant as the hereditary Trustee by way of testamentary succession as per its prevailing custom. Being dissatisfied with such a finding by the learned Lower Appellate Court, the appellant has knocked the doors of this Court with the present appeal.

4. Heard Mr. Rath, learned counsel for the appellant and Mr. Nath, learned counsel for the Commissioner of Endowments, Odisha-respondent No.1. None has appeared for respondent No.2.

5. Mr. Rath, learned counsel for the appellant refers to a copy of the report of Inspector of Endowments, Jajpur dated 18th June, 2010 and also evidence of the appellant examined as PW 1 and another witness, namely, Sanatan Biswal as PW 2 and submits that the deity is a private deity and the properties of it are private endowments and there has been material on record that the institution has been managed and administered by the Marfatdars finally succeeded by the appellant, so therefore, the findings of the learned courts below that the deity to be a public deity is against the weight of evidence. It is further submitted that the local public never worshiped the deity nor played any part in its management and in absence of any such evidence, the learned Lower Appellate Court could not have held it as a public religious institution declaring the appellant as its hereditary Trustee. It is contended by Mr. Rath that both the learned courts below fell into serious error in law by concluding the deity as a public deity and the properties to be public religious endowments. Even though the learned Lower Appellate Court held that the court of first instance declared the case institution as a public religious institution even in absence of involvement of the general public but by considering the fact that the religious endowments have been acquired and succeeded by the appellant at the end covering a period of more than 100 years, it was held as a religious endowment, a status which was crystallized and hence, the Marfatdar is to be held as a hereditary Trustee on the strength of the Will, as according to Mr. Rath, is a finding and conclusion grossly erroneous and cannot therefore be sustained in law.

6. On the contrary, Mr. Nath, learned counsel for the respondent No.1 justifies the findings of the learned courts below and submitted that the deity is a public deity and the properties are public religious endowments acquired by the Marfatdars from the time of its founder and thereafter succeeded by the appellant, therefore, the impugned judgment in F.A. No. 11 of 2010 suffers from no legal infirmity.

7. Mr. Rath, learned counsel for the appellant produced a copy of the deposition of PW 1, namely, appellant examined before the learned Additional Assistant Commissioner of Endowment, Odisha to satisfy the Court that the deity was privately installed by the founder and there was no contribution by the local public in any manner. The evidence of PW 2 is referred to by Mr. Rath and he submits that the evidence clearly proved the status of the deity to be private in

nature. The copy of the report of the Inspector of Endowment dated 18th June, 2010 is placed reliance on and according to Mr. Rath, the same never disclosed the public character of the deity and its endowments. Thus, in absence of any evidence as a public deity and endowments to be of a public religious institution, it is contended that the decision of the learned courts below is wholly misconceived.

8. Whether the deity is a public deity or private and endowments to be of a public religious institution is required to be examined with reference to the evidence made available. It is claimed that the appellant as the Marfatdar of the deity and PW 2, an independent witness have been examined.

9. Law is well settled that whether a deity to be a private or public deity, the burden of proof lies on the person to prove the institution to be private, or the property to be other than that of a religious endowment or specific endowment in view of the proviso to Section 41(1) of the OHRE Act. In other words, the onus lies on the appellant to establish it to be a private deity. It is also to be shown by the appellant that the religious institution is a private endowment. As per the report of the Inspector of Endowment, which has been referred to by Mr. Rath, learned counsel for the appellant, the source of endowment could not be ascertained accurately. As per the facts on record, the properties situate under Hal Khata No.576 stand recorded in the name of the deity with other properties under Hal Khata No. 291 which corresponds to Sabik Khata No. 115. All the RoRs stated to have been produced before the learned Additional Assistant Commissioner of Endowment, Odisha, Cuttack. As per the evidence of the appellant, eldest Guru acquired some lands under RSD No. 3535 dated 29th March, 1960 and he installed the deity Shree Raghunath Jew Thakur. There have been purchases of properties on couple of occasions as deposed by the Marfatdar, namely, PW 1 with the claim that management of the affairs of the deity all along remained with the Marfatdars. It has been deposed by PW 1 that none of the villagers ever attended the deity or worshiped it which is rather installed inside a residential campus and the ceremonial functions are being performed without the involvement of the public. It is claimed by PW 1 that he succeeded the Marfatdary right of the deity and its properties on account of registered Will dated 11th December, 1956 by which the predecessor nominated him as the successor to look after the seva puja and management of the deity. PW1 was cross-examined by respondent No.2, Similar is the evidence of PW 2. It is made to suggest that the learned courts below did not appreciate the evidence in its proper prospective while reaching at a conclusion that the deity to be a public deity and properties as public religious endowments.

10. Law is well settled that presence and participation of the public if any in respect of a deity installed by a private person is a matter to be taken cognizance of. If in case, a private deity is installed but subsequently, the public attended the deity or visited the temple in which the idol of the deity is installed and be a part of the religious functions/ceremonies over a period of time, a presumption would arise

against the private character of the deity or temple. If the deity remains secluded and was never visited by the public or at no point of time, after its installation, it retains a character of a private deity and is not to be treated as a public deity. If the endowment of a private deity is managed by the Marfatdars since the idol installed and there is no evidence to show that the Marfatdars as hereditary Trustees ever ousted by the public or the capacity in which they functioned was ever challenged by the local public, it has to be held as a private deity and not otherwise. There is a long line of authorities which support the aforesaid. In so far as the conclusion which has been reached at by the learned courts below even in absence of any evidence with accuracy about the installation of the deity, to hold that the deity is a public deity certainly appears to be an erroneous conclusion. The specific endowments acquired in the name of the deity have been deposed by PW 1. No evidence is on record to show that any such endowment was at the instance of the local public or an outsider. For PW 1 having failed to submit the documents to satisfy as to the line of succession cannot be a justification for the learned Additional Assistant Commissioner of Endowment, Cuttack Zone, Cuttack to hold that it is hence to be held as a public deity and the endowments as of a public religious endowment. To reiterate, if a private deity is managed by hereditary Trustees but subsequently, the public is allowed to attend and participate either in the management or otherwise or such participation is confined to religious functions, under such circumstances, it could become a public deity with the change of character. So, therefore, it depends on the attendance of public in offering puja or participating in the religious ceremonies of the deity and such other surrounding circumstances would really determine the nature and character of the deity and its endowments. As it appears, the aforesaid aspect has not been duly examined by the learned courts below. Quite interestingly, the learned Lower Appellate Court by taking notice of the fact that the endowments have been succeeded by the Marfatdars and it has been over a period of 100 years held that the religious endowment to be public in nature or by such passage of time, it stood crystallized as a public religious endowment. In the considered view of the Court, such a view cannot be subscribed as in similar circumstances, the endowments could be of a private deity managed by the Marfatdars, who are appointed either by natural succession or testamentary. A deity could remain private deity and managed by hereditary Trustees or marfatdars appointed by any testamentary succession and it cannot become a public deity merely by long passage of time unless a case is made out for the same. Such a view expressed by the learned Lower Appellate Court as rightly pointed out by Mr. Rath, learned counsel for the appellant stands to no reason.

11. While advancing the above argument, Mr. Rath cited a decision of this Court in the case of ***Benudhar Hota and others Vrs. Jagannath Nayak and others 2009 (Supp.-II) OLR (NOC) 922*** and contended that the learned Endowment Commissioner did not adhere to the guidelines laid down therein which is based on the principles outlined by the Supreme Court in ***G.S. Mahalaxmi Vrs. Shah Ram***

Chandra Das AIR 1970 SC 2025. In the decision of Benudhar Hota (supra), this Court while dealing with a similar question held and observed that the Courts have to address themselves to the following questions, such as, (i) whether the temple built in such imposing manner that it may prima facie appear to be a public temple? (ii) Are the members of the public entitled to worship in that temple as of right? (iii) Are the temples expenses met from the contributions made by the public? (iv) Whether the seva and ceremonies conducted in the temple are attended and celebrated by the public? (v) Have the management as well as the devotees been treating the temple as a public temple? Applying the principles of law enunciated by the Apex Court in ***G.S. Mahalaxmi*** (supra) and taking cognizance of the judgment of the Privy Council in ***Lakshmana Vrs. Subramania reported in AIR 1924 PC 44***, the Court finally concluded that the institution involved therein to be a public religious Endowment. In ***G.S. Mahalaxmi*** (supra), the Supreme Court has elaborately dealt with the aforesaid aspect and observed that though appearance of a temple is a relevant circumstance, it is by no means decisive. In the decision of Privy Council (supra), the Judicial Committee while considering the facts and circumstances of the case therein and the question with respect to a temple initially installed privately concluded that the conduct of the Mahant to be such that the temple has become a public temple at which all Hindus might worship and inference was, therefore, to be drawn that it had been dedicated to the public. A bare reading of the aforesaid decision leads to a logical conclusion that a decision as to whether an institution is public or private depends on the inference to be derived considering and taking it account the evidence vis-à-vis the manner in which the temple and its endowments have been managed and dealt with. In ***Benudhar Hota*** (supra), this Court has also taken judicial notice of the instances where a private deity may have become public by elucidating facts that though most of the present day Hindu public temples had been founded ages back as private temples, by efflux of time, the same have become public in nature and some of the private temples have acquired great deal of religious reputation either because of their location or other circumstances. It has also been observed therein that the temples and deities privately installed initially having attracted large number of devotees gradually in course of time have become public temples and in such cases, it would have to be held as public religious institutions even if they had been originally private temples or where its origin are unknown or lost in antiquity. Applying the above legal standard laid down by the Judicial Committee in ***Lakshmana*** (supra), a judgment legal classicus on the point, the Court has to consider, whether, the learned Commissioner of Endowments, Odisha rightly reached at the conclusion having regard to the evidence received. In so far as the evidence on record is concerned, as it is made to appear, affidavits have been received from the petitioner. It is claimed that a report of the Inspector of Endowment, Jajpur dated 18th June, 2010 has also been considered. The affidavits filed from the side of the petitioner claimed the temple to be a private temple and never visited by the local public. A copy of the report dated 18th June, 2010 of the Inspector of Endowment does not clearly suggest that the case institution

is a public deity. In fact, the Court finds absence of any such evidence to relate the deity as a public deity or for that matter, to draw any such inference. It was the bounden duty of the learned Additional Assistant Commissioner of Endowment, Cuttack Zone, Cuttack before whom an application under section 41 of O.H.R.E. Act to hold a detailed inquiry before reaching at a conclusion as the deity to be public. The said aspect has also been left out of consideration by the learned Lower Appellate Court keeping in view the settled principles of law discussed herein above. Having held so, the Court has no other option except to remand the matter for a fresh decision by the learned Additional Assistant Commissioner of Endowment, Cuttack Zone, Cuttack on the question involved, which is with respect to the nature of deity, whether, private or public and if required, by receiving further evidence.

12. Hence, it is ordered.

13. In the result, the appeal stands allowed. As a necessary corollary, the impugned judgments under Annexure-2 in F.A. No. 11 of 2010 and Annexure-1 in O.A No.38 of 2006 are hereby set aside with a direction to the learned Additional Assistant Commissioner of Endowment, Cuttack Zone, Cuttack to deal with the matter afresh and to dispose it of keeping in view the settled principles of law and observations made herein above.

—— o ——

2023 (III) ILR – CUT- 528

R.K. PATTANAIK, J.

W.P.(C) NO. 9076 OF 2021

ADARSHA PATHAGAR ………Petitioner

-V-

THE MANAGER (TS) LAND, ROURKELA STEEL PLANT & ORS. ………Opp. Parties

(A) ORISSA PUBLIC PREMISES (EVICTION OF UNAUTHORISED OCCUPANTS) ACT,1971 r/w Article 226 of Constitution of India, 1950 – The Petitioner challenges the initiation and continuance of proceeding under the Act – Whether Judicial review by invoking Article 226, against show cause notice is maintainable? – Held, No. (Para-12)

(B) TRANSFER OF PROPERTY ACT, 1882 – Section 105 – Lease – Distinction between renewal and extension – Discussed with reference to case law. (Para-13)

Case Laws Relied on and Referred to :-

1. (2006) 12 SCC 28 : Union of India & Anr. Vs. Kunisetty Satyanarayana.
2. (2007) 13 SCC 270 : Union of India & Anr. Vs. Vicco Laboratories.
3. AIR 2001 SC 343 : State of Punjab Vs. V.K. Khanna & Ors.
4. (1990) 4 SCC 406 : Ashoka Marketing Ltd. & Anr. Vs. Punjab National Bank & Ors.
5. (1996) 1SCC 777 : Executive Engineer Bihar State Housing Board Vs. Ramesh Kumar Singh.
6. 1989 AIR 1834 : PravashChandra Dalui & Anr. Vs. Biswanath Banerjee & Anr.

For Petitioner : Mr. D.Panda

For Opp. Parties: Mr. N.K. Sahu
Mr. H.M. Dhal, Sr. Adv.
Mr. YSP Babu, AGA

JUDGMENT Date of Judgment: 02.09.2023

R.K. PATTANAIK, J.

1. Instant writ petition is at the behest of the petitioner challenging the initiation and continuance of the proceeding against it under the Orissa Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (hereinafter referred to as 'the OPP Act') on the grounds inter alia that such action vide Annexure-1 is outrightly illegal and hence, to quash the same with a direction to the opposite parties to execute and renew the sub-lease agreement and not to create any obstruction in its regular activities and functioning from the leased out premises.

2. In fact, the petitioner has questioned the legality of the eviction proceeding initiated against it by opposite party No.2 by claiming that the occupation of the premises in question is not unauthorized pending renewal of the sub-lease in respect thereof. It is claimed that opposite party No.1 instead of complying the approval order not only made illegal demand for deposit but also initiated the action under challenge before opposite party No.2 under the OPP Act. It is alleged that opposite party No.1 intentionally did not take any step to renew the sub-lease in respect of the entire area of Ac. 3.19 decimals rather made the alleged demand under Annexure-4 and its compliance as a precondition for such renewal which thereafter led to the initiation of the proceeding. So, the petitioner has knocked the doors of this Court up against the initiation of eviction proceeding under the OPP Act alleging that the sub-lease was not renewed and instead unreasonable demand has been made despite the fact that it is a voluntary organization operational since 1956 which manages one of the biggest and oldest libraries in Orissa having an auditorium and a sister organization teaching and imparting training in music, dance etc. Hence, the petitioner on the aforesaid grounds has assailed the impugned action and eviction proceeding initiated and pending before opposite party No.2.

3. On the contrary, opposite party No.1 justified the action under challenge by stating that first and foremost, the writ petition is not maintainable and secondly, it

was inevitable as the company was left with no other option but to evict the petitioner by following due process of law. It is claimed that the petitioner without exhausting the statutory remedy under the OPP Act has approached this Court which should not, therefore, be entertained. That apart, according to opposite party No.1, the sub-lease expired on 7th January, 2004 and the Committee constituted for the same, recommended the case of the petitioner on 4th May, 2010 for execution of an agreement which was duly forwarded to the Commissioner-cum-Secretary, Revenue and Disaster Management Department, later to which, the State Government after careful consideration by order dated 17th January, 2011 was pleased to approve the proposed sub-lease and its renewal, consequent upon which, the details of the dues payable by the petitioner was worked out keeping in view the decision of the Sub-lease Committee referring to the resolution of the Board of Directors of SAIL which was thereafter communicated vide letter dated 12th October, 2012 for necessary compliance. As per opposite party No.1 despite repeated reminders as at Annexure-4 series to the writ petition, the petitioner did not deposit the dues rather remained in occupation of the premises and as a result, on 18th July, 2020, notice was issued calling upon to handover its vacant possession which was not obliged and the possession was continued for more than 17 years which, in absence of sub-lease renewed, is unauthorized and therefore, by its own conduct for not showing any interest for renewal of sub-lease or vacating the premises, the company had no other alternative except to resort to the remedial measures, for which, the proceeding in P.P. Case No.300001 of 2020 was initiated which is perfectly justified and in accordance with law.

4. Heard Mr. Panda, learned counsel for the petitioner; Mr. Sahu, learned counsel for opposite party No.1; Mr. Dhal, learned Senior Advocate for opposite party No.2; and Mr. Babu, learned AGA for the State opposite party Nos. 3 & 4.

5. Mr. Panda, learned counsel for the petitioner submits that the RSP Management has no right or authority to compel the petitioner to sign a fresh lease agreement imposing terms and conditions not in consonance with the pre-existing rates. It is submitted that huge amount is demanded from the petitioner to renew the sub-lease which was to be on the same terms and conditions as in the original allotment especially when its organizational activities survive and thrive on the collections received from the members and donation. Mr. Panda further submits that Annexure-4 series would reveal that there has been no consistency whatsoever by RSP while making the unreasonable demand as a condition precedent to the execution of tripartite sub-lease, inasmuch as, the demands for ground rent payable by it stands fluctuated from year to year which is at the whim and caprice of the company inclusive of demand towards electricity and water charges which had never been in arrears. Further contention of Mr. Panda is that the company as a lessee with merely occupancy right is making an attempt to unlawfully gain at the expense of the petitioner, a voluntary organization in existence on the subscription fees and public donation. It is anticipated by the petitioner, as further submitted by Mr.

Panda, that the impugned action is intentional in order to prevent renewal of sub-lease so that the possession can be resumed by the company and re-convey the same to someone else. It is hence contended by Mr. Panda that the demand is outrageous and illegal and for not having the sub-lease renewed instead alleging the occupation of the premises by the petitioner as unauthorized with the initiation of the proceeding under the OPP Act.

6. In response to the above, Mr. Sahu, learned counsel for opposite party No.1 and Mr. Dhal, learned Senior Advocate for opposite party No.2 submit that the recommendation of the Sublease Committee was duly approved by the Government vide Annexure-3 with regard to the proposed renewal of sub-lease but it shall have to be subject to dues payable by the petitioner in terms of the rules and procedure of the company which was worked out on the basis of the recommendation and keeping in view the decision of the Board of Directors of SAIL. It is submitted that the petitioner is liable to clear the arrear dues since the possession is from 2004 and onwards and when the conditions for renewal of sub-lease failed to be complied, the possession has become unauthorized and therefore, rightly, the proceeding under the OPP Act was initiated. Mr. Sahu, learned counsel for opposite party No.1 submits that the petitioner was required to pay the security deposit, Annual Ground Rent (AGR) and annual service charges besides land premium on token basis which has been opposed on the ground that renewal of sub-lease shall have to be on the existing rates. Referring to the lease deed as at Annexure-A/3, Mr. Sahu further submits that as per the conditions, the lessee is liable to pay the lease premium and other rents, tax, service charges, assessments for the present and future at any time after such execution of the lease duly assessed and imposed upon in respect of the demised land and therefore, any such renewal of sub-lease with the petitioner shall have to be on fresh terms and conditions. It is contended that as the petitioner did not fulfill the conditions of sub-lease for its renewal and the original sub-lease expired in 2004, rightly, after repeated demands failed, opposite party No.1 in order to get the premises vacated approached opposite party No.2 seeking action under the provisions of the OPP Act.

7. Mr. Dhal, learned Senior Advocate appearing for opposite party No.2 supported the contention of Mr. Sahu, learned counsel for opposite party No.1 and would submit that no illegality has been committed in the initiation of the eviction proceeding against the petitioner after expiry of the sub-lease period and in absence of renewal of such lease which failed onaccount of non-compliance of the conditions duly communicated and that apart, the petitioner has approached this Court without responding to the show cause notice and hence, the writ petition is not maintainable rather premature and while contending so, he cited a decision of the Apex Court in **Union of India and Another Vrs. Kunisetty Satyanarayana reported in (2006) 12 SCC 28**. Mr. Dhal, learned Senior Advocate referred to another decision of the Supreme Court in **Union of India and Another Vrs. Vicco Laboratories (2007) 13 SCC 270** stating that judicial review and interference in exercise of jurisdiction

invoking Article 226 of the Constitution challenging the show cause notice is maintainable subject to a condition that the action is without jurisdiction or continuance of it would be an abuse of process of law. So to say, the petitioner having approached this Court instead of replying to the show cause is challenged by opposite party Nos. 1 & 2 and Mr. Dhal, learned Senior Advocate contends that such interference should only be in exceptional cases which is what has been held by the Apex Court in **Vicco Laboratories** (supra). It is contended that as the law is settled that exercise of writ jurisdiction should be rare and not in a routine manner and when opposite party No.1 despite repeated attempts for the petitioner to come forward to execute the tripartite sub-lease on the terms and conditions so determined, failing to do so and complying the requirements, resulted in the impugned action which is a natural consequence. It is contended that the possession of the premises by the petitioner since not on the strength of any sub-lease executed, it has to be held as unauthorized since 2004 and rightly, therefore, the proceeding was initiated under the OPP Act and for that matter, opposite party No.2 does possess the jurisdiction to deal with the matter. Both Mr. Sahu, learned counsel for opposite party No.1 and Mr. Dhal, learned Senior Advocate for opposite party No.2 would submit that it is not a case where the proceeding is questionable due to absence of jurisdiction and therefore, when the petitioner failed to comply the conditions necessary for execution of sub-lease, the action was initiated for eviction which is not beyond authority and hence, keeping in view the legal position as enunciated by the Apex Court in the decisions (supra), correctly jurisdiction was exercised which therefore calls for no interference leaving the parties to work out the remedy under the OPP Act.

8. Bereft of unnecessary details, the undisputed facts are that way back in the year 1974, the petitioner was allotted the land which belongs to the company by way of a sub-lease for construction of Bhanja Bhawan, library building and physical possession of the same was handed over on 17th January, 1974 and an allotment order was issued.In fact, the opposite party placed on record a Possession Certificate dated 7th January, 1974 besides the order of allotment dated 1st October, 1977 as at Annexure-A/1 & A/2 respectively to the counter affidavit of opposite party No.1. It is also a fact that the agreement was a bipartite lease between the parties executed on 13th March, 1997 and has been given effect to retrospectively on and from 7th January, 1974. A copy of the said lease deed is at Annexure-A/3 to the counter affidavit. Such lease was for a period of thirty years which expired on 6th January,2004 and thereafter, the petitioner was asked about its consent as to whether to renew the sub-lease. A copy of the said letter dated 24th April, 2004 and correspondence dated 8th July, 2004 have also been brought on record as at Annexure-A/4 and A/5 to show that such was the intimation to the petitioner to obtain consent as to if it is interested to retain the demised premises for a further term on the basis of a sub-lease after renewal. The bone of contention is with regard to the demand made for the purpose of execution of lease at the time of its renewal

and outstanding dues payable on and from 2004. Apart from, land premium on a token basis, the company demanded security deposit (one time), Annual Ground Rent (AGR) and annual service charges @ of 2 % 1% and 2% of the land revenue respectively besides delay charges per annum at Rs. 1,31,725/- which was later waived with an intimation dated 10th June, 2013 as evident from Annexure-A/10 to the counter affidavit.

9. The contention of the petitioner is that the sub-lease is required to be executed as per the existing rates since it is not a commercial establishment and therefore, the demand so advanced is unacceptable. The very challenge at the behest of the petitioner is questioned by the opposite parties on the ground that the disputed questions of fact cannot be agitated before this Court and hence, the writ petition is not maintainable. It is contendedthat the allegation of malafide on the part of the Authority, who initiated the proceeding under the OPP Act is unjustified since the action under challenge is fallout of the unauthorized occupation of the premise by the petitioner on expiry of the sub-lease in the year 2004. While contending so, Mr. Sahu, learned counsel for opposite party No.1 refers to a decision of the Apex Court in the case of **State of Punjab Vrs. V.K. Khanna and others reported in AIR 2001 SC 343**, wherein, it has been held that the expression 'malafide' has a definite significance in the legal phraseology and the same cannot possibly emanate out of fanciful imagination or even apprehension but there must be existing definite evidence of bias and actions which cannot be attributed to be otherwise bonafide-actions not otherwise bonafide, however, by themselves would not amount to be malafide unless the same is in accompaniment with some other factors which would depict a bad motive or intent on the part of the doer of the act. In the instant case, the petitioner alleges that the sub-lease is sought to be renewed with higher charges and not as per the rates of the original lease and suspects the intention of the company to disengage it by demanding additional charges as a pre-condition for a fresh lease and hence, attributes malafide. Furthermore, the learned counsel for opposite party No.1 submits that in case the petitioner is aggrieved, alternate remedy in view of Section 9 of the OPP Act is available to approach the District Judge having jurisdiction by way of an appeal and hence, the writ petition should not be entertained and while advancing such an argument, he cites a decision in case of **Ashoka Marketing Ltd. and Another Vrs. Punjab National Bank and Others (1990) 4 SCC 406**.

10. In so far as the OPP Act is concerned, Section 5 thereof provides the Estate Officer to take action against the unauthorized occupants. The powers of an Estate Officers stand described in Section 8 of the said Act. Any such order by the Estate officer under Section 5 is appealable under Section 9 of the OPP Act. The jurisdiction of any other court is barred under Section 14 in respect of the matters or disputes for determination of which provision is made under the Act. In the case at hand, the authority, namely, opposite party No.2 initiated the proceeding against the petitioner under the OPP Act on the premise that the possession has become unauthorized as the sub-lease was not renewed and therefore, the land in occupation

of the petitioner is to be vacated. It is not that opposite party No.2 does not have the jurisdiction to initiate any such action under the OPP Act since prima facie it is established that the petitioner has remained in possession of the premises without renewal of the sub-lease which expired long back in 2004. As regards, the contention that there is malafide on the part of opposite party No.2, initiation of action under the OPP Act by itself cannot be alleged so against the backdrop of a demand for execution of the sub-lease especially when the alleged action has been initiated as a last resort. Since the demand so made by the company has not been accepted needed for the purpose of execution of the sub-lease on any such ground whatsoever and the same since awaited since 2011, in the considered view of the Court, it cannot be held to be a case of malafide.

11. While examining constitutionality of some provisions of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971, the Supreme Court in **Ashoka Marketing Ltd**. (supra) held that the definition of the expression 'unauthorized occupation' appearing in Section 2(g) thereof is in two parts and in the first part, said expression is to mean the occupation by any person of the public premises without authority and it implies occupation by a person,who has entered into possession of any public premises without lawful authority as well as occupation which was permissive at the inception but has ceased to be so and the second part is a definition inclusive in nature and the same expressly covers continuance in occupation by any person of the public premises after the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy has expired or has been determined for any reason whatsoever. Thus, in view of the decision as aforesaid, a case where a person enters into occupation lawfully under a valid authority but continues to possess and retain the same after such authority under which he was put in occupation has expired or determined falls within the ambit and definition of 'unauthorized occupation'. In the instant case, the lease was executed for a period of 30 years but after its expiry in 2004, the sub-lease was to be renewed with a tripartite agreement executed which did not materialize even after 2011, when the petitioner was informed about the charges payable with the confirmation that renewal of sub-lease has received sanction of the State Government. In such view of the matter, when the sub-lease expired in 2004 and thereafter, it has not been renewed and when the petitioner has not come forward to accept the conditions for the fresh sub-lease to be executed nor vacated the premises, the occupation vis-à-vis the premises by it could well be held as unauthorized in view of the decision of the Apex Court in **Ashoka Marketing Ltd**. (supra) as the definition in Section 2(g) of the OPP Act bears a similar expression and meaning attached to 'unauthorized occupation' and that too when there is no challenge to the source of authority of opposite party No.2 being appointed as an Estate Officer to act upon under the OPP Act. Hence, it would not therefore be proper to allege that the action so initiated by opposite party No.2 against the petitioner does not have the sanction of law since the very occupation of the land and premises by it becomes

unauthorized after expiry of the sublease in the year 2004 in absence of a fresh one executed. That apart, the Court is not inclined to accept the allegation of malafide for the reason that additional charges have been demanded for the sub-lease and its renewal leading to the initiation of the action under the OPP Act without anything placed on record to label it as biased or such authority to establish that the initiation of the proceeding under the OPP Act by opposite party No.2 to be not authorized.

12. In so far as the maintainability of the writ petition is concerned, learned counsels for the opposite parties submit that the petitioner should not be permitted to agitate its grievance before this Court unless the action under challenge is held to be perverse or beyond authority. In **Kunisetty Satyanarayana** (supra),the Supreme Court held that the writ petition challenging a show cause notice should not ordinarily be entertained. However, in some very rare and exceptional cases, the same can be maintained where it is found that the action is fully without jurisdiction or otherwise illegal. Referring to the decisions in **Executive Engineer Bihar State Housing Board VRs. Ramesh Kumar Singh (1996) 1 SCC 777** and other decisions, the Apex Court in **Kunisetty Satyanarayana** (supra) observed that the reason why ordinarily a writ petition should not be entertained against a show cause notice or chargesheet is that at that stage, it may be held to be premature. Furthermore, it is held that mere show cause notice does not give rise to any cause of action because the same is no any adverse order which affects the rights of the party unless the same has been issued by a person having no jurisdiction to do so. In other words, considering the above decision which has been reiterated time and again, the conclusion is that a writ petition should not normally be entertained against a show cause notice issued by an authority under any law unless such exercise of power by the authority is illegal or wholly without jurisdiction. In the present case, since the petitioner did not offer consent to the execution of sub-lease or agreed to the conditions put forth for execution of the lease and the possession long expired in 2004,according to the Court, the action under the OPP Act initiated cannot be said to be without jurisdiction. In other words, the action with a notice to the petitioner under the OPP Act, in the peculiar facts and circumstances of the case, cannot be held as beyond jurisdiction for the Court to intervene exercising jurisdiction under Article 226 of the Constitution.

13. Section 105 the Transfer of Property Act postulates that besides other essential elements of a lease, such as, the parties being lesser and lessee, the subject matter being an immovable property demised being a transfer of a right to enjoy at the consideration, time or the term or period of the said lease is essential requisite for a valid lease. An instrument of lease may contain a provision to the effect that on the expiry in term of the lease, it is to be renewed or extended. Such a provision may not if so facto renew or extend the term of the lease but it entitles the lessee to obtain a new lease in his favour after the expiry of the original term. The Apex Court in case of **Hindustan Petroleum Corporation Ltd. Vrs. Dolly Das reported in 1999(4) SCC 450** observed that a covenant for renewal is not treated as part of term

prescribing the period of lease but only entitles a lessee to obtain a fresh lease. In so far as the present case is concerned,considering the recitals of the sub-lease which lapsed, the Court does not find any such covenant or provision for renewal or extension of it. However, the company asked for the consent of the petitioner and thereafter, processed the matter for execution of fresh sub-lease which received the approval of the State Government. Mr. Panda, learned counsel for the petitioner submits that the sub-lease has to be executed as per the existing rates not on the terms and conditions freshly imposed. The sublease has expired in 2004 and it is sought to be renewed and the Government approved the same, however, according to the Court, the same cannot be demanded with the existing rates.Even otherwise, renewal of a lease means a fresh one. It is not a case of extension of sub-lease. In fact, a distinction lies between renewal and extension. While dealing with a question as to if a case to be extension or renewal, the Supreme Court in **Pravash Chandra Dalui and Another Vrs. Biswanath Banerjee and Another reported in 1989 AIR 1834** observed that the distinction between extension and renewal is chiefly that in the case of renewal, a new lease is required while for extension of the same, the lease continues for the additional period. In **State of U.P. and others Vrs. Lalji Tandon (Dead) reported in 2004(1) SCC 1,** the Apex Court also lucidly explained the difference between an extension of lease and renewal. Having considered the aforesaid decisions,the Court is of the conclusion that in the instant case, the sub-lease did not specifically contain clause for extension or renewal. The terms and conditions for sub-lease are as per the Clauses 2(e) and (2)(ii) thereof with the recital that the lessee is liable to pay yearly and other rents besides charges duly assessed payable during the period which means the payment of all the dues shall be in addition to the premium amount. In terms of the said lease executed in 1997, the petitioner deposited all the dues, such as,land rent and security deposit. In view of the legal position, as discussed herein above, the settled law is that the rights and liabilities of the parties are to be determined in accordance with the recitals of the lease deed and if there is a covenant or a clause for renewal after expiry of the original lease period, such renewal is always subject to payment of fair and equitable rent and other charges. Having said that, a fresh sub-lease is to be executed by the petitioner on expiry of its duration in the year 2004, so therefore, the challenge to the additional demand so made with the pending dues payable cannot be demanded as per the old/existing rates. Under the above circumstances and having regard to the fact that a fresh lease is to be executed and it has to be by virtue of a tripartite agreement between the parties, the same cannot be opposed and objected to by the petitioner by not accepting the terms and conditions duly communicated vide Annexure-A/8 later to the decision of the Board of Directors dated 21st July, 2008, a copy of which is at Annexure-A/6 series. Hence, it has to be held that the challenge to the initiation of the proceeding under the OPP Act at the instance of the petitioner cannot be upheld.

14. Accordingly, it is ordered.

15. In the result, the writ petition stands dismissed nevertheless leaving the parties the option to reach at a consensus on the charges leviable for the sub-lease to be freshly executed.

—— o ——

2023 (III) ILR – CUT- 537

SASHIKANTA MISHRA, J.

CRLMC NOS. 1114 OF 2023

RANJAN KUMAR PATASANI & ANR. ……….Petitioners

-V-

STATE OF ORISSA ……….Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 167(2) – Statutory/ Mandatory Bail – In the present case, though the charge sheet was filed within the statutory period but the cognizance was taken beyond the above period – Whether delay in taking cognizance of the case confer any vested right on the accused to be released on bail? – Held, No.

Case Laws Relied on and Referred to :-

1. 2022 SCC OnLine SC 153 : Serious Fraud Investigation Office Vs. Rahul Modi & Ors.
2. 2023 SCC Online SC 543: Judgebir Singh alias Jasbir & Ors. Vs. National Investigation Agency.

For Petitioners : M/s. M. Chand, R.R. Mishra,R.R. Mishra, A. Sahoo & K.N. Panda, A.K. Behera

For Opp. Party : Mr. S.N. Das, Addl. Standing Counsel

JUDGMENT Date of Judgment :25.08.2023

SASHIKANTA MISHRA,J.

1. The petitioners are accused persons in T.R. Case No.46 of 2022 of the Court of learned 1st Additional Sessions Judge-cum-Special Judge, Khurda. In the present application filed under Section 482 of Cr.P.C., they question the correctness of order dated 30.01.2023 passed by the court below whereby cognizance of the offence under Sections 21(C)/29 of the NDPS Act was taken. Further case of the petitioners are that they are otherwise entitled to default bail as per the provision under Section 36-A (4) of the NDPS Act read with Section 167 (2) of Cr.P.C. for being remanded to custody beyond the statutory period of 180 days.

2. The prosecution case, briefly stated is that upon receiving reliable information regarding proposed delivery of bulk quantity of Brown Sugar by three

persons, the IIC of S.T.F., CID, CB, Bhubaneswar proceeded to the spot and found three persons standing there with one of them holding a carry bag. The petitioner No.1 was one of the said persons. On search of the bag, it was found to contain Brown Sugar weighing 1kgs. 47 grams. Accordingly, the case was registered and the petitioner No.1 was forwarded to the Court on 12.06.2022 and the petitioner No.2 was taken on remand being in judicial custody in connection with another case. Upon completion of investigation, charge sheet was submitted on 05.11.2022, but cognizance was taken of the alleged offences on 30.01.2023.

3. Heard Mr. Manas Kumar Chand, learned counsel for the petitioner and Mr. S.N. Das, learned Additional Standing Counsel for the State.

4. Mr. Chand has forcefully argued that though the charge sheet contains the endorsement of the learned Special Judge that it was received on 05.11.2022, but the same was actually taken on record on 30.01.2023 on which date, cognizance was taken. Thus, it is a clear case where the accused persons were remanded to custody despite absence of a charge sheet in the record beyond the statutory period of 180 days, which is completely contrary to law and therefore, entitles them to be released on default bail.

5. Mr. S.N. Das, learned State Counsel, on the other hand, has vehemently opposed the contentions advanced by Mr. Chand by submitting that the fact that the charge sheet was not taken on record by the learned Special Judge on the date of its submission by the I.O., i.e., 05.12.2022 is not the same thing as non submission of charge sheet. Since the charge sheet was submitted within the statutory period of 180 days, the accused petitioners did not acquire any indefeasible right of being released on default bail. Mr. Das further contends that the very fact that the accused petitioners have filed an application for discharge under Section 227 of Cr.P.C., referring to the charge sheet filed on 05.11.2022 and also filed application of regular bail thereafter, it cannot be said that they were not aware of submission of the charge sheet on 05.11.2022.

6. Reference to the order dated 30.01.2023 reveals that the learned Special Judge specifically mentioned in his order that the charge sheet was received on 05.11.2022 but inadvertently cognizance of the offence was not taken on the said date. In order to appreciate the contentions put forth before this Court, copy of the charge sheet and the entire order sheet of the case was called for. On the first page of the copy of the charge sheet, the Special Judge has endorsed his signature with the date 05.11.2022 and seal. The order sheet of the case before the court below reveals that the case was posted on 04.11.2022 and thereafter adjourned to 18.11.2022, which was taken up on the record being advanced on 17.11.2022. There were several adjournments thereafter such as, 19.11.2022, 02.12.2022, 15.12.2022, 27.12.2022, 10.01.2023, 13.01.2023, 25.1.2023 and finally 30.01.2023. As stated earlier, the fact of submission of charge sheet on 05.11.2022 was for the first time reflected in the order shee t as late as on 30.01.2023. It is nobody's case that the

charge sheet was not actually submitted on 05.11.2022 but was inserted into the record later. Regardless, this Court is of the considered view that the court below has dealt with the matter in a most slipshod and careless manner, even though the liberty of the accused persons was at stake. The question that arises on such facts however is, whether delayed taking of cognizance of the offences can entitle the accused persons to default bail. In this regard, it is to be noted that the NDPS Act provides for investigation to be completed within 180 days, subject to extension for a maximum period of one year as provided under Section 36-A (4) of the Act. It goes without saying that in case charge sheet is not submitted within the statutory period or the extended period, as the case may be, an indefeasible right accrues in favour of the accused persons to be released on bail. In the instant case, the accused persons were first remanded to custody on 12.06.2022 and therefore, 180 days expired on 09.12.2022. The charge sheet was filed much earlier, i.e., on 05.11.2022, though not formally taken on record. It has been argued that remanding the accused persons beyond 09.12.2022 is illegal as it was without the charge sheet being on record. It is true that the Special Judge should have taken pain to ascertain whether any charge sheet had been filed or not while remanding the accused persons beyond 180 days but in the instant case fact remains that charge sheet was in fact filed much before the expiry of 180 days. Under such circumstances, the delayed taking of cognizance cannot enure to the benefit of the accused persons in any manner whatsoever. Reference may be had to the judgment of the Apex Court rendered in the case of ***Serious Fraud Investigatio*n *Office vs. Rahul Modi & Others, reported 2022 SCC OnLine SC 153*** where, relying upon some previous decisions on the point it was observed as follows:-

> *" A close scrutiny of the judgments in Sanjay Dutt (supra), Madar Sheikh (supra) and M. Ravindran (supra) 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), CrPC, failing which the accused would be entitled to default bail, even after filing of the chargesheet 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 charge-sheet within the statutory period is the ground for availing the indefeasible right to claim bail under Section 167(2), CrPC. 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."* *(Emphasis supplied)*

Similar view was taken by the Apex Court in a recent judgment passed in the case of ***Judgebir Singh alias Jasbir and Others v. National Investigation Agency,reported in 2023 SCC Online SC 543*** wherein the Apex Court observed as under:

> *"54. This Court in the case of Suresh Kumar Bhikamchand Jain (supra) had the occasion to consider in detail the question whether cognizance of the chargesheet was necessary to prevent the accused from seeking default bail or whether mere filing of the chargesheet would suffice for the investigation to be deemed complete. The petitioner in the said case was arrested on 11.03.2012 on the allegation of misappropriation of amounts meant for development of slums in Jalgaon City. The petitioner therein was accused of committing offences punishable under Sections 120B, 409, 411, 406, 408, 465, 466, 468, 471, 177 and 109 read with Section 34, IPC and also under Sections 13(1)(c), 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988. The contention of the petitioner therein was that he could not have been remanded to custody in view of cognizance not being taken for want of sanction within the statutory period of 90 days. 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 the period prescribed therein. This Court held that in the event of investigation not being completed by the investigating authorities within the prescribed period, the accused acquires an indefeasible right to be granted bail, if he offers to furnish bail. This Court was of the firm view that 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.However, once the chargesheet was filed within the stipulated period, the right of the accused to statutory/default bail came to an end and the accused would be entitled to pray for regular bail on merits. It was held by this Court that the filing of chargesheet is sufficient compliance with the provisions of proviso (a) to Section 167(2) of the CrPC and that taking of cognizance is not material to Section 167 of the CrPC. The scheme of CrPC is such that once the stage of investigation is completed, the court proceeds to the next stage, which is the taking of cognizance and trial. During the period of investigation, the accused is under the custody of the Magistrate before whom he or she is first produced, with such Magistrate being vested with the power to remand the accused to police custody and/or judicial custody, up to a maximum period as prescribed under Section 167(2) of the CrPC. Acknowledging the fact that an accused has to remain in custody of some court, this Court concluded that on filing of the chargesheet within the stipulated period, 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 of the CrPC. This Court clarified that the two stages are different, with one following the other so as to maintain continuity of the custody of the accused with a court."*
>
> *(Emphasis supplied)*

8. Thus, the legal position that emerges is, the right of the accused persons to be released on default bail is contingent upon the failure of the Investigating Agency to complete investigation within the statutory period of 180 days or the extended period, as the case may be. There is however no statutory mandate for cognizance of the offences being taken immediately on submission of the charge sheet.

Conversely, if the charge sheet has been submitted in time, mere non-taking of cognizance immediately cannot confer any vested right on the accused persons to be released on bail. As regards the remand of the accused persons beyond the statutory period, as was held in ***Judgebir Singh (supra),*** the accused continues to remain in custody of the Magistrate, till such time as cognizance is taken by the Court trying the offence, whereafter Section 309 comes into play. In view of what has been discussed hereinbefore, this Court is unable to accept the contentions advanced by Mr. Chand that remanding the accused persons beyond the stipulated period was in any manner illegal and that the delay in taking cognizance entitles the accused persons to default bail.

9. In the result, I find no merit in the CRLMC, which is therefore, dismissed.

—— o ——

2023 (III) ILR – CUT - 541

SASHIKANTA MISHRA, J.

RSA NO. 604 OF 2014

DUSMANTA KUMAR BISOI & ORS. ....Appellants

-V-

DEBES CHANDRA NANDI & ORS. ....Respondents

CODE OF CIVIL PROCEDURE, 1908 – Order 41 Rule 27 – Whether the lower appellate court was right in allowing the petition U/o. 41 Rule 27 of CPC without giving any opportunity to the other parties to rebut the same – Held, No – The contesting party ought to have been granted an opportunity to rebut such evidence so that ends of Justice would have been better served.

Case Law Relied on and Referred to :-

1. (2016) 13 SCC 124 : Union of India Vs. K.V. Lakshman

For Appellants : M/s. Kishore Kumar Jena, A.K. Mohapatra & S.N. Das

For Respondents: M/s. N.P. Parija, S.K. Rout, A.K. Mohanty, S. Parija

JUDGMENT Date of Judgment :11.09.2023

SASHIKANTA MISHRA,J.

1. The present appeal is directed against the reversing judgment passed by the learned District Judge, Cuttack in Title Appeal No. 58 of 2001 passed on 30th September,2014 followed by decree. As per the said judgment, the ex-parte judgment passed by learned Civil Judge (Junior Division), 2nd Court, Cuttack on

31.03.2001 followed by decree in T.S. No. 78 of 1994 in dismissing the suit ex-parte was set aside and the appeal was allowed.

2. The present appeal has been filed by the defendants-respondents.

3. For convenience, the parties are referred to as per their respective status in the Court below.

4. The following substantial question of law has been framed by this Court while admitting the present appeal.

> *"(i) Whether the lower appellate Court was right in allowing the petition under Order 41 rule 27 of CPC filed by the appellant before it (who is respondent no.1 here and plaintiff in the trial Court) and by taking those documents into consideration in deciding the appeal without giving any opportunity to the appellants to rebut the same?*

5. In view of the substantial question of law as framed it is not necessary to delve into the specific details of the case of the parties. It would suffice to indicate only the relevant facts.

6. The suit was filed by one Jatindra Nath Bhuyan as the plaintiff against Hemendranath Bisoi, Swarnalata Bisoi, Kusuma Kumari, Bhagabata Chatterjee, Nabina Sahoo, Narayan Patra and Damodar Ojha as defendant Nos. 1 to 7. The suit was filed for declaration of right, title, interest and confirmation of possession of the plaintiff over the suit land. Though notice of the suit was validly served on the defendants, they did not appear for which they were set ex-parte. The plaintiff examined himself as the sole witness from his side and proved two documents. The trial Court on consideration of the oral and documentary evidence found that the plaintiff had failed to prove his title and possession over the suit property by producing the relevant documents as also the fact that the sale deed vide Ext. 1 had been acted upon and therefore, held that the plaintiff is not entitled to any relief and accordingly dismissed the suit ex-parte.

7. The plaintiff carried the matter in appeal.The original parties having expired, the appeal was prosecuted by one Debes Chandra Nandi in place of original plaintiff being substituted as per the provisions under Order-1 Rule -10 of CPC as he was a lis pendens purchaser of the suit land vide RSD dated 25.02.2009 executed by the original plaintiff, Jatindra Nath Bhuyan. Similarly, the original defendant Nos.1 to 3 having also died,were substituted by their LRs.The defendants-respondents (including the LRs of the deceased respondents) contested the appeal. In course of hearing of the appeal, as many as eight documents were produced by the plaintiff-appellant and admitted as additional evidence being Ext. 3 to 10. Considering the documentary evidence, the First Appellant Court found the plaintiff to have successfully established his claim over the suit property and thus, allowed the appeal by setting aside the ex-parte decree and by declaring the right, title, interest and possession of the plaintiff-appellant over the suit property.

8. Heard Mr.Kishore Kumar Jena,learned counsel for the defendant-appellants and Mr. N.P. Parija, learned counsel for the plaintiff-respondents.

9. Mr. Jena has forcefully argued that proper procedure was not followed by the First Appellate Court inasmuch as the valuable right of the defendants to adduce rebuttal evidence was not granted. It is contended that at the time of hearing of the appeal, the plaintiff sought to admit several documents as additional evidence invoking the provision under Order 41 Rule-21 of CPC by filing a petition and a memo. The memo and petition were served upon the counsel for the defendants, who received the same with objection but the petition was allowed by the First Appellate Court without granting time to the defendants to either file objection or to adduce rebuttal evidence. Mr. Jena, therefore, argues that valuable right of the defendants to adduce rebuttal evidence was completely taken away and therefore, the appeal must be held to have been incorrectly decided.

10. Mr. N.P. Parija, learned counsel for the plaintiff-respondents on the other hand would argue that the copy of the memo enclosing additional documents and the petition with prayer to adduce additional evidence was duly served upon the counsel for the defendants, who received the same endorsing his objection but did not come forward to actually file any objection. The First appellate Court was therefore, fully justified in allowing the petition and admitting the documents on record as additional evidence.

11. In order to appreciate the rival contentions it would be proper at the outset to keep in mind the provision under Order 41 Rule 27 of CPC which is quoted hereinbelow:

> *"**27. Production of additional evidence in Appellate Court**.- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—*
>
> *(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or*
>
> *(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or*
>
> *(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be exam med.*
>
> *(2) Whenever additional evidence is allowed to the produced, by an Appellate Court, the court shall record the reason for its admission."*

12. This Court finds that the original plaintiff, despite no contest from the side of the defendants during trial chose not to file the documents in question. No plausible reason has been assigned for not filing the said documents during trial.

Nevertheless the substituted plaintiff-appellant sought to introduce the documents as additional evidence at the stage of hearing of the appeal. The First Appellate Court admitted the same. This Court would not like to enter into the controversy as to whether opportunity was given to the defendants to adduce rebuttal evidence or not but then it is trite law that if a party is allowed to adduce evidence, the other party must be allowed opportunity to adduce rebuttal evidence, as was held by the Supreme Court of India in the case of ***Union of India v. K.V. Lakshman,*** reported in ***(2016) 13 SCC 124***. As already stated, as many as eight documents were admitted into evidence from the side of the plaintiff at the appellate stage. According to the defendants he also has several documents in his favour, copies of which have been appended to the written note of arguments filed before this Court which, according to him can successfully rebut the documentary evidence, adduced by the plaintiff. It must be kept in mind that the defendants were set ex-parte and therefore, had no occasion to adduce any evidence either oral or documentary during trial. Of course, the Court cannot be blamed in this regard since the defendants had been set ex-parte for non-appearance despite valid service of notice. But then, it is significant to note that the suit was dismissed for want of adequate evidence in support of the claim of the plaintiff. While assailing the judgment of the trial Court, the plaintiff was permitted to adduce further evidence and in fact on such basis the appeal was allowed.Since the defendants had appeared and were contesting the appeal, they ought to have been granted opportunity to rebut such evidence so that ends of justice would have been better served. The endeavor of the Court should be to ensure a level playing field for both parties and not to permit any party to take advantage of the situation in any manner over the other party.

13. Another important aspect that attracts the attention of this Court is non-compliance of the mandatory provision of Order 41, Rule 31 of CPC. inasmuch as, the First Appellate Court did not frame the points for determination in the appeal. True, the defendants were set ex-parte in the suit and therefore, no issues were struck but they had appeared and contested the appeal raising certain specific pleas.The Appellate Court took note of the rival contentions and therefore, ought to have framed specific points for determination as envisaged in the provision under Order 41, Rule-31 of CPC.

14. For the foregoing reasons therefore, this Court is of the considered view that the plaintiff’s case having been allowed almost entirely on the basis of the documents adduced as additional evidence and defendants being in possession of documents to rebut such evidence, it would be in the best interest of justice to allow the defendants to bring on record such rebuttal evidence so that a just and proper decision can be arrived at.

15. In the result, the appeal succeeds and is therefore, allowed. The impugned judgment and decree passed by the First Appellate Court is hereby set aside. The matter is remanded to the First Appellate Court to decide the appeal afresh after

giving opportunity to the defendants to adduce rebuttal evidence in respect of the additional evidence adduced by the plaintiff. The appeal being of the year 2014 should be disposed of as early as possible, preferably within a period of six months.

—— o ——

2023 (III) ILR – CUT -545

A.K. MOHAPATRA, J.

I.A. NO.147 OF 2023
(ARISING OUT OF CRLMP NO.939 OF 2022)

HIMANSHU PATNAIK & ANR. ....Petitioners

.V.

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

CONSTITUTION OF INDIA, 1950 – Article 226 – Power of the court while directing the de novo inquiry – The valuable articles of the petitioners just vanished in thin air from the public sector bank and the investigating agency after thorough investigation found no clue, what happened to the valuable article belonging to the petitioner – Question raised – Held, this court is of the considered view that the petitioners have been deprived of a fair investigation which is apparent on the face of the record – This would definitely result in miscarriage of justice unless this court intervenes in the matter and directs for re-investigation of the matter by an independent agency like CBI.

(Para 30-33)

Case Laws Relied on and Referred to :-

1. (Criminal Appeal No.872-873 of 2020 : Dr. Naresh Kumar Mangla Vs. Smt. Anita Agarwal & Ors. Etc.
2. (2013) 5 SCC 762 : Vinay Tyagi Vs. Irshad.
3. (2011) 13 SCC 337 : Disha Vs. State of Gujarat.
4. (2010) 2 SCC 200 : Rubabbuddin Sheikh Vs. State of Gujarat.
5. (2016) 3 SCC 135 : Pooja Pal Vs. Union of India.
6. (2016) 4 SCC 160 : Dharam Pal Vs. State of Haryana.

For Petitioners : M/s. Jaydeep Pal, L. Das,
A. Pal, S.R. Pradhan & C. Mohapatra

For Opp. Parties : Mr. Saswat Das, Addl. Govt. Adv.

JUDGMENT Date of Hearing :18.05.2023: Date of Judgment :27.09.2023

A.K. MOHAPATRA, J.

A disgruntled and dissatisfied customer of the Canara Bank, Chandi Chhak Branch, Cuttack and who happens to be a member of the legal fraternity, has

approached this Court by filing the present interlocutory application arising out of above noted CRLMP petition with a prayer for a direction to the Opposite Parties No.1, 2 and 5 to initiate appropriate proceeding to transfer the ongoing investigation of a criminal case continuing for years without arriving at a conclusion to the Central Bureau Investigation (CBI)-Opposite Party No.6.

2. The factual backdrop of the Petitioners' case, in short, is that the Petitioners availed locker facility in the Opposite Party No.7-Bank and, accordingly, they have kept their valuables in the locker provided by Opposite Party No.7-Bank. Surprisingly the Petitioners discovered that the valuables kept in the said locker are missing. On coming to know about such facts, they lodged a complaint initially before the Branch Manager of Opposite Party No.7-Bank. Since no satisfactory /convincing action was taken on the compliant of the Petitioners regarding loss of valuable articles from the Safe Deposit Locker (SDL) provided by Opposite Party No.7-Bank to the Petitioners lawfully, a complaint was lodged before the Crime Branch (EOW), Odisha Police-Opposite Party No.5 with a request to conduct an investigation into the alleged loss of valuable articles belonging to the Petitioners from the custody of a Public Sector Bank like the Opposite Party No. 7.

3. It may not be out of place to mention here that on an application made by the Petitioners, the Opposite Party No.7 had allotted the SDL facility to the Petitioners, however, such valuables are missing while the same was kept in the SDL facility which was under the lawful custody of Opposite Party No.7, a Public Sector Bank governed by the RBI guidelines.

4. Although on the basis of the complaint lodged before the EOW, Odisha Police, an investigation was initiated by the EOW, however, they have failed to arrive at a logical conclusion and it is further stated that such investigation has not come to an end despite several years have passed in the meantime. Accordingly, the Petitioner has approached this Court by filing the present CRLMP application with a prayer to transfer the investigation to the CBI (Opposite Party No.6) with a further direction to Opposite Party No. 6 to conduct a free, fair and transparent investigation into the matter and to apprehend the culprits who are involved in the alleged crime and more importantly to recover the missing valuables from the locker.

5. Initially, the locker was allotted in favour of the parents of the Petitioner No.1. After the unfortunate death of the parents of the Petitioner No. 1, who were of the joint account holders in the year 1992 and 1993 respectively, the Petitioner No.1 being the only legal heir and nominee was allotted with the SDL facility by the Opposite Party No.7-Bank in the year 1994. In the year 1994, the Petitioner No.1 got married to Petitioner No.2 and, as such, both of them have become joint account holders of the aforesaid SDL facility after execution of necessary documents by the Opposite Party no. 7 - Bank. The Opposite Party No.7-Bank is deducting the annual locker rent from the joint account of the Petitioners. Therefore, the agreement between the Opposite Party No.7 and the Petitioners was valid when the alleged

occurrence took place. It is further alleged by the Petitioners that the valuable jewelries belonging to the family of both the Petitioners were kept in such SDL facility under the safe custody of Opposite Party No.7-Bank.

6. While the matter stood thus, in the year 2011 and 2012, the Opposite Party No.7-Bank issued a letter to the Petitioner No.1 communicating him regarding shifting of the SDL No.S-6 situated outside the strong room to a locker inside the strong room of the Bank. Moreover, S-6 was kept in a steel locker cabinet for years and, with the passage of time the cabinet has become old and dilapidated. Since the size of the previous locker was big, the same could not be shifted to the strong room immediately. Accordingly, the Petitioners surrendered the said locker facility and thereafter they were allotted with a new locker facility with SDL No.90 bearing No.G-1/90. Pursuant to the said notice, the Petitioners shifted all the valuables from SDL No.6 to SDL No.G-1/90. Moreover, it has also been stated that since the new locker was placed at an inconvenient place, on the complaint of the Petitioners, the Opposite Party No.7 had assured the Petitioners that the same will be shifted to a more convenient place once such facility is available with the Bank. The Petitioners have also stated that in the year 2012 and 2013, they had operated the new locker account on quite a few occasions.

7. In January 2013, the Bank authorities informed the Petitioners about the availability of a better positioned SDL inside the strong room. Accordingly, vide letter dated 29.1.2013, the Petitioners were requested to surrender the SDL No.G-1/90 which was accepted on 4.3.2013 and, accordingly, the Petitioners were summoned to the Bank on 4.3.2013 for allotment of the new locker. Upon completion of documentation and other formalities, the Petitioners were allotted a new locker bearing No.8 which was placed in the middle of the cabinet inside the strong room of the Bank. Thereafter, the Petitioners shifted all their valuables from old locker to the new locker. It has also been stated that 4.3.2013 is the only date on which the new locker was opened and operated by the Petitioners. Thereafter the same had not been operated by the Petitioners till they found the entire locker missing.

8. On 16.11.2017, when the Petitioner No.1 visited the Branch to operate his locker as there was some necessity to bring out some valuables, the officials concerned informed the Petitioners that his locker has been surrendered. On the repeated request of the Petitioner No.1 to permit him to use his locker as all his valuables are still inside the said locker and that he is in possession of the key of the SDL, the Bank officials became furious and denied operation of the SDL to the Petitioner No.1. As such, the Petitioners were informed by the Bank that their locker facility has been surrendered and they were requested to surrender the key also which was in possession of Petitioner No.1. The Bank authorities further informed the Petitioners that the locker rent might have been deducted erroneously from the joint account of the Petitioners. Moreover, on being repeatedly asked by the

Petitioners regarding surrender of the SDL facility, the Opposite Party No.7-Bank refused to provide further details. When the Petitioners somehow managed to see the locker register to their utter surprise, they discovered that there exists overwriting on the entries made earlier and there also exists several other manipulations on record. Although the matter was reported to the Branch Manager, but the Petitioners did not get any satisfactory reply from the Branch Manager and the Branch Manager was not in a mood to cooperate with the Petitioners.

9. On 18.11.2017, the Petitioners ventilated their grievance before the Branch Manager of Opposite Party No.7. Since no action was taken, the Petitioners approached the Deputy General Manager and Circle Head of the Opposite Party No.7-Bank on 20.11.2017 and submitted another representation with a request to look into the matter. The Petitioners had to return from the office of the DGM, Canara Bank with an assurance that necessary immediate action shall be taken in the matter and an inquiry shall be caused into the allegation made by the Petitioners. Although no action was taken as promised to the Petitioners by the DGM.

10. Mr. J. Pal, learned counsel for the Petitioner, at the outset, submitted that a robbery has been committed by removing the entire locker as well as the valuables belonging to the Petitioner in collusion with the Bank employees. He further submitted that although he had ventilated his grievance before the Bank authorities and despite the assurance given by the higher authorities of the Bank in question, no action whatsoever was taken by the Opposite Party-Bank authorities. On the contrary, the Bank authorities took a stand that the locker account has been surrendered and that the key which was in possession of the Petitioners is not a genuine key and the same does not belong to any locker kept in the Bank. He further contended that despite several requests made by the Petitioners to the Opposite Party-Bank authorities to look into the matter and cause an inquiry and to return the valuables kept in the new locker account, the Opposite Party-Bank authorities did not take any tangible action in the matter. Accordingly, the Petitioners were compelled to lodge an F.I.R. on 30.11.2017 before the Cantonment Police Station, Cuttack against the Branch Manager and other officials of Opposite Party No.7. Such F.I.R. was lodged and registered for commission of a crime under Section 409 read with 34 of the I.P.C.

11. Since the Bank authorities did not provide any details to the Petitioners, on their request, the Petitioners sought for information under the Right to Information Act on 12.12.2017 thereby requesting the P.I.O. of the Bank to provide the authenticated originals of the entire documents pertaining to the SDL facility allotted in favour of the Petitioners. In reply to such request under the RTI Act, the Petitioners received a reply from the P.I.O. on 8.1.2018 stating therein that the documents sought for are all vague and that such documents have been seized by the police authorities and, as such, no documents as sought for by the Petitioners in their RTI application is available with the Bank. Moreover such letter r eveals that the

copy of the locker room entry register could not have been provided to the Petitioners as the same would have divulged the confidential information in respect of other customers having SDL facility in the very same Branch.

12. Being aggrieved by the robbery of the valuables from the custody of the Bank and the inaction of the Bank authorities in the matter and the slackness shown by the Investigating Agency in inquiring into the matter, the Petitioners approached the Director General of Police on 5.1.2018 by submitting a representation before the A.D.G, Crime Branch,Odisha. In the said representation, the Petitioner had requested the A.D.G., Crime Brach to look into the matter and to expedite the investigation of the allegations made in the F.I.R. and to restore his families' valuable articles which is estimated to be more than thirty lakhs and was kept in the above noted SDL Account. Since no action was taken by the Bank Authorities as well as the police, the Petitioners were compelled to approach this Court by filing CRLMP No.584 of 2018 thereby seeking transfer of the investigation to the Central Bureau of Investigation or the Crime Branch (Economic Offence Wing), Odisha to ensure a free and fair investigation.

13. While the matter stood thus, this Court after hearing the learned counsels vide order dated 8.8.2019, passed in CRLMP No.584 of 2018, issued a direction to the Cantonment Police Station, Cuttack to transfer Cantonment P.S. No.104 of 2017 to the Crime Branch (Economic Offence Wing), Cuttack, Odisha. Whereafter the Crime Branch (Economic Office Wing), Odisha registered E.O.W. Case No.18 of 2019. On 12.11.2019, the I.O. of the Crime Branch (Economic Offence Wing) visited the Petitioners' residence in connection with the investigation and further took three sets of admitted signatures of the Petitioners. It is further alleged that since December, 2019 the investigation has not progressed any further. Although the Petitioners have been perusing the matter with the Crime Branch (Economic Offence Wing) Authorities with a request to expedite the investigation and to file the charge sheet at the earliest. It is further alleged that despite such request/reminder by the Petitioners, the investigation of the case has not been concluded as of now and, accordingly, no charge sheet has been filed.

14. It was also brought to the notice of the Court, in course of hearing of the matter, that the Crime Branch had filed an affidavit before this Court in CRLMP No.584 of 2018 enclosing an internal inquiry report of the Bank dated 14.5.2018 wherein the Bank Authorities have admitted that several irregularities have been committed by the Bank Officials in connection with the SDL Account of the Petitioner. Yet no steps were apparently taken by the EOW of Crime Branch, Odisha to further investigate the matter and to find out the real culprits and to return the valuable articles to the Petitioners.

15. Learned counsel for the Petitioners expressed his apprehension and displeasure over the manner in which the investigation is being conducted by the

EOW of Crime Branch, Odisha. He further contended that though several years have passed in the meantime, EOW of the Crime Branch, Odisha has not been able to conclude the investigation and, accordingly, they have not been able to catch hold of the culprit and the stolen articles, belonging to the Petitioners, have not yet been recovered and returned to them. He also questioned the preparedness, intention and the manner in which the investigation is being conducted by the E.O.W. in the present case.

16. Learned counsel for the Petitioners further contended that the Petitioners are valid customers of Opposite Party No.7-Bank and the SDL facility in question had been lawfully allotted to them which was under the custody and supervision of Opposite Party No.7-Bank. Further, the alleged robbery had taken place while the SDL Account was under the custody and supervision of the Opposite Party No.7-Bank. Learned counsel for the Petitioners also contended that the Petitioners have left no stone unturned to get back their valuable articles which is their lifetime saving and the backbone of their families' financial strength.

17. Opposite Party No.7-Bank being a Nationalized Bank guided and governed by the rules of the Reserve Bank of India is expected to act responsibly and to fulfill the commitment of the public sector bank to the investors/ depositors of the Bank as has been assured under the policies of the Bank to an investor/depositor likes the Petitioners. Neither the Bank has fulfilled its promise nor has the EOW of the Crime Branch, Odisha, performed its duties in a manner as they are expected from the EOW of Crime Branch, Odisha. Being harassed by the Opposite Parties, the Petitioners had no other alternative but to approach this Court by filing the present application to transfer the investigation to the CBI-Opposite Party No.6.

18. Learned counsel for the Petitioners further expressed the apprehension of the Petitioners that the EOW of the Crime Branch and the Odisha Police are deliberately not conducting a proper inquiry into the matter. He further alleged that the Investigating Officer and his team have been illegally gained over by the Bank Authorities to hide the inefficiency of the Bank and to save the reputation of a Nationalized Bank like the Opposite Party No.7. Thus, the Petitioners further apprehended that there will never be a free, fair, and impartial investigation by the EOW and that they are simply sitting over the matters and letting the time to fly by and not filing the charge sheet as is required to be filed under the law. Hence, it was prayed that the investigation in the Cantonment P.S. Case No.104 of 2017 which was later on converted to E.O.W. P.S. Case No.18 of 2019 be handed over to CBI to ensure a free, fair, and impartial investigation into the matter.

19. Although no counter affidavit has been filed by the State-Opposite Parties despite the matter remaining pending before this Court for more than a year, the learned Additional Government Advocate submitted before this Court that the EOW of the Crime Branch, Odisha is still pursuing the investigation. He further submitted

that since the investigation is on, it cannot be said that the EOW of the Crime Branch, Odisha is not taking any steps to conclude the inquiry and to file the charge sheet.

20. Learned Additional Government Advocate further contended that the investigation team of the E.O.W. of Odisha Police have visited the branch of Opposite Party No.7 on several occasions, however, nothing substantial has come out of such sluggish or delayed investigation, as a result of which, the investigation is still going on to find out the truth. It was further contended by the learned Additional Government Advocate that all possible steps have been taken by the EOW to complete the investigation as expeditiously as possible and to file the charge sheet upon conclusion of such investigation.

21. In course of hearing of the present application, this matter was heard in great details, by this Court, on several dates. However, the learned counsel for the State was unable to give any satisfactory reply with regard to the progress of the investigation. Vide order dated 1.5.2023, the I.O., E.O.W., Crime Branch, Odisha was directed to remain present in Court on 3.5.2023. Pursuant to such order passed by this Court, one Miss Geeta Rani Sethi, DSP, EOW, CID, CB, Bhubaneswar appeared in person with records before this Court. On being asked certain questions by this Court to the above named I.O., the I.O. could not give any satisfactory reply with regard to the alleged crime. She further submitted before this Court in person that the Bank Authorities did not cooperate with her in course of investigation and that the relevant records were not made available to the Investigating Officer which has caused delay in conclusion of the investigation. She further submitted that with whatsoever material that was provided by the Branch Manager of Opposite Party No.7, the EOW of Crime Branch, Odisha has concluded the investigation and that a final charge sheet has already been submitted since 2021. Although this Court was not satisfied with the reply given by the I.O., E.O.W., CID, CB, Odisha, the personal appearance of the I.O. was dispensed with on the very same day.

22. In reply to the explanation given by the I.O. of this case, learned counsel for the Petitioners submitted that since the Petitioners were not satisfied with the investigation they had approached this Court by filing CRLMP No.939 of 2022 with a specific prayer to transfer the investigation of the case to CBI for a proper investigation. This Court after realizing the factual background of the case vide order dated 26.9.2022 directed the EOW to take over the investigation and to conclude the same within three months with a further direction to the Petitioners to cooperate with the investigation.

23. Learned counsel for the Petitioners further contended that specific allegations were made in the FIR against one Ingita Das, who is an employee of Opposite Party No.7-Bank. The above named employee had approached this Court by filing a bail application bearing BLAPL No.20677 of 2017 which was rejected by

this Court vide order dated 3.12.2018. It was also alleged that the persons who have been named in the FIR have not at all been examined by the EOW in this case and more interestingly no steps were taken for custodial interrogation of such named accused persons by the EOW for the reasons best known to them. It is also contended that no proper investigation has been done in the case as was directed by this Court in the earlier application. However, the Investigating Agency to save their own skin have hastily filed the final form on 31.3.2023 and moreover, such final form has not been received by the Petitioners as of now.

24. In reply to the final form which was handed over to the learned counsel for the Petitioners in Court by the learned counsel for the State, learned counsel for the Petitioners expressed his shock and surprise with the manner in which the investigation has been conducted. He further submitted that in fact no investigation has been carried out in the present case as is required to be done statutorily. He further expressed that the final form handed over to the Petitioner only conforms the apprehension and the allegation made by the Petitioners in the present application. It was also contended that the Petitioners were never contacted and examined in the matter and no steps were taken for custodial interrogation of the named accused persons in the F.I.R. Moreover, on being asked by this Court with regard to progress of the investigation, the I.O. has filed the final form hastily indicating therein that there are no clues with regard to the alleged occurrence of the crime, as a result of which, the Petitioners have been left high and dry and further the Petitioners are absolutely sure that they would not get justice in the hands of the EOW Crime Branch, Odisha, Bhubaneswar.

25. In the aforesaid factual backdrop, particularly the failure of the Investigation Agencies in unearthing the truth, the Petitioners have approached this Court with a prayer to handover the investigation to the Central Bureau of Investigation.

26. Learned counsel for the Petitioners relied upon a judgment of the Hon'ble Supreme Court in ***Dr. Naresh Kumar Mangla v. Smt. Anita Agarwal & Ors. Etc.*** (Criminal Appeal No.872-873 of 2020) in support of his contention. He further submitted that the Hon'ble Supreme Court while considering a case with the similar background facts was pleased to entrust the further investigation of the case to CBI. While directing transfer of investigation to the CBI, the Hon'ble Supreme Court has categorically held that the conduct of the investigating authority from the stage of arriving at the scene of occurrence to the filing of the charge sheet do not inspire confidence in the robustness of the process. Further, it was also held that perusal of the charge sheet evinces a perfunctory rendition of the investigating authorities' duty by a bare reference to the facts and the presumption under Section 304B of the IPC.

27. The Hon'ble Supreme Court has also observed in the aforesaid judgment that no attempt whatsoever was made by the Investigating Agency for custodial interrogation of the accused. Similarly, learned counsel for the Petitioners submitted

that mere submission of the final form would not take away jurisdiction of this Court under Article 226 and 227 of the Constitution of India to quash the final form and to give a direction for reinvestigation in the matter in the event this Court comes to a conclusion that the investigation has been done in perfunctory manner. In the aforesaid context, learned counsel for the Petitioner further submitted that mere submission of charge sheet does not oust the jurisdiction of a superior court, when the superior court comes to a conclusion that investigation is tainted and there is a real likelihood of justice being deflected. In the aforesaid context, learned counsel for the Petitioners relied upon the judgment of the Hon'ble Supreme Court in ***Vinay Tyagi v. Irshad,*** reported in ***(2013) 5 SCC 762.*** In Para-43 of the said judgment which is relevant for the purpose of the present case is quoted herein below:-

> *43. At this stage, we may also state another well-settled canon of the criminal jurisprudence that the superior courts have the jurisdiction under Section 482 of the Code or even Article 226 of the Constitution of India to direct "further investigation", "fresh" or "do novo" and even "reinvestigation". "Fresh", "de novo" and "reinvestigation" are synonymous expressions and their result in law would be the same. The superior courts are even vested with the power of transferring investigation from one agency to another, provided the ends of justice so demand such action. Of course, it is also a settled principle that this power has to be exercised by the superior courts very sparingly and with great circumspection."*

28. On a careful examination of the factual background of this case as well as on perusal of the charge sheet, this Court is of the considered view that there is no doubt that the investigation has not been done properly and the same is tainted and there is every likelihood that justice would be deflected. The case of the preset nature has a wide repercussions on the society as a whole where people have faith in the Nationalized Banks and keep their valuables and lifetime savings in the custody of such public sector banks. In the case in hand, it was observed that the valuables belonging to the Petitioners which were kept in the SDL of Opposite Party No.7-Bank had just vanished and the Bank Authorities had no clue whatsoever as to what happened to the valuables belonging to the Petitioners.

29. This Court firmly believes that unless the extraordinary jurisdiction of this Court vested through Article 226 of the Constitution of India is exercised, there is a possibility of erosion of public faith in the judicial system. Moreover, non-interference by this Court would give a free hand to the public sector banks and its employees to play around with the valuable deposits belonging to the poor and helpless investors. On a careful examination of the materials before this Court by the Investigating Agency, this Court was shocked to learn that the valuable articles of the Petitioners just vanished in thin air from the public sector bank and the Investigating Agency after thorough investigation (as claimed by such agency) found no clue whatsoever as to what happened to the valuable articles belonging to the Petitioners.

30. This Court is aware of the limitations while exercising the jurisdiction under Article 226 and 227 of the Constitution of India. It is also aware of the restrictions imposed by law in giving a direction for further investigation, fresh or de novo investigation or reinvestigation of a crime. Such power though vested in a superior court, however, the same has to be exercised very sparingly and cautiously keeping in view the extraordinary circumstances and the absolute failure on the part of the Investigating Agency in carrying out the investigation work. On a careful analysis of the entire investigation process and upon hearing the I.O., who appeared before this Court in person pursuant to the direction of this Court, neither the records were produced before this Court nor the explanation given by the I.O. inspired the confidence of this Court in the robustness of the investigation, and the manner in which the investigation of the case culminated in the shape of filing of a final form by the I.O. This Court would like to remind at this stage that, the Constitution of India guarantees a fair investigation as well as a speedy trial to each and every citizen of this country. In the present case, this Court is of the considered view that the Petitioners have been deprived of a fair investigation which is apparent on the face of the record. In the aforesaid context, this Court would like to refer to some of the judgments of the Hon'ble Supreme Court, i.e., in ***Disha v. State of Gujarat,*** reported in ***(2011) 13 SCC 337 and Rubabbuddin Sheikh v. State of Gujarat,*** reported in ***(2010) 2 SCC 200***.

31. In ***Pooja Pal v. Union of India, reported in (2016) 3 SCC 135***, the Hon'ble Supreme Court speaking through Justice Amitava Roy (as he then was) observed as follows:-

> *"79. The precedential ordainment against absolute prohibition for assignment of investigation to any impartial agency like CBI, submission of the charge-sheet by the normal investigating agency in law notwithstanding, albeit in an exceptional fact situation warranting such initiative, in order to secure a fair, honest and complete investigation and to consolidate the confidence of the victim(s) and the public in general in the justice administering mechanism, is thus unquestionably absolute and hallowed by time. Such a measure, however, can by no means be a matter of course or routine but has to be essentially adopted in order to live up to and effectuate the salutary objective of guaranteeing an independent and upright mechanism of justice dispensation without fear or favour, by treating all alike……*
>
> *81. The judiciary propounded propositions on the aspects of essentiality and justifiability for assignment of further investigation or reinvestigation to an independent investigating agency like CBI, whether or not the probe into a criminal offence by the local/State Police is pending or completed, irrespective of as well, the pendency of the resultant trial have concretised over the years, applicability whereof, however, is contingent on the factual setting involved and the desideratum for vigilant, sensitized and even-handed justice to the parties.*
>
> *83……Though a court's satisfaction of want of proper, fair, impartial and effective investigation eroding its credence and reliability is the precondition for a direction for further investigation or reinvestigation, submission of the charge-sheet ipso facto or the pendency of the trial can be no means be a prohibitive impediment. The contextual facts*

> *and the attendant circumstances have to be singularly evaluated and analysed to decide the needfulness of further investigation or reinvestigation to unravel the truth and mete out justice to the parties."*

32. Similarly, in ***Dharam Pal v. State of Haryana,*** reported in ***(2016) 4 SCC 160***, the Hon'ble Supreme Court has held as follows:-

> *"24. Be it noted here that the constitutional courts can direct for further investigation or investigation by some other investigating agency. The purpose is, there has to be a fair investigation and a fair trial. The fair trial may be quite difficult unless there is a fair investigation. We are absolutely conscious that direction for further investigation by another agency has to be very sparingly issue but the facts depicted in this case compel us to exercise the said power. We are disposed of think that purpose of justice commands that the cause of victim, the husband of the deceased, deserves to be answered so that miscarriage of justice is avoided. Therefore, in this case the stage of the case cannot be the governing factor."*

Further in para-25 of the very same judgment, the Hon'ble Apex Court has observed as follows:-

> *"25……If a grave suspicion arises with regard to the investigation, should a constitutional court close its hands and accept the proposition that as the trial has commenced, the matter is beyond it? That is the "tour de force" of the prosecution ad if we allow ourselves to say so it has become "idée fixe" but in our view the imperium of the constitutional courts cannot be stifled or smothered by bon mot or polemic….."*

33. In the aforesaid factual backdrop particularly keeping in view the sluggish manner in which the investigation has been conducted in the present case, this Court is of the view that the same would definitely result in miscarriage of justice unless this Court intervenes in the matter and directs for reinvestigation of the matter by an independent agency like the CBI. In fact, in the factual background of the present case, the Opposite Party No.7-Bank being a Nationalized Bank comes under the Union Government and, accordingly, the CBI is the appropriate agency to reinvestigate into the matter. However, the same was not done at the initial stage by handing over the investigation to the CBI.

34. Keeping in view the aforesaid factual analysis as well as the settled legal position in view of the judgments referred to hereinabove, this Court has no hesitation to quash the final form that has been submitted in the present case. Accordingly, the same is hereby quashed. Further, the investigation of the case is transferred to the Central Bureau of Investigation. Accordingly, the Deputy Superintendent of Police, EOW, CID, CB, Bhubaneswar is directed to handover the case records to the Superintendent of Police, Central Bureau of Investigation, Bhubaneswar Office within a period of two weeks from the date of communication of a copy of this order.

35. Mr. P.K. Parhi, learned DSGI appearing on behalf of the Union of India as well as the Central Bureau of Investigation, i.e. Opposite Party No.6 is directed to intimate the S.P., C.B.I., Bhubaneswar to take up the investigation of the case

forthwith and make every endeavour to conclude the investigation as expeditiously as possible preferably within a period of 3 months. Accordingly, it is further directed that the records of EOW P.S. Case No.18 of 2019 arising out of Cantonment P.S. Case No.104 of 2017 be transferred to the S.P., C.B.I., Bhubaneswar within the aforesaid time stipulation.

36. Accordingly, the I.A. is allowed in terms of the observation and directions made hereinabove. However, there shall be no order as to cost.

—— o ——

2023 (III) ILR – CUT- 556

A.K. MOHAPATRA, J.

W.P.(C) NO. 31327 OF 2022

KARTIK SENAPATI ……..Petitioner

-V-

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

SERVICE LAW – Appointment – Petitioner being an ex-serviceman applied to the post of Odisha Civil services Examination, 2020 – Petitioner qualified in preliminary, main as well as personality test – During verification of original document the authority rejected the candidature of the petitioner on the ground that, the discharge certificate was issued after the last date of submission of online application form – Whether such ground for rejection is sustainable under law ? – Held, No – On a careful examination of the grounds laid down in the clause-II of the advertisement this court observed that there is no specific ground under which the candidature of the petitioner could have been rejected as has been done – This court has no hesitation to hold that the OPSC had no authority to reject the candidature of the petitioner. (Para 31-33)

For Petitioner : M/s. D.K. Mohapatra, R.Ch. Das & M. Mishra

For Opp. Parties : Mr. S. Das, A.G.A.,Ms. Sumitra Mohanty

JUDGMENT Date of Hearing : 10.08.2023 : Date of Judgment : 27.09.2023

A.K. MOHAPATRA, J.

1. The above named Petitioner, who had participated in the recruitment test conducted by the Odisha Public Service Commission (hereafter referred to ‘OPSC’) to the post of Odisha Civil Services-2020 under the Ex-serviceman category, has approached this Court by filing the present writ application with a prayer to quash the notice under Annexure-9 to the writ application dated 07.10.2022 and for a further direction to the Opposite Parties to consider the candidature of the Petitioner

for the above mentioned examination and declare him successful in the said examination and accordingly grant consequential benefits to the Petitioner.

2. The factual backdrop of the writ application, in a narrow compass, is that, after qualifying in +2 Examination the Petitioner joined the Indian Navy on 03.02.2006 for a tenure of 15 years.While working with the Indian Navy, the Petitioner opted for discharge from service on the completion of 15 years of service in the Indian Navy in the year 2019. As per the practice and regulations of the Indian Navy, the Petitioner was required to give two years prior notice for not continuing in service for any extended tenure beyond the initial 15 years of service. In course of his service in the Indian Navy, the Petitioner underwent special advanced training and as such, was required to serve for three years w.e.f. 01.05.2018 after completion of training.

3. After obtaining the NOC on 28.09.2020 wherein it has been specifically stipulated that the date of discharge of the Petitioner would be 30.04.2021. The Petitioner was interested in joining in a civil organization against the civil post. At that point of time, the petitioner came across the Advertisement No.7 of 2020-2021 published by the Odisha Public Service Commission inviting applications for the OCS Examination 2020. Accordingly, the petitioner submitted his online application on 28.01.2021 under the Ex-serviceman category along with NOC dated 28.09.2020 (like other Government servants). Last date for receipt of said application was notified to be 18.02.2021, which was later extended to 02.03.2021.

4. While the recruitment process was ongoing, the petitioner was discharged from service w.e.f. 30.04.2021, as has been indicated in the NOC dated 28.09.2020. By the time, the petitioner submitted his application he had acquired a M.A. qualification. It is needless to mention here that the petitioner was discharged from service on expiry of 128 days from the last date of application, which is much prior to the recruitment test that was conducted by OPSC. Since the application of the petitioner was complete in all respects and the same was submitted in time, OPSC accepted said online application and accordingly allowed the petitioner to appear in the Preliminary Examination of the OCS 2020. Consequently, the petitioner appeared for the Preliminary Examination and has secured 46% marks, as a result of which he was declared successful and was given intimation to appear for the OCS Main Examination.

5. Pursuant to the intimation issued by OPSC, the petitioner also appeared in the Main Examination of the OCS Examination 2020,and secured 50% of the marks therein and accordingly he was declared successful in the Main Examination as well. After successfully clearing both the Preliminary Examination and Main Examination of Odisha Civil Services 2020, the petitioner was called upon to participate in the Personality Test, which was held on 23.09.2022. In the Personality Test, the petitioner secured 52% of the marks and received an intimation from OPSC that the he had successfully cleared said Personality Test and was therefore called upon for

document verification. During the document verification process, the petitioner submitted his original Discharge Certificate dated 30.04.2021 under Annexure-8 to the writ application, which was issued by the Indian Navy in the prescribed Naval format (INS272 REVIV) and the original NOC dated 28.09.2020 (like other Government servants). However, before appearing in the Personality Test, the petitioner was compelled to sign a pre-typed undertaking dated 23.09.2022. Finally, the Opposite Parties have rejected the candidature of the petitioner vide order dated 07.10.2022 under Annexure-9 to the writ application on the ground that, the discharge certificate was issued after the last date of submission of online application form. Challenging said rejection order dated 07.10.2022 under Annexure-9, the petitioner has approached this Court by filing the present writ application.

6. A counter affidavit has been filed on behalf of the Opposite Party Nos. 2 and 3. A careful scrutiny of the counter affidavit reveals that the Opposite Party Nos.2 and 3 have admitted the facts that the petitioner had participated in the OCS, 2020 examination and he was assigned Roll No.312038. He was finally short-listed for Personality Test of OCS 2020 under UR Ex-serviceman category. However, candidature of the petitioner was subsequently rejected under Annexure-9 to the writ application. In the said counter affidavit it has been stated by the Opposite Party Nos.2 and 3 that the last date of submission of online application form was on 02.03.2021. However, the petitioner had submitted Ex-serviceman Discharge Certificate which was issued on 30.04.2021. In such view of the matter, it has been stated in the counter affidavit that the submission of the said discharge certificate by the petitioner is contrary to Note-2 to sub-para (k) of Paragraph-10 of the advertisement. The aforesaid provision of the advertisement prescribes that the Discharge Certificate must have been issued by the competent authority within the last date fixed for submission of online application form. However, in the instant case, the Discharge Certificate was issued after the cut-off date fixed for submission of online application form.

7. In the said counter affidavit, the Opposite Party Nos. 2 and 3 have already led emphasis on the undertaking by the petitioner before the OPSC. It has been stated that in the said undertaking, the petitioner had promised that his candidature is subject to the final decision of the Commission with regard to his Ex-serviceman status.Based on such undertaking, the petitioner was allowed to participate in the Personality Test and for document verification. After verification of documents, the candidature of the petitioner has been rejected on 07.10.2022.

8. The counter affidavit filed by the Opposite Party Nos. 2 and 3,further reveals that the representation of the petitioner under Annexure-10 has already been disposed of and the petitioner has been communicated the result thereof. With regard to the recommendation of Rajya Sainika Board under Annexure-12, it has been stated that the same has already been considered by the Commission and has also

been rejected. It has also been stated in the counter affidavit that the petitioner had specifically applied under Ex-serviceman category. However, his candidature was not considered under the Ex-serviceman category on the ground that the NOC (No Objection Certificate) produced by the petitioner clearly reveals that he was due to be released from the Indian Navy on 30.04.2021 and as such, the answering Opposite Parties have stated that the petitioner will be eligible to take any civil employment/assignment only after 30.04.2021. On the aforesaid grounds, it has been prayed in the counter affidavit that the writ petition is devoid of merit and hence the same should be dismissed.

9. Learned counsel for the petitioner has filed a rejoinder affidavit to the counter affidavit filed by the Opposite Party Nos. 2 and 3 explaining the Undertaking alleged to have been given by the petitioner. It has been stated in the rejoinder that the Undertaking was taken under compulsion in a pre-typed form and at that time, the petitioner was given an impression that the production of such an Undertaking is a condition precedent to appear for Personality Test. Since the petitioner neither had any other option nor any time to object to such undertaking, and, he was required to appear in the Personality Test to complete the recruitment, the petitioner had to sign such undertaking on a pre-typed form under compulsion of the Opposite Parties. In other words, it has been stated on behalf of the petitioner that such undertaking is not voluntary and that the consent of the petitioner was obtained under compulsion.

10. The rejoinder affidavit further reveals that the petitioner had submitted the NOC dated 28.09.2020 wherein it was specifically mentioned that the petitioner shall be discharged from service w.e.f. 30.04.2021 as per the Indian Navy Rules and Regulations. Therefore, the petitioner was entitled to get a discharge certificate only after he was discharged from service. The aforesaid facts were well within the knowledge of the Opposite Parties. Knowing the same fully well, the Opposite Parties have accepted the online application form of the petitioner and accordingly, permitted the petitioner to participate in both the Preliminary as well as Main examination in Odisha Civil Service Examination 2020. Therefore,the Opposite Parties are estopped to turn back and say that the petitioner was not eligible to be considered under Ex-serviceman category for some technical reasons.The Discharge Certificate dated 30.04.2021, which was obtained subsequently has been produced before OPSC at the time of verification of the documents on 23.09.2022. Thus, it has been stated on behalf of the petitioner that the rejection of the petitioner's candidature is highly illegal and arbitrary. On the contrary the Opposite Parties should have accepted the Discharge Certificate of the petitioner as is being done in the case of other similarly situated Government employees and the petitioner's candidature for the OCS Examination 2020 should not have been rejected.

11. Heard Mr. D.K. Mohapatra, learned counsel appearing for the petitioner, Ms. Sumitra Mohanty, learned counsel appearing for the Opposite Party Nos. 2 and

3 and Mr. S. Das, learned Additional Government Advocate for the Opposite Party No.1. Perused the pleadings of the parties as well as materials on record.

12. Mr. D.K. Mohapatra, learned counsel appearing for the petitioner, at the outset submitted that the rejection of petitioner's candidature vide order dated 07.10.2022 under Annexure-9 is highly illegal, arbitrary and discriminatory. He further contended that the Opposite Parties having accepted the online application of the petitioner and the NOC dated 28.09.2020 issued by the Indian Navy and thereafter permitting the petitioner to participate in the recruitment process, are not justified in rejecting the candidature of the petitioner under Ex-serviceman category. In course of his argument, Mr. Mohapatra, learned counsel appearing for the petitioner referred to (Odisha Civil Service Combined competitive) Rule, 1991. He further contended that none of the rules framed for the purpose prescribes that the candidate belonging to the category of Ex-Servicemen is required to furnish his Certificate of Discharge from service to be eligible for a civil post. In the present case, the Petitioner was discharged w.e.f. 30.04.2021, i.e., well before the completion of the recruitment process.

13. Learned counsel for the Petitioner further contended that the application of the Petitioner with NOC, which clearly reveals that the date of discharge from service, was accepted by the Opposite Parties pursuant to the advertisement. Furthermore, Opposite Parties upon due scrutiny not only accepted the application form of the Petitioner, but also the Petitioner was allowed to participate in two stages of the recruitment process and in both the examination, the Petitioner was declared successful. Finally, the Petitioner was called upon to attend personality test and there also the Petitioner has succeeded. Up to the final stage of selection, no objection whatsoever was raised by the recruiting agency with regard to the candidature of the Petitioner and the Petitioner was allowed to participate in the recruitment process till end. Finally, the candidature of the Petitioner was rejected by misinterpreting the provisions prescribed for the purpose. Therefore, it was argued by Mr. Mohapatra, learned counsel for the Petitioner that the Opposite Parties have committed a glaring illegality in rejecting the candidature of the Petitioner at the final stage of selection on a very hyper-technical ground and the same is not supported by any legal authority.

14. Next, drawing attention of this Court to the rules, learned counsel for the Petitioner demonstrated the procedure required to be followed so far Ex-Servicemen candidates are concerned. Referring to Rule-2(b) of the Odisha Ex-Servicemen (Recruitment to the State Civil Service), Rules, 1985, it was submitted before this Court that the word 'Ex-Servicemen' means that a person must have served in any post in the armed forces. Moreover Rule-2(b)(ii) provides that a person to be called Ex-Servicemen in the armed forces, he must have served in the Union for a continuous period not less than six months. Further, referring to Clause-2(b)(ii), it was submitted that the same provides that an Ex-Servicemen must have served not

less than six months for completing the period of service which is required to be entitled to be released or transferred to the reserve. Similarly, Rule-4 of the aforesaid Rule, 1985, provides that 3% of the vacancy arising in a year in each of the category shall be reserved to be filled up by candidates belonging to Ex-Servicemen category. Similarly, the document under Annexure-3 and 4 provides that an Ex-Servicemen who has rendered 5 years of service shall be released on completion of assignment within one year. Learned counsel for the Petitioner referring to notice dated 07.06.2019 of OPSC further submitted that the candidates who were not released from service within six months from last date of submission of online application form, their candidature is liable to be rejected by OPSC.

15. Similarly, referring to advertisement dated 21.12.2019 of the Odisha Staff Selection Commission under Annexure-6 to the writ application, learned counsel for the Petitioner submitted that, para-5(a) of the said advertisement provides that, persons of the Defence Forces having more than six months to retire/discharge from the forces as on the last date of submission of online application are not eligible to apply as Ex-Servicemen for the post and the persons of armed forces, who are going to retire within six months from the last date of online application are allowed to apply by obtaining “No Objection Certificate”. The advertisement dated 23.12.2021 under Annexure-7 issued by the Odisha State Staff Selection Commission also provides that Ex-Servicemen going to retire within six months from the last date of submission of application can apply for the post.

16. Mr. Mohapatra, learned counsel for the Petitioner referring to “Other Eligibility Conditions” under Clause-5(iii) of the Advertisement No.07 of 2020-21 relating Odisha Civil ServiceExamination, 2020, has submitted before this Court that Government Servants, whether temporary or permanent, are eligible to apply for the post, provided that, they possess requisite qualifications and are within the prescribed age limit, failing which their candidature shall be summarily rejected. Furthermore, the same also provides that such candidates are required to obtain NOC from their competent authority for submission at the time of document verification and that they must inform their respective head of departments in writing regarding the submission of said documents for the recruitment. Thus, learned counsel for the Petitioner submitted that Opposite Parties have not acted in a fair, reasonable, and non-discriminatory manner, so far as the present Petitioner is concerned. He further contended that when Government servants are allowed to submit their NOC at the stage of document verification,the Opposite Party, recruiting agency, should not have taken a different stand in the case of the Petitioner and, accordingly, they should have accepted the discharge certificate submitted by the Petitioner at the stage of document verification.

17. Moreover, the advertisement in question at Point No.9 under the heading ‘Important Points’ at Clause-(XII) provides that online application submitted to OPSC, if found to be incomplete in any respect, are liable to rejection without

entertaining any correspondence with the applicants on that score. Therefore, learned counsel for the Petitioner submitted that it is presumed that the application of the Petitioner was complete in all respect, and as such, he was allowed to participate in the recruitment process till the stage of document verification. With regard to documents to be submitted as per Clause-10 under the heading "Certificates/Documents to be Attached", learned counsel for the Petitioner further contended that the candidates, who will qualify for the main written examination are required to submit true copies of the prescribed documents duly self-certified. Further, it provides that the candidates must not attach the original certificates to their hard copy of online application. Only those who are called for personality test or interview will be required to bring with them the original certificates on the date of verification as decided by the Commission, failing which, he/she shall not be allowed to appear at the personality test or interview. So far the present Petitioner is concerned,the learned counsel for the Petitioner referred to the Discharge Certificate under Clause-10(f) of the advertisement. He further submitted that so far as Ex-Servicemen are concerned, they are required to produce Discharge Certificates issued by the commanding officers of the unit last served.

18. Ms. Sumitra Mohanty, learned counsel appearing for the Opposite Party No.2 and 3, on the other hand, contended that initially the Petitioner was shortlisted for personality test of OCS Examination, 2020 under the UR Ex-Servicemen Category. However, his candidature has been rejected by the Commission under Annexure-9 on the ground that Discharge Certificate issued after the last date of submission of online application form. Referring to the Advertisement No.7 of 2020-21 for OCS Examination, 2020, learned counsel for the Opposite Party No.2 and 3 submitted that in the said advertisement under Clause-9(XII), it has been specifically provided that online applications submitted to OPSC, if found to be incomplete in any respect, are liable to rejection without entertaining any correspondence with the applicants on that score. Accordingly, it was submitted that it was well within the authority and jurisdiction of the Commission to reject the application as well as the candidature of the Petitioner as the online application was found incomplete.

19. Ms. Mohanty, learned counsel appearing for the Opposite Party No.2 and 3 further submitted that under Clause-10(f) of the advertisement, it has been specifically provided that the Discharge Certificate issued by the Commanding Officer of the Unit last served; Ex-Servicemen candidates must submit an Affidavit that he has not been appointed against any civil post after Military Service. Referring to Note-2 of Clause-10 appended to the aforesaid Advertisement, she submitted before this Court that Degree Certificate, Caste Certificate, Odia Test Pass Certificate, Discharge Certificate of Ex-servicemen and Identity Card issued from Director of Sports & Permanent Disability Certificate of Persons with Disabilities must have been issued by the competent authority within the last date fixed for submission of online application forms.

20. So far the present Petitioner is concerned, she further contended that the Discharge Certificate was issued after the last date for submission of online application form. Therefore, the Commission in exercise of its power under Clause-11(d) & (j) has every authority to reject the application on the grounds mentioned in sub-clause(d) and sub-clause(j) of Clause-11 of the advertisement. In such view of the matter, learned counsel appearing for the Commission submitted that no fault can be found with the action of the Commission in rejecting the candidature as well as application of the Petitioner under Annexure-9 to the writ petition. Accordingly, she further submitted that the present writ petition is devoid of merit and, as such, the same should be dismissed.

21. Having heard the learned counsels appearing for the respective parties and on a careful consideration of their respective submission as well as on a detailed scrutiny of the materials on record, this Court is of the opinion that to adjudicate the dispute involved in the present writ petition, this Court is required to examine the relevant clauses in the advertisement with regard to submission of Discharge Certificate as well as the validity of the exercise of power by the Commission under Clause-11(d) & (j) of the advertisement to reject the application of the Petitioner.

22. Before taking a plunge into the factual background of the case for determination of the issues involved, it is imperative to know about the relevant provisions contained in the advertisement. With regard to Discharge Certificate, this Court on a careful scrutiny observed that two different standards have been laid down, one for Government servants whether temporary or permanent and the other for Ex-Servicemen. So far the Government Servants are concerned,whether they are temporary or permanent, they are eligible to apply under the advertisement, provided they possess the requisite qualifications and are within the prescribed age limit as provided under para-3 of the Advertisement, failing which their candidature shall be summarily rejected. It is also provided that all such candidates are required to obtain an NOC (No Objection Certificate) from their competent authority for **submission at the time of document verification**. They must inform their respective Heads of Departments in writing regarding submission of their application for this recruitment.

23. So far the Ex-Servicemen are concerned, on perusal of the advertisement, it appears that 3 posts were reserved under the Ex-Servicemen Category. All applicants were required to submit their online application form along with photocopies of relevant documents as prescribed under para-10 of the advertisement. Moreover, Clause-5(v) provides only those candidates, who possess the requisite qualification and fulfil other eligibility conditions bythe closing date of submission of registered online application forms will be considered eligible. Therefore, there is no dispute that the Petitioner was found eligible after submission of the online application form. Accordingly, he was allowed to participate in the recruitment test.

24. Furthermore, the fact with regard to issuance of the Discharge Certificate was also disclosed in his application form, i.e., there is no discrepancy in the information provided in the application form with that of the certificate which was produced later on. Clause-10 of the advertisement specifically provides that only those candidates who will be qualifying in the main written examination are required to submit the original certificates, i.e., only those who are called for personality test or interview will be required to bring with them the original certificate on the day of verification as would be decided by the Commission, failing which such candidates shall not be allowed to appear at the personality test or interview. It has also been clarified that if a candidate fails to furnish any of the original certificates and documents of the attested copies of the documents submitted with the application for verification by him/her, for verification on the date fixed by the Commission, his/her candidature will be rejected. It is relevant to note here that it is not the case of the Commission that the Petitioner did not produce the original copies of the documents, photocopies whereof were filed by the Petitioner at the time of submission of online application form. Therefore, the aforesaid ground of rejection is not applicable to the Petitioner's case. Moreover, the Petitioner had submitted an affidavit before the Commission indicating therein that he had not been appointed against any civil post after military service.

25. The next question that falls for consideration by this Court is with regard to submission of the Discharge Certificate by the Petitioner. In this regard, Note No.2 appended to Clause-10 of the advertisement specifically provides that the Discharge Certificate of Ex-Servicemen must have been issued by the competent authority within the last date fixed for submission of online application form. In other words the Discharge Certificate, so far the present Petitioner is concerned, it should have been issued by the competent authority prior to the last date fixed for submission of online application form. On a careful examination of the rejection letter under Annexure-9, it appears that the candidature of the Petitioner has been rejected only on the ground that the Discharge Certificate has been issued by the Commanding Officer after the last date of submission of online application form.

26. It is not disputed that the Petitioner was serving as CPO in the Indian Navy. As per the relevant law/rules applicable to the Naval Personnel, an officer who intends to take voluntary retirement prematurely has to mandatorily give a six months' notice. Accordingly, the Petitioner applied for pre-mature retirement with a request to issue a Discharge Certificate. After applying for voluntary retirement from service, the Petitioner was interested in an employment against the civil post. When he came across the advertisement of OCS Examination 2020, he had applied for the post by submitting his online application form thereby providing all relevant and valid information. It is not a case where the Petitioner has suppressed any material information. Furthermore, in view of the conditions in the advertisement, the Petitioner could have applied for appointment under the Notification of OCS Examination 2020 provided he has retired from service six months prior to the date

of publication of the advertisement. Before submitting his application, the Petitioner had obtained the No Objection Certificate on 28th September, 2020 as per relevant rules and laws applicable to the Indian Navy.

27. The service of the Petitioner was to come to an end w.e.f. 30.04.2021 and in fact on that date only a Discharge Certificate was issued in favour of the Petitioner. Accordingly, the Petitioner pursuant to the notice of the Commission appeared on the date fixed for personality test and document verification on 23rd September,2023 along with a copy of the Discharge Certificate dated 30.04.2021. However, most unfortunately the Commission rejected the candidature of the Petitioner although he was validly selected vide their Notice dated 7th October, 2022. Taking into consideration the aforesaid facts, this Court is unable to comprehend the scenario i.e. as to how the OPSC under Clause-5(ii) of the advertisement has made it mandatory that the candidate who has applied under Ex-Servicemen Category must produce the Discharge Certificate which was issued within six months from the last dare of submission of application form. At the same time, they have rejected the same on the ground that the Discharge Certificate was issued after the last date for submission of the application form. The aforesaid time restriction of six months is probably with the intention to have a close proximity of the date of retirement/discharge to the date of engagement against a civil post.

28. On a careful examination of the factual background, it appears that the Petitioner had already made his intention clear by applying for NOC from the Naval Authorities for recruitment against a civil post and, therefore, his service with the Indian Navy was to come to an end w.e.f. 30th April, 2021, i.e., much prior to the finalization of the recruitment process. Moreover, the authorities accepting such NOC issued by the Naval Authorities permitted the Petitioner to participate in the recruitment process till the final stage. The Petitioner who had participated in the recruitment process, with all sincerity, succeeded at every stage of the selection only to find at the final stage that his candidature has been rejected illegally and arbitrarily by the authorities mercilessly on the ground that the Discharge Certificate has been issued after the last date of submission of the application form. In my considered view such an action taken by the Commission is highly unfair and unjust, unreasonable, and above all discriminatory.

29. Coming back to the allegation made by the learned counsel appearing for the Petitioner, it was emphatically contended by Mr.Mohapatra that the Petitioner has been seriously discriminated against. In the aforesaid context, this Court examined the provisions with regard to the Government employees who have applied for the civil posts under OCS Examination 2020. On perusal of the conditions in the advertisement, it appears that the Government servants have been given the liberty to produce the No Objection Certificate under Clause-5(iii) of the advertisement, from their competent authority, at the time of document verification. Therefore, while continuing in service, with a No Objection Certificate from a

competitive authority, they can participate in the recruitment test for selection and appointment to the post under the advertisement. However, a different standard has been adopted, so far Ex-Servicemen candidates are concerned. While giving liberty to the Government servants to produce the No Objection Certificate at the time of document verification, the advertisement provides that the Discharge Certificate must have been issued prior to the last date for submission of the application. On a careful consideration of the aforesaid factual aspects, this Court is of the considered view that the clause providing for submission of the Discharge Certificate under Note-2 to Clause-10 of the advertisement, i.e., within the last date fixed for submission of application form is highly arbitrary and discriminatory.

30. Moreover, the aforesaid provision has been incorporated in the shape of a Note to Clause-10 of the advertisement. In contra distinction to the aforesaid Note, Clause-10(f), which specifically deals with Discharge Certificate provides that the Discharge Certificate issued by the Commanding Officer of the Unit last served shall be furnished by the candidate for verification on the date fixed by the Commission, failing which the candidature shall be rejected. In addition to the above, the said clause also provides that the Ex-Servicemen candidate must submit an affidavit that he has not been appointed against any civil post after military service. In the aforesaid context, this Court is of the considered view that Note-2 which has been appended to Clause-10 of the advertisement has to be read and construed harmoniously with Clause-10(f) which deals with the Discharge Certificate. Therefore, the provision contained in the Note cannot override the Clause-10(f) of the advertisement. Taking into consideration the aforesaid analysis, this Court is of the considered view that the Note-2 appended to Clause- 10 of the advertisement is highly discriminatory, so far the Ex- Servicemen are concerned. Accordingly the portion of Note-2 which is in conflict with Clause 10(f) is required to be read down to bring the same in conformity with the substance of Clause 10(f).

31. The next question that was raised before this Court is with regard to the authority of the Commission to reject the application of the Petitioner. In the said context, it is pertinent to refer to Clause-11 of the advertisement. The said Clause-11 provides the ground for rejection of applications by the Commission. Subclause(d) provides a ground for rejection of application on the ground of non-furnishing of copies of Certificate/documents as provided under para-10 of the Advertisement. Similarly, the Clause-11(j), which is relevant for the purpose of the present case, provides that if a candidate fails to furnish any of the original certificates and documents for verification on the date fixed by the Commission, his/her candidature is liable to be rejected on that ground.

32. On a careful examination of the grounds laid down in Clause-11 of the advertisement, this Court observed that there is no specific ground under which the candidature of the Petitioner could have been rejected as has been done in the case of the Petitioner under Annexure-9 to the writ application. In such view of the

matter, this Court has no hesitation to hold that the OPSC had no authority to reject the candidature of the Petitioner.

33. In view of the aforesaid analysis of the factual as well as legal position, this Court is of the considered view that the impugned rejection order under Annexure-9 is unsustainable in the eye of law. Accordingly, the same is hereby quashed. Further, the Opposite Parties are directed to accept the Discharge Certificate submitted by the Petitioner and further process the candidature of the Petitioner keeping in view performance of the Petitioner in the recruitment test as well as the merit list prepared by the Commission in respect of the posts advertised pursuant to Advertisement No.7 of 2020-21 for OCS Examination, 2020.

34. It is further made clear that in the event it is found that the Petitioner is qualified and only on the ground of the dispute with regard to the Discharge Certificate he has not been given appointment to a post reserved for Ex-servicemen category, on the recommendation of the OPSC, the Government shall give appointment to the Petitioner by reckoning his seniority from the date of his batchmates. However, the Petitioner shall not claim any salary or financial benefits for the aforesaid period.

35. Accordingly, the writ petition is allowed. However, in the facts and circumstances, there shall be no order as to costs.

—— o ——

2023 (III) ILR – CUT - 567

V. NARASINGH, J.

OJC NO. 7096 OF 1999

BISWANATH PARHI ……..Petitioner

-V-

UNITED COMMERCIAL BANK & ORS. ……..Opp. Parties

UCO BANK OFFICERS EMPLOYEES CONDUCT REGULATION, 1976 – Regulation 6(17) – Violation of the mandatory provisions relating to Regulation 6(17) – The Delinquent officer has not got himself examined during the inquiry – It would be incumbent upon the inquiry officer to generally question him on the circumstances appearing against him – This is a self-contained safeguard against arbitrariness as a facet of principles of natural justice – Effect of – Held, since there is patent violation of Regulation 6(17) by the Opp. Party, this court has no alternative but to relegate the matter to the stage, where the petitioner shall be given an opportunity in terms of Regulation. (Para 17-18-A)

Case Laws Relied on and Referred to :-

1. (2015) 2 SCC 610 : Union of India and Ors. Vs. P. Gunasekaran.
2. (2016) 6 SCC 304 : Commissioner of Police Vs. Sat Narayan Kaushik.
3. AIR 2022 SC 4611 : District Collector, Salem Vs. S. Arichandran & Ors.
4. (2021) 2 SCC 612 : Deputy General Manager (Appellate Authority) & Ors.Vs. Ajai Kumar Srivastava.
5. (WP(C) No.25141 of 2012 : Ajoy Kumar Praharaj Vs. Chairman, Utkal Gramya Bank & Ors.
6. (2013) 6 SCC 530 : Chairman, LIC of India & Ors.Vs. A. Masilamani.

S. 2022 SCC OnLine SC 341 : Arichandran (supra) and State of Uttar Pradesh & Ors.Vs. Rajit Singh.

7. AIR 2022 SC 4611 : Inspector of Panchayats and District Collector, Salem Vs. S. Arichandran & Ors.

For Petitioner : Mr. S.N. Panda

For Opp. Parties : Mr. A.K. Nath

JUDGMENT Date of Hearing :01.05.2023:Date of Judgment :27.09.2023

V. NARASINGH, J.

1. The Petitioner while working as Assistant Manager of UCO Bank, Dola Sahi Branch, a show cause was issued to him for alleged irregularities committed during his incumbency at Khaira Branch from 15.06.1987 to 06.02.1993. On consideration of his reply, charge sheet was issued to him on 14.03.1997 detailing allegations on three counts and subsequent to issuance of such charge sheet and after conduct of inquiry, an inquiry report was submitted to the disciplinary authority who after giving the Petitioner opportunity of personal hearing affirmed the order passed by the inquiry authority vide dated 30.12.1998 at Annexure-9 and the same was affirmed by the appellate authority vide order 4.5.1999 at Annexure-11.

1.A The writ petition has been filed assailing the order of framing of charge, initiation of the proceeding, the finding arrived at the inquiry officer, the order of the disciplinary authority and the order of the appellate authority at Annexures- 5(a), 7(a), 9 and 11 respectively.

2. For convenience of ready reference the Charge Nos.1 to 3 are extracted hereunder:

> "**Charge No.1** :
>
> Shri Biswanath Parhi received cash deposit from LBY agent which was less than the amount mentioned in the daily collection sheets submitted by the agent, on various dates, spread over a period of 3 ½ years, without verification. On account of his such action, a sum of Rs.3,32,396/- was less deposited in the Bank.
>
> Shri Parhi by his such action as committed a grave misconduct and failed to protect the interest of the Bank and did not discharge his duties with integrity, devotion, honesty and diligence and thereby contravened Regulation 3(1) of UCO Bank Officers Employees Conduct Regulation 1976 as amended.

Charge No.2 :

Shri Biswanath Parhi not only failed to receive cash deposit from LBY agent as per the daily collection sheet but also paid commission to the LBY agent based on the amount mentioned on the daily collection sheet, even though full amount has not been deposited in the Bank. He has thus caused payment of excess commission of Rs.5051/- to the agent. By his such acts, Shri Parhi had committed grave misconduct and failed to protect the interest of the Bank and did not perform his duties with diligence, devotion, honesty and integrity and thereby contravened Regulation 3(1) of the UCO Bank Officer Employees (Conduct) Regulation 1976 as amended.

Charge No.3 :

Shri B. Parhi had acted in an irregular and negligent manner in his dealing of LBY accounts, viz.

(i) Permitted closure of LBY No.727 of Laxmidhar Jena without adjusting the loan given against that deposit by him earlier.

(ii) By giving credit to LBY A/c No.1078 without corresponding credit voucher.

(iii) Transferring an amount of Rs.5000/- from LBY A/c No.270 to FD A/c. By his such action, he had caused pecuniary loss to the Bank of Rs.5719/-, Rs.2650/- and Rs.4985/- in the 3 A/cs respectively. Shri Parhi had by his such actions committed a grave misconduct and failed to protect the interest of the Bank. He did not perform his duties with utmost integrity, honesty, devotion and diligence thereby contravened Regulation 3(1) of UCO Bank Officer Employees (Conduct) Regulations 1976 as amended.

3. To substantiate the article of charges, statement of allegation was annexed thereto. In response thereof, as the Petitioner denied the charges, the Enquiry Officer was appointed and he conducted enquiry and submitted his report dated 30.11.1998 to the disciplinary authority. It is apt to note here that the Enquiry Officer found the Petitioner guilty of all the charges. The disciplinary authority gave an opportunity of hearing before imposing proposed penalty and subsequently by the final order at Annexure-9 exercising power vested in him as a disciplinary authority in terms of Regulation of UCO Bank Officer Employees(Conduct) Regulation 1976 (hereinafter referred to as "Regulation 1976") as amended with Regulation 4 thereof levied the following penalties on the Petitioner. The same is quoted hereunder:

"Charge No.1 – PROVED – Sri Biswanath Parhi, PF No.27164 be removed from Bank's service which will not be a disqualification for his future employment.

Charge No.2 – PROVED – The basic pay of Sri Biswanath Parhi, PF No.27164 be brought down by three stages from Rs.7820/- to Rs.7130/- in the scale of pay applicable to him for a period of three years. It is further directed that during the said period Sri Biswanath Parhi will not earn any increment and on expiry of the said period the reduction in basic pay will have the cumulative effect of postponing his future increments.

Charge No. 3 – PROVED – The basic pay of Sri Biswanath Parhi, PF No.27164 be brought down by three stages from Rs.7820/- to Rs.7130/- in the scale of pay applicable to him for a period of three years. It is further directed that during the said period Sri Biswanath Parhi will not earn any increment and on expiry of the said period the reduction in basic pay will have the cumulative effect of postponing his future increments."

4. The appeal was preferred by the Petitioner which is on record at Annexure-10. In the appeal while contesting the finding of the disciplinary authority it was, inter alia, stated that the punishment awarded is highly disproportionate and it was the further submission that there has been patent violation of Regulation 6(17) of Regulation 1976.

5. Paragraph-9 of the memorandum of appeal relates to violation of Regulation 6 (17) of Regulation 1976. The copies of the said Regulation have been placed on record by way of memorandum. Regulation 6 deals with procedure for imposing major penalties.

6. It is the submission of the learned counsel for the Petitioner that since in the case at hand admittedly there has been total violation of Regulation 6(17) of Regulation 1976, the disciplinary proceeding and the order of the appellate authority are liable to be quashed. To fortify his submission, he has relied on the judgments of the Apex Court in the case of **Union of India and others vrs. P. Gunasekaran**, **(2015) 2 SCC 610**, **Commissioner of Police vrs. Sat Narayan Kaushik, (2016) 6 SCC 304**, more particularly paragraphs 15 and 19 thereof and **Inspector of Panchayats and District Collector, Salem vrs. S. Arichandran and others, AIR 2022 SC 4611**.

7. In opposition, learned counsel for the Bank, Mr. Nath submitted that the Petitioner was a Chief Cashier of the Bank and because of his action and inaction a sum of Rs.3,32,396/- was found less deposited in the Bank relating to the collection under the Laghu Batchat Yojana (LBY). He submitted that since the Petitioner did not perform his duty with due diligence which is expected from an employee of a Bank and it is a case of misappropriation by an employee of a public sector employee as such, no leniency can be shown to him and the writ petition is liable to be rejected. To fortify his submission, learned counsel for the Bank relied on the decisions in the case of **Deputy General Manager (Appellate Authority) and others vrs. Ajai Kumar Srivastava, (2021) 2 SCC 612** and order of this Court in the case of **Ajoy Kumar Praharaj vrs. Chairman, Utkal Gramya Bank and others** (WP(C) No.25141 of 2012 disposed of on 02.01.2023) and seeks dismissal of the writ petition.

8. Contours of interference of a disciplinary proceeding have been well outlined. In **P. Gunasekaran (supra)** relied on by the learned counsel for the Petitioner, the Apex Court expressed its dismay that the High Courts are acting as an appellate authority in the disciplinary proceeding, reappreciating the evidence adduced before the enquiry officer and restated the dos and don'ts by the High Courts in matters relating to disciplinary proceeding. Paragraphs 12 and 13 thereof are extracted as under for convenience of ready reference:

> "12. Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the disciplinary proceedings, reappreciating

even the evidence before the enquiry officer. The finding on Charge I was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Articles 226/227 of the Constitution of India, shall not venture into reappreciation of the evidence. The High Court can only see whether:

(a) the enquiry is held by a competent authority;

(b) the enquiry is held according to the procedure prescribed in that behalf;

(c) there is violation of the principles of natural justice in conducting the proceedings;

(d) the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;

(e) the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;

(f) the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;

(g) the disciplinary authority had erroneously failed to admit the admissible and material evidence;

(h) the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;

(i) the finding of fact is based on no evidence.

13. Under Articles 226/227 of the Constitution of India, the High Court shall not:

(i) reappreciate the evidence;

(ii) interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;

(iii) go into the adequacy of the evidence;

(iv) go into the reliability of the evidence;

(v) interfere, if there be some legal evidence on which findings can be based.

(vi) correct the error of fact however grave it may appear to be;

(vii) go into the proportionality of punishment unless it shocks its conscience."

9. The same view has also been reiterated by the Apex Court in the case of **Ajai Kumar Srivastava (supra).**

10. The statutory rules governing the disciplinary proceeding have been placed on record. It is one of the submissions of the learned counsel for the Petitioner that there has been violation of Regulation 6(17) of Regulation 1976. The said Regulation reads as under :

"(17) The inquiry authority may, after the officer employee closes his evidence, and shall, if the officer employee has not got himself examined, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the officer employee to explain any circumstances appearing in the evidence against him."

11. In the case at hand admittedly the delinquent officer has not got himself examined and hence it was incumbent upon the inquiry authority to give an opportunity of hearing in terms of the said Regulation. The same allegedly having not been done such ground was taken in the memorandum of appeal filed by the present Petitioner. Paragraph-9 of the memorandum of appeal refers to the same and is quoted hereunder:

> "9. Sub-Regulation (17) of Regulation 6 of UCO Bank Officer Employees (Discipline & Appeal) Regulations, 1976, lays down as follows: -
>
> The inquiring, authority may, after the officer employee closes his evidence and shall, if the officer employees has not got himself examined, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the officer employee to explain any circumstances appearing in the evidence against him."
>
> In paragraph no.10, 16 (Page No.60) of Manual on Disciplinary Action and Related Matters, the Head Office directs as follows:-
>
> "The charge-sheeted officer employee may examine himself in his own behalf if he so prefers. After the officer employee closes his evidence, the Enquiry Officer **must**, if the officer employee has not got himself examined during the inquiry, generally question him on the circumstances appearing against him……"
>
> The above **must-procedure** was not followed by the Enquiry Officer. Even though I did not examine myself in the inquiry in my own behalf, the Enquiry Officer did not give me the chance scope of explaining my position as contemplated in the above obligatory provisions." (Emphasized)

12. The appellate authority while passing the order at Annexure-11 confirmed the order of the disciplinary authority dealt with the charges leveled against the delinquent officer and the findings relating to the same and concurred with the views expressed by the disciplinary authority and referring to Regulation 1976 dismissed the appeal preferred by the delinquent-Petitioner.

But conspicuously there is no reference to the stand of the Petitioner relating to infraction of Regulation 6(17) of Regulation 1976 in the memorandum of appeal adverted to hereinabove.

13. In paragraph-15 of the writ petition the Petitioner has taken a specific stand relating to violation of mandatory requirement of giving opportunity in the given circumstances since he has not got himself examined. Recitals in the said paragraph are extracted hereunder:

> "xxx xxx xxx
>
> In the appeal, the petitioner raised the contentions in para-9 and 23 of the appeal memo regarding non affording of the mandatory requirement of giving opportunity of hearing of both the instances i.e. by the enquiring officer and the disciplinary authority, besides the contention that he is not liable for the charges."

14. The Opposite Party-Bank chose to give a vague reply to such specific assertion of the Petitioner in the writ petition as well as the memorandum of appeal.

Recitals of which have already been taken note of. The averments in paragraph-14 of the counter are quoted under:

> "14. That the averments made in para-15 of the writ application, it is humbly submitted, that the appellate authority disposed of the appeal after considering all the materials available and following the provisions of the Regulations. The allegation that the Inquiring Officer and the Departmental Authority did not give any personal hearing to the petitioner is misconceived. As stated earlier, the Inquiring Officer as well as the Departmental Authority followed the procedures laid down in the Regulations. At the same time, the said Authorities also given adequate opportunities of personal hearing to the petitioner in consonance with the rules.Thus the allegations leveled are mischievously false and the same are hereby stoutly denied."

15. And, Opposite Party-Bank have chosen to ignore such specific assertion.

16. In paragraph-16 of the rejoinder, the Petitioner has reiterated the violation of the mandatory provisions relating to Regulation 6(17) of Regulation 1976.

17. On a bare perusal of the said Regulation, it can be seen that in the event delinquent officer has not got himself examined during the inquiry, it would be incumbent upon the inquiry officer to generally question him on the circumstances appearing against him. This is a self-contained safeguard against arbitrariness as a facet of principles of natural justice, which in the case at hand, has been violated in toto.

Hence, the question has to be answered to what relief the Petitioner would be entitled to in the face of such violation.

18. In this context, it is apposite to refer to the judgment of the Apex Court in the case of **Chairman, LIC of India & others vrs. A. Masilamani**, **(2013) 6 SCC 530** wherein it has been held that once the Court sets aside an order of punishment on the ground of improper conduct of the enquiry, it must remit the matter to the disciplinary authority to conduct the enquiry from the point that it stood vitiated and conclude the same. Para-9 thereof is quoted hereunder:

> "9. It is a settled legal proposition, that once the Court sets aside an order of punishment, on the ground that the enquiry was not properly conducted, the Court cannot reinstate the employee. It must remit the concerned case to the disciplinary authority, for it to conduct the enquiry from the point that it stood vitiated, and conclude the same….."

18-A. Following the above dictum wherein the case law governing the field till the date of the said judgment has been referred to and the latest judgments of the Apex Court in the case of **S. Arichandran (supra)** and **State of Uttar Pradesh and others vrs. Rajit Singh, 2022 SCC OnLine SC 341,** since there is patent violation of Regulation 6(17) of Regulation 1976 by the Opposite Party-Bank, this Court has no alternative but to relegate the matter to the stage where the Petitioner shall be given an opportunity in terms of Regulation 6(17) of Regulation 1976 and consequentially the order of the disciplinary authority as well as appellate authority are hereby set aside.

19. The exercise in terms of Regulation 6 (17) of Regulation 1976 relating to the materials collated during inquiry shall be completed within a period of two months from the date of receipt/production of a certified copy of this order and consequential order as envisaged under the said Regulation shall be passed within one month thereafter.

20. It is needless to state that the Petitioner shall be at liberty to invoke the jurisdiction of the appellate authority in the event the order passed by the disciplinary authority is adverse to him.

21. The writ petition is accordingly disposed of. No costs.

—— o ——

2023 (III) ILR – CUT- 574

V. NARASINGH, J.

GA NO.18 OF 1999

STATE OF ORISSA ………Appellant

-V-

JAGAT BHOTRA ……....Respondent

CODE OF CRIMINAL PROCEDURE, 1973 – Section 378(1) (6) – Principles governing the exercise of power in an appeal against acquittal – Discussed with reference to case laws.

Case Laws Relied on and Referred to :-

1. 2011 (9) SCC 479 : Mrinal Das & Ors. Vs. The State of Tripura.
2. 2019 (II) ILR-CUT322 : State of Orissa Vs. Balaram Pradhan & Ors.
3. (2007) 3 SCC 755 : State of Goa Vs. Sanjay Thakran & Anr.
4. (2007) 4 SCC 415 : Chandrappa & Ors. Vs. State of Karnataka.
5. 2009) 17 SCC 405 : State of Uttar Pradesh Vs. Jagram & Ors.
6. (2010) 6 SCC 1 : Sidhartha Vashisht alias Manu Sharma Vs. State (NCT of Delhi)
7. (2010) 9 SCC 189 : Babu Vs. State of Kerala.
8. (2010)12 SCC 59: Ganpat Vs. State of Haryana & Ors.
9. (2010) 13 SCC 657 : Sunil Kumar Sambhudayal Gupta (Dr.) & Ors. Vs. State of Maharashtra.
10. (2011) 4 SCC 324 : State of Uttar Pradesh Vs. Naresh & Ors.
11. (2011) 4 SCC 786 : State of Madhya Pradesh Vs. Ramesh & Anr.

For Appellant : Mr. P.K. Maharaj, ASC

For Respondent : Mr. B. Mishra

JUDGMENT Date of Hearing:11.10.2023:Date of Judgment: 16.10.2023

V. NARASINGH, J.

1. Heard Mr. Maharaj, learned ASC for the Appellant and Mr. Mishra, learned counsel for the Respondent.

2. This Appeal at the instance of the State is filed under Section 378(1)(b) of the Cr.P.C. assailing the judgment dated 06.09.1996 passed by the learned Assistant Sessions cum-Chief Judicial Magistrate, Nabarangpur in Sessions Case No.11 of 1996 acquitting the Opposite Party of the charges under Section 376 of IPC.

3. The principles governing the exercise of power in an appeal against acquittal is worth reiterating before adverting to the factual matrix of the case at hand. In **Mrinal Das & Others vs. the State of Tripura, 2011 (9) SCC 479** reported in the apex Court have extensively dealt with the scope of an Appellate Court to interfere with an Appeal against acquittal and referred to the following judgments.

i. **State of Goa vs. Sanjay Thakran & Anr**. (2007) 3 SCC 755

ii. **Chandrappa and Others vs. State of Karnataka** (2007) 4 SCC 415

iii. **State of Uttar Pradesh vs. Jagram and Others**,(2009) 17 SCC 405

iv. **Sidhartha Vashisht alias Manu Sharma vs. State (NCT of Delhi)** (2010) 6 SCC 1

v. **Babu vs. State of Kerala**, (2010) 9 SCC 189

vi. **Ganpat vs. State of Haryana and others**, (2010)12 SCC 59

vii. **Sunil Kumar Sambhudayal Gupta (Dr.) and Others vs. State of Maharashtra**, (2010) 13 SCC 657

viii. **State of Uttar Pradesh vs. Naresh and Others**, (2011) 4 SCC 324

ix. **State of Madhya Pradesh vs. Ramesh and another**, (2011) 4 SCC 786

4. The guiding principles in an Appeal against acquittal and the power of the Appellate Court to "re-appreciate, review or reconsider evidence and interfere with an order of acquittal was restated while quoting paragraph-42 of the judgment of the Apex Court in the case of **Chandrappa and Others vs. State of Karnataka** (Supra).

> "42.....The following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:
>
> (1) An appellate court has full power to review,reappreciate and reconsider the evidence upon which the order of acquittal is founded.
>
> (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
>
> (3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.
>
> (4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. *Firstly*, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every

> person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.
>
> (5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

5. Thus on the touchstone of the law laid down by the Apex Court, the contention of the State has to be examined as to whether the case at hand merits interference, with the impugned judgment of acquittal.

6. The Respondent was charged under Section 376 of IPC and it is the case of the prosecution that on 07.10.1995, the complainant (P.W.2) lodged the FIR alleging that the Opposite Party-accused on 11.09.1995, in the night at about 10:00P.M, when the victim, his wife (P.W.1) was outside her house to relieve herself, ravished her and hearing the shout of the victim, P.W.2 came out and it was stated in the FIR that the victim escaped from the clutches of the accused with much difficulty and seeing the presence of the complainant, the accused decamped.

7. The further case of the prosecution that the matter was immediately reported to the member of the village Panchayat-P.W.6 and there was a meeting and ultimately the FIR was lodged on 07.10.1995, after a lapse of about 26 days.

8. The case of the defence was one of complete denial and false implication due to land dispute.

9. 9 witnesses were examined on behalf of the prosecution, P.W.1 is the victim lady and P.W.2 is the complainant-husband of the victim, P.W.3 is the sister of the mother of P.W.1, P.W.4 is the father-in-law of the victim,P.W.5 is the mother-in-law of the victim, P.W.6 is the village member, P.W.7 is a seizure witness relating to the seizure of the saree of the victim under Ext.1, P.W.8 is the medical officer and P.W.9 is the Investigating Officer.

10. While recording the Judgment of acquittal the learned Court on an analysis of the evidence of P.W.1-victim, noted the patent contradiction in her statement in paragraph-9 of the impugned judgment and also referred to the supervening circumstances allegedly falsifying the allegation, in paragraph-13 of the impugned judgment.

11. The learned trial Court has also noted that the delay in lodging of the FIR has not been explained and the theory that there was a Panchayat where the accused-Respondent agreed to pay compensation and later on resiled, which resulted in delay in lodging the FIR is an afterthought.

12. This Court has also noted that the Investigating Officer-P.W.9 in his cross-examination has clearly denied that there was a Panchayat meeting at the instance of P.W.2 and in fact he goes on to state that "my investigation reveals that there was an illicit relationship between the victim lady and the accused person prior to the

occurrence" though denies the suggestion that the investigation was perfunctory. Paragraph-3 of the cross-examination of the I.O.-P.W.9 is extracted hereunder;

> "I have not examined the scribe of the F.I.R. P.W.2 did not state before me that the village member Sansai Bhotra prevented him from lodging F.I.R and that there was any panchayat meeting convened at the instance of P.W.2 and that the accused agreed to pay any compensation for the occurrence before any panchayat meeting. My investigation reveals that there was illicit relationship between the victim lady and the accused person prior to the occurrence….xxx".

13. The finding of the Investigating Officer-P.W.9 regarding the relationship has to be considered in the light of the circumstances which weighed with the learned trial Court while disbelieving the version of P.W.2 as noted in paragraph-13 of the impugned judgment which is extracted hereunder.

> "……………The long absence of the victim (P.W.1) from the house is also suggestive of her willingness to go out side for the purpose of joining with the accused.Hence it is evident that she had the consent for the alleged occurrence."

14. It is also relevant to extract the paragraph-9 of the impugned judgment of the learned trial Court in which the contradictions in the FIR lodged by P.W.2, his statement and that of the victim-P.W.1, his wife has been noted.

> "9.Besides the above the victim (P.W.1) states in her evidence that when she was sitting for latrine outside her house under a Tamarind tree and after having cleaning herself, the accused arrived there and made her flat on the ground and started making sexual intercourse with her under the said Tamarind tree forcibly. It is also stated by the victim lady (P.W.1) that when the accused was cohabitating with her forcibly, at that time her husband (P.W.2) came out of the house and saw her in sexual compromise position with the accused. The above circumstance does not tally with the evidence of the complainant as well as to the F.I.R. story with regard to the alleged occurrence."

15. Learned counsel for the State, Mr. Maharaj submitted with vehemence that the victim has supported the prosecution in material particulars and the alleged contradiction ought not to have weighed with the Court as such the judgment being perverse on the face of it is liable to be set aside.

16. It is the contention of the learned counsel for the State that the findings of the learned trial Court are based on surmises and conjectures and militate against the weight of materials on record and states that in the case at hand, the materials on record unerringly point to the guilt of the accused-Respondent and the only conclusion that is possible on the basis of evidence on record, is that the Respondent is guilty of committing the alleged offence. Hence, the judgment of acquittal is unsustainable.

17. Learned counsel for the Respondent, Mr. B.K. Mishra supported the judgment of acquittal and stated that keeping in view the law governing the field relating to interference with a judgment of acquittal and there being no "compelling and substantial reasons" for reversing the, the Appeal is liable to be dismissed and in

this context he relies on the law laid down by the Apex Court in the case of ***Chandrappa and Others vs. State of Karnataka*** (Supra) and ***State of Orissa vs. Balaram Pradhan and Ors***. 2019 (II) ILR-CUT322.

18. As noted in the preceding paragraphs, taking note of the conduct of the victim (P.W.1) and the attending circumstances as borne out from the evidence of the complainant (P.W.2), her husband and the I.O.-P.W.9, learned trial Court on a cogent analysis of the materials on record passed the judgment of acquittal.

19. On close scrutiny of evidence on record, this Court is not persuaded to take a view different from that of the learned trial Court, keeping in view the contours for the exercise of jurisdiction while dealing with an Appeal against acquittal, as noted. Hence, the Appeal being devoid of merit is dismissed.

20. The bail bond of Respondent stands cancelled and sureties are discharged.

21. Accordingly, the GA stands disposed of.

—— o ——

2023 (III) ILR – CUT - 578

BIRAJA PRASANNA SATAPATHY, J.

W.P.C.(OA) NO. 2665 OF 2016

ALEKHA KUMAR PANIGRAHI ………Petitioner

.V.

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

SERVICE LAW – Appointment – The petitioner by producing fake B.A and B.Ed. mark-sheet has managed to get selected and appointed as Shikhya Sahayak in the year 2003 – The authority by order dated 28.10.2016 disengage the petitioner after following due procedure – The petitioner challenges the impugned order of disengagement – Held, fraud vitiates everything this court is not inclined to interfere with the impugned order. (Para 8.3-8.4)

Case Laws Relied on and Referred to :-

1. (2021 (I) ILR-CUT-115) : Prtima Sahoo Vs. State of Odisha & Ors.
2. (2022 (I) ILR-CUT-108) : Bikash Mahalik Vs. State of Odisha & Ors.
3. (2023 (I) OLR - 162) : Bishnu Kishore Majhi Vs. State of Odisha & Ors.
4. (AIR 1994 SC 853) : S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. & Ors.
5. (2012(2) CLR (SC) 312) : Smt. Badami (Deceased) by her L.R. Vs. Bhali.

For Petitioner : M/s. J.K. Khuntia, H.S. Deo

For Opp. Parties : Mr. B. Panigrahi, Addl. Standing Counsel

JUDGMENT Date of Hearing: 12.07.2023 : Date of Judgment: 02.08.2023

BIRAJA PRASANNA SATAPATHY, J.

The present writ petition has been filed by the Petitioner challenging the order dtd.28.10.2016 passed by the Collector-Cum-Chairman, SSA, Bhadrak in Misc. Case No. 01/2016 arising out of W.P.(C) No. 15497 of 2016. Vide the said order the Petitioner who was continuing as a primary school teacher was terminated from his service.

2. It is the case of the Petitioner that pursuant to the advertisement issued by the Opp. Party No. 2 in the year 2003 for selection and engagement of Sikshya Sahayak, the Petitioner made his application and on being found suitable, he was issued with the order of engagement vide order dtd.16.12.2003 under Annexure-1 series. Pursuant to the order passed by this Court in W.P.(C) No. 11748 of 2003 though the Petitioner was disengaged, but once again vide office order dtd.28.09.2005 under Annexure-1 series, he was reengaged as a Sikshya Sahayak.

3. It is contended that while so continuing as a Junior Teacher the Petitioner for the first time was issued with a show-cause notice on 17.04.2010 under Annexure-2 by the Opp. Party No. 3 asking him to produce the original certificates and mark-sheets regarding his educational qualification for verification. The Petitioner as directed also produced his original certificates and mark-sheets in terms of Annexure-2 and Opp. Party No. 4 vide letter dtd.05.05.2010 under Annexure-3 requested Controller of Examination, Utkal University to verify the genuineness of the mark-sheets so submitted by the Petitioner of his B.A. and B.Ed. Examination. Not only that vide letter dtd.29.05.2010 under Annexure-4, Opp. Party No. 3 requested Opp. Party No. 4 to produce the advertisement published for engagement of Sikshya Sahayak during the year 2004-05 and other relevant information. In the said letter Opp. Party No. 4 was also requested to provide the marks secured by the present Petitioner during the selection process.

3.1. It is contended that on receipt of Annexure-4 vide letter dtd.24.06.2010 under Annexure-5, Opp. Party No. 4 intimated Opp. Party No. 3 to the effect that the original application form and other relevant documents may be available in his office. In the meantime vide letter dtd.20.08.2010 Utkal University under Annexure-6 indicated that the result of the present Petitioner of his B.Ed. Examination, 1994 has been withheld due to want of Registration Number.

3.2. It is contended that while the matter stood thus, an allegation was made by one Dillip Kumar Nayak that the Petitioner by producing fake B.A. and B.Ed. certificates along with fake mark-sheets has managed to get appointment as Sikshya Sahayak in the year 2005. On receipt of such complaint, the Petitioner was again issued with the show-cause by the Opp. Party No. 3 on 28.10.2010 directing him to submit his reply with regard to the submission of fake B.A. and B.Ed. certificates for his selection and appointment as Sikshya Sahayak.

3.3. It is contended that the Petitioner on receipt of the show-cause dtd.28.10.2010 under Annexure-8, submitted his reply on 15.11.2010 under Annexure-9 indicating that pursuant to the earlier notice issued on 29.05.2010 under Annexure-4, the Petitioner since has already submitted his original B.A. and B.Ed. marksheets, the authenticity of the said documents may be verified at his level.

3.4. It is contended that in the meantime vide office order dtd.13.06.2012 the Petitioner while continuing as a Junior Teacher, he was appointed as a regular primary school teacher vide order dtd.13.06.2012 w.e.f.28.09.2011 under Annexure-10. However, the Petitioner was again issued with a show-cause notice by the Opp. Party No. 2 on 29.08.2016 under Annexure-12 directing him to file his reply as to why his services shall not be terminated for submitting forged B.A. & B.Ed. certificates during the process of selection of Sikshya Sahayak in the year 2004-05.

3.5. The Petitioner challenging issuance of such show-cause by the Opp. Party No. 2 approached this Court in W.P.(C) No. 15497 of 2016. This Court vide order dtd.12.09.2016 while disposing the writ petition, observed that if the Petitioner files his show-cause within a period of 15 days, Opp. Party No. 2 shall conduct an enquiry after affording opportunity of hearing to the Petitioner and pass a reasoned order within a period of one month thereafter. Till a decision is taken, the services of the Petitioner shall not be dispensed with.

3.6. Pursuant to the order passed by this Court, Petitioner submitted his reply to the show-cause on 27.09.2016 and the matter was registered as Misc. Case No. 01 of 2016 before the Opp. Party No. 2. But Opp. Party No. 2 without causing any enquiry passed the order of disengagement vide the impugned order dtd.28.10.2016 under Annexure-13.

4. It is the contention of the learned counsel for the Petitioner that the Petitioner pursuant to the selection process initiated by the Opp. Party No. 2 was duly engaged as Sikshya Sahayak initially vide order dtd.16.12.2003 and subsequently vide another order issued on 28.09.2005 under Annexure-1 series. The Petitioner thereafter was engaged as a Junior Teacher on completion of 3 years of engagement as a Sikshya Sahayak. While so continuing when the Petitioner was issued with a show-cause and he was directed to produce the certificates in support of his qualification vide Annexure-2, he submitted all the original certificates in support of his qualification including the mark-sheet of his B.A. and B.Ed. qualification.

4.1. Even though after due verification of his B.A. and B.Ed. certificates from Utkal University nothing was found against him, but the Petitioner when was issued with another show-cause on 28.10.2010 under Annexure-8, he submitted his reply to the same on 15.11.2010 under Annexure-9. On submission of such reply no further action was taken and the Petitioner vide order dtd.13.06.2012 was appointed as a regular primary school teacher w.e.f. 28.09.2011 under Annexure-10. But

surprisingly, the Petitioner was again issued with a show-cause by the Opp. Party No. 2 on 29.08.2016 under Annexure-12 and without following the direction of this Court so issued in its order dtd.12.09.2016 in W.P.(C) No. 15497 of 2016, the Petitioner was terminated from his service vide order dtd.28.10.2016 under Annexure-13.

4.2. It is accordingly contended that since while terminating the services of the Petitioner vide the impugned order dtd.28.10.2016 the direction of this Court in W.P.(C) No. 15497 of 2016 was not followed, the impugned order is not sustainable in the eye of law. It is also contended that since the Petitioner was duly selected and appointed as a Sikshya Sahayak and was regularized as a junior teacher and subsequently as a regular primary school teacher, Opp. Parties basing on the principle of promissory estoppel are not competent to terminate the services of the Petitioner. In support of such submission learned counsel for the Petitioner relied on a decision of this Court in the case of ***Prtima Sahoo Vs. State of Odisha & Ors. (2021 (I) ILR-CUT-115)*** and another decision of this Court in the case of ***Bikash Mahalik Vs. State of Odisha & Ors. (2022 (I) ILR-CUT-108)***. Learned counsel for the Petitioner also relied on another decision of this Court in the case of ***Bishnu Kishore Majhi Vs. State of Odisha & Ors. (2023 (I) OLR - 162)***.

4.3. This Court in Para 10 of the Judgment in the case of ***Prtima Sahoo*** has held as follows:-

> *"10. Thus, in this case, the district administration, being an integral part of the State of Orissa, by its declaration i.e. act of issuing order of appointment intentionally caused the petitioner to believe that she is found to be eligible on comparison of the marks secured by all the candidates and she acted upon such belief, thereby resigned from the post of Anganwadi Worker and joined the post of Sikshya Sahayak under Bhapur Block. In such situation, neither the State of Orissa nor its representatives i.e. the district administration or the Director of the OPEPA, in any proceeding between it and the petitioner deny the truth of that thing. Once the State Government has allowed the petitioner to believe that she has qualified in the selection process and is being appointed as Sikshya Sahayak in pursuance of which she resigned from the post of Anganwadi Worker and worked for almost six to eight months as Sikshya Sahayak, the district administration/ State Government cannot deny that she does not qualify for the post of Sikshya Sahayak."*

4.4. Similarly, this Court in Para 27 of the Judgment in the case of ***Bikash Mahalik*** has held as follows:-

> *"27. In **Pratima Sahoo** (supra), this Court held that the order of disengagement of the petitioner from the post of Sikshya Sahayak, pursuant to decision of the district administration, having found qualified in the selection process and appointed after resigning from her erstwhile post of Anganwadi Worker and having worked for six to eight months, amounts to putting the petitioner in prejudical and disadvantageous position and the reason assigned for later finding the petitioner not suitable for securing less marks than other meritorious candidates do holds good, the petitioner cannot be found faulted by the mistake committed by the appointing authority in calculating the percentage. Consequentially, direction was given to absorb the petitioner forthwith applying the doctrine of promissory estoppel in the said case."*

4.5. Similarly, this Court in Para 9 to 15 of the Judgment in the case of ***Bishnu Kishore Majhi*** has held as follows:-

> *"In the case of* ***Miss Reeta Lenka v. Berhampur University****. 1992 (11) OLR 341, where the petitioner had been admitted in Rama Devi Women's College in 1985 and completed her B.Sc. from that College and thereafter obtained Diploma in Pharmacy from V.S.S. Medical College, Burla, but on cancellation of her result because of mass copying she had approached this Court, it was observed by this Court that in cases of mass copying, natural justice is not required to be complied with and, as such, it is apparent that the candidate in question does not get an opportunity to have his say in the matter. Therefore, after thorough discussion on the principle of promissory estoppels under Section 115 of the Evidence Act, the Division Bench of this Court held that the said case was a fit case, where the petitioner should be protected by applying the principles of promissory estoppel.*
>
> *Similar view was taken in the case of* ***David C. Jhan v. Principal Ispat College, Rourkela and others****, 1984 (1) OLR 564, where the petitioner was admitted to the College after being declared to have passed the High School Certificate Examination conducted by the Board of Secondary Education, but subsequently the Board notified that the candidate was wrongly declared to have passed and on the basis of such notification, the College Authorities cancelled the admission of the petitioner. But due to interference of this Court, referring to the judgment of this Court in the case of* ***Gita Mishra v. Utkal University****, ILR 1971 CUT-24, the said notification was quashed and the petitioner in the said case was permitted to continue his studies.*
>
> ***10.*** *In* ***Ambika Prasad Mohanty v. Orissa Engineering College and another****, 1989 (1) OLR 440, this Court, applying the principle of estoppel, observed that once a student is admitted after satisfying all the qualification, subsequent cancellation of admission cannot be made since he/she would be deprived of pursuing his/her studies in any other institution.*
>
> *11. The principles of promissory estoppel has been considered by the apex Court in* ***Union of India and others v. M/s Anglo Afghan. Agencies etc.****, AIR 1968 SC 718,* ***Chowgule & Company (Hind) Pvt. Ltd. v. Union of India and others****, AIR 1971 SC 2021,* ***M/s Motilal Padampat Sugar Mills Co. Ltd. v. The State of Uttar Pradesh and others****, AIR 1979 SC 621,* ***Union of India and others v. Godfrey Philips India Ltd.****, AIR 1986 SC 806,* ***Delihi Cloth & General Mills Ltd. v. Union of India and others****, AIR 1987 SC 2424,* ***Bharat Singh and others v. State of Haryana and others****, AIR 1988 SC 2181 and many other subsequent decisions also.*
>
> *12.* ***Sanatan Gauda*** *(supra) is a case where the petitioner, while securing his admission in the Law College, had admittedly submitted his mark sheet along with the application for admission, the law college had admitted him and he had pursued his studies for two years, the University had also granted him the admission cards for the Pre-Law and Inter-Law Examinations, he was also permitted to appear in the said Examinations and was admitted to the Final Year of the course and it was only at the stage of the declaration of his results of the Pre-Law and Inter-Law Examinations, the University raised objection to his so called ineligibility to be admitted to the law course. Therefore, in the said case, this Court held that the University is clearly estoppel from refusing to declare the results of the appellant's examination or preventing him from pursuing his Final Year course.*

13. The ratio decided by this Court as well as the apex Court, as discussed above, is fully applicable to the present case and any other plea advanced by opposite parties no.2 and 3-BPUT, cannot sustain in the eye of law.

14. In the case of ***P.V. Mahadevan v. Md. T.N. Housing Board****, (2005) 6 SCC 636, the apex Court, in paragraphs-8, 10 and 11 of the judgment held that for the mistake committed by the Department in the procedure for initiating a disciplinary proceeding, the appellant should not be made to suffer. Similar view has also been taken in* ***Secretary Ministry of Defence v. Prabhash Chandra Mishra****, (2012) 11 SCC 565.*

15. In the above premises, the stand taken by the BPUT, that inadvertently the result was published and subsequently the mistake having been detected the same was withdrawn, cannot have any justification, in view of the law laid down by the apex Court, as mentioned supra."

5. Mr. B. Panigrahi, learned Addl. Standing Counsel on the other hand made his submission basing on the stand taken in the counter affidavit so filed by the Opp. Party No. 3. Though it is not disputed that pursuant to the advertisement issued by the Opp. Party No. 2, the Petitioner was selected and engaged as a Sikshya Sahayak vide order dtd.16.12.2003 and subsequent order dtd.28.09.2005 under Annexure-1 series and he was also regularized as a junior teacher and as a regular primary school teacher, but at the time of his initial selection the Petitioner since had submitted forged mark-sheets of both B.A. and B.Ed. examination, show-cause was issued on 17.04.2010 under Annexure-2. Basing on the show-cause issued by the Opp. Party No. 3 on 17.04.2010 under Annexure-2, when the Petitioner submitted the mark-sheets of both B.A. and B.Ed. examination, it was found that the Petitioner has secured 503 marks out of 1200 marks in B.A. and 406 marks out of 900 marks in his B.Ed. examination. But in the calculation sheet prepared on the basis of mark-sheets submitted by the Petitioner at the time of submission of his application, his mark in the B.A. Examination was reflected as 714 marks out of 1200 marks and 526 marks out of 900 marks in the B.Ed. examination.

5.1. Since in the calculation-sheet prepared at the time of initial selection basing on the mark-sheet produced by the Petitioner, his mark in the B.A. examination was calculated as 714 marks out of 1200 marks and in the B.Ed. examination his mark was calculated as 526 marks out of 900 marks and on verifying the original mark-sheets so produced by the Petitioner pursuant to Annexure-2, it was found that the Petitioner has in fact secured 503 marks out of 1200 marks in his B.A. examination and 406 marks out of 900 marks in his B.Ed. examination, show-cause was issued to the Petitioner to justify the anomaly.

5.2. Not only that in the selection conducted by the Opp. Party No. 2 in the year 2003, the Petitioner having belonged to UR Category and taking into account his mark secured in the B.A. & B.Ed. Examination so produced by him, he should not have been selected.

Taking into account the mark secured by the Petitioner in his B.A. i.e. 503 marks out of 1200 marks and in the B.Ed. i.e. 406 marks out of 900 marks, his

percentage comes to 41.91% in the B.A. examination and 45.11% in his B.Ed. examination, the average percentage of which comes to 43.51%. But since the Petitioner at the time of his selection produced fake mark-sheets showing his mark in B.A. as 714 marks out of 1200 marks and 526 marks out of 900 marks in the B.Ed., his percentage was calculated at 59.50% in the B.A. examination and 58.44% in the B.Ed. examination, the average percentage of which comes to 58.97%. Since the cut-off mark in UR category in the selection made in the year 2005 was fixed at 55.31%, taking into account the average mark of the Petitioner at 58.97%, the Petitioner was selected and engaged. But in fact in the original mark-sheets so produced by the Petitioner his percentage of mark in the B.A. examination is 41.91% and in the B.Ed. it is 45.11%, the average of which comes to 43.51%.

5.3. Accordingly, since on enquiry it was found that the Petitioner by producing forged mark-sheets of his B.A. and B.Ed. examination was selected and appointed as a Sikshya Sahayak in UR Category, basing on the order passed by this Court in W.P.(C) No. 15497 of 2016 Opp. Party No. 2 after due enquiry came to the aforesaid finding with regard to the percentage of mark secured by the Petitioner originally as per his certificate and the calculation made because of the forged mark-sheets produced by the Petitioner at the time of making the application. Since the Petitioner by producing forged mark-sheets of his B.A. and B.Ed. examination managed to be selected and engaged in UR Category, Opp. Party No. 2 rightly terminated the Petitioner from his services vide order dtd.28.10.2016 under Annexure-13.

5.4. It is also contended by the learned Addl. Standing Counsel that in the calculation-sheet so prepared at the time of initial selection, the Petitioner had put a signature in the scrutiny-cum-marks calculation register by agreeing to the said calculation. Therefore, it is to be held that the Petitioner knowingly submitted forged and manipulated mark-sheets of his B.A. and B.Ed. examination and basing on the exaggerated mark he was selected and appointed as a Sikshya Sahayak. Accordingly, it is contended that no illegality and irregularity has been committed by the Opp. Party No. 2 in terminating the services of the Petitioner vide order dtd.28.10.2016 under Annexure-13.

5.5. It is also contended that the Petitioner when was issued with a show-cause on 28.10.2010 under Annexure-8, Petitioner challenging the same approached this Court in W.P.(C) No. 22419 of 2011. Pursuance to the order passed by this Court, Opp. Party No. 2 initiated Misc. Case No. 13 of 2011. In the aforesaid Misc. Case No. 13 of 2011, Opp. Party No. 2 held that Opp. Party No. 3 must cause an enquiry and if any prima facie material is found against the Petitioner, further show-cause can be issued. On receipt of the report, Opp. Party No. 2 issued a fresh show-cause on 29.08.2016 under Anenxure-12, which led to passing of the order impugned.

5.6. Learned Addl. Standing Counsel in support of his submission relied on the decision of the Hon'ble Apex Court in the case reported of ***S.P. Chengalvaraya***

Naidu (dead) by L.Rs. Vrs. Jagannath (dead) by L.Rs. & Ors. *(AIR 1994 SC 853)* and another decision of the Hon'ble Apex Court in the case of ***Smt. Badami (Deceased) by her L.R. Vs. Bhali*** *(2012(2) CLR (SC) 312).*

5.6. Hon'ble Apex Court in Para 7 of the Judgment in the case of ***S.P. Chengalvaraya Naidu*** has held as follows:-

> *"7. 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-loan-dodgers 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 whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation"*

5.7. Similarly, Hon'ble Apex Court in Para 21 to 24 of the Judgment in the case of ***Smt. Badami*** has held as follows:-

> *"21. In the said case it was clearly stated that the courts of law are meant for imparting justice between the parties and one who comes to the court, must come with clean hands. A person whose case is based on falsehood has no right to approach the Court. A litigant who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If a vital document is withheld in order to gain advantage on the other side he would be guilty of playing fraud on court as well as on the opposite party.*
>
> *22. In* ***Smt. Shrist Dhawan v. M/s. Shaw Brothers*** *AIR 1992 SC 1555 it has been opined that fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It has been defined as an act of trickery or deceit. The aforesaid principle has been reiterated in* ***Roshan Deen v. Preeti Lal*** *AIR 2002 SC 33,* ***Ram Preeti Yadav v. U. P. Board of High School and Intermediate Education and other*** *(2003) 8 SC 311 and* ***Ram Chandra Singh v. Savitri Devi and others*** *(2003) 8 SCC 319.*
>
> *23. In* ***State of Andhra Pradesh and another v. T. Suryachandra Rao*** *AIR 2005 SC 3110 after referring to the earlier decision thiscourt observed as follows:-*
>
> *"In* ***Lazaurs Estate Ltd. v. Beasley*** *(1956) 1 QB 702 Lord Denning observed at pages 712 & 713, "No judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything." In the same judgment Lord Parker LJ observed that fraud vitiates all transactions known to the law of however high a degree of solemnity."*
>
> *24. Yet in another decision* ***Hamza Haji v. State of Kerala & Anr.*** *AIR 2006 Sc 3028 it has been held that no Court will allow itself to be used as an instrument of fraud and no*

Court, by way of rule of evidence and procedure, can allow its eyes to be closed to the fact it is being used as an instrument of fraud. The basic principle is that a party who secures the judgment by taking recourse to fraud should not be enabled to enjoy the fruits thereof."

6. To the stand taken in the counter affidavit, Petitioner while filing his rejoinder, produced the mark-sheets of his B.A. and B.Ed. examination vide Annexure-15 series and contended that since taking into account the mark-sheet available under Annexure-15 series which was produced by the Petitioner at the time of his selection, he was selected and appointed, no fault can be attributed as against the Petitioner for such selection and appointment. Taking into account his selection and appointment as well as long continuance, the order of termination passed under Annexure-13 is liable for interference of this Court.

7. I have heard Mr. J.K. Khuntia, learned counsel for the Petitioner and Mr. B. Panigrahi, learned Addl. Standing Counsel appearing for the Opp. Parties. On the consent of both the Parties, the matter was heard at the stage of admission and dispose of by the present order.

8. Having heard learned counsel appearing for the Parties and after going through the materials available on record, it is found that the Petitioner pursuant to the selection process initiated by the Opp. Party No. 2 in the year 2003 was appointed as a Sikshya Sahayak vide order dtd.16.12.2003 and subsequently vide order dtd.28.09.2005 under Annexure-1 series. It is also found from the record that basing on the engagement order issued on 28.09.2005 under Annexure-1 series, the Petitioner was appointed as a junior teacher on completion of 3 years of service in the year 2008. But for the first time when a show-cause was issued to the Petitioner by the Opp. Party No. 3 on 17.04.2010 under Annexure-2, the Petitioner as directed submitted his original certificates and mark-sheets with regard to his educational qualification. Even though the Petitioner in terms of Annexure-2 submitted his original certificates in support of his educational qualification, but when another show-cause was issued by the Opp. Party No. 3 on 28.10.2010 under Annexure-8, the Petitioner challenging the show-cause approached this Court in W.P.(C) No. 22419 of 2011. Pursuant to the order passed by this Court, Opp. Party No. 2 initiated Misc. Case No. 13 of 2011 and in the said Misc. Case the following order was passed:-

"xxx In the above scenario of facts, the District Project Co-ordinator,SSA,Bhadrak is directed to look into the allegation against the petitioner if there is prima-facie materials on record against the petitioner. Merely on simply allegation petition against the petitioner, the District Project Co-ordinator,SSA,Bhadrak must cause an enquiry and thereafter can issue further show cause notice to the petitioner. Accordingly, the Misc. Case is disposed of."

8.1. Subsequently, basing on the enquiry conducted by the Opp. Party No. 3 and on being satisfied that fraud has been committed by the Petitioner in submitting fake

B.A. and B.Ed. mark-sheets, Opp. Party No. 2 when issued a show-cause on 29.08.2016 under Annexure-12 proposing therein to terminate the services of the Petitioner on the ground that the Petitioner has submitted fake B.A. and B.Ed. mark-sheets for the purpose of his selection as Sikshya Sahayak, Petitioner challenging the said show-cause approached this Court in W.P.(C) No. 15497 of 2016. This Court vide order dtd.12.09.2016 when directed the Opp. Party No. 2 to conduct an enquiry and pass a reasoned order by affording opportunity of hearing to the Petitioner, Opp. Party No. 2 initiated Misc. Case No. 01 of 2016.

8.2. This Court finds that in Misc. Case No. 01 of 2016, Petitioner was not only afforded with personal hearing through his counsel, but also Opp. Party No. 2 conducted due enquiry by verifying the mark-sheet produced by the Petitioner of his B.A. & B.Ed. examination with the marks indicated in the scrutiny-cum-mark calculation register, which was countersigned by the Petitioner by agreeing to such calculation at the time of his selection. On proper verification of the mark-sheet so produced by the Petitioner of his B.A. & B.Ed. examination with that of the mark indicated in the scrutiny-cum-calculation register. Opp. Party No. 2 clearly found that the Petitioner by producing fake B.A. & B.Ed. mark-sheets was appointed as Sikshya Sahayak vide order under Annexure-1 series.

8.3. This Court after going through the materials available on record also finds that vide Annexure-15 series, Petitioner has produced his original B.A. & B.Ed. mark-sheets. While in the mark sheet issued by the Utkal University, the Petitioner has secured 503 marks in his B.A. examination out of 1200 marks and 406 marks in his B.Ed. examination out of 900 marks, but the Petitioner was selected as Sikshya Sahayak by taking his mark as 714 marks out of 1200 marks in his B.A. exam and 526 marks out of 900 marks in his B.Ed. examination. The Petitioner has also not disputed the cut-off mark of the selection conducted in the year 2003 in UR category, which was fixed at 55.31%. Since in spite of opportunity and while filing the writ petition as well as the rejoinder, Petitioner has failed to produce the mark-sheet of his B.A. and B.Ed. examination showing his securing 714 marks out of 1200 marks in B.A. and 503 marks out of 900 marks in his B.Ed. examination, this Court is of the view that the Petitioner by producing fake B.A. and B.Ed. mark-sheets, has managed to be selected and appointed in the year 2003 and subsequently in the year 2005.

8.4. In view of the aforesaid analysis, it is the view of this Court that the Petitioner by committing fraud has managed to be selected and appointed as Sikshya Sahayak vide order under Anenxure-1 series. Placing reliance on the decisions cited by the learned Addl. Standing Counsel and in view of the settled legal position that fraud vitiates everything, this Court is not inclined to interfere with the impugned order so passed by the Opp. Party No. 4 on 28.10.2016 under Annexure-13. The decisions relied on by the learned counsel for the Petitioner with regard to promissory estoppel is not acceptable to this Court as it is found that the Petitioner

has committed fraud by producing fake mark-sheets of his B.A. and B.Ed. examination. This Court therefore finds no illegality or irregularity with the impugned order at Anexure-13. Accordingly, this Court is not inclined to entertain the writ petition with the prayer as made and dismiss the same.

—— o ——

2023 (III) ILR – CUT - 588

BIRAJA PRASANNA SATAPATHY, J.

WPC(OAC) NO.1536 OF 2015

J. SAMESWAR RAO ....Petitioner

.V.

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

ORISSA CIVIL SERVICES (CLASSIFICATION CONTROL APPEAL) RULES, 1962 – Rule 15(10) (i) (b) – The disciplinary authority issued 2nd show cause notice without giving his disagreement note and the reason for not agreeing with the finding of the inquiry officer – Effect of – Held, in view of such non-compliance of the statutory provision this court is inclined to interfere with the impugned order of punishment.

Case Laws Relied on and Referred to :-

1. W.P.(C) No.9214 of 2008 : Gobinda Sahoo Vs. Managing Director, OFDC Ltd. & Ors.
2. W.P.(C) No.5092 of 2008 : Narottam Pati Vs. NESCO & Ors.
3. W.P.(C) No.6703 of 2023 : Anita Kumar Das Vs. State of Odisha & Ors.

For Petitioner : M/s. B. Routray, Sr.Adv.
Mr. J. Biswal

For Opp. Parties : M/s. S.K. Samal, Addl. Govt. Adv.

JUDGMENT Date of Hearing: 10.07.2023 : Date of Judgment: 28.08.2023

BIRAJA PRASANNA SATAPATHY, J.

The Petitioner has filed the Present Writ Petition inter alia challenging the impugned order dt.24.03.2015 so passed by the Opp. Party No.1 under Annexure-14 and with a further prayer to direct the Opp. Parties to regularize the services of the Petitioner for the period he remained under suspension and to give all service benefits for the said period.

2. The factual matrix giving rise to filing of the present Writ Petition is that the Petitioner while working as a Medical Officer in PHC, Kundra in the district of Koraput, he was conferred with the power of drawing and disbursement authority. The Petitioner after assuming the charge of D.D.O brought to the notice of the

CDMO, Koraput as well as Director, Health Services, Bhubaneswar about mis-appropriation and overdraft of the Government money by one Venkateswar Das, Jr. Clerk working in the said PHC on 01.09.1989 under Annexure-1. Accordingly, preliminary enquiry was held and in course of the enquiry, Sri Venkateswar Das agreed to refund the over-draft amount to the Government.

2.1. On the face of such admission, Petitioner was placed under suspension vide order dt.26.12.1989 and an FIR was also lodged on 26.12.1989 giving rise to Kundra P.S. Case No.46 of 1989 corresponding to G.R. Case No.816 of 1989 in the file of Chief Judicial Magistrate, Jeypore for the offences under Section 409/477-A of the Indian Penal Code. The aforesaid Criminal Proceeding was initiated against the present Petitioner along with other persons. However, in the meantime, a proceeding was initiated against the Petitioner under Annexure-3 with the following charges:

C H A R G E

"*Dr. J. Someswar Rao, Assistant Surgeon (under suspension) during his incumbency as Medical Officer, P.H.C, Kundra in the district of Koraput from 1.8.88 to 7.8.89 along with Sri Venkateswar Dash Junior Clerk-cum-Store Keeper (under suspension) of the P.H.C., Kudnra in the district of Koraput Committed the following improper acts and omissions-*

1. *Committed severe irregularities mentioned in the statement of allegations regarding drawal and disbursement of claims and custody of Govt. cash and misappropriated closing balance of cash of Rs.2564.00 as on 7.8.89 of the P.H.C., Kundra.*

2. *Adopted various fraudulent methods outlined in the statement of allegations and made fraudulent drawals of Rs.8,12,477.00 and misappropriated the same.*

3. *Made server omissions and commissions enumerated in the statement of allegations in contravention of provisions of the Orissa Treasury Code, Orissa General Financial Rules No.I and other instructions and orders in the matter of drawl and disbursmene of claims and custody of Govt. cash.*

4. *Made excess payment of Rs.215/- to himself in respect of Bill NO.59 dt.5.8.89.*

The aforesaid acts and omissionis amount to failure-

(i) To discharge duties properly,

(ii) to maintain devotion to duty and

(iii) to maintain absolute integrity in contravention of provisions of Rule 3 of the Orissa Govt. Servants' Conduct Rules, 1959."

2.2. In the proceeding, the Petitioner submitted his written statement of defence on 19.09.1991 and initially one Ramesh Chandra Mishra was appointed as Inquiry Officer to enquire into the charges. The Inquiry Officer when could not complete the enquiry during his tenure and retired on 31.01.1997, another Inquiry Officer was appointed and the said Inquiry Officer submitted the enquiry report on 08.10.1999 under Annexure-4. Even though the enquiry report was submitted on 08.10.1999, but Petitioner was issued with the 1st show-cause along with the enquiry report only vide notice dt.19.01.2012 under Annexure-4 series. However, in the enquiry report

so submitted on 08.10.1999, the Inquiry Officer clearly indicated about the admission made by Sri Venkateswar Das with regard to misappropriation towards fraudulent drawal of money amounting to Rs.6,61,205/- and mis-appropriation of Rs.25,439/-, in total, mis-appropriation of Rs.6,86,644/-.

2.3. After submission of the inquiry report and prior to issuance of the 1st show-cause on 19.01.2012, Petitioner was re-instated in his service vide order dt.24.02.2001 under Annexure-5. However, after receipt of the 1st show-cause on 19.01.2012, Petitioner submitted his reply before Opp. Party No.1 on 10.09.2012 under Annexure-6. But Opp. Party No.1 even after supply of the inquiry report vide notice dt.19.01.2012 under Annexure-4 and submission of the reply by the Petitioner under Annexure-6, directed for de novo enquiry vide his order dt.22.03.2013.

2.4. The Inquiry Officer appointed vide order dt.22.03.2013 when submitted the inquiry report on 06.08.2013, Petitioner was once again issued with another show-cause in the nature of 1st show-cause vide notice dt.24.09.2013 under Annexure-7. The Inquiry Officer while submitting the report on 06.08.2013 came to the following conclusion:

CONCLUSION-

> *From the above observations the Enquiring Officer is of the opinion that the during the period from01-08-88 to 07-08-89 there is misappropriation of Rs.8,15,256/0 which includes Rs.8,12,477+Rs.2564/-+Rs.215/- and the main culprit Sri V. Ds the Junior Clerk has admitted the fact that he had manipulated the entire amount, Govt. is requested to take expeditious step to finalize the case to award some punishment at the earliest by stopping 3 annual increments with cumulative effect and to regularize the entire period as leave due. The total period of Suspension is 11 years. It is requested to finalize the case on humanitarian poiont of view but the recovery of misappropriated money is in question as the main accused Mr. V Das is No More. As the matter is subjudice Govt may wait till final disposal of the case, but Govt. is requested to regularize the period at an early date.*

2.5. It is contended that the Inquiry Officer in its report dt.06.08.2013 taking into account the admission by Sri Venkateswar Das, Jr. Clerk of the PHC who have manipulated the entire amount, suggested the Government to take expeditious steps to finalise the proceeding by awarding punishment of stoppage of three annual increments with cumulative effect and to regularise the entire period of suspension as “Leave Due”. The Enquiry Officer also opined that since the total period of suspension is 11 years, the case be finalised by taking a humanitarian point of view. But the recovery of misappropriated amount in question, in view of the admission by the main accused, Sri Venkateswar Das, who is no more, Government, may wait till final disposal of the criminal case.

2.6. The Petitioner on receipt of the 2nd enquiry report along with the 1st show-cause vide notice dt.24.09.2013 under Annexure-7 submitted his reply on 04.11.2013 under Annexure-8 with the prayer to exonerate him from the charges.

But on the face of such reply and the inquiry report so provided vide Annexure-7, Opp. Party No.1 issued the 2nd show-cause vide notice dt.09.10.2014. In the said notice, Opp. Party No.1 without giving a disagreement note to the punishment suggested by the Inquiry Officer as provided under Rule 15(10)(i) (b) of the OCS (CC&A) Rules, 1962, proposed to impose the following punishment against the Petitioner.

> "As regards the other delinquent officer namely Sri V. Das, Junior Clerk, he is dead and he has also not submitted his written statement of defence. Hence no punishment can be awarded to him. But the balance misappropriated amount can be recovered from him in pursuance of G.A Deptt. Guidelines contained in Letter NO.19806 dated 21.08.2012. Whereas all the charges have been established against Dr. Rao, the following penalities are proposed to be awarded.
>
> (i) Recovery of fifty percent of the misappropriated of Rs.8,12,477/- i.e. Rs.4,06,239 and Rs.2564/- from Dr. Rao.
>
> (ii) Withholding of two increments with cumulative effect.
>
> (iii) The period of suspension will be treated as such
>
> Now, therefore, in accordance with Clause (i)(b) of Sub-Rule 10 of Rule 15 of OCS (CC& A) Rules, 1962, Dr. Rao is called upon to submit such representation as he may wish to make against the proposed penalty within 30 days from the date of receipt of this notice failing which the matter may be decided on its own merit."

2.7. It is further contended that while issuing the 2nd show-cause vide notice dt.09.10.2014, Opp. Party No.1 did not take into consideration the order of punishment imposed against Sri Venkateswar Das, Jr. Clerk of the PHC so passed on dt.19.10.2001 under Annexure-10. In the proceeding initiated against Sri Venkateswar Das, Opp. Party No.1 after due consideration of the inquiry report so submitted against Sri Das, awarded the following punishment.

> **1.** Sri Venkateswar Das may be reinstated in service in a post where he would not have to handle cash and may be kept under the strict vigil of C.D.M.O/S.D.M.O.
>
> **2.** His suspension period be treated as such
>
> **3.** The entire misappropriated amount of Rs.1706661.05 (Rupees Seventeen lakh six thousand six hundred sixty one and paisa five), be recovered fro his salary and other dues in suitable monthly instalements not later than his date of retirement.
>
> **4.** Two of his annual increment be withheld with cumulative effect."

2.8. Learned Sr. Counsel appearing for the Petitioner accordingly contended on the face of the punishment imposed against Sri Venkateswar Das wherein he was held liable for the entire mis-appropriated amount of Rs.17,06,661.05, the Petitioner should not have been held liable for recovery of 50% of the mis-appropriated amount of Rs.8,12,477/-. It is also contended that the proposed punishment indicated by Opp. Party No.1 in the 2nd show-cause dt.09.10.2014 is not in accordance with the provision contained under Rule 15(10)(i)(b) of OCS(CCA) Rules, 1962, which mandates for giving a disagreement note if the disciplinary authority does not agree with the findings of the enquiry officer.

2.9. Be that as it may, the Petitioner on receipt of the 2nd show-cause vide notice dt.09.10.2014 submitted his reply on 12.11.2014 under Annexure-12 again praying therein exonerate him from the charges. But it is contended that without considering the admission made by Sri Venkateswar Das and the order of punishment passed against him on 19.10.2001 under Annexure-10 and without following the guideline issued by the G.A Deptt on 21.08.2012 so reflected in the 2nd show-cause notice dt.09.10.2014, Opp. Party No.1 after taking concurrence of the Orissa Public Service Commission passed the impugned order of punishment against the Petitioner vide order dt.24.03.2015 under Annexure-14. Opp. Party No.1 passed the following punishment against the Petitioner.

> *1. Recovery of fifty percent of the misappropriated amount of Rs.8,12,477/- i.e. Rs.4,06,239/- and Rs.2564 from Dr. Rao.*
>
> *2. The Period of suspension be treated as such.*

2.10. Learned Sr. Counsel appearing for the Petitioner accordingly contended that the impugned order of punishment so passed against the Petitioner under Annexure-15 is not sustainable on the following grounds.

> *(i) The admission of the entire mis-appropriation by Sri Venkateswar Das,Jr. Clerk of the PHC.*
>
> *(ii) The order of punishment passed against Sri Venketeswar Das vide order dt.19.10.2010 under Annexure-10 wherein he was held liable for the entire mis-appropriated amount of Rs.17,06,661.05.*
>
> *(iii)the 2nd Show cause issued on 09.10.2014 under Annexure-9 without having a dis-agreement note to the finding of the Inquiry Officer is contrary to the provisions contained under Rule 15 (10()i)(b) of the OCS(CC&A) Rules, 1962.*

2.11. Mr. B. Routray, learned Sr. Counsel in support of his submission relied on the decision of this Court rendered on 08.12.2017 in the case of ***Gobinda Sahoo Vs. Managing Director, OFDC Limited and others*** *passed in* ***W.P.(C) No.9214 of 2008***. This Court in Paragraph 6 & 11 of the judgment has held as follows:

> **"6.** This Court carefully perused the enquiry report submitted by the enquiry officer, as well as the orders passed by the disciplinary authority and the appellate authority. As it appears, the disciplinary authority, while imposing punishment disagreeing with the recommendation made by the enquiry officer, has not assigned any reason whatsoever, least to say any plausible reason. The law is fairly settled that after receiving enquiry report, the disciplinary authority may find it difficult to agree with the finding in the enquiry report. But the rules generally provide that in case of such disagreement he must record his reasons and also record his own findings, if the evidence already on record is sufficient for that purpose, or remit the case to the enquiry authority for further enquiry and report.
>
> **11.** In view of the above settled position of law, which is squarely application to the present context; since the disciplinary authority has not assigned any reason, while differing with the finding of the enquiry officer and imposing penalty for recovery of Rs.62,821/- and the appellate authority has upheld the same also without assigning any

> reason, the order dated 27.09.2007 ini Annexure-1 passed by the disciplinary authority and the order dated 03.10.2008 in Annexure-8 passed by the appellate authority are liable to be quashed and are accordingly quashed."

2.12. Learned Sr. Counsel appearing for the Petitioner also relied on another decision of this Court rendered in the case of ***Narottam Pati Vs. NESCO and others*** vide judgment ***dt. 03.05.2017,*** passed in ***W.P.(C) No.5092 of 2008.*** This Court in paragraph 8 of the said judgment has held as follows:

> "***8.*** *In Travancore Rayons Ltd. V. The Union of India, MANU/SC/0280/1969: AIR 1971 SC 862 the apex Court observed that the necessity to give sufficient reasons which disclose proper appreciation of the problem to be solved, and the menta process by which the conclusion is reached in cases where a non-judicial authority exercises judicial functions is obvious. When judicial power is exercised by an authority normally performing executive or administrative functions, the Supreme Court would require to be satisfied that the decision has been reached after due consideration of the merits of the dispute uninfluenced by extraneous considerations of policy or expediency. The Court insists upon disclosure of reasons in support of the order on two grounds: one that the party aggrieved in a proceeding before the Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case where erroneous; the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power."*

2.13. Similarly, learned Sr. Counsel relied on another decision of this Court rendered in the case of ***Anita Kumar Das Vs. State of Odisha and others*** vide judgment ***dt.25.07.2022*** *passed in* ***W.P.(C) No.6703 of 2023.*** This Court in paragraph 8 of the said judgment has held as follows:

> "*8. The above mentioned position does not reflect with regard to reasons assigned by the Disciplinary Authority to impose the penalty on the Petitioner. More so, against the said Order, when the Petitioner preferred an appeal, the Appellate Authority also passed the order on 02.01.2015, under Annexure-11, to the following effect:*
>
> *"xxxx After careful consideration of the charges in the proceeding and punishment imposed by the Disciplinary Authority and the appeal petition, filed by the D.O., the Appellate Authority has been pleased to dispose of the appeal with the following orders.*
>
> 1. *Stoppage of one increment with cumulative effect.*
> 2. *Warning not to repeat in future.*
> 3. *Censure"*

2.14. Making all such submissions, learned Sr. Counsel contended that the impugned order of punishment so passed against the Petitioner under Annexure-14 is not sustainable in the eye of law and liable to be quashed by this Court.

3. Mr. S.K. Samal, learned Additional Government Advocate on the other hand made his submission basing on the stand taken in the counter affidavit so filed by Opp. Party No.1 and the counter filed to the rejoinder of the Petitioner.

3.1. Mr. Samal though does not dispute with regard to the conduct of the proceeding against the Petitioner, but contended that in spite of the admission made by Sri Venkateswar Das, Jr. Clerk-cum-Store Keeper, Kundra PHC, the Petitioner since was the drawing and disbursing Officer during the relevant point of time and the cash book of the PHC since was not maintained properly, nor verified by the Petitioner resulting such misappropriation of the amount by the Jr. Clerk, the Petitioner in view of the non-compliance of the provision of S.R-37(III) of OTC Vol.-I is squarely liable for the mis-appropriation of Government money amounting to Rs.17,06,661.05. It is accordingly contended that since the Petitioner as the drawing and disbursing Officer of the PHC did not follow the guideline so prescribed in the aforesaid S.R and thereby giving a hand to the Jr. Clerk to manage such mis-appropriation of Government money, in spite of the admission made by Sri Das, the Petitioner cannot be made scot-free from the mis-appropriation.

3.2. It is also contended that basing on the admission made by Sri Venkateswar Das,though certain recovery was made from his salary but since he died prematurely and no further recovery was made from his salary, the Opp. Party No.1 taking into account the non-recoverable amount, held the petitioner liable to the extent of 50% while imposing the order of punishment vide order under Annexure-14. It is accordingly contended that since the Petitioner because of his latches in not taking required step as provided under SR-37 and 225 of O.T.C Vol-I, Petitioner cannot be discharged of the charges and Opp. Party No.1 taking everything into account rightly held the Petitioner liable to pay 50% of the mis-appropriated amount of Rs.8,12,477/- and to treat the period of suspension as such.

3.3. However, learned Addl. Govt. Advocate contended that in terms of the G.A Deptt. Resolution dt.21.08.2012 vide Annexure-H to the counter, the balance mis-appropriated amount can be recovered from the legal heirs of the deceased Venkateswar Das. It is also contended that while issuing the 2nd show-cause by proposing the punishment under Annexure-9 dt.09.10.2014 though the Opp. Party No.1 did not give his dis-agreement note as provided under Rule 15(10)(i)(b) of the Rules, but taking into account the nature of charges and the finding of the Inquiry Officer, Opp. Party No.1 proposed such punishment against the Petitioner and imposed the same while disposing the proceeding vide order under Annexure-14. It is accordingly contended that taking into account the negligence of the Petitioner in not taking steps as provided under S.R-37 and S.R-235 of O.T.C Vol. I vide Annexures-D and E to the Counter affidavit, no illegality or irregularity can be found with the impugned order.

4. To the submission of the learned Additional Government Advocate, learned Sr. Counsel for the Petitioner contended that since for the self-same charges, the Petitioner has been acquitted in the Criminal Proceeding in G.R. Case No.816 of 1989 vide judgment dt.10.10.2021 under Annexure-15 and the Criminal Court has clearly held that the Petitioner is no way responsible for the alleged mis- appropriation,

the impugned order of punishment so passed against the Petitioner under Annexure-14 is not sustainable in the eye of law.

5. I have heard Mr. B. Routray, learned Sr. Counsel along with Mr. J. Biswal, learned Counsel appearing for the Petitioner and Mr. S.K. Samal, learned Additional Government Advocate for the Opp. Parties.

On the consent of the learned counsels appearing for the parties, the matter was heard at the stage of admission and disposed of by the present order.

6. Having heard learned counsel for the parties and after going through the materials available on record, this Court finds that with regard to the alleged mis-appropriation of Government money when the preliminary enquiry was initially conducted basing on the complaint made by the Petitioner, as reflected in Annexure-1, Sri Venkateswar Das, Jr. Clerk of the PHC clearly admitted that he has misappropriated the Government money and will refund the amount. On the face of such admission by Sri Das, the Petitioner was implicated in Kundra P.S. Case No.46 of 26.12.1989 corresponding to G.R. Case No.816 of 1989 in the file of C.J.M, Jeypore for the offences under Section 409/477-A of the Indian Penal Code. Along with initiation of the criminal proceeding, the Petitioner and Sri Venkateswar Das were also proceeded with in the Disciplinary proceeding. In the proceeding initiated against Sri Venkateswar Das, Opp. Party No.1 vide his order dt.19.10.2001 under Annexure-10, held Sri Das responsible for the mis-appropriation and directed for recovery of the entire mis-appropriated amount of Rs.17,06,661.05.

6.1. Taking into account the admission made by Sri Venkateswar Das, as reflected in Annexure-1 and the order of punishment so passed against Sri Das under Annexure-10, the Inquiry officer in the de-novo enquiry conducted by him while submitting the enquiry report on 06.08.2013, suggested therein that since Sri Das, Jr. Clerk has admitted the entire mis-appropriation, punishment of stoppage of three annual increment with cumulative effect be passed against the Petitioner. The Inquiry officer taking into account the long period of suspension of 11 years also suggested to regularize the said period of suspension as "Leave Due". The Inquiry Officer also suggested that with regard to the recovery of the mis-appropriated amount, Government may wait till final disposal of the Criminal case.

6.2. On the face of such finding of the Inquiry officer, this Court finds that while issuing the 2nd show-cause vide notice dt.09.10.l2014 under Annexure-9, Opp. Party No.1 as provided under Rule 15(10(i)(b) of the Rules has not given his disagreement note and the reason for not agreeing with the finding of the Inquiry Officer.

In view of such non-compliance of the statutory provision and the order of punishment passed against Sri Venkateswar Das under Annexure-10 as well as placing reliance on the decisions so cited (supra) and the order of acquittal passed against the Petitioner in the Criminal Proceeding, this Court is inclined to interfere with the impugned order of punishment so passed on 24.03.2015 under Annexure-

While interfering with the same, this Court is of the view that no recovery can be effected from the Petitioner for the alleged mis-appropriation in view of the admission made by the other employee and the order passed against him under Annexure-10. This Court further directs Opp. Party No.1 to treat the period of suspension as "Leave Due" and pass a fresh order to that effect. The Writ Petition is accordingly disposed of.

—— o ——

2023 (III) ILR – CUT - 596

SANJAY KUMAR MISHRA, J.

W.P.(C) NO.12881 OF 2020

BISWANATH BEURA ....Petitioner

-V-

STATE OF ORISSA & ANR. ....Opp. Parties

ORISSA CIVIL SERVICES (PENSION) RULES, 1992 – Rule 7 r/w rule 15 and 16 of Orissa Civil Services (Classification Control and Appeal) Rules, 1962 – On the date of filing of the writ petition no charge memo in connection with any proceeding had been served on the petitioner – In the meantime 10 years have elapsed after his superannuation – Whether authority concerned were justified to withhold the gratuity so also the full pension of the petitioner on the plea of pending of departmental proceeding – Held, No. (Para 11-15)

Case Laws Relied on and Referred to :-

1. 2008 (1) OLR 384 : Brajasundar Patnaik Vs. Government of Orissa & Ors.
2. 2014 LabIC 2598 : State Of Odisha Vs. Adwaita Prasad Sahoo.
3. AIR 1993 SC 1488 : Delhi Development Authority Vs. H.C. Khurana.

For Petitioners : Mr. S.K. Dalai

For Opp. Parties : Mr. G.N. Rout, Addl. Standing Counsel

JUDGMENT Date of Hearing and Judgment: 11.09.2023

SANJAY KUMAR MISHRA, J.

The Petitioner, who was superannuated from service with effect from 31.12.2010, has preferred the present Writ Petition seeking for a direction to the Opposite Parties to release his retirement benefits along with final pensionary benefits with accrued interest thereon.

2. The brief background facts, which lead to filing of the present Writ Petition is that, the Petitioner entered into Government Service as a Consolidator Grade-1 on 09.01.1979. In September, 1982, he was posted as Progress Assistant under

Panchayat Raj Department. In the year 2003, he was promoted to the cadre of Additional Block Development Officer (ABDO). While working as such, he was superannuated on 31.12.2010 in the same cadre on attaining the age of Superannuation. It is further case of the Petitioner that; he submitted his pension papers in time. The said pension papers along with original service book were transmitted by B.D.O., Niali to Opposite Party No.1 on 13.06.2012. In spite of such transmission, till the date of filing of the present Writ Petition, excepting the provisional pension, no other pensionary benefits has been released in favour of the Petitioner for which, he was induced to approach the Administrative Tribunal for inaction of the authorities to act on his representation as at Annexure-3 series. The Tribunal, without going into the merits of the case, vide order dated 23.12.2015 disposed of the O.A. No.3287 of 2015 by directing the State-Respondents to consider and dispose of the representation of the Petitioner dated 09.09.2014 within a period of two months from the date of receipt of a copy of the said order. Despite such direction, since the authority did not act as per the direction given by the Tribunal, on initiation of contempt proceeding, ultimately on 25.04.2016, an order was issued by the Commissioner-cum-Secretary to Govt. Panchayat Raj and D.W. Department (Opposite Party No.1) vide which, prayer of the Petitioner for release of the final pension and pensionary benefits was rejected on the plea that it is found that the Disciplinary Proceeding for gross misconduct and dereliction in duties for causing loss of Government money to the tune of Rs.3,60,000/- has been initiated against the Petitioner under Rule-15 of the Orissa Civil Services (Classification, Control & Appeal), Rules, 1962, for short, “1962 Rules” read with Rule-7 of the Orissa Civil Services (Pension) Rules, 1992, for short, “1992 Rules” in P.R. Department. Memorandum dated 29.07.2011 and another proceeding under Rule-16 of 1962 Rules initiated in P.R. Department Show Cause Notice dated 17.11.2004 is still pending against him. It is further case of the Petitioner that, as on the date of filing of the Writ Petition, no Charge Memo in connection with any proceeding had been served on the Petitioner, though in the meantime, 10 years have elapsed after his superannuation. In such situation, communication dated 25.04.2016 is highly irrational and deserves interference by this Court. It has also been stated that the Petitioner has become victim of colourable exercise of power of Authority concerned. So far as the proceeding of the year 2004 so also alleged charge sheet was never communicated to the Petitioner. Similarly the other charge sheet is of dated 29.07.2011, which is admittedly after retirement of the Petitioner, which is not permissible under law and the same was also never communicated to the Petitioner.

3. Being noticed, the Opposite Party No.1 has filed a Counter Affidavit reiterating the stand taken in the impugned order as to pendency of the Department Proceeding against the Petitioner. To substantiate such pleadings, a stand has been taken that the B.D.O, Niali Block, has submitted the pension papers of the Petitioner vide letter dated 13.06.2012 for sanction of pensionary benefits in his favour. However, Vigilance Clearance Report was sought for from the GA (Vig.)

Department,Cuttack. In response to the same, GA (Vig.) Department, Cuttack, vide letter dated 02.04.2015 informed as to registration of vigilance case against the Petitioner vide CTC File No.61/92, CTC File No.94/10 and CTC(V) P.S. Case bearing No.49 dated 31.12.1999. However, it has been stated that the Government in G.A. (Vigilance) Department, Cuttack has informed the Opposite Party No.1 that the Charge Sheet No.51 dated 27.12.2001 has been submitted against other co-accused persons, but not against the Petitioner. It has been clarified that no Charge Sheet has been submitted against the Petitioner in Cuttack Vigilance P.S. Case No.49 dated 31.12.1999. So far as other dues of the Petitioner, it has been stated that during pendency of the Writ Petition,different retirement benefits like GPF, GIS, Unutilized Leave Salary have already been released in favour of the Petitioner. So far as the release of the regular pension and gratuity, the same are yet to be released due to pendency of the Departmental Proceeding. A stand is also taken in the Counter Affidavit that being directed by the Tribunal, the prayer of the Petitioner was rejected, vide Department Order dated 25.04.2016 due to pendency of Departmental Proceeding No.15328 dated 29.07.2011 under Rule-15 and Minor Penalty Proceeding, Vide No.13144 dated 17.11.2004 against the Petitioner under Rule-16 of 1962 Rules. The Collector, Nabarangpur, was requested to serve the copy of the D.P. to the Petitioner while he was working as ABDO, Tentulikhunti Block, vide P.R. Department Memo No.13145 dated 17.11.2004. So far as the other proceeding drawn against the Petitioner, vide P.R. Department Memorandum No.15328 dated 29.07.2011, under Rule-15 of 1962 Rules, the Collector, Cuttack was requested to serve copy of the said Memorandum to the present Petitioner, vide P.R Department Memo No.15328 dated 29.07.2011. Further, relying on Rule-7 of the 1992 Rules, more particularly explanation under the said Rules, it has been stated that Departmental Proceeding shall be deemed to be instituted on the date on which the statement of charges are issued to the Government servant or pensioner, or if the Government Servant has been placed under suspension from the date of his suspension. Since, admittedly a proceeding was initiated against the Petitioner in terms of Explanation to Rule-7 of 1992 Rules, irrespective of its service on the Petitioner, the Authority concerned are justified to held up the regular pension and gratuity of the Petitioner. A stand has also been taken in the Counter Affidavit that Rule-66 of the 1992 Rules empowers the Authority to release only the provisional pension, where the Departmental Proceeding is pending in respect of a government servant on the date of his retirement. Relying on Rule-49 of the 1992 Rules, a stand has been taken in the Counter Affidavit that because of the pendency of the Departmental Proceeding, the gratuity is not payable to the Petitioner.

4. A Rejoinder Affidavit has been filed by the Petitioner denying and disputing the averments made in the Counter Affidavit. That apart, the communications, both dated 05.08.2023, made to the Petitioner have been appended to the Rejoinder Affidavit as Annexure-5 series to demonstrate before this Court that vide the said communications, for the first time the Petitioner was supplied with the copy of the

Memorandum dated 29.07.2011 so also Show Cause Notice Dated 17.11.2004 on 05.08.2023. That apart, relying upon the provisions under Rules-7 & 66 of the 1992 Rules, it has been stated in the Rejoinder Affidavit that in terms of Rule-15 of the 1992 Rules, since the second Memorandum dated 29.07.2011 has been issued much after his retirement and the proceeding dated 17.11.2004 under Rule-16 are yet to be communicated to the Petitioner along with copy of Article of Charges, he had no knowledge about the same. Hence, the pendency of both the Departmental Proceeding no way affects or creates any legal bar to consider the prayer of the Petitioner to release regular pension and gratuity in favour of the Petitioner. It has further been stated that after filing of Counter the Opposite Party, on 05.08.2023 has issued Show Cause Notice pertaining to both the said charge sheets dated 17.11.2004 and 29.07.2011. Relying on the ruling of this Court, it has been pleaded in the Rejoinder Affidavit that the Petitioner is entitled to get the gratuity with accrued interest and other dues as has been prayed.

5. Learned Counsel for the Petitioner in addition to his submissions, draws attention of this Court to Rule-7 of 1992 Rules, which is extracted below:

> "***7. Right of Government to Withhold or Withdraw Pension****- (1) The Government reserve to themselves the right of withholding a pension or gratuity, or both either in full or in part, or withdrawing a pension in full or in part, whether permanently or for specified period and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government,* ***if in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence in duty during the period of his service including service rendered on re-employment after retirement:***
>
> *Provided that the Odisha Public Service Commission shall be consulted before any final orders are passed:*
>
> *Provided further that when a part of pension is withheld/withdrawn, the amount of such pension shall not be reduced below the amount of minimum limit.*
>
> *(2) (a) Such departmental proceedings referred to in sub-rule (1),* ***if instituted while the Government servant was in service, whether before his retirement or during his reemployment****, shall, after the final retirement of the Government servant, be deemed to be a proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service:*
>
> *Provided that when the departmental proceedings are instituted by an authority, subordinate to Government that authority shall submit a report recording its findings to the Government.*
>
> *(b) such departmental proceedings as referred to in sub-rule (1) if not instituted while the Government servant was in service, whether before his retirement or during his reemployment-*
>
> *(i) shall not be instituted save with the sanction of Government;*
>
> *(ii) shall not be in respect of any event which took place more than four years before such institution; and*

(iii) shall be conducted by such authority and in such place as the Government may, direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service;

(c) No judicial proceeding, if not instituted while the Government servant was in service, whether before his retirement or during his re-employment, shall be instituted in respect of cause of action which arose or in respect of an event which took place, more than four years before such institution.

(d) In the case of Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceeding are instituted or where departmental proceedings are continued under clauses (a) and (b), a provisional pension as provided in rule 66 shall be sanctioned.

(e) Where the Government decides not to withhold or withdraw pension but order recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one-third of the pension admissible on the date of retirement of a Government servant.

Explanation-For the purpose of this rule-

(a) ***Departmental proceedings shall be deemed to be instituted on the date on which the statement of charges are issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from the date of his suspension; and***

(b) judicial proceedings shall be deemed to be instituted-

(i) in the case of criminal proceedings, on the date on which the complaint or report of a Police Officer, of which the Magistrate takes cognizance, is made; and

(ii) in the case of civil proceedings, on the date of presentation of the plaint in the Court." (Emphasis supplied)

6. Mr. Dalai, learned Counsel for the Petitioner submits, it is the right of the Government to withhold the pension or gratuity of a retired employees governed under said Rules. He further submits, though the proceeding of the year 2004 was never communicated to the Petitioner, even for the sake of argument it is admitted that the Petitioner was so communicated, an admission being made in the Counter Affidavit that the said proceeding initiated against the Petitioner was pertaining to minor punishment, there is no bar to release the regular pension as well as gratuity of the Petitioner. So far as the Proceeding of the year 2011, though the same was initiated after the retirement of the Petitioner, with due approval of the State Government, the same was never communicated to the Petitioner till 05.08.2023 i.e. recently during pendency of the writ petition. The same cannot be a ground to withhold the regular pension and gratuity of the Petitioner.

7. To substantiate his argument and prayer made in the Writ Petition, Mr. Dalai drew attention of this Court to the Division Bench Judgments of this Court reported in **2008 (1) OLR 384 (Brajasundar Patnaik vs. Government of Orissa**

and others) and reported in **2014 LabIC 2598** (**State Of Odisha vs. Adwaita Prasad Sahoo)**. Mr. Dalai submits, in view of said Judgments of this Court and admission in the Counter Affidavit as to release of GPF, GIS, Unutilized Leave Salary during pendency of the Writ Petition, it is a fit case to set aside the impugned order dated 25.04.2016 as at Annexure-4 and direct the authority concerned to release regular pension so also unpaid gratuity with accrued interest thereon in favour of the Petitioner within the stipulated period.

8. In response to the said submission made by Mr. Dalai, learned Counsel for the Petitioner, Mr. Rout, learned Additional Standing Counsel for the State-Opposite Parties, relying on Rule-66 of the 1992 Rules submits, in view of Sub-Rule-2 under Rule-66 of the Rules, 1992, since the Departmental Proceedings are pending against the Petitioner, no gratuity shall be paid to him until the conclusion of the said Departmental Proceedings. Mr. Rout relying on the Judgment of the apex Court reported in **AIR 1993 SC 1488** (**Delhi Development Authority vs. H.C. Khurana)** submits, irrespective of communication of charge sheet, since admittedly the charge sheet of the year 2004 was issued much before the retirement of the Petitioner, until the said Departmental Proceeding comes to an end, the gratuity with accrued interest cannot and should not be released in favour of the Petitioner. Similarly, drawing attention to Sub-Rule (1) in Rule 66 of the said 1992 Rules, Mr. Rout submit, since Departmental Proceedings are pending in respect of the Petitioner, rightly he has been paid provisional pension and full pension can only be paid after conclusion of the Departmental Proceedings.

9. Mr. Rout further submits, in terms of Rule-7 of 1992 Rules, more particularly, in the Explanation under the said Rules, Departmental Proceeding shall be deemed to be initiated on the date on which the statement of charges are issued to the Government servant or pensioner and it is not necessary that it must be communicated for the sake of initiation of the Departmental Proceeding enabling the Authority concerned to withhold the pension so also gratuity of the Petitioner.

10. In response to the said submission of Mr. Rout, Mr. Dalai, learned Counsel for the Petitioner submits, the Division Bench of this Court in **Adwaita Prasad Sahoo** (supra) has also taken note of the judgment of the apex Court in **Delhi Development Authority** (supra) on which learned Counsel for the State wants to rely upon to substantiate the stand taken in the counter affidavit. In terms of the said ratio decided by this Court, unless and until the Memorandum of Charges is communicated to the Petitioner, it cannot be said to have initiation of the Departmental Proceeding and that cannot and should not be a plea to withhold the after retiral dues, including the gratuity so also full pension of the Petitioner.

11. Before dealing with the issue involved in the present lis, it would be apt to reproduce below Rules-66 of the 1992 Rules.

> "***66. Grant of provisional pension where departmental or judicial proceeding is pending****- (1) Where departmental or judicial proceedings are pending in respect of a*

Government servant on the date of his retirement, referred to in, he shall be paid a provisional pension not exceeding the maximum pension which would have been admissible on the basis of qualifying service up to the date of retirement of the Government servant; or if he was under suspension on the date of retirement up to the date immediately preceding the date on which he was placed under suspension.

(2) No gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings and issue of final orders thereon:

Provided that where departmental proceedings have been instituted under rule 16 of the Odisha Civil Services (Classification, Control and Appeal) Rules, 1962 for imposing any of the penalties specified in clause (i), (ii) and (iii-A) of rule 13 of the said rules, the payment of gratuity shall be authorized to be paid to the Government servant.

(3) The provisional pension shall be authorized during the period commencing from the date of retirement up to and including the date on which, after the conclusion of departmental or judicial proceedings, final orders are passed by the competent authority.

(4) The authority competent to sanction pension shall be the authority competent to sanction provisional pension.

(5) Payment of provisional pension made under sub-rule (1) shall be adjusted against final retirement benefits sanctioned to such Government servant upon conclusion of such proceedings but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or the pension is reduced or withheld either permanently or for a specified period." (Emphasis supplied)

12. Relying on the said Rule-66, the Division Bench of this Court in **Brajasundar Patnaik** (supra), vide paragraphs-8 to 10 held as follows:

"8. A cumulative reading of both the sub-rules quoted above shows that the same may apply only when on the date of retirement of a Government servant, departmental or judicial proceedings are pending against him, but this rule would not apply where no departmental or judicial proceedings are pending on the date of retirement against the Government servant. In the instant matter, it is admitted by the opposite parties that neither departmental proceeding nor any judicial proceeding was pending against the petitioner on the date of retirement. The judicial proceeding has started pursuant to the raid conducted in the house of the petitioner after his retirement and a first information report was lodged on the basis of the documents recovered from the house of the petitioner. Therefore, Sub-rules (1) and (2) of Rule 66 of the Orissa Civil Services (Pension) Rules, 1992 would not be applicable in the case of the petitioner.

9. It is also a matter of consideration that when the criminal proceeding was initiated against the petitioner in the year 1992, there should be some limit for its disposal. ***The petitioner retired in the year 1992. Thereafter criminal proceedings were initiated against him, which are allegedly still pending even after about fifteen years. Therefore, we do not think it proper to observe in the instant case that non-payment of gratuity is justified even after fifteen years of the retirement of the petitioner. He is entitled to the gratuity with interest.***

10. As regards interest, the concerned rules are silent. In the case of H.Gangahanume Gowda v. Karnataka Agro Industries Corporation Limited (2003) 1 ATT (SC) 95, the

> *apex Court has fixed the interest at the rate of 10% per annum. In the case of Gorakhpur University v. Shital Prasad Nagendra, AIR 2001 SC 2433, the apex Court, relying upon the earlier decisions in the case of R. Kapur v. Director of Inspection (Painting and Publication) Income-Tax, State of Kerala v. M. Padmanabhan Nair and Som Prakash v. Union of India, observed that the apex Court has been repeatedly emphasizing the position that pension and gratuity are no longer matters of any bounty to be distributed by Government but are valuable rights acquired and property in their hands and any delay in settlement and disbursement thereof should be viewed seriously and dealt with severely by imposing penalty in the form of payment of interest. Having regard to the facts and circumstances, as discussed in the foregoing paragraph, we fix the interest at the rate of 10% per annum."* *(Emphasis supplied)*

13. In **Adwaita Prasad Sahoo**(supra) the Division Bench of this Court referring to Rule-7 of the 1992 Rules, which has already been extracted above, vide paragraphs-12 to 14, held as follows:

> *"**12.** In view of the distinguishable facts, the decision in Delhi Development Authority (AIR 1993 SC 1488) (supra) cannot be made applicable to the facts of the present case.* ***In the case of Union of India and others (AIR 1998 SC 2722) (Supra), the Hon'ble Supreme Court categorically laid down that where the disciplinary proceedings are intended to be initiated by issuing a charge-sheet, its actual service is essential as the person to whom the charge-sheet is issued is required to submit his reply and, thereafter, to participate in the disciplinary proceedings. In the case of Managing Director, U.P. Warehousing Corporation and others (AIR 1980 SC 840) (supra), the Hon'ble Supreme Court in the facts of the said case also held that a regular departmental enquiry takes place only after the charge-sheet is drawn up and served upon the delinquent and the latter's explanation is obtained.***
>
> ***13. It is, therefore, clear that the phrase "the date on which the statement of charges are issued to the Government servant or pensioner" should be interpreted as "the date which the charges are received by the Government servant or pensioner" as the Government servant or pensioner, who was charge-sheeted, is required to file his show cause****.*
>
> ***14.*** *In such view of the matter,* ***unless the charge-sheet/statement of imputation is served on the delinquent, it cannot be said to have been issued and the date of dispatch of such charge-sheet/statement of imputation cannot be held to be the date on which the departmental proceeding is initiated.****"* *(Emphasis supplied)*

14. Though it has been specifically averred in the Writ Petition that no charge memo pertaining to proceeding in the year 2004 so also in the year 2011 was ever communicated to the Petitioner, though a counter has been filed by the State, in response to the said averments made in the Writ Petition, there is no specific averment as to communication of the said proceeding vide Memo No.13144 dated 17.11.2004 under Rule-16 of the 1962 Rules so also mode of communication to the Petitioner, including the proceeding drawn vide Memorandum No.15328 dated 29.07.2011. Rather, the communications, both dated 05.08.2023, which have been appended to the Rejoinder Affidavit as Annexure-5 Series, well demonstrate that the said Memorandum were never communicated to the Petitioner. Only after filing of the Counter Affidavit in the Writ Petition, recently the same were communicated to

the Petitioner enclosing thereto the handwritten draft for approval of Show Cause Notice dated 17.11.2004 so also the Memorandum dated 29.07.2011 along with the Articles of Charges and Statement of Imputation in support of the charges framed against the Petitioner in the year 2011.

15. From the pleadings and documents on record as detailed above, so also the recent communications made to the present Petitioner on 05.08.2023, which have been appended to the Rejoinder Affidavit as Annexure-5 series, it is amply clear that the Show Cause Notice dated 17.11.2004, which is pertaining to minor penalty so also the Memorandum dated 29.07.2011, which was issued after the retirement of the Petitioner on 31.12.2010, were never communicated to the Petitioner till 05.08.2023 giving him an opportunity to have his say in the said regard. Hence, this Court is of the view that the Authority concerned was not justified to withhold the gratuity so also the full pension of the Petitioner on the plea of pendency of Departmental Proceeding. Accordingly, the impugned order dated 25.04.2016, as at Annexure-4 is set aside.

16. It has been admitted in the Counter Affidavit that the benefits like GPF, GIS and Unutilized Leave Salary etc. have been released in favour of the Petitioner, which is not disputed by the learned Counsel for the Petitioner. Since the Petitioner at present is being paid provisional pension, the authority concerned are directed to do the needful to calculate and regularize the pension of the Petitioner and pay him full pension. Apart from the same, after adjusting the provisional pension already paid to the Petitioner, the differential arrear pension till the date of payment of regular pension be released in favour of the Petitioner within a period of three months hence with 7% interest. So far as the unpaid gratuity of the Petitioner, the same be paid within the said period of three months with 10% interest from the date it became due till the date of actual payment.

17. Accordingly, the Writ Petition is disposed of. No Order as to costs.

—— o ——

2023 (III) ILR – CUT- 604

G. SATAPATHY, J.

CRLMC NO. 249 OF 2016

ENKON PVT. LTD., BHUBANESWAR & ORS. ……….Petitioners

-V-

HAREKRUSHNA SUBUDHI ……….Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – The learned SDJM passed order of taking cognizance of offence U/ss. 294/341/506/406 of IPC without any discussion of ingredients of the

offences – Whether the order of cognizance is sustainable? – Held, No. –The learned SDJM was not vigilant enough to rule out over implication of the petitioners in this case and he had probably passed the impugned order mechanically taking cognizance offence without making any discussion as to the ingredient of the offences – The impugned order along with criminal proceeding quashed.

(Para 14-16)

Case Laws Relied on and Referred to :-

1. AIR 1962 SC 1821 : R K Dalmia Vs. Delhi Administration.
2. (2009) 8 SCC 1 : Sudhir Shantilal Mehta Vs. CBI.
3. 1992 Supp (1) SCC 335 : Haryana & Ors. Vs. Bhajan Lal & Ors.

For Petitioners : Mr. S.D. Ray

For Opp. Party : Mr. P.C. Mishra

ORDER Date of Order:28.08.2023

G. SATAPATHY, J.

1. This matter is taken up through Hybrid Arrangement (Virtual/Physical Mode).

2. This is an application under Section 482 of Cr.P.C. by the petitioners seeking to quash the impugned order passed on 05.12.2015 by the learned S.D.J.M., Bhubaneswar in 1.C.C. Case No.2142 of 2015 taking cognizance of offence under Sections 294/341/506/406 of Indian Penal Code, 1860 (in short the "IPC") and consequently, the criminal proceeding arising thereon.

3. At the outset, it needs to be mentioned, "the learned S.D.J.M., Bhubaneswar by the impugned order has declined to proceed against co-accused Deepak Mishra and Abhaya Routray, the IIC and ASI of Sahidnagar PS for want of sanction under Section 197 of Cr.P.C., but issued process against the petitioners by the same order".

4. An overview of the facts involved in this case are the OP was the complainant and the petitioners were the accused persons in a complaint instituted by complainant in 1.C.C. Case No.2142 of 2015 of the Court of learned S.D.J.M., Bhubaneswar. It is alleged in the complaint that in the year 2008, the Manager of the accused company (A1) contacted the OP for supplying and installing glow sign boards in the traffic posts at a rate per square foot basis and, accordingly,transactions were made during the preceding five years of 2013, but when complainant submitted his bills towards the work for making payments to him, A2(Accused No.2) with an ulterior motive to deprive the complainant from his legitimate due, did not pay the amount and on 21.07.2015, when OPComplainant visited the office of A1 for the purpose of raising claim towards payment, A2 instead of releasing his payment of Rs.83,692/-, threatened the complainant with dire consequence and, thereafter, A2 to

4 being armed with weapon attacked the complainant with intention to kill him and A2 and A3 scolded him in filthy language by saying “SALA TO TANKA DEBUNU TU AMARA KANA KARIBU JAA KOU POLICE AMARA KANA KARIBA DEKHIBU AAU TU SALA ODIA AMATHU PAISA NABU ETHIKI ASIBU TA JIBANARE MARI DEBU AMA MALIKARA DAMBHA KETE JANIBU”. On this incident, complainant approached the police, but in vain and, thereafter, he instituted the complaint against the petitioners.

On receipt of the complaint, the learned S.D.J.M., Bhubaneswar after recording initial statement of the complainant, took cognizance of offences by the impugned order. Hence, this application by the petitioners under Section 482 of Cr.P.C.

5. In the course of hearing of CRLMC, Mr. S.D. Ray, learned counsel for the petitioners by taking this Court through the provision of issuing summons on cooperate bodies and societies, submits that the learned S.D.J.M., Bhubaneswar has not followed the provision of Section 63 of Cr.P.C. to issue summons on the Secretary, Local Manager and other officers of the Company and, thereby, the very issuance of summons is faulted with. It is further submitted by him that a bare perusal of complaint would not disclose the commission of offences under Section 294/341/506/406 of IPC and, thereby, the impugned order taking cognizance of offence is otherwise an abuse of process of Court and, consequently, the criminal proceeding being manifestly attended with malafide should be quashed. Learned counsel for the petitioners, accordingly, prays to quash the impugned order taking cognizance and, consequently, the criminal proceeding arising therein.

6. On the other hand, Mr. Pranab Kumar Pasayat,learned counsel appearing for Mr. P.C. Mishra,learned counsel for the OP, submits that they have got no instruction from OP and, thereby, the name of M/s. P.C. Mishra and associates be deleted from the brief. None also appears for OP to reply the submission of Mr. Ray, learned counsel for the petitioners.

7. A bare perusal of impugned order dated 05.12.2015 would go to reveal the following order:

> “Later:
>
> On further perusal of the material placed on the case record, it is ascertained that it is prima facie is well made out against the accused persons namely 1) Enkon Pvt. Ltd.,(2) Mr. Kamal Kumar, (3) Pranab Mandal and4) Maheswar Nayak U/s.294/ 341/ 506/ 406 of IPC, cognizance of offence punishable U/s.294/341/ 506/ 406 of IPC is taken to proceed against the accused persons namely 1) Enkon Pvt. Ltd., (2) Mr. Kamal Kumar, (3) Pranab Mandal and 4) Maheswar Nayak.
>
> Issue summons to the accused persons namely 1) Enkon Pvt. Ltd., (2) Mr. Kamal Kumar, (3) Pranab Mandal and 4) Maheswar Nayak fixing the case record to 11.01.16 for their appearance.”

8. It, therefore, very clear that the impugned order from the very beginning is the devoid of any reasoning because neither it discussed the complaint nor the initial statement made by the complainant and simply, the learned Presiding Officer has stated in the order as "prima facie case is well made out against the accused persons" and by recording so, the learned trial Court took cognizance of offences by the impugned order.

9. A copy of the complaint enclosed by the petitioners would go to indicate that OP has filed complaint against the Company "Enkon Pvt. Ltd." along with five persons showing them as accused persons, but the learned trial Court by the impugned order, has declined to proceed against A5 and A6 for want of sanction. A bare perusal of complaint would go to disclose that the complainant had instituted the complaint against the Company and its employees for non-receipt of payment for a work pursuant to a contract to supply and install of glow sign boards and flakes at traffic posts in the year 2008 and had raised bills in the year 2013, but the complaint also alleges that A2 instead of paying the amount, had taken recourse to unlawful means and he along with two other members of the Company abused the complainant in filthy language and threatened him for dire consequence. Law is well settled that mere use of abusive word would not attract the offence under Section 294 of IPC, unless the same is uttered in a public place to the annoyance of others, but in this case, the vital ingredient of annoyance is missing in the complaint as well as in the initial statement of the complainant. It is, however, alleged by OPcomplainant against the petitioners to have threatened, but again at the cost of repetition, mere holding threat to the person concern without causing alarm to his mind or such person if not feel threatened, the offence under Section 506 of IPC would not be attracted. There also appears no ingredients of Section 341/506 of IPC from a bare conspectus of complaint and initial statement. A cumulative assessment of the complaint together with initial statement of the complainant, this Court does not find the necessary ingredients of offences under Sections 294/341/506 of IPC.

10. On coming back to the next offence i.e. 406 of IPC, which is extracted as under:

> "**406. Punishment for criminal breach of trust**:- Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

It is, therefore, very clear that although Sec.406 of IPC prescribes punishment for commission of offence of criminal breach of trust, but Sec. 405 of IPC only defines what is criminal breach of trust in following words:-

> "Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged,or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

Hence, the essential ingredients of the offence of criminal breach of trust are:-

1 The accused must be entrusted with the property or with dominion over it,

2 The person so entrusted must use that property, or;

3 The accused must dishonestly use or dispose of that property or willfully suffer any other person to do so in violation,

(a) of any direction of law prescribing the mode in which such trust is to be discharged, or;

(b) of any legal contract made touching the discharge of such trust.

11. The "Entrustment" of property as contemplated under Section 405 of the Indian Penal Code, 1860 is pivotal to constitute the offence. The words used in the section are, 'in any manner entrusted with property'. So, it extends to entrustments of all kinds whether to clerks, servants, business partners or other persons, provided they are holding a position of 'trust'. A person who dishonestly misappropriates property entrusted to them contrary to the terms of an obligation imposed is liable for a criminal breach of trust and is to be punished under Section 406 of the Penal Code.

12. The definition in the section does not restrict the property to movables or immoveable alone. Accordingly, in ***R K Dalmia vs Delhi Administration;AIR 1962 SC 1821***, the Apex Court held that "the word 'property' is used in the Code in a much wider sense than the expression 'moveable property'. It is not therefore, necessary to consider in detail what type of property will be included in the various section of IPC." Hence, the word 'property' cannot be restricted to moveable property only when it is used without any qualification in Section 405 of IPC.

13. In ***Sudhir Shantilal Mehta Vs. CBI; (2009) 8 SCC 1***, the Apex Court observed that the criminal breach of trust would, inter-alia mean using or disposing of the property by a person who is entrusted with or has otherwise dominion thereover. Such an act must not only be done dishonestly but also in violation of any direction of law or any contract express or implied relating to carrying out the trust.

14. A conspectus of complaint in the present case would go to disclose that some agreement was entered into by the petitioners and OP, but mere breach of contract without requisite mens rea would not give rise to criminal breach of trust and, thereby, making it punishable under Section 406 of IPC inasmuch as unless the person so charged dishonestly misappropriates the property so entrusted to him contrary to the terms of the agreement and the act of accused must not only be done dishonestly, but also in violation of direction of law or any contract express or implied relating to carrying out the trust. Here in this case, the complainant had stated in the complaint that he had raised some bills in the year 2013, but OP in his initial statement had alleged that he was working in A1 Company and A2 to 4 forced him to work without any salary and he denied them to work without any salary as

Rs.83,000/- was due to them. This being the scanty piece of material available on record and that too, the initial statement being contrary to the complaint, it cannot reasonably attract the offence under Section 406 of IPC against the petitioners and, therefore, the ingredients of 406 of IPC being absent in the complaint, the impugned order by the learned S.D.J.M., Bhubaneswar taking cognizance of offences without any discussion of ingredients of the offences, appears to be unsustainable. Further, the complaint does not disclose about complainant approaching the Superintendent of Police U/S. 154(3) of Cr.P.C., which creates a reasonable suspicion about the veracity of allegation made in the complaint. It should not be forgotten that sometimes complainant ventures to proceed against the accused persons with an ulterior motive for wrecking personal vengeance/vendetta and in such circumstance, the complaint which is normally drafted by a legal expert, who would definitely draft the complaint containing necessary ingredients to constitute offences, has to be considered with great care and circumspection. Hence, the Court owes more than verbal respect and be duty bound to look into many other attending circumstance emerging from the complaint and at the same time, it should also be careful with great circumspection while taking cognizance of offence and issuing process against the accused persons in such private complaints, which are sometimes ultimately designed to harass the other side. Keeping in mind the aforesaid facts and the principle of law together with the general notion, especially when the complainant-OP had not resorted to statutory requirement as laid down in Section 154(3) Cr.P.C., this Court, however, considers that the learned S.D.J.M., Bhubaneswar was not vigilant enough to rule out over implication of the petitioners in this case and he had probably passed the impugned order mechanically taking cognizance of offences without making any discussion as to the ingredients of the offences.

15. In what circumstances a complaint can be quashed has been well explained by our Apex Court in the most celebrated and oft-quoted decision in State of ***Haryana & others Vrs. Bhajan Lal & others; 1992 Supp (1) SCC 335***, which itself is a locus classicus and the Apex Court therein at Paragraph-102 has enumerated the grounds under which a criminal proceeding can be quashed. The aforesaid paragraph-102 of the decision is as under:-

> "102. In the backdrop of interpretation of the various relevant provision of the Court under chapter XIV and of the principle of law enunciated by this Court in a series of decisions relating to the exercise of the extra ordinary power under article 226 or the inherent powers U/S. 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelized and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised;
>
> "(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not primafacie constitute any offence or make out a case against the accused.

(2) Where the allegations made in the First Information Report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under section 156(1) of the Code except under an order of a Magistrate within the purview of section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate,as contemplated under section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act(under which a criminal proceeding is instituted) to the institution and continuation of the proceedings and/are where there is a specific provision in the Code or the concerned Act providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

16. In view of the discussions made in the foregoing paragraphs and taking into consideration the fact that the ingredients of offences under which cognizance is taken being not found out from a bare perusal of complaint and initial statement of complainant, this Court considers the impugned order together with the criminal proceeding arising therein against the petitioners to be an abuse of process of Court and the further continuance of such proceeding would unnecessarily put the petitioners to mental harassment and, therefore, the same is liable to be quashed. The impugned order passed on 05.12.2015 by the learned S.D.J.M., Bhubaneswar together with the criminal proceeding in 1.C.C. Case No.2142 of 2015 is hereby quashed against the petitioners.

17. In the result, the CRLMC stands allowed, but in the circumstance without any order as to costs.

—— o ——

2023 (III) ILR – CUT- 611

G. SATAPATHY, J.

CRA NO. 65 OF 1995

MAHENDRA BAG ………Appellant

-V-

STATE OF ORISSA ……….Respondent

INDIAN PENAL CODE, 1860 – Section 307 – Conviction and sentence of appellant to undergo rigorous imprisonment for a period of five years– Neither there was any medical evidence available on record to indicate that the injuries sustained by PW2 on the assault of appellant were sufficient in ordinary course to cause death of a person nor there was any evidence on record to disclose any grievous injuries to PW2 – There was no evidence against the appellant beyond reasonable doubt which would establish his intention to commit murder of the injured – Whether the punishment of imprisonment for a period of five years Justified? – Held, No – Taking into consideration the nature of injuries sustained by the injured and the act of the appellant, this Court considers that sentence of rigorous imprisonment for one year to the appellant would meet the ends of justice. (Para 15)

For Appellant : Mr. A. Mohanty, Amicus Curiae

For Respondent : Mr. S.S. Pradhan, AGA

JUDGMENT Date of Judgment :29.09.2023

G. SATAPATHY, J.

1. This criminal appeal impugns the judgment passed on 30.01.1995 by the learned Sessions Judge, Sambalpur in S.T. Case No.267 of 1994 convicting the appellant for offence under Section 307 of IPC and sentencing him to undergo Rigorous Imprisonment (RI) for a period of five years.

2. An overview of facts involved in this case were on 12.10.1994 at about 9.45 PM, PW2 while returning from a cloth shop after making some purchase had a collision with the appellant at Baidyanath Chowk and on this, when PW2 asked the appellant to walk properly on the road, the appellant being annoyed, went to a nearby place and brought out a sword and chased PW2 to assault, but PW2(injured) accordingly ran towards Kansaripada with appellant following behind him by holding a sword, however, the appellant could be successful in reaching near PW2 in front of the residence of Headmaster, Town High School and dealt successive blows on the head and back of PW2 by means of the sword resulting in bleeding injuries on his persons. This incident was witnessed by PW1-Milan Maharana,PW4-Ashok Nepak and PW-5-Jagadish Mahapatra and out of whom, PW1 had unsuccessfully tried to rescue PW2 ending only with receiving injury on his right index finger.

Immediate after the occurrence, PWs.1 and 2 went to the police station and PW2 orally reported the incident and, thereafter, both of them receive treatment at a hospital.

3. On the same date i.e. on 12.10.1994 at about 10.10 PM, PW2, however, lodged FIR against the appellant, which paved the way for registration of Sambalpur Town P.S. Case No.354 of 1994, which culminated in submission of charge-sheet against the appellant for offence under Sections 307/324 of IPC read with Section 27 of Arms Act, but the learned trial Court proceeded against the appellant in the trial by framing charge under Section 307/324 of IPC without assigning any reason for not proceeding against the appellant for offence under Section 27 of Arms Act. This was how the trial commenced in the case.

4. In support of its case, the prosecution examined altogether 6 witnesses vide PWs.1 to 6 and relied upon five documents under Ext.1 to 5 as against no evidence whatsoever by the defence in support of its plea of false implication and innocent of the offence.

5. After appreciating the evidence on record upon hearing the parties, the learned the learned trial Court by the impugned judgment, convicted the appellant for commission of offence U/S.307 of IPC and sentenced him to the punishment indicated (supra). The learned trial Court, however, considered the charge under Section 324 of IPC against the appellant as an alternative charge and accordingly, appeared to have ignored to consider such charge against the appellant after his conviction for higher offence U/S.307 of IPC. It appears from the impugned judgment that the learned trial Court had convicted the appellant by mainly relying upon the evidence of eye witnesses PWs.1, 2 and 5.

6. In this case, PW2 being main injured witness-cum-informant, his evidence requires to be scrutinized first in the sequence. The evidence of PW2 transpired that on 12.10.1994 at about 9.30 PM, he had a collision with the appellant at Baidyanath Crossing and, accordingly, cautioned him to walk properly on the road, but the appellant brought out a sword and chased to assault him and the appellant accordingly, dealt sword blows on his head and back,as a result he sustained bleeding injuries on his person. It was his further evidence that when PW1 intervened to rescue him, one of the sword blows made by the appellant struck on the tip of the right index finger of PW1 causing bleeding injury to him. In addition to his oral evidence, PW2 had also proved the FIR under Ext.1. Since the evidence of PW2 disclosed PW1 to be an injured, it is considered apposite to examine the evidence of PW1, whose testimony transpired that on 12.10.1994 at about 9.50 PM, the appellant while chasing PW2 with a sword became successful in striking on PW2 by the said sword in front of the house of Headmaster, Town High School and he had also sustained injury on his right index finger while intervening in the matter. PW1 had also clearly stated in his evidence that the appellant had dealt strokes by

means of a sword on the person of PW2, who had sustained injuries on his head and neck by such assault of the appellant.

7. Mr. A. Mohanty, learned Amicus Curiae has, however, termed PWs.1, 2 and 5 as interested witnesses and he has accordingly submitted not to rely upon the evidence of aforesaid highly interested witnesses. It is also submitted by Mr. Mohanty that the injured in this case was an anti social element,which was clearly reflected in the judgment and the prosecution having not been able to unearth the motive behind the crime, it would not be proper to confirm the conviction of the appellant. Mr. Mohanty, however, has acknowledged the evidence of PWs.1, 2 and 5 led by the prosecution against the appellant, but he has definitely tried to make out a case in favour of the appellant by terming these witnesses as interested witnesses and thereby, he has urged to disbelieve their evidence.

8. On the other hand, Mr. S.S. Pradhan, learned AGA has, however, strongly urged this Court to rely upon the evidence of these witnesses by terming the evidence of eye witnesses to be independent evidence unconnected with the appellant and the informant-injured. Learned AGA accordingly has drawn the attention of the Court to the evidence of another injured independent witness as well that of PW5 and has prayed to confirm the conviction.

9. The plea of interestedness of witnesses was taken by the defence in the learned trial Court, which on close scrutiny, had rejected such plea by assigning the following reason "as admitted by the said PWs, all of them are not only close friends, but associates of one another and have been entangled in commission of many anti social offences, but what is significant is that their evidences get good amount of corroboration from the evidence of PW3 (Doctor) and PW6 (IO)".

10. The testimony of PW3 disclosed that PW1 had received one cut injury of size ½" X ¼" over his right index finger, which was opined by PW3 to be simple in nature and would have been caused by a sharp cutting weapon. PW3 had also stated in his evidence that he had examined PW2 on police requisition and found one cut injury of size 6'' in length and 2'' in breadth over the left scapula (back) and one cut injury of size 3" X ½" X ½" over the back of the vertex (head) and the aforesaid injuries were opined by PW3 to be simple in nature and might have been caused by a sharp cutting weapon. PW3 had also stated in his evidence that these cut injuries were possible by means of a sword (Talwar).

11. On coming back to the testimony of PW5, who was another eye witness to the occurrence, it appears that PW5 had not only reiterated the assault made by the appellant on the injured-informant PW2 as well as the other injured PW1 by means of a sword, but also had given a detailed picturesque of the transaction as to how the appellant attacked and inflicted injuries to PWs.1 and 2 and the reason for such attack. It can neither be denied nor disputed that the defence had not been successful in demolishing the evidence of all these three witnesses i.e. the evidence of PWs.1, 2

and 5 and their evidence not only corroborated to each other in material particulars, but also vividly described the mode and manner of assault by appellant on PWs.1 and 2. It cannot be disputed that the evidence of PW2 was squarely corroborated by Ext.1(FIR) so also by Ext.3. It, however, appears that Mr. A. Mohanty, learned Amicus Curiae has assailed the evidence of PWs.1, 2 and 5 on the ground of interested witnesses, but such contention appears to be the imagination of the appellant and in no circumstance, the evidence of PWs.1 and 5 can be rejected en-bloc merely because they were friends of PW2, but their evidence, however, was strongly corroborated by the medical evidence of PW3. The learned Amicus Curiae has also argued that the sword was never seized by the IO, rather one barber knife was seized by him, but such submission merits no consideration in view of the overwhelming oral evidence of PWs.1, 2 and 5 which was supported by the medical evidence of PW3.

12. In the aforesaid circumstance and on meticulous appreciation of evidence of prosecution witnesses together with failure of the defence to impeach the veracity of the evidence available on record and there being ample evidence against the appellant, this Court is of the considered view that the appellant had attacked PWs.1 and 2 and caused injuries to them by use of sharp cutting weapon on the relevant date and time of occurrence, which was the main substratum of evidence against the appellant and the same was squarely established by the prosecution against the appellant beyond all reasonable doubt. At this juncture, this Court, however, noted a fact that the learned trial Court had ignored the charge sought to be established against the appellant for offence under Section 324 of IPC by considering it to be an alternative in character, but this Court considers it proper to remind that the appellant was not only allegedly charged for assaulting the informant-injured(PW2), but also injuring PW1, however, the learned trial Court while framing charge had forgotten to frame charge against the accused for injuring PW1, who had made valiant attempt to rescue PW2 in the course of occurrence, but such lapses would not have any effect on the case of prosecution which was already established against the appellant by way of unimpeachable evidence for attacking and assaulting the injuredinformant and, thereby, inflicting injuries to PW2.

13. This Court, however, considers it apposite to find out as to whether the act of the appellant established his guilt either for offence under Section 307 of IPC or for any other offences and in the pursuit of such determination, it appears to this Court that neither there was any medical evidence available on record to indicate that the injuries sustained by PW2 on the assault of appellant were sufficient in ordinary course of matter to cause death of a person nor was there any evidence on record to disclose any grievous injuries to PW2. There is no cavil of doubt, even without injuring a person, an accused can be made liable for offence under Section 307 of IPC provided there must be evidence against him beyond reasonable doubt establishing his intention to commit the murder of the injured. Hence, the intention

plays an important role in prosecution against the accused for commission of offence under Section 307 of IPC.

14. In common parlance, nature of injuries caused by the offender more than often depict/reveal the intention of such offender, but they are by themselves not decisive factor to determine the mensrea in terms of Section 307 of IPC, however, bodily injuries capable of causing death in ordinary course is one of the relevant consideration for attracting the charge under Section 307 of IPC, which may of course be attracted even in absence of injuries, if there is unimpeachable evidence that the offender does such act with intention or knowledge and under such circumstances, by which he would have killed the victim, who had survived because the act of the offender failed or missed the target. Reverting back to the evidence on record keeping in view the aforesaid legal principle to find out the requisite intention/knowledge of the appellant for the offence U/S. 307 of IPC, it appears that the learned trial Court in its judgment had explained that inflicting successive blows by means of a sword projects the intention of the appellant to commit murder of PW2 in an affirmative manner, but the ocular testimony of PW2 disclosed that the appellant had dealt blows by means of a sword on his head and back and he had sustained bleeding injuries due to such blows of the appellant on his person. On the other hand, it was the evidence of PW1 to the extent that the appellant dealt strokes by means of the sword on the person of the injured Lingaraj, who sustained injuries on his head and back. PW5, however, stated in his evidence that the appellant dealt a sword blow on the head of the injured Lingaraj and second blow with the same sword on the back of the Lingaraj. None of the aforesaid three witnesses had ever whispered about the intention of the appellant to commit murder of the injured which assumes great significance in absence of medical evidence as to the sufficiency of the injuries in ordinary course of nature to cause death of PW2. Had there been any intention on the part of the appellant to commit murder of the injured, he could have given blows to the injured repeatedly by means of the sword, which he was wielding at that time when the injured fell down on the ground and he would not have escaped from the spot. Besides, the injuries found on the injured as per medical evidence were simple in nature, but would have been caused by sharp cutting weapon.

15. In the backdrop of aforesaid facts and situation coupled with analysis of evidence on record, this Court is unable to subscribe to the view of the learned trial Court that the appellant was having intention to kill the injured, but subsequently, prevented in not achieving the desired result, however, the act of the appellant was squarely covered by the ingredients of offence under Section 324 of IPC and, therefore, the conviction of the appellant is required to be modified for offence under Section 324 of IPC which is punishable with imprisonment of either description up to three years or with fine or with both. It is not in dispute that the appellant was convicted in this case more than 28 years and 6 months back, when he was aged about 25 years. There is also no dispute about the appellant to be involved

in other serious cases like dacoity as revealed from the impugned judgment and the appellant, therefore, is not entitled to the beneficial provision of either PO Act or Section 360 of the Cr.P.C. Moreover, the appellant was in judicial custody for near about five and half months in this case as revealed from the record, but taking into consideration the nature of injuries sustained by the injured and the act of the appellant, this Court considers that a sentence of Rigorous Imprisonment for one year to the appellant would meet the ends of justice.

16. In the result, the appeal stands allowed in part on contest, but in the circumstance there is no order as to costs. The impugned judgment of conviction and sentence passed by learned Sessions Judge, Sambalpur in S.T. Case No.267 of 1994 are hereby set aside and modified to offence under Section 324 of IPC with sentence of Rigorous Imprisonment of one year to the appellant.

17. Be noted, since the petitioner was directed to be released on bail by an order passed by this Court on 30.03.1995 in this appeal, the bail bond(s) of the appellant is/are hereby cancelled and the appellant is directed to surrender to custody not later than 1st November, 2023, to suffer the remainder of his sentence, failing which the concerned IIC will take proper steps to commit the appellant to prison.

—— o ——

2023 (III) ILR – CUT- 616

CHITTARANJAN DASH, J.

CRLMP NO.1232 OF 2023

MOHAMMAD HAMID SIDDIQUI ……….Petitioner

-V-

NAJIBUN BEGUM ……….Opp. Party

(A) MUSLIM WOMEN(PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986 – Section 5 r/w Section 125 of Code of Criminal Procedure – Whether provision under Section 125 of CrPC can be resorted to by the Muslim women(divorce) in seeking maintenance ? – Held, Yes – The Muslim women can claim maintenance under the CrPC and unlike the Muslim personal law even the divorced women are given right to maintenance under the CrPC. (Para 11-14)

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 125 r/w Muslim Women (Protection of Right to Divorce) Act, 1986 – Jurisdiction of family court – As per the Act, a magistrate has Jurisdiction to entertain the claim of maintenance of the divorced women – Whether family court have the Jurisdiction to entertain an application U/s. 125 of the CrPC – Held, Yes. (Para-16)

Case Laws Relied on and Referred to :-

1. 1979 SCR (2) 75 : Bai Tahira Vs. Ali Hussain.
2. (1980) 4 SCC 125 : Fuzlunbi Vs. K. Khader Vali & Anr.
3. AIR 1985 SC 945 : Mohd. Ahmed Khan Vs. Shah Bano Begum & Ors.
4. 2002 Cr..LJ 2282 : Abdul Latif Mondal Vs. Anuwara Khatun & Anr.
5. Criminal Appeal No. 2309 of 2009 (Arising out of S.L.P.(Crl) No.717 of 2009 : Sahaba Bano Vs. Imran Khan.

For Petitioner : Mr. Trilochan Nanda

For Opp. Party : Mr. D. Biswal, ASC

ORDER Date of Order :12.09.2023

CHITTARANJAN DASH, J.

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

2. By means of this application, the Petitioner seeks to quash the order dated 20.04.2023 passed by the learned Judge, Family Court,Sonepur in Cr.P. No.7 of 2023 under Annexure-1.

3. The background facts of the case are that the Opposite Party filed a Petition for maintenance U/s.125 of CrPC before the learned Judge, Family Court, Sonepur registered as Cr.P. No.7 of 2023. In the said petition, she stated, inter alia, that the present Petitioner is the husband and the Opposite Party is the wife. The parties are Muslim and they are guided by the Muslim Personal Law. The marriage between the parties was performed on 02.01.2021 in accordance with ceremonies as laid down in their personal law and it was consummated. The relationship between the parties continued only for a period of nine months and ten days. It is further contended that after the marriage, the Petitioner and his family members subjected her to ill-treatment and torture demanding more dowry for which the Opposite Party instituted a criminal case against the Petitioner and his relatives registered vide Tarbha P.S. Case No.270 of 2022 under Section 498-A/506/34 of IPC. She alleged to have no source of livelihood and is completely dependent on her relation for her survival and as such she is leading a miserable life. The Opposite Party further stated that her husband is having a wholesale shop dealing with bangles and his monthly income is more than four lakhs. On this background the Opposite Party prayed for grant of maintenance of Rs.60,000/- per month in her application before the learned Judge, Family Court.

4. The Petitioner having caused his appearance filed his show-cause before the learned court of Judge, Family Court traversing the averments made by the Opposite Party in her petition under Section 125 of CrPC.

5. Learned counsel Mr. Nanda appearing for the Petitioner submitted that the Petitioner categorically stated in his show cause that he married the Opposite Party on 02.01.2021 and after marriage, there was no demand of dowry as alleged by the

Opposite Party. On the contrary, the Opposite party, after marriage, started misbehaving the parents and sister of the Petitioner. Thereafter, on enquiry from her father, the Petitioner came to know that she had mental disorder and was under treatment. The Petitioner also got her treated for the same. The Petitioner made several attempt requesting the Opposite Party and her father to extend co-operation in her treatment but they refused to accede to the request of the Petitioner and the Opposite Party willfully deserted the Petitioner. Under the circumstances, the Petitioner as per the Muslim personal law applicable to the parties gave Talaq to the Petitioner in the month of June, 2022, July 2022 and August, 2022 completing the three Talaqs over a period of three months. Accordingly, the Opposite Party has been legally and validly divorced by the Petitioner since 22.08.2022.

6. It is also contended by Mr. Nanda that after the Talaq, a reasonable and fair provision of maintenance was given by the Petitioner within the "Iddat" period to the Opposite Party. He also gave an amount larger than the amount which was fixed as "Mahr" or "Dower". According to the Mohammedan Law, all the marriage presentations brought by the Opposite Party were duly returned to her at the time of the third Talaq. After the Talaq, the Opposite Party was residing separately in her parental home. After the Opposite Party got divorced, she remarried in accordance with the personal law of the Muslim. As such, the Opposite Party has no claim over the Petitioner. According to the Petitioner he is working in a shop and is receiving a paltry remuneration of Rs.1500/- per month and it is difficult for him to make both ends meet. According to the Petitioner, it is preposterous to say that he would pay maintenance to the Opposite Party.

7. Raising a contentious point, it is contended by the learned counsel that the Petitioner in his show-cause submitted that as per Muslim Women (Protection of Rights on Divorce) Act, 1986 only a Magistrate has jurisdiction to entertain the claim of maintenance of the divorced woman and Family Court does not have jurisdiction to entertain an application U/s.125 of the CrPC. The Petitioner accordingly asserted that in the proceeding, the learned Judge,Family Court is barred by the Provision of Muslim Women (Protection of Rights on Divorce) Act, 1986. On the prayer of the Petitioner before the learned Judge, Family Court, Sonepur to resolve the point of jurisdiction as a preliminary issue, the Opposite Party filed her objection to the Petition and stated that as per the provision of Family Court Act, all matrimonial disputes including U/s.125 of CrPC is to be tried and disposed of by the Family Court.The learned Judge, Family Court, Sonepur having heard the parties rejected the aforesaid petition filed by the Petitioner vide the order impugned under Annexure-1 and the learned court below held that it has jurisdiction to try the proceeding initiated by the present Opposite Party. The said order dated 20.04.2023 passed by the learned court below has been impugned herein this application.

8. It is submitted by Mr. Nanda, learned counsel for the Petitioner that the learned Judge, Family Court, Sonepur has erred in law by holding that the Family

Court has jurisdiction to try the proceeding initiated by the Opposite Party - divorced wife. He also submitted that in view of the specific provision under ***Muslim Women (Protection of Rights on Divorce) Act, 1986*** only a Magistrate has jurisdiction to entertain the present claim. It is further submitted that the learned Judge, Family Court does not have jurisdiction to entertain the application under Section 125 of CrPC and as such the proceeding is not maintainable as being barred under the said Act. It is also submitted that the learned court below has not followed the harmonious reading of the provisions of Muslim Women (Protection of Right on Divorce) Act, 1986 and the provisions of Family Court Act. According to him, the Opposite Party has been divorced by the present Petitioner in accordance with Muslim Personal Law and after Talaq, she was given a reasonable and fair amount of maintenance within the "Iddat" period and she was also given the amount which was fixed as "Mahr' or 'Dower'. Given the aforesaid facts, the provision of Family Court Act does not apply to the proceeding initiated by the present Opposite Party. The learned counsel also submitted that the court below misread the facts of the case and misconstrued the provisions of law and arrived at a wrong conclusion while deciding the preliminary issue regarding jurisdiction and as such the order impugned deserves to be quashed.

9. Having heard the parties this Court finds it worth to mention that the law as enumerated under Section 125 of CrPC, as said, perhaps is one of the most secular enactments ever made in this country. Right of maintenance available to wife from the husband is an absolute right and divorce can not affect this right unless the wife is disqualified on account of remarriage or sufficient earning.

10. Article 21 of the Constitution of India guarantees every person,right to live with dignity. Dignified life is not possible unless a fair and reasonable provision is made by the husband towards the maintenance of divorced wife. However, coming to the case in hand, the sole point needs to be decided herein is whether the provision under Section 125 of CrPC can be resorted to by the Muslim woman (divorcee) in seeking maintenance and the same comes for disposal within the jurisdiction of the family court.

11. Needless to say that all the provisions regarding maintenance are beneficial legislation. While interpreting and applying this beneficial legislation, therefore, it is read in consonance with the Constitution of India as to the right of equality, liberty and justice more so the social justice to the human and marginalized sections of the society.

12. The law of maintenance in the Muslim Personal Law has evolved through various cases such as in the case of ***Bai Tahira vs Ali Hussain 1979 SCR (2) 75***, wherein it was held that since the dower amount comes under the meaning of the term "sum payable" as given under Section 127(3)(b) of the CrPC, a woman who has already received it is not entitled to further maintenance under Section 125 of

the CrPC. In the case of ***Fuzlunbi vs K. Khader Vali And Anr (1980) 4 SCC 125*** it is decided that only after judging the sufficiency of the amount of 'Mahr', the husband be released on making any further payment. In the light of the landmark case of ***Mohd. Ahmed Khan vs Shah Bano Begum And Ors, AIR 1985 SC 945*** it was finally cleared that 'Mahr' does not come under Section 127(3)(b) as it is an obligation on the husband and is paid as a mark of respect for the wife and not the amount payable to the wife on divorce. After that, the ***Muslim Women (Protection of Rights on Divorce) Act, 1986*** was passed, where it is provided that reasonable and fair provision is to be made and maintenance is to be paid within the 'iddat' period. Subsequently, the constitutional validity of the said Act was challenged and the Apex Court in the case of the ***Danial Latifi & Anr vs Union of India dealt in Civil Miscellaneous Petition No.552 of 1987 (W.P. (C) No. 868 of 86)*** held that the same is constitutionally valid and though the maintenance has to be paid within the 'iddat' period, it must be enough to maintain for her whole life. Finally in the case of ***Abdul Latif Mondal vs Anuwara Khatun And Anr., in 2002 Cr..LJ 2282*** it was discussed that since the objective of Section 125 of CrPC was to prevent the woman from destitution and it is speedier, the Muslim woman can still claim maintenance under Section 125 of CrPC.

13. In the matter of ***Sahaba Bano vrs. Imran Khan reported in Criminal Appeal No. 2309 of 2009 (Arising out of S.L.P.(Crl) No.717 of 2009*** the Apex Court held as follows:

> **"28. Learned Single Judge appeared to be little confused with regard to different provisions of Muslim Act, Family Act and Cr.P.C. and thus was wholly unjustified in rejecting the appellant's Revision.**
>
> **29. Cumulative reading of the relevant portions of judgments of this Court in Danial Latifi (supra) and Iqbal Bano (supra) would make it crystal clear that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women.**
>
> **30. In the light of the aforesaid discussion, the impugned orders are hereby set aside and quashed. It is held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of the Cr.P.C. after the expiry of period of iddat also, as long as she does not remarry.**
>
> **31. As a necessary consequence thereof, the matter is remanded to the Family Court at Gwalior for its disposal on merits at an early date, in accordance with law. The respondent shall bear the cost of litigation of the appellant. Counsel's fees Rs.5,000/-."**

14. From the discussion as above, it emerges that the Muslim woman can claim maintenance under the CrPC and unlike the Muslim personal law even the divorced women are given right to maintenance under the CrPC. It is therefore, no more ***resintegra*** to hold that the Muslim divorced woman can claim the right to maintenance under the CrPC even after receiving the 'dower' as has been settled

once for all in the matter of ***Abdul Latif Mondal vs Anuwara Khatun And Anr and Danial Latifi & Anr vs Union Of India (Supra).***

15. Further, Section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 also provides that the parties can opt to be ruled by the secular law under Section 125 and 128 of the CrPC instead of the Muslim Personal Law. Thus, woman can claim maintenance under the CrPC or the Muslim Women (Protection of Rights on Divorce) Act, 1986. Broaderly, however, the CrPC is a more appropriate recourse in this scenario as it provides for maintenance for both married and divorced wife, unlike the personal law. Also, the quantum of maintenance is more reasonable under the secular law, whereas just the payment of 'Mahr' is considered to be enough under the personal law.

16. Coming to the case in hand, the Opposite Party-wife has opted for the maintenance under the CrPC and has rightly moved the court of the learned Judge, Family Court having territorial jurisdiction as well as the jurisdiction to entertain the application under Section 125 CrPC who too has rightly exercised its jurisdiction and there is no infirmity in the order impugned and the same being in consonance with the law requires no interference by this Court. In the result, the CRLMP is dismissed being devoid of merit. Copy of the order be communicated to the learned court concerned for reference.

—— o ——

2023 (III) ILR – CUT - 621

CHITTARANJAN DASH, J.

I.A. NO.736 OF 2022
(ARISING OUT OF RSA NO. 228 OF 2020)

RAJU BANJARA & ORS. ……...Appellants

-V-

BHIKARU GOND ………Respondent

LIMITATION ACT, 1963 – Section 5 – Sufficient cause – Delay of 2989 days – What constitute sufficient case – Explain with reference to case laws.

Case Laws Relied on and Referred to :-

1. 1988 SCR (3) 198 : G. Ramagowda Vs. Special Land Acquisition Officer.
2. (CIVIL APPEAL NO.7696 OF 2021) : Majji Sannemma @ Sanyasirao Vs Reddy Sridevi & Ors.
3. (1997) 7 SCC 556 : P.K. Ramachandran Vs. State of Kerala and Anr.
4. (2013) 14 SCC 81 : Basawaraj and Anr. Vs. Special Land Acquisition Officer.
5. [CIVIL APPEAL NO.7696 OF 2021] : Majji Sannemma @ Sanyasirao Vs. Reddy Sridevi & Ors.

For Appellants : Mr. N. Panda
For Respondent :

JUIDGMENT Date of Judgment : 22.09.2023

CHITTARANJAN DASH, J.

1. By means of this Application the Appellants seek condonation of delay pointed out by the office for 2989 days. In explaining the delay, the Appellants contended that soon after passing of the Judgment and decree by the learned court below, they got the certified copy and handed over the Papers to the Advocate instructing him to file the Second Appeal before this Court but the Advocate concerned did not file the Appeal. In the process they filed the Appeal on 31.12.2020 though the Decree was passed on 22.02.2014 i.e after the lapse of 2383 days beyond the period of limitation while it was to be filed within 90 days of passing of the decree. It is further contended by the Petitioners that belongs to Schedule Tribe Community and that the delay in filing the Appeal is due to the fault of the Advocate engaged earlier and latches cannot be attributed to him.

2. It is apt to mention that the Law of Limitation is the embodiment of the maxim ***Vigilantibus non dormentibus jura subvenitent*** that ensures the case is filed within the stipulated time frame to avoid unnecessary delays. On the other hand, condonation of delay is the safeguard to the law of limitation and bars certain cases in which the delay in filing the suit is justifiable,i.e. can be backed by having "sufficient cause".

3. Section 5 of the Limitation Act, 1963 mandates that an appeal or application may be accepted even after the period of limitation has expired if the appellant or applicant satisfies the court that he did not have ***sufficient cause*** to file the appeal or application within the limitation period, irrespective of whether the party is a state or a private one. The phrase "sufficient cause" has not been explicitly defined and therefore, varies from case to case. In some cases, the Court has not allowed even a delay of one day, while in others it has allowed delay of even for several years. In essence, it differs from case-to-case and the Court has optional purview to decide if a case is reasonable for approbation or not, depending on the facts and circumstances of each case, the Court has scope in deciding what constitutes sufficient cause. The Apex Court in ***G. Ramagowda v. Special Land Acquisition Officer 1988 SCR (3) 198*** decided that "sufficient cause" should be interpreted broadly in order to achieve substantial justice whereas in the case of ***Majji Sannemma @ Sanyasirao Vs Reddy Sridevi & Ors.(CIVIL APPEAL NO.7696 OF 2021)*** the Court has dismissed the notion that equity principle should be considered when dealing with condonation of delay, stating that such pleas should be rejected if the delay is not adequately explained giving thereby a clear indication that the party seeking condonation of delay must show its diligence in pursuing the matter but could not put forth the same being prevented by sufficient cause.

4. In the case in hand, the delay occasioned in bringing the Appeal is assessed by the office at 2989 days i.e more than six and half years. The sole ground advanced for the delay is that the Petitioners/Appellants handed over the brief to the lawyer but the lawyer concerned did not file the Appeal in time thereby got delayed in filing the Appeal and the same being not attributed to him is entitled to the relief.

5. In view of the contentions of the Appellants, it is imperative to examine if the Appellants was diligent in handing over the brief to the lawyer to escape their latches? Very surprisingly, the Petition is completely silent as to on what date (even by approximation) they handed over the brief to the lawyer engaged earlier. The name of the lawyer to whom the brief was handed over has also not been revealed in the petition. Absence of such information creates a serious doubt if at all the matter was entrusted to the lawyer before the expiry of the period of limitation.

6. In order to correlate the ground vis-à-vis the circumstances appearing before the Appellants, when this Court examined the case record nothing left for the Court to doubt but to hold that truly the Appellants could not have disclosed the above information because the ground propounded by the Appellants is based on an absolute myth and blatant lie as the case record reveals that the application for certified copy of the Judgment itself was made by the Appellants on 03.11.2020 and was obtained on 09.11.2020 i.e six and half years beyond the period of limitation. Therefore, the plea of the Appellants that they had handed over the papers to the lawyer to file Appeal in time but the lawyer concerned did not file the Appeal is a plea advanced only to get out of the rigor of law. Rather, it can be said that the Appellants have made an attempt to take a false plea to overcome the issue of limitation though he himself remained callous to his own cause.

7. The Apex Court in ***P.K. Ramachandran Vs. State of Kerala and Anr., (1997) 7 SCC 556*** held that in the absence of reasonable, satisfactory, or even appropriate explanation for seeking condonation of delay, the same is not to be condoned lightly.

8. Furthermore, the Apex Court in the case of ***Basawaraj and Anr. Vs. Special Land Acquisition Officer, (2013) 14 SCC 81*** observed and held that the discretion to condone the delay has to be exercised judiciously based on facts and circumstances of each case. It is further observed that the expression "sufficient cause" cannot be liberally interpreted if negligence, inaction, or lack of bona fides is attributed to the party; that even though limitation may harshly affect the rights of a party but it has to be applied with all its rigor when prescribed by statute and in case a party has acted with negligence, lack of bona fides, or there is inaction then there cannot be any justified ground for condoning the delay even by imposing conditions. It is further observed that each application for condonation of delay has to be decided within the framework laid down by the Court. The Apex Court also held that if courts start condoning delay where no sufficient cause is made out by

imposing conditions then that would amount to a violation of statutory principles and showing utter disregard to the legislature.

9. It is trite that law helps a vigilant, not an indolent. In the instant case the Appellants have remained completely recalcitrant in espousing his cause and made up his mind one fine morning to agitate the same. The Appellants had absolutely no mind to file Appeal. Had any such intention was there they could have at least applied for the certified copy of the Decree and obtained the same within the limitation prescribed i.e 90 days. Therefore, there is no ground explained to condone the delay much less to speak of sufficient cause. Relying on the ratio propounded in various decisions as discussed coupled with the one in the matter of ***Majji Sannemma @ Sanyasirao vs Reddy Sridevi & Ors. [CIVIL APPEAL NO.7696 OF 2021]*** this Court finds no merit in the Petition filed by the Appellant for condonation of delay by 2989 days i.e approximately six and half years which is not only deliberate but intentional.

10. The Petition for condonation of delay being devoid of merit accordingly stands rejected and the I.A is dismissed. In the circumstance there is no order as to cost.

RSA NO.228 OF 2020

11. In view of the dismissal of the Petition for condonation of delay the RSA is not admitted and hence dismissed.

—— o ——

2023 (III) ILR – CUT - 624

SIBO SANKAR MISHRA, J.

W.P.(C) NO. 31253 OF 2022

ALETHES KHARIN DHANPHUL ……..Petitioner

-V-

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

CONSTITUTION OF INDIA, 1950 – Article 226 – Petitioner was retrenched from service without complying any of the mandatory provisions under the Industrial Dispute Act – Learned Labour Court directed for reinstatement without back wages – The management as well as petitioner challenges the order of Labour Court – The writ petition filed by the management rejected and direction issued to the management to reinstate the workman forthwith all consequential

benefits – The Opp. Party reinstate petitioner but denied the consequential benefits on the ground of "no work no pay"– Whether non payment of consequential benefits is sustainable? – Held, No – The authority blatantly disobey the dictum of this court – The impugned order is not sustainable in law being contrary to the direction of this court – Direction given with exemplary cost of Rs. 25000/-. (Para 9-12)

For Petitioner : Mr. B.Mohanty, Mr. D. Chhotray

For Opp. Parties : Mr. H.M. Dhal, AGA

JUDGMENT Date of Hearing: 14.09.2023 : Date of Judgment : 29.09.2023

SIBO SANKAR MISHRA, J.

1. Through this Writ Petition, Petitioner is seeking quashing of the order dated 12.01.2022 passed by the Special Secretary to Government in the Water Resources Department and seeks direction to the Opposite Parties for all the retiremental dues taking into consideration his service from 26.09.1986.

2. The case of the Petitioner as would appear from the record is that on 26.09.1986 she was initially appointed as Junior Assistant against the existing vacancy and subsequently she was promoted to the post of Senior Grade Typist. While she was continuing in the said post till 10.06.1988 without any break, suddenly without any reason or without complying any the mandatory provisions under the Industrial Disputes Act, she was retrenched from the service while allowing her juniors to continue in the service. She raised a labour dispute. Since conciliation failed, the matter was referred to the Learned Labour Court, Jeypore under Section 10 of I.D Act. The Petitioner highlighted the aforementioned grievances of retrenchment/termination from service. Learned Labour Court by way of a detailed judgment has allowed the reference case in the file of I.D. Case No.55 of 1994 on 08.03.1996. The operative part of the judgment of the Labour Court reads as under:-

> "The reference is, thus, answered on contest against the first party-Management and accordingly the termination of service of Smt. A.K.Dhandphul Ex- adhoc junior typist with effect from 11.6.88 is held illegal and unjustified. She be reinstated to the post of junior typist without back wages within three months from the date of receipt of the order by the management."

3. The said award of the Labour Court was assailed by the Management by filing O.J.C. No.14236 of 1996, whereas the Petitioner also challenging the award claiming consequential benefit and back wages by filing O.J.C. No.2262 of 1998. The learned Single Judge of this Court on 19.03.2013 allowed the Writ Petition of the Petitioner while rejected the Writ Petition of the Management. The operating part of the said judgment reads as under:-

> "14. With regard to O.J.C. No.2262 of 1998, in view of the above conclusion of this Court that the impugned award cannot be interfered with, as this Court finds that the said award has been notified by the State Government under section 17 of the Act, it is held that the said award is enforceable under sections 17-A and 18(3) (a) and (c) of the Act and is binding on the management. It is, therefore, directed that the management shall reinstate the workman forthwith will all consequential benefits, failing which, action may be taken under section 29 of the Act, against the management.
>
> 15. In the result, therefore, O.J.C. No.14236 of 1996 is dismissed and O.J.C. No.2262 of 1998 is disposed of with the aforesaid directions. There shall be no order as to costs."

4. Despite specific direction of reinstatement of the Petitioner in the service with all consequential benefit, the Opposite Parties evaded compliances for eight months and eventually on 18.11.2013 the Petitioner was reinstated in the post of Junior Grade Typist. On 29.03.2018, she was also promoted to the post of Senior Grade Typist. The Petitioner has retired from service on 30.06.2020 on attaining the age of superannuation.

5. Meanwhile the Petitioner on 27.08.2015, 12.12.2019 and 27.08.2020 gave repeated representations claiming the consequential benefit of service, arrears of salary etc.as per the judgment of this court. Since her repeated representation yield no result, she had filed another Writ Petition being W.P.(C) No.4427 of 2021. The said Writ Petition was disposed of by this Court on 10.02.2021 directing the Principal Secretary, Water Resources Department to consider her representation dated 12.12.2019 and take a lawful decision within a period of two weeks.

6. Pursuance to the aforementioned direction of this Court dated 10.02.2021, the Opposite Parties have now pass the impugned order dated 12.01.2022 at Annexure-10.

7. The Petitioner is assailing the said order dated 12.01.2022 at Annexure 10 *inter alia* contending that the impugned order passed by the Special Secretary to Government Water Resources Department is squarely against the order dated 19.03.2013 passed by this Hon'ble Court in W.P.(C) Nos.2262 of 1998 & 14236 of 1996.

8. The impugned order dated 12.01.2022 passed by the Special Secretary to Government Water Resources Department at Annexure-10 records the entire sequence of events and eventually in the penultimate paragraphs records the following order:-

> "Whereas, the representation of the petitioner (Annexure-9) was earlier received in this Department on 23.12.2019 wherein she prayed for grant of back wages and other benefits from the date of award till her reinstatement in service as per the judgment of the Hon'ble High Court of Orissa. The petitioner has also requested to allow proper scale of pay w.e.f. the date of termination i.e. 11.6.1988 till the date of reinstatement i.e. 29.11.2013 by revising pay and other allowances.

> Whereas, Smt Dhanphul has not worked in the intermittent period of her dis-engagement and engagement, she is not due for any wages/remuneration for that period. As such, Ld Presiding Officer in order dated 08.03.1996 observed/directed for reinstatement without back wages.
>
> That, as per the orders dated 19.3.2013 of Hon'ble High Court, she is entitled for the consequential benefit on reinstatement.
>
> That, in obedience to the orders of Hon'ble High Court all benefits from the date of her reinstatement i.e. dated 29.11.2013 has been allowed.
>
> Now, therefore, considering all fact and circumstances of the case, the representation at Annexure-9 of the petitioner has been considered and in view of the discussions made in the foregoing paragraphs the same being found devoid of merits is hereby rejected."

9. Learned Counsel appearing for the Opposite Parties fairly submits that the rejection of the representation of the Petitioner indeed contradicts the direction dated 19.03,2013 passed by this court in W.P.(C) No. 14236 of 1996 & W.P.(C). No.2262 of 1998.

Facts scenario of the present case depicts a sorry state of affairs, the Opposite Parties have scant regards to the order of this Court and subjected the Petitioner to harassment since 1988. Despite specific direction by this Court the Opposite Parties have passed the impugned order denying the consequential benefit to the Petitioner on the ground of "no work no pay" principle and blatantly disobeyed the dictum of this Court. The casual and lackadaisical approach of the Opposite Parties by mechanically rejecting the representation of the Petitioner are deprecable.

10. Be that as it may, the impugned order dated 12.01.2022 at Annexure-10 to this Writ Petition is not sustainable in law being contrary to the direction of this Court, therefore, set aside.

11. Since uncalled for litigation has been the thrust upon the Petitioner by the Opposite Parties and made her to suffer since 1994, further deprival of the Petitioner from her rightful dues and the entitlement would cause serious injustice. Therefore, the Opposite Parties are directed to comply the order dated 19.03.2013 passed by this Court in W.P.(C) No.2262 of 1998 & 14236 of 1996 within a period of thirty days from receipt of this order/judgment. Failing which the Opposite Party No.1 shall initiate an inter departmental inquiry to ascertain the cause of delay in the implementation of the order of this court dated 19.03.2013 and fix the responsibility. In case time bound compliance of this order is not done, the Opposite Parties shall be saddle with an exemplary cost of Rs 25,000/- to be deposited with the Welfare Fund of the High Court Bar Association.

12. The Writ Petition is allowed accordingly.

—— o ——

2023 (III) ILR – CUT - 628

SIBO SANKAR MISHRA, J.

W.P.(C) NO. 36822 OF 2022

RAGHUNATH NAIK ……....Petitioner

-V-

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

SERVICE LAW – The petitioner was removed from the service/ post of sepoy on the basis of Departmental Proceeding – The allegation against the petitioner for submission of forged caste certificate at the time of appointment – On the basis of allegation one FIR was lodged and charge sheet was filed – The Learned Trial Court framed charges against the petitioner U/s. 468/420 IPC – Eventually the Trial Court acquitted petitioner from the charges – Whether the impugned order of removal sustainable? – Held, No – Undisputedly the petitioner is a schedule caste and the element of forgery also could not be proved by the opposite parties conclusively either in Criminal Trial or in the departmental proceeding, removal order passed by the Opp. Party is set aside. (Para 17-21)

Case Laws Relied on and Referred to :-

1. (2018) 14 SCC 279 : Ex Sig. Man Kanhaiya Kumar Vs. Union of India & Ors.
2. Civil Appeal No.487 of 2018 : Sunita Singh Vs. State of Uttar Pradesh & Ors.

For Petitioner : Mr. P.K.Ray,Mr. K.C. Dash, Mr. M.K.Sahoo

For Opp. Parties : Mr. N.K.Praharaj, Addl. Govt. Adv.

JUDGMENT Date of Hearing: 15.09.2023 : Date of Judgment : 29.09.2023

SIBO SANKAR MISHRA, J.

1. By way of this Writ Petition, the Petitioner has essentially challenged the order passed by the Opposite Party No.3 removing him from the service with effect from 28.01.2011.

2. The Petitioner was provisionally appointed as a Sepoy on 22.12.2006 after undergoing the rigors of the recruitment process. In the appointment letter dated 22.12.2006, there is a recitation that the appointment is purely provisional and temporary. In case of any discrepancy/falsity/adverse report, they will be summerly discharged from service without calling for any explanation and whenever necessary appropriate criminal proceedings will also be initiated against them.

3. It appears, at the time of appointment, the Petitioner relied upon a Caste Certificate to avail the reservation benefit under Schedule Caste category. He produced a Caste Certificate No.3661 of 2003 purported to have been issued by the Tahasildar, Dhenkanal. On the strength of the Caste Certificate he has represented that he belongs to "PANA" Caste as such a Schedule Caste. The certificate is annexed to the Writ Petition as Annexure-3.

4. While he was continuing in the service, the certificate appears to have been verified. A verification report was received from the Additional Tahasildar, Dhenkanal on 06.05.2010. On the basis of the said verification report, the Petitioner was suspended from 22.05.2010 and was subjected to a departmental proceeding. In the departmental proceeding the Tahasildar, Dhenkanal was examined, who deposed against the Petitioner *inter alia* stating that the Caste Certificate produced by the Petitioner bearing No.3661 of 2003 purported to have been issued by the Additional Tahasildar, Dhenkanal is a forged one and the same is not matching with the entry made in the Register maintained at the Dhenkanal Tahasil.

5. On the basis of the said departmental proceeding the Petitioner was removed from the service vide B.O. No.164 dated 28.01.2011 issued by the Opposite Party No.3.

6. The Petitioner filed Original Application being O.A. No.362(C) of 2011 before the Orissa Administrative Tribunal challenging the order dated 28.01.2011 by way of which punishment of removal from service was imposed on him. After abolition of Orissa Administrative Tribunal, the said substantive petition was transferred to this Court and registered as WPC(OAC) No.362 of 2011. The learned Single Judge of this Court vide its order dated 24.08.2021 dispose of the said Writ Petition permitting the Petitioner to pursue his remedy before the Appellate Authority. Pursuance thereof the Petitioner filed an Appeal against the order dated 28.01.2011 passed by the Commandant, OSAP, 4th Bn. Rourkela-Opposite Party No.3 before the Appellate Authority-cum-Additional D.G. of Police, OSAP, Odisha Bhubaneswar i.e. Opposite Party No.2. The memo of the Appeal filed by the Petitioner before the Appellate Authority is annexed with the Writ Petition as Annexure-7, which indicates that he had pleaded his case in detail supported with documents.

7. The Additional D.G. of Police vide its order dated 13.07.2022 rejected the Appeal inter alia stating as under:-

> "After going through the material of the facts, the grounds of appeal and parawise comments of the D.A., it is seen that the appeal cannot be considered as per the recruitment rules."

8. By way of the present Writ Petition, the Petitioner is assailing the order dated 13.07.2022 passed by the Additional D.G. of Police i.e. Opposite Party No.2 in the Appeal preferred by the Petitioner against the order of removal from service.

9. It is worthwhile to mention here that, on the basis of allegation that forged certificate was being produced by the Petitioner at the time of his appointment as a genuine document, a F.I.R. was also lodged apart from Departmental Proceeding. The Petitioner was put to trial under G.R. Case No.857 of 2010.

10. The F.I.R. was lodged on 24.05.2010. Charge-sheet was filed on 31.12.2010 by the Police on the accusation of forging and using the forged documents as genuine documents for procuring appointment to the post of Sepoy. The learned trial Court on 07.12.2011 framed charges against the Petitioner under Section 468/420 of I.P.C. and subjected the Petitioner to trial. Eventually the trial Court vide its detailed judgment dated 13.10.2022 recorded an acquittal in favour of the Petitioner and stated that the prosecution has miserably failed to establish the case against the Petitioner. It would be relevant to produce the penultimate paragraphs of the judgment dated 13.10.2022 passed by the J.M.F.C., Rourkela:-

> "In order to make a person liable for the offence punishable U/s.-420 of IPC. Prosecution has to prove cheating, dishonest inducement to deliver property and mens-rea of the accused at the time of making inducement. In this case the prosecution did not prove how the accused induced or cheated the informant or any other victim. In order to make a person liable for the offence punishable U/s.-468 of IPC. Prosecution has to prove that there is a forgery in respect of the document, the intention of forgery should be that the forged document is to be used for purpose of cheating and the forgery is with particular intent. In this case no witness deposed in the court that the accused has forged any document, for the purpose of cheating.
>
> The offences commission of which have been alleged against the accused are traditional offences punishable under the Indian Penal Code which needs to be proved beyond all reasonable doubt by the prosecution by adducing cogent and legally acceptable evidence. As per the principles of Criminal law it is the duty of the prosecution to prove it's case against the accused beyond any reasonable doubt. The statements of the witnesses must be uncontradictory and corroborative in nature to become reliable chain of evidence must be complete. The prosecution has failed to prove the allegation made against the accused that on 22.12.2006 at O.S.A.P., 4th Battalion Rourkela by submitting forged caste certificate before the Authority of O.S.A.P. and thereby dishonestly induced the O.S.A.P. Authority to appoint him as recruit Sepoy and thereby committed an offence and the accused committed forgery of caste certificate intending that the said document shall be used for the propose of cheating. The prosecution has miserably failed to prove the commission of offence by the accused punishable U/s. 420/468 of I.P.C."

Since no Appeal preferred by the State against the acquittal order passed in favour of the Petitioner before any superior court of law, the acquittal order attains finality.

11. The Opposite Parties filed a detailed counter affidavit controverting the contention raised by the Petitioner in the Writ Petition. However broadly the aforementioned factual matrix are not disputed.

12. Heard Mr. P.K.Ray, learned counsel for the Petitioner and Mr. N.K. Praharaj, learned Additional Government Advocate.

13. Mr. Ray, learned counsel for the Petitioner contended that in the Departmental proceeding the sole oral testimony of Smt. Gitanjali Naik, the Tahasildar, Dhenkanal recorded in 2010 was made the basis for proving the Caste Certificate No. 3661 of

2003 to be a forged document. Baring her deposition no other material supports the case of the Opposite Parties to establish that the Caste Certificate produced by the Petitioner being forged. He submits that the Appellate Authority in its order dated 13.07.2022 even goes on to the record that the Caste Certificate subsequently produced by the Petitioner in the year 2010 is found to be genuine, however since the Petitioner had applied for the Post of Sepoy in 2006 on the basis of a Caste Certificate of 2003 and the said Caste Certificate is not a genuine document. From the factual scenario it emerges that the Petitioner belongs to Schedule Caste category being a "PANA".

14. Mr. Praharaj, learned Additional Government Advocate fairly admits the fact that the Petitioner belongs to "PANA" Caste is not doubted, however, the certificate he produced at the time of applying for appointment to the post of Sepoy was a forged document. The Petitioner was subjected to a departmental proceeding and it is established that he had used a forged document to be a genuine one for the purpose of availing reservation in the appointment. Therefore, he submits that although the Petitioner is a Schedule Caste, the fact that he had used a forged certificate cannot be doubted in view of the deposition made by the Tahasildar, Dhenkanal in the departmental proceeding.

15. Mr.Praharaj, learned Additional Government Advocate further submits that acquittal in the criminal prosecution recorded by the J.M.F.C., Rourkela is of no consequence in so far as the departmental action against the Petitioner is concerned. Because the standard of proof required to be adopted in both the proceedings are different.

16. The fact that the Petitioner belongs to "PANA" Caste is not disputed and also it is not disputed that his father namely Rabinarayan Naik was also working as a Sepoy under the reserved category of Schedule Caste being a "PANA". To establish the same, the Petitioner has placed on record the pension document of his father. Therefore, there was no occasion for the Petitioner to forge a document to avail the reservation benefit as admittedly he is a Schedule Caste.

17. The genuinity of the document was also subjected to judicial scrutiny under the parameter of strict proof beyond the reasonable doubt and in the said scrutiny it was found that the subject document could not be proved to be a forged document. Therefore, the Petitioner was honourably acquitted.

18. Mr. Praharaj, learned Additional Government Advocate vehemently contended that the department is not doubting regarding the Caste but he was removed from the service only on the ground of proved allegation of using a fraudulent document as genuine for availing the reservation. No doubt the departmental proceeding has a different standard of proof and goes by the principle of preponderance probability of doctrine but in the present case all the facts and documents are tilted in favour of the Petitioner baring the sole statement of Smt.

Gitanjali Naik, the Tahasildar, Dhenkanal, which she made in the departmental proceeding.

19. It is relevant to mention that the subject document was produced by the Petitioner in the year 2006 at the time of applying for recruitment to the post of Sepoy whereas the departmental proceeding, the statement of the Tahasildar, Dhenkanal was recorded on 10.02.2010. In her statement she has admitted that Dhenkanal Tahasil has been bifurcated in the year 2007 to Odapada Tahasil and Dhenkanal Tahasil. Therefore, she had no advantage of seeing any relevant documents of Odapada, Tahasil being the Tahasildar of Dhenkanal. She also stated that Petitioner's subject Caste Certificate appears to have been generated from Odapada, Tahasil but it is not matching with the Register available at Dhenkanal Tahasil. Therefore, keeping in mind that the bifurcation took place in 2007, the Register maintaining in Dhenkanal Tahasil would not reflect the entry pertaining to the subject certificate. The Tahasildar, Dhenkanal also deposes that all records pertaining to Odapada Tahasil has already been transferred in the year 2009. Therefore, in all possibility neither she had the advantage seeing the record to support her statement nor she was the right witness to be relied upon in the departmental proceeding being from a separated Tahasil. In that view of the matter the statement of Smt. Gitarani Naik, the Tahasildar, Dhenkanal made in the departmental proceeding inspires no confidence to be relied upon particularly when series of facts mentioned above are starring on the face of the records in favour of the Petitioner.

20. Mr. Praharaj, learned Additional Government Advocate also relied upon a judgment reported in ***(2018) 14 SCC 279*** in the case of ***Ex Sig. Man Kanhaiya Kumar versus Union of India and others*** to support his case. However, factually the said case is distinguishable as in that case the certificate was established to be a fake certificate, whereas the mitigating facts of the present case gives different narrative.

21. Per contra, Mr. Ray, learned counsel for the Petitioner relied upon the judgments of the Hon'ble apex Court in *Civil Appeal No.487 of 2018* in the case of ***Sunita Singh vs. State of Uttar Pradesh & others*** and stated that there cannot be any dispute that caste be determined by birth and if born as a Schedule Caste, it always remain and continuing a Schedule Caste. The fact of the present case being same, it cannot be doubted that the Petitioner belongs to Schedule Caste being a "PANA". Therefore, he is entitlement to the reservation for the post of Sepoy cannot be find fault with. Evaluating the facts scenario in toto, I am of the view that forging a document to prove something which really he is may not be comprehensible. Moreover, undisputedly the Petitioner is a Schedule Caste and the element of forgery also could not be proved by the Opposite Parties conclusively either in the criminal trial or in the departmental proceeding. Therefore, the Petitioner succeeds in this lis.

22. For the foregoing reasons, the Writ Petition deserves merit and the removal order dated 28.01.2011 passed by the Opposite Party No.3 is set aside and consequentially the impugned order dated 13.07.2022 passed by the Appellate Authority namely Opposite Party No.2 also stands quashed. The Opposite Parties are directed to reinstate the Petitioner forthwith with all consequential benefits applicable under law.

23. The Writ Petition is allowed accordingly.

—— o ——

2023 (III) ILR – CUT - 633

A.C. BEHERA, J.

R.S.A. NO.152 OF 2015

SNEHAPRAVA MOHAPATRA & ORS. ………Appellants

-V-

SUDHANSHU KUMAR MOHAPATRA ………Respondents

HINDU SUCCESSION ACT, 1956 – Sections 6, 8, 9 and 15 – Appellant/ plaintiff filed the suit for partition of the ancestral properties – The suit properties were self acquired properties of the common ancestor, who was the grand-father of plaintiff and defendants – The learned Trial Court decreed the suit entitling the plaintiff and defendants 1/8th share each from the suit schedule properties – The 1st appellate court by applying the provision of section 6 of the 1956 Act as, it was stand prior to the Amendment of Act, 2005 modified the share of plaintiff and respondent 5, 6, 7 each from 1/8th to 1/40th share each – Whether the order of 1st Appellate court is sustainable? – Held, No – In a suit for partition the daughters would inherit equal share as that of the sons in the ancestral properties and the death of their father before or after the date of amendment to sec 6 of the Act, 1956 would be irrelevant.

(Para 12-25)

Case Laws Relied on and Referred to :-

1. 2010(I) OLR 508 : Smt. Aparna Dhir Singh Vs. Debendra Nath Jenamani & Ors.
2. AIR 1962 (S.C.) 1471 : Hem Nolini Judah Vs. Mrs. Isoline Sarobasini Bose & Ors.
3. AIR 2007 (Delhi) 254 : Brij Narain Aggarwal Vs. Anup Kumar Goyal & Ors.
4. AIR 2008 (Madras) 250 : Smt. Barirathi & Ors.Vs. S. Manivanan & Anr.
5. 2009(I) OLR (SC) 957 : G. Sesar Vs. Geetha & Ors.
6. (2009) 6 SCC 99 : G. Sesar Vs. Geetha & Ors.
7. 2020(II) CLR-83 : Viruta Sharma Vs. Rakesh Sharma & Ors.

For Appellants : Mr. B. Bhuyan, B.N. Mishra & A.Pattnaik

For Respondents : Mr. Debasis Panigrahi, Smt. A. Panigrahi,
S. Acharya. Ms. S. Swain, Mr. M.K. Behera

JUDGMENT Date of Hearing : 11.09.2023: Date of Judgment :29.09.2023

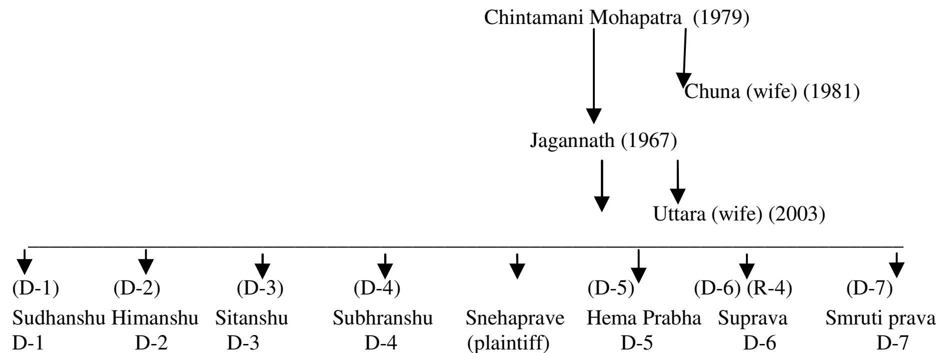
A.C. BEHERA, J.

The appellants {those were the plaintiff and defendant nos.5, 6 and 7 before the learned trial court below in the court of learned 1st Additional Civil Judge (C.J. (S.D.), Cuttack in C.S. No.427 of 2007 and those were the Respondent Nos.1, 3, 4 and 5 in the 1st appeal vide RFA No.173 of 2012 in the court of learned 2nd Additional District Judge, Cuttack} have preferred this 2nd appeal. Being aggrieved with the judgment and decree of the 1st Appellate Court passed in R.F.A. N0.173 of 2012 on dated 19.02.2015.

2. The appellant No.1 was the sole plaintiff before the learned trial court below in C.S. No.427 of 2007, wherein the appellant Nos.2 to 4 were the defendant Nos.5, 6 and 7. In that suit vide C.S. No.427 of 2007, the respondent Nos.1, 4, 2 and 3 were the defendant Nos.1 to 4 respectively,

The suit of the plaintiff/appellant No.1 was a suit for partition simpliciter. As per the averments made in the plaint, plaintiff and defendants are sisters and brothers respectively. Chintamani Mohapatra was their common ancestor and he was the grand-father of the plaintiff and defendants. Chintamani Mohapatra had one son, namely, Jagannath Mohapatra, who was the father of the plaintiff and defendants. Jagannath Mohapatra expired in the year 1967 leaving behind his widow Uttara Mohapatra along with the plaintiff and his defendants as his children. Chintamani Mohapatra expired in the year 1979. Thereafter his widow wife Chuna Mohapatra expired in the year 1981. The mother of the plaintiff and defendants, i.e. Uttara Mohapatra expired in the year 2003.

3. In order to have a better appreciation and so also for an easy understanding about the family pedigree of the plaintiff and defendants, their geneology as stated above, is depicted hereunder:-



4. According to the plaintiff, all the parties to the suit are governed and guided under Mitakshara School of Hindu Law. The properties of the suit described in schedule below of the plaint under different lots were the self acquired properties of

Chintamani Mohapatra. After the death of Chintamani Mohapatra in the year 1979, the suit properties left by him, devolved upon his wife Chuna Mohapatra and the widow of his deceased son, i.e., Uttara Mohapatra along with the plaintiff and defendants by way of succession. When, the widow of Chintamani Mohapatra, i.e. Chuna Mohapatra expired in the year 1981, the share of Chuna Mohapatra over the suit properties devolved upon the plaintiff and defendants along with Uttara Mohapatra. Thereafter, when in the year 2003, the widow mother of the plaintiff and defendants, i.e., Uttara Mohapatra expired, then her share over the suit properties devolved upon the plaintiff and defendants equally.

Accordingly, after death of Chintamani Mohapatra, Chuna Mohapatra and Uttara Mohapatra, the plaintiff and defendants became the co-sharers of the entire joint and undivided suit properties having their 1/8 share each thereon. So, the RoRs of some lots of the suit properties stand in the name of the grand-father of the plaintiff, i.e. in the name of Chintamani Mohapatra exclusively and the RoRs of some lots of the suit properties stand jointly in the name of the plaintiff and defendants.

The suit scheduled properties are the joint and undivided properties of the plaintiff and defendants having their equal share each on the same and the said properties have not been partitioned between them through metes and bound partition. When misunderstanding arose between the plaintiff and defendants concerning the possession of the suit properties and when the brothers of the plaintiff did not respond her request for partition of the suit properties, then, without getting any way, the plaintiff approached the Civil Court by filing the suit vide C.S. No.427 of 2007 against his four brothers arraying them as defendant Nos.1 to 4 along with her three sisters as defendant Nos.5 to 7 praying for partition of her 1/8th share from the suit schedule properties.

5. In that suit, the defendant Nos.1, 3 and 4 filed their written statement jointly challenging the claim of the plaintiff, but, whereas the defendant Nos.2, 5, 6 and 7 filed their written statements separately supporting the case of the plaintiff.

6. As per the pleadings in the W.S. of the contesting defendant Nos.1, 3 and 4 (those are the three brothers of the plaintiff), the suit of the plaintiff is not maintainable due to lack of cause of action, because, after the death of Jagganath Mohapatra (who was the only son of Chintamani Mohapatra and who was the father of the plaintiff and defendants), the original owner of the suit properties, i.e., Chintamani Mohapatra was very sad and depressed, for which, during that time, the defendants 1 to 4 along with their widow mother Uttara Mohapatra had taken all the cares of Chintamani Mohapatra. Therefore, on being satisfied upon the nourishments made by the defendant Nos.1 to 4 along with their mother, Chintamani Mohapatra had executed and registered a WILL bearing No.19 dated 28.09.1975 bequeathing all the suit properties in favour of the defendant Nos.1 to 4 along with their mother Uttara Mohapatra. Chintamani Mohapatra had given the plaintiff and defendant

Nos.5 to 7 in marriage in sound families by incurring huge expenditures. Since the execution and registration of the above WILL, the defendant Nos.1 to 4 were possessing of the suit properties on the strength of that WILL and they were paying land revenues thereof and they were obtaining the rent receipts. After the death of Chintamani Mohapatra on 25.07.1979, the defendant Nos.1 to 4 became the owners of the suit schedule properties by virtue of the aforesaid registered WILL. For which, the plaintiff and defendant Nos.5 to 7 had/have no interest in the suit properties. But, when the Hal RoRs of the suit schedule properties in respect of some lots were prepared erroneously in the name of the plaintiff and defendants, then by taking the advantage of such wrong recording of the name of the plaintiff in some lots of the suit properties, she (plaintiff) has filed the suit claiming her 1/8th share from the same. But, in fact, neither the plaintiff nor the defendant Nos.5 to 7 has any right title interest and possession over any portion of the suit properties. For which, the suit filed by the plaintiff is liable to be dismissed with costs.

7. The defendant Nos.2,5,6 and 7 in their respective written statements admitted the family pedigree of plaintiff and defendants as stated in the plaint and they also admitted to the claim of the plaintiff regarding the entitlement of each party as 1/8th share from the suit properties.

8. On the basis of the aforesaid matters in controversies between the parties as per their pleadings, altogether six numbers of issues were framed by the learned trial court below in C.S. No.427 of 2007 and the said issues are:-

ISSUES

I. Is the suit maintainable?

II. Has the plaintiff cause of action to file the suit?

III. Is the suit bad for non-joinder and mis-joinder of parties?

IV. Is the suit property Partiable?

V. Is the plaintiff entitled to get 1/8th share out of the suit schedule properties?

VI. Is plaintiff entitled for any other relief?

9. In order to substantiate her aforesaid case against the defendant Nos.1, 3 and 4, she (plaintiff) had examined one witness on her behalf, i.e., to her son as P.W.1 and had proved several documents from her side vide Exts.1 to 10. But, on the contrary the contesting defendant Nos.1, 3 and 4 had examined two witnesses on their behalf, i.e., to defendant Nos.2 and 4 as D.W.1 and 2 respectively and they had proved some documents vide Ext. A, B to C/4 from their side.

After conclusion of hearing and on perusal of the materials and documents available on record, the learned trial court below answered the vital issue Nos.4 and 5 in favour of the plaintiff by observing that, Chintamani Mohapatra being the common ancestor of the plaintiff and defendants had left the suit properties. After the death of Chintamani Mohapatra, Chuna Mohapatra and Uttara Mohapatra, the

suit properties ultimately had devolved upon the plaintiff and defendants by way of succession and accordingly, the plaintiff and defendants being grand-daughters and grand-sons of Chintamani Mohapatra, they are the joint owners over the suit schedule properties having their equal share therein, i.e. $1/8^{th}$ share each, because the suit properties have not been partitioned through metes and bound partition among them. For which, the suit properties are liable for partition. On the basis of the said findings and observations made by learned trial court below in issue No.4 and 5, the learned trial court decreed the suit vide C.S. No.427 of 2007 on contest against the defendant Nos.1, 3 and 4 preliminarily for partition entitling the plaintiff and defendants $1/8^{th}$ share each from the suit schedule properties vide judgment and decree dated 31.08.2012 and 06.09.2012 respectively.

10. The defendant Nos.1, 3 and 4 challenged the same by preferring the 1st Appeal under Section 96 read with Order-41 and Rule-1 of the C.P.C. vide RAF No.173 of 2012 being the appellants against the plaintiff, defendant No.2 and defendant Nos.5, 6 and 7 by arraying them as respondents in order to nullify the said judgment and decree passed by the leaned trial court below.

After hearing from both the sides and on perusal of the materials and documents available on record, the learned 1st appellate court passed the judgment of the said RFA No.173 of 2012 on dated 19.02.2015 and allowed that RFA No.173 of 2012 in part and modified / altered / reduced the shares of the plaintiff and respondent Nos.5, 6 and 7 each from $1/8^{th}$ to ¼0th share each and increased/enhanced the shares of the defendant Nos.1 to 4 each from $1/8^{th}$ to $1/5^{th}$ from and out of the suit properties by assigning the reasons in Para No.14 of the judgment of the said RFA No.173 of 2012 that, as the suit properties were the self-acquired properties of their common ancestor, i.e., Chintamani Mohapatra, who was their grand-father, then after his death, the suit properties had devolved upon the surviving members of the joint family of the plaintiff and defendants including the widow of Chintamani Mohapatra along with their widow mother. So, only after the death of the widow of Chintamani Mohapatra and widow mother of the plaintiff and defendants, entire suit properties became joint family properties of the plaintiff and defendants. Therefore, the daughters of Jagannath Mohapatra, i.e. plaintiff and defendant Nos.5 to 7 would be entitled to succeed the interest of their father Jagannath Mohapatra along with defendant Nos.1 to 4, for which, the defendant Nos.1 to 4 being the sons of Jagannath Mohapatra would be entitled to $1/5^{th}$ share each and $1/5^{th}$ share of Jagannath Mohapatra would devolve equally upon the plaintiff and defendants. So, the plaintiff and defendant Nos.5 to 7 are entitled to $1/40^{th}$ share each. Because, such devolution or dispossession of property having already taken place by virtue of law, which was in existence prior to the amendment of Section 6 of the Hindu Succession Act, i.e., prior to 09.09.2005 and such devolution creates vested rights in the legal heirs, which cannot be reopened after coming into force of 2005 amendment.

11. The plaintiff and defendant Nos.5, 6 and 7 (those were the respondent Nos.1, 3, 4 and 5 in the 1st appeal vide R.F.A. No.173 of 2012) challenged the above

judgment of the 1st appeal passed in R.F.A. No.173 of 2012 preferring this 2nd appeal for the confirmation of the judgment and decree of the learned trial court below.

12. This 2nd appeal was admitted by formulating the substantial of law, i.e. whether the lower appellate court, i.e., the 1st appellate court has erred in law allotting shares to the parties by applying the proviso of Section 6 of the Hindu Succession Act, 1956 as it is stand prior to the Amendment of Act of 2005, when the properties in the hands of Chintamani Mohapatra were his self-acquired properties and on his death, it is to be succeeded by his Class-I heirs as provided in the schedule of the Act?

In order to answer the above substantial question of law framed in this Second Appeal, it is pertinent to discuss about the manner of devolution of the suit properties upon the parties as per law.

13. It is the undisputed case of the parties that, all the suit properties were the self-acquired properties of their grand-father Chintamani Mohapatra and after his death, the said properties have devolved upon them (parties).

14. The case of the contesting defendant Nos.1, 3 and 4, i.e., three grandsons of Late Chintamani Mohapatra is that, they (defendant Nos.1 to 4) are the owners of the entire suit properties to the exclusion of the plaintiff and defendant Nos.5, 6 and 7 through one un-probated registered WILL bearing No.19 dated 28.09.1975 vide Ext.-A said to have been executed by Chintamani Mohapatra in their favour.

The above stands of the defendant Nos.1, 3 and 4 regarding their ownership over the entire suit schedule properties on the basis of the above will vide Ext.A has already been negatived/discarded by the learned courts below and the said findings of the learned courts below regarding non-creation of any right through that un-probated will vide Ext-A in their favour has already been reached in its finality due to non-challenge of that part of findings of the learned courts below by the defendant Nos.1 to 4 in this 2nd appeal.

Such findings of the learned courts below that, an un-probated will like Ext.A shall not create any right relating to the properties involved therein in favour of the so-called beneficiaries thereof has already been clarified by this Hon'ble Courts in ratio of the decision reported in ***2010(I) OLR 508*** : ***Smt. Aparna Dhir Singh vrs. Debendra Nath Jenamani and two others*** by relying upon the decision of the Hon'ble Apex Court in AIR 1962 (S.C.) 1471 : ***Hem Nolini Judah vrs. Mrs. Isoline Sarobasini Bose and others that,***

> "***Indian Succession Act 1925—Section 213*** – Section 213 will be a bar to any right being claimed by a person under a will whether as a plaintiff or as a defendant unless Probate or Letters of administration of the WILL have been obtained."

It is the settled propositions as per Mitakhsyara School of Hindu law that, properties inherited from father and grand-father shall be called as ancestral properties of the grand-sons and grand-daughters.

15. When the claim of ownership of defendant nos.1 to 4 over the suit properties through on un-probated will vide Ext.A has become inacceptable, then at this juncture, all the suit properties left by Chintamani Mohapatra have become the ancestral properties of his grand-sons and grand-daughters, i.e. plaintiff and defendants.

So in order to determine (carve out) the shares of the parties in the suit properties, it is pertinent to discuss the relevant provisions of law envisaged in Sections 8, 9 and 15 of the Hindu Succession Act, 1956.

Hindu Succession Act, 1956—Section 8— General rules of Succession in the Case of Males:- The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter:-

(a) Firstly, upon the heirs, being the relatives specified in class-I of the Schedule.
(b) x x x x
(c) x x x x
(d) x x x x

Section-9 – order of succession among heirs in the schedule:-

Among the heirs specified in the schedule, those in Class-I shall take simultaneously and to the exclusion of all other heirs;

xx xx xx xx xx xx xx

Section-15-Genral rules of succession in the case of female Hindus:-

(i) The property of a female Hindu dying intestate shall devolve according to the rules set out in Section-16 :

(a) firstly upon the sons and daughters (including the children of any of pre-deceased son or daughter) and the husband.

(b) xxxxx
(c) xxxxx
(d) xxxxx
(e) xxxxx

16. In view of the above noted provisions of law in Sections 8 and 9 of the Hindu Succession Act, 1956, after the death of Chintamani Mohapatra in the year 1979, on the basis of the undisputed genealogy indicated in Para No.3 of this judgment, in first phase (first chance), the suit properties left by him devolved upon his widow wife, i.e., Chuna Mohapatra, plantiff and defendants (those are eight in numbers as sons and daughters of the predeceased son, i.e., Jagannath) along with Uttara Mohapatra (widow wife of the predeceased son, i.e., Jagannath) according to the Class-I of the schedule of the above Act, 1956.

17. Therefore, in the 1st phase after the death of Chitamani Mohapatra, Chuna Mohapatra, Uttara Mohapatra along with the plaintiff and defendants being ten in numbers in total were entitled to equal share each, i.e., 1/10th share each from the suit properties, by coming within the category of Class-I of the schedule.

18. Then in the 2nd phase, after the death of Chuna Mohapatra (widow wife of the Chintamani Mohapatra) in the year 1981, her 1/10th share had devolved upon the children for her predeceased son, i.e., upon the plaintiff and defendants equally as per Section 15(a) of the Hindu Succession Act, 1956. As the plaintiff and defendants are in total 8(eight) in numbers, for which, due to the devolution 1/10th share of Chuna Mohapatra upon them equally, the share of each of the plaintiff and defendants became 1/10th + 1/80th =9/80th share each in the suit properties.

19. In the 3rd and last phase, when the mother of the plaintiff and defendants, i.e. Uttara Mohapatra expired in the year 2003, 1/10th share left by her in the suit properties devolved upon her children, i.e. plaintiff and defendants equally as per Section 15(a) of the Hindu Succession Act, 1956. So due to the devolution of 1/10th share of Uttara Mohapatra upon the plaintiff and defendants equally, those are eight (8) in numbers, the share of each of the plaintiff and defendants became 9/80th + 1/80th =10/80, i.e. 1/8th each in the suit schedule properties.

20. Now, it is to be seen, whether the reduction of shares of the plaintiff and defendant Nos.5, 6 and 7 (those are the grand-daughters of Chintamani Mohapatra and sisters of defendant Nos.1 to 4) from 1/8th to 1/40th by the learned 1st appellate court below in the judgment of RFA No.173 of 2012 is sustainable under law.

21. The basis/reason of reduction of share of the plaintiff and defendant Nos.5 to 7 from 1/8th to 1/40th has been indicated by the learned 1st appellate court in para-14 of the judgment of RFA No.173 of 2012 by placing reliance in the ratio of the decisions of the Hon'ble Courts and Apex Court in the case of ***Brij Narain Aggarwal vrs. Anup Kumar Goyal and others*** : reported in ***AIR 2007 (Delhi) 254***, in the case of ***Smt. Barirathi and others vrs. S. Manivanan and another*** : reported in ***AIR 2008 (Madras) 250*** and in the case ***of G. Sesar vrs. Geetha and others*** : reported in ***2009(I) OLR (SC) 957, (2009) 6 SCC*** 99. ***G. Sesar vrs. Geetha and others*** stating that, as the original owner of the suit properties, i.e, Chintamani Mohapatra (who was the grand-father of the plaintiff and defendants) had expired in the year 1979 and by that time the father of the plaintiff and defendants, i.e. Jagannath Mohapatra was not alive and as by that time there was no amendment to the provisions of Section 6 of Hindu Succession Act, 1956 for making the daughters as coparceners providing equal share with that of their brothers and as after the death of Chintamani Mohapatra in the year 1979, succession had already opened, for which, the daughters of his predeceased son, i.e., plaintiff and defendants 5 to 7 are only entitled to succeed the interest of 1/5th share of their deceased father Jagannath Mohapatra along with their brothers on the basis of notional partition as per Section 6 of the Hindu Succession Act, which was before Amendment. "Therefore, the share of the plaintiff and defendant Nos.5 to 7 is 1/40th each in the suit properties, but not 1/8th, as there was devolution of the properties in the year 1979 after the death of Chintamani Mohapatra prior to the amendment of Section 6 of the Hindu Succession Act, 1956 in the year 2005 and the said devolution cannot be reopened after coming

into force of 2005 amendment. For which, the learned trial court has gone wrong in recognizing 1/8th interest of the plaintiff. So, the plaintiff and defendant Nos.5 to 7 are entitled to 1/40th share each and the defendant Nos.1 to 4 being the sons of Jagannath Mohapatra are entitled to 1/5th share each from the suit properties."

22. The above findings and observations made by the learned 1st appellate court in Para No.14 of the impugned judgment passed in RFA No.173 of 2012 that, as the father of the four daughters, i.e., plaintiff and defendant Nos.5 to 7 had expired prior to the amendment of Section 6 of Hindu Succession Act, i.e., prior to 2005, for which, they are not entitled to equal share in the suit properties with that of their brothers, i.e., defendant Nos.1 to 4 are not at all acceptable under law.

23. Because, in a three Judges Bench decision of the Hon'ble Apex Court in ***2020(II) CLR-83*** : ***Viruta Sharma vrs. Rakesh Sharma and others*** (decided on 11.08.2020) resolving the conflicting verdicts rendered in earlier two Judges Bench judgments of the Hon'ble Apex Court between ***Rakesh and others vrs. Phulvanti and others, and Damanna @ Sumansurpur and another vrs. Aman and others*** and after considering the amended provisions of Section 6 of the Hindu Succession Act, 1956 (which was amended vide Amendment Act of 2005) it has been held and clarified as under:-

> "***Hindu Succession Act, 1956 Section 6 (as amended in the year 2005 vide Amendment Act, 2005***)—coparcenery depends on birth, but not on death. Amended Act of Section 6 of Hindu Succession Act, 1956 confer status of coparcener on daughter borne before or after amendment in same manner as son with same rights and liabilities.
>
> Since right of daughter in coparcenery is by birth, it is not necessary that, father/coparcener should be living as on 09.09.2005. So coparcener and daughter do not need to alive as on date of amendment. It is not necessary that, there should be a living coparcener or father as on date of amendment, to whom, the daughter would succeed. The daughter would step into coparcenary as that of a son by taking birth before or after the Amended Act of 2005."

24. So, in view of the above clarified propositions of law relating to the applicability of the amended provisions of Section 6 of the Hindu Succession Act, 1956 (as amended vide Amendment Act of 2005), in a suit for partition like the present suit at hand, the daughters, i.e., plaintiff and defendant Nos.5 to 7 each would inherit equal share as that of the sons, i.e. defendant Nos.1 to 4 in the ancestral properties and whether the date of death of their father before or after the date of amendment to Section 6 of the Act, 1956 would be irrelevant.

25. Even the marriage of the daughters' prior to the Amendment of Section 6 of Hindu Succession Act, 1956 cannot debar them from claiming equal right with that of their brothers.

> "When a son continues to be a son both before and after marriage like-wise a daughter continues to be a daughter before and after her marriage. This relationship of a daughter is not affected either in fact or in law upon marriage. Marriage does not bring about a

severance of the relationship between a father and mother and their son or between parents and their daughter. These relationships are not governed or defined by marital status. Marriage of the daughters cannot be taken as a ground to define and exclude them from getting equal shares with that of their brothers. Therefore, exclusion of daughters from getting equal share with that of their brothers purely on the ground of marriage would constitute an impermissible discrimination and be violative of Articles-14 and 15 of the Constitution of India, 1950."

26. When, as per the discussions and observations made above, the original owner in the suit schedule properties, i.e., Chintamani Mohapatra died intestate (as the so-called will vide Ext.A said to have been executed by him has been held to be unused for any purpose due to non-probatation of the same) and when no partition of the suit properties was effected before 20.12.2004, then the plaintiff and defendant Nos.5 to 7 being his grand-daughters(daughters of his predeceased son Jagannath) each are entitled to equal share as that of their brothers, i.e. defendant Nos.1 to 4 under both the ways as discussed above, i.e. either through the application of Section 8, 9 and 15 of Hindu Succession Act, 1956 or through the application of Section 6 of Hindu Successions Act, 1956 (as amended vide Act of 2005). For which, the findings and observations made by the learned 1st appellate in RFA No.173 of 2012 reversing the findings of the learned trial court below altering/modifying the shares of the plaintiff and defendant Nos.5 to 7 from 1/8th share each to 1/40th share each on the basis of wrong interpretation of the provisions of Hindu Succession Act, 1956 before and after Amendment (as amended in 2005) as per the clarifications made above cannot be sustainable under law.

27. As such, there is justification under law for making interference with the findings and observations made by the learned 1st appellate court in the impugned judgment through this 2nd appeal filed by the appellants (plaintiff and defendant nos.5 to 7).

Therefore, after disregarding the findings and observations made by the learned 1st appellate court in the judgment of RFA No.173 of 2012 relating to the shares of the parties from the suit schedule properties, it is held that, the findings of the leaned trial court below in that respect is confirmed.

28. So for the reasons stated above, there is merit in this 2nd appeal filed by the appellants.

Therefore, the 2nd appeal filed by the appellants is allowed on contest, but without cost.The impugned judgment and decree passed in RFA No.173 of 2012 by the learned 2nd Additional Sessions Judge, Cuttack(1st appellate court) are set aside. The judgment and decree passed by the learned trial court below on 31.08.2012 and 06.09.2012 respectively in C.S. No.427 of 2007 are confirmed.

—— o ——