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deceased – The owner of the tea stall (P.W.18) where the incident took place is also not implicating any of these accused persons to have played any role and committed the overt act against the deceased – Effect of – Held, the court is at a loss to follow the view taken by the Trial Court that the evidence of the I.O thoroughly corroborated the prosecution case – Hence appeals are allowed.

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SERVICE LAW – Probation – In the appointment order of the petitioner, it has been mentioned that appointee would be on probation for a period of one year from the date of his joining and the period of probation can be extended for a further period of one year or more as per the satisfaction of the authority – The authority extended the probation period of petitioner after two years – The authority terminated the service of petitioner during the period of probation – Whether the order of termination is sustainable? – Held, No – As no communication was made to the petitioner regarding his unsatisfactory performance, his case deserve to be considered for the purpose of permanent absorption/regularization – Impugned order set aside.

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——o ——

2023 (III) ILR – CUT- 643

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

W.A NO. 601 OF 2022

M/s. JSW STEEL LTD. .....Appellant

-V-

MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL, CUTTACK & ORS. .....Respondents

(A) MICRO, SMALL AND MEDIUM ENTERPRISES DEVELOPMENT ACT, 2006 – Section 18 – Maintainability of claim before the council – Whether each unit of an enterprise or company can be considered as a separate enterprise for the purpose of maintaining a claim U/s.18 of the Act? – Held, No – The classification of units of a company cannot be consider as "Small Enterprise" for the purpose of maintaining claim. (Paras12-15)

(B) ARBITRATION AND CONCILIATION ACT, 1996 r/w Sections 18,24 of the MS&MED Act – Whether the provisions in section 15 to 18 of the MS&MED Act prevail over the Arbitration and Conciliation Act ? – Held, Yes. (Para16)

(C) CONSTITUTION OF INDIA, 1950 – Articles 226, 227 – Maintainability of Writ – Whether presence of an alternative remedy would operate as a bar for invocation of writ jurisdiction under Article 226, when the impugned award was passed in violation of principle of natural justice and the proceeding before the council was wholly without jurisdiction? – Held, No.

Case Laws Relied on and Referred to :-

1. AIR 2011 SC 2477 : J.G. Engineers Pvt. Ltd. Vs. Union of India.
2. (2005) 8 SCC 618 : SBP & Co. Vs. Patel Engineering Ltd.
3. 2022 (1) SCC 75 : Bhaven Construction Vs. Executive Engineer Sardar Sarovar Narmada Nigam Ltd.
4. (2005) 8 SCC 618 : SBP & Co. Vs. Patel Engineering Ltd.

For Appellant : Mr.P.Chidambaram, Sr. Adv.
Mr.S.S.Mohanty

For Respondents : Mr D.K.Mohanty A.G.A
Mr.S.P.Mishra, Sr. Adv.
Mr Amit Patnaik

JUDGMENT Date of Judgment : 29.09.2023

SAVITRI RATHO, J.

This appeal under Clause-10 of the Letters Patent Constituting the High Court of Judicature of Patna read with Article 4 of the Orissa High Court (Amendment) order, 1948 has been filed by the appellant challenging the orders

dated 04.03.2022 and 07.04.2022 passed by the learned Single Judge in W.P. (C) No.21943 of 2016. The writ application had been filed by the Appellant challenging the award dated 28.06.2016 passed by the Micro and Small Enterprises Facilitation Council , Cuttack (in short "Council") directing the Appellant to pay the principal amount of Rs.1,00,57,533.32 (Rupees one crore fifty seven thousand five hundred thirty three and thirty two paise only) and interest claim of Rs.4,03,10,934.91 (Rupees Four crore three lakhs ten thousand nine hundred thirty four and ninety one paise only) calculated upto 31.12.2014 with compound interest with monthly rests at the rate of 3 times of the bank rate as notified by the Reserve Bank of India till realization of dues.

BEFORE THE COUNCIL

2.1 On 24.04.2014, the Respondent No. 2 M/s Gupta Power Infrastructure Ltd, claiming to be a small scale industry had filed a claim - MSEFC Case No. 17 / 2014 before the Council against the Appellant , under Section 18 of the Micro Small and Medium Enterprises Development Act, 2006 (in short "MSMED Act ") for Rs. 4,98,60,326.33, out of which only a sum of Rs. 1,93,81,657.88 was the principal amount and the balance of Rs. 3,04,78,668.45 was towards interest. In its claim it had been indicated that it had works in Khurda, and two in Kashipur .Its Khurda Unit had a DIC registration of the year 1997. It was stated that between 2009 – 2013, sixty two purchase orders had been placed by the Appellant with Respondent No.2, for supply of articles at Bellary, Karnataka for the value of Rs.36,36,59,057.45 for which it had raised bills on various dates. The Appellant had made part payment leaving a balance of Rs.1,93,81,657.88 as outstanding towards principal.(Annexure 8)

2.2 On 01.09.2014, the council issued notice to the Appellant calling upon it to file written statement/counter within seven days. (Annexure 9)

2.3 The Appellant filed its counter affidavit on 23.10.2014 stating the claim was not maintainable as the various purchase orders had an arbitration clause that any dispute shall be referred to and resolved by arbitration. The claim was denied as being incorrect. Compliance of Section - 7 and 8 of the MSMED Act by producing appropriate documents was demanded. It admitted the total basic amount of purchase orders was Rs. 321,172,711/- and that some of the purchase orders did not pertain to it and indicated the details of the purchase orders and that adjusted amount was on account of liquidated damages for the delay in delivery of goods and withheld amount of Rs.12,109/- was towards Excise Duty for non receipt of duplicate for transporter copies of invoices and would be released on receipt of DFT copies of invoices.It admitted that only the Excise amount was pending. (Annexure 10)

2.4 On 29.12.2014, in its 34th Meeting, the Council found that three invoices pertaining to the claim at Kashipur unit were outside its jurisdiction and the

Respondent No. 2 was asked to comply.Four tax invoices were found to be of IID Centre Mukundaprasad, Khurda. The petitioner was asked to file rejoinder within seven days and comply the invoices raised in Kashipur. (Annexure 11)

2.5 On 13.03.2015, the Respondent No 2 filed its rejoinder praying for exclusion of its claims of its Kashipur Units and confined its claims to the invoices of IID Centre Mukundaprasad, Khurda. It modified its claim to Rs.5,03,68,468.23. (Principal amount of Rs.1.00,57,533.32 and interest of Rs.4,03,10,934.91 upto 31.12.2014). It claimed it was small enterprise as per certification of DIC Bhubaneswar as per registration certificate annexed to the claim application .It admitted mistakes in quoting purchase orders due to typographical mistake and disputed the details given by the Appellant. (Annexure 12)

2.6 On 27.04.2015, the Appellant filed a reply affidavit to the rejoinder. In its affidavit filed before the Council, the Appellant had stated the Council had no jurisdiction to entertain the matter as the purchase orders contained an arbitration clause which provided that any dispute shall be referred to and resolved by arbitration under the Rules of Indian Court of Arbitration (the "ICA Rules") at Mumbai. It admitted that the basic amount of the purchase orders was Rs. 3,21,172,711 /- and all the amounts due to Respondent No.2 had already been paid. Amount of Rs. 9,661,794 /- had been adjusted due to late delivery and Excise duty of Rs.12,109/- had been withheld and would be released forthwith on receipt of DFT copies of invoices from the Claimant. It reiterated its statements in the counter affidavit and also that Respondent No. 2 was not entitled to payment of interest. (Annexure 13)

2.7 In its 38th meeting**,** on 20.07.2015, the Council granted the Appellant 15 days time to file counter to the rejoinder and directed the parties to amicably settle the dispute within one month and report to the Council. (Annexure 14)

2.8 In its 42nd meeting on 20.01.2016 1-08.02.2016 directed the appellant to have amicable settlement with the Respondent No.2 within seven days and if no communication was received from it within the stipulated period, award would be given for payment with due interest (Annexure 15)

2.9 On 12.03.2016 additional affidavit was filed by the Appellant stating that there was an error in the calculation as the liquidated damages (in short "LD") for delay in delivery, deductions due to shortage in supply and retention amount towards excise duty, had not been taken into account ; and the calculation of interest was also erroneous .(Annexure 16

2.10 On 20.04.2016, the Appellant sent an email to Joint Director of Industries and Member Convenor, MSFEC Odisha, not to pass any orders and to take up the issues of maintainability and jurisdiction as preliminary issues. (Annexure 17)

2.11 Notice vide Memo No. 6235 dated 18.06.2016 was sent to the Appellant directing it to appear on 28.06.2016 for settlement of the case, and in default in

appearance, the Council would proceed as per provisions of the MSFEC Rules under the MSMED Act. In the said notice in Memo No 6236, Respondent No.2 had been directed to appear in person with original relevant documents for verification. (Annexure 18)

2.12 On 28.06.2016, the sitting was closed. An award was passed on that day in MSEFC Case No. 17 of 2014 directing the Appellant to make payment of the principal amount of Rs.1,00,57,533.32 (Rupees one crore fifty seven thousand five hundred thirty three and thirty two paise only) and interest claim of Rs. 4,03,10,934.91 (Rupees Four crore three lakhs ten thousand nine hundred thirty four and ninety one paise only) calculated upto 31.12.2014 with compound interest to the Respondent No. 2. It is stated in the award that the Appellant had stated that the Respondent No. 2 was not an SSI unit and after examining the MPT Registration Certificate/EM Part–II, the Council concluded that it was an SSI Unit. It is also stated that on 20.01.2016 in its 42nd sitting, the Council had directed the Appellant to make amicable settlement within 7 days from 20.01.2016 but the conciliation failed, the Appellant filed additional affidavit on 27.01.2016 and 21.04.2016 and Respondent No. 2 filed its counter on 28.06.2016 and the Council went through the documents and decided to pass the award as the amicable settlement had failed. (Annexure 20)

IN THIS COURT

3. On 04.07.2016, the Appellant filed WP(C) No. 11580 of 2016 in this Court, challenging the jurisdiction of the Council in entertaining the claim of the Respondent No.2. The same was withdrawn on 09.08.2016 when the counsel for Respondent No.2 brought to the notice of the Court about passing of the award on 28.06.2016, with the liberty to file a fresh petition challenging the award.

3.1 WP (C) No. 21943 of 2016 was filed on 14.07.2016 seeking the following reliefs:

> "*(a) issue Rule NISI calling upon the Opposite Parties to show cause as to why the proceedings initiated by Opp. Party No.2 before Opp. Party No.l under Section 18 of the Micro,Small and Medium Enterprises Act, 2006, being MSEFC Case No. 17/2014 and award dated 28.06.2016 under annexure-16, shall not be quashed and set aside, and if insufficient cause, to make the said Rule NISI absolute;*
>
> *(b) issue a writ of certiorari in line with aforesaid Rule NISI quashing the award dated 28.06.2016 passed by Opp. Party No.l in MSEFC Case No. 17/2014; and*
>
> *(c) pass such other or further writ/writs, direction/directions. order/orders as the Hon'ble Court may deem, fit and proper in the facts and circumstances of the present case."*

3.2 The grounds of challenge of the impugned award in the writ petition were as follows ;

a) The claim was not maintainable as the Respondent No.2 was not a "small enterprise".

b) S. 18 of the MSMED Act can only be invoked for any amounts due to a "supplier" under S. 17 of the MSMED Act and as per Section-2(n), a "supplier" can only be a micro or small enterprise. In order to be classified as a "small enterprise", the total investment made by the entity in plant and machinery has to be more than Rs. 25 lakh but cannot exceed Rs. 5 crore. The annual returns of Respondent no 2 indicated that investments made by it in plant and machinery in the years 2009-10, 2010-11 and 2011-12 are Rs. 11 crore, Rs. 21.60 crore and Rs. 21.66 crore respectively. The Respondent is therefore not a "small enterprise" and it was not even a "medium enterprise".

c) As per the General Instruction under Schedule 1 of the MSMED Act. The industry is required to inform of any change in investment within three months. From this it is apparent that classification of "small enterprise" is not permanently available to an enterprise . By using the registration of the year 1977, the Respondent No.2 has misled the Council that it is a "small enterprise" when it approached it after many decades in 2014 .

d) The MSMED Act is a social welfare legislation intended to benefit micro and small enterprises which may not have the funds or the power to deal with buyers which may have significantly more corporate clout and to prevent undue harassment to them, and not for enterprises like the Respondent.

e) All the purchase orders contained an arbitration clause, for which the Council did not have the jurisdiction to entertain the claim.

f) After failure of conciliation, without hearing the parties and without initiation arbitration proceedings, the case was posted for award which is illegal and contrary to Section 18 (3) of the MSMED Act.

g) The purchase orders of the year 2009-2010 are grossly barred by limitation.

3.3 A preliminary reply (affidavit) on the issue of maintainability had initially been filed by the Respondent only on the point of maintainability of the writ petition stating that in view of the provisions of Section 18 and 19 of the MSMED Act, any order passed by the Council pursuant to arbitration is to be treated as an award under the Arbitration and Conciliation Act. Hence a writ application was not maintainable. As regards the challenge that it was not a small scale unit and the Council has acted without jurisdiction, it was disputed, stating that as it was a disputed question, the same could not be adjudicated in a writ petition. The status report dated 30.03.2015 of the Committee which had undertaken field visit on 28.03.2015 to the unit and concluded that its investment in plant and machinery amounts to Rs 4,48,90,501/- and it was termed as a 'small scale industry" was annexed as Annexure A/2 to the counter affidavit. It was stated that the contravention of the substantive law or an award bereft of reasons can also be the grounds of challenge under Section 34 of the Arbitration and Conciliation Act. As Section – 19 of the MSMED Act provides that 75% of the award has to be deposited when any application under Section 34 of the Arbitration and Conciliation Act is preferred, the writ application has been filed only to avoid such deposit. (Annexure 22)

3.4 A rejoinder affidavit was filed by the Appellant refuting the contents and claims in the preliminary counter stating that from the claim statement it was apparent that the Respondent No.2 had units in Odisha as well as Kashipur, Uttarakhand.It had relied on the certificates of registration issued by the DIC Odisha as well as DIC Udhamsinghnagar, Uttarakhand. Its investments in plant and machinery has to be taken as whole. From its returns filed in the years 2009-10, 2019-11 and 2011-12 it was apparent that the investments in plants and machinery was more than 10 crores which was much more than the limit prescribed in Section - 7(1)(a) (ii) of the MSMED Act which was Rs. 25 lakhs to Rs. 5 crores. It was also stated that the returns had not been denied by the Respondent No.2 and the status report of the Committee cannot run contrary to the returns filed by the Respondent No. 2 before the Income Tax Department where it was shown that investments in plants and machinery was more than two crores. (Annexure 23).

3.5 A counter affidavit had been filed by the Depy Director of Industries on behalf of opposite parties No 1 and 3 in the writ application. It was interalia stated therein that Respondent No. 2 had filed the claim as per Section 7 and 8 of the MSMED Act which was a special and self contained statute, with Permanent registration certificate bearing No-15/11/0055/551 dated 12.01.1977 and Entrepreneurs Memorandum Part II bearing No. 210171200121 dated 06.05.2008 by the DIC, Bhubaneswar indicating it to be small scale industry (Annexure A/1 to the Court Affidavit. It was heard on 29.12.2014, 20.07.2015 and 28.06.2016 (Annexure B/1 Series) Both parties had participated in the proceeding and proper procedure has been followed and a reasoned order has been passed. The conciliation initiated under the MSMED Act was not successful and was terminated without any settlement. The Council took up the dispute for arbitration and decided the same and passed award on 28.06.2016. On 28.06.2016, the Advocate for the Appellant had brought to the notice of the Council regarding their objection as to status of the Respondent No. 2 which should be substantiated by documentary evidence and the Council examined the PMT /EM –II certificate issued by the DIC and concluded that it is a small scale industry. Proper procedure has been followed and adequate opportunity given to the parties to place their cases and a reasoned order has been passed which cannot be faulted. (Annexure 22)

3.6 A rejoinder was filed by the Appellant to the affidavit of the Depy Director, with more or less the same averments as in the earlier rejoinder and the writ petition. It was specifically stated that the certificate of registration under Sennexure A/1 could not have been the sole basis for accepting that the Respondent No 2 to be small scale unit. The certificate of registration in favour of Gupta Cables Pvt Ltd as it was called then, had been issued by the DIC was back on 12.01.1977 and had been amended on 25.09.2008 for inclusion of its second unit at Mukund Prasad Khurda with plant machinery worth Rs 78.06 lakhs with effect from 12.06.2008. The Respondent No.2 has relied upon the certificate of registration issued in its favour by

the DIC Odisha as well as the DIC Udhamnagar.The investments in Plant and machinery cannot be bifurcated and has to be taken as a whole.

3.7 After hearing the counsel on the circulars dated 29th September 2015 and 3rd March 2016, by order dated 04.03.2022, the learned Single Judge held that the investments in plant and machinery of different units of Respondent No. 2 Company were not required to be clubbed together for the purposes of determining whether it is a "small enterprise". The relevant portion of the order is extracted below:

> *" What emerges is that there is no notification regarding clubbing of enterprises or units that make the aggregate working capital ineligible for certification as a micro or small or medium enterprise as the case may be. Internal correspondence between departments/offices will not be relied upon by Court. There has been demonstration that Khurda unit of opposite party no.2 had received certification. On query from Court Mr.Mishra clarified that there was disclosure of the two circulars to demonstrate that there was no notification for clubbing and the dispute regarding nonpayment arose in year, 2013-14, at a time before the circulars came into existence."*

3.8 By order dated 07.04.2022, the learned Single Judge dismissed the writ petition as not maintainable holding that the award which had been passed did not make out a rare case for judicial review so as to justify interference in exercise of power under Section 226 / 227 of the Constitution of India. While dismissing the writ petition, the learned Single judge observed that it was left to the petitioner to find remedy as may be available to it under law.

3.9 The relevant portions of the order dated 07.04.2022 of the learned Single Judge are extracted below :

> *"11. First, Court must deal with challenge mounted on contention that opposite party no.2 cannot claim itself to be a small enterprise, for invoking mechanism under the 2006 Act. The certificate is dated 6th May, 2008 and is of date prior to the purchase order. The dispute arose on part of the payment for the supplies remaining outstanding. Prayers in the writ petition are for interference with the award. Scope of the prayers do not include a challenge to the certificate itself and the issuing authority was accordingly not impleaded as opposite party*."
>
> *"13. Petitioner had also contended on clubbing. Nothing further in addition to what was already said in order dated 4th March, 2022, extracted and quoted above, is required to be said."*
>
> *"14. ….. It does appear the council acted as conciliator in allowing parties to arrive at amicable settlement."*
>
> *"16. Though section 80 in the 1996 Act says that unless otherwise agreed by the parties, inter alia, conciliator shall not act as arbitrator but section 18 in the 2006 Act says, inter alia, the council shall either itself conduct conciliation or seek assistance in the matter and where the conciliation initiated is not successful, the council shall either itself take up the disputes for arbitration or refer it to any institution. The 2006 Act came after the 1996 Act and section 24 in it gives overriding effect to section 15 to 23 in the Act. As such, the council has legislative mandate to be both conciliator as well as arbitrator, under section 18 in the 2006 Act overriding section 80 in the 1996 Act.*

*17. In **Jharkhand Urja Vikas Nigam Limited** (supra) the facts were that appellant before the Supreme Court had not appeared in the proceeding for conciliation and on the very first date of its appearance, it was directed by the council to pay towards principal and interest. The Supreme Court set aside the award and left it open to the council to either take up the dispute of its own or to refer the same in terms of section 18. Here, 45 sittings were held by the council. It does appear that petitioner participated, if not in all of them, in most.*

*18. In **Vijeta Construction** (supra) the Supreme Court interfered on finding that the facilitation council did not follow the procedure as required to be followed under section 18 of the 2006 Act. It is on facts found in the case. The facts were as would appear from paragraph 3 in the order.*

"3. By order dated 10.01.2012 the Facilitation Council closed the said proceedings by observing that Facilitation Council has been constituted with limited object and jurisdiction and the Facilitation Council has no jurisdiction to make through enquiry and take evidence and decide truth about the challenged document. The Facilitation Council also observed that parties are at liberty to move before the competent court."

*Clearly **Vijeta Construction** (supra) is not applicable.*

*19. In **Steel Authority of India Limited** (supra) there was arbitration agreement between the buyer and supplier. The arbitration agreement stood invoked. After the supplier had submitted to the reference, it thereafter went to the council and invoked the mechanism under the 2006 Act. It is on those facts that the Division Bench of High Court of Bombay at Nagpur said that the council is not entitled to proceed under the provisions of section 18 (3) in view of independent arbitration agreement dated 23rd September, 2005 between the parties. The Division Bench, thereafter, gave direction for participation in the conciliation, which shall be conducted by the council. This decision too is inapplicable to the case at hand as the arbitration agreement between the parties, if there was one, was not invoked by opposite party no.2.*

*20. Coming to **Bajaj Electricals Limited** (supra), an order passed by this Bench, there is recollection that the contention was of petitioner, in that case, not having been heard. However, there is reference in **Bajaj Electricals limited** (supra) to an earlier order of this Bench, being order dated 20th December, 2021 in W.P.(C) no.28464 of 2020 (**Rolta India Limited Vs. Micro and Small Enterprises Facilitation Council and another**), whereby the challenge to breach of the procedure by the council was rejected by this Bench on being bound by view taken by a co-ordinate Bench on order dated 22nd September, 2021 in **W.P.(C) no.20234 of 2020** (**Anupam Industries Ltd. vs. State of Odisha and others**), confirmed in appeal by the first Division Bench of this Court.*

21. For forgoing reasons, where award has been passed, Court does not find this to be a rare case for judicial review. The writ petition is not maintainable. Petitioner is left to find remedy, as may be available to it in law.

22. The writ petition is dismissed."

4. We have heard Mr.P.Chidambaram, learned Senior Counsel assisted by Mr.S.S.Mohanty, learned counsel and Mr.S.P.Mishra, Senior Counsel appearing for the Respondent No. 2 assisted by Mr Amit Patnaik learned counsel. We have gone through the records, written notes of submissions and the decisions relied on by the counsel.

SUBMISSIONS ON BEHALF OF THE APPELLANT

5. Mr P. Chidambaram, learned Senior Advocate appearing for the Appellant has urged following contentions for setting aside the orders of the learned Single Judge and the award passed by the Council**.**

(a) The impugned award passed by the Council is without jurisdiction as Section 18 of the MSMED Act can only be invoked with respect to an amount due to a 'supplier' under Section 17, and Respondent No.2 not being a 'micro' or 'small' enterprise does not fall within the purview of a 'supplier' as defined under Section 2(n). The enterprise in this case was Gupta Power Infrastructure Limited (GPIL), Respondent No. 2 .Purchase ordered had been placed with it and it had raised invoices. It is immaterial from where or which unit it supplied the goods. It has units for the purpose of the Act, particularly Section 2(n) read with Section 7, the enterprise is GPIL and its four units of the constitute a single enterprise and its classification can therefore be only as a medium enterprise as its total investment in plant and machinery in the four units in the year was 6.54 crore in the Financial Year 31.03.2011 and Rs. 5.47 in the Financial year 31.03.2012 .

(b) The learned Single Judge in order dated 04.03.2022 has not assigned reasons for treating the Khurda as separate enterprise other than saying that Appellant failed to challenge the certificate issued in favour of the Khurda unit . It was not necessary to do so as the contention of the appellant that Respondent was a medium enterprise, as its investment in plant and machinery during the relevant years in all its units was more than Rs.5 Crore .Circular dated 29.09.2015 and the Circular dated 03.03.2016 were not relied upon by the Appellant as they were of the 2015 and 2016 which are subsequent to the relevant period of supply namely 2009-2013.

(c) The presence of an alternative remedy would not operate as a bar for invocation of writ jurisdiction under Article 226 as the impugned award was in violation of the principles of natural justice and the proceedings before the Council was wholly without jurisdiction hence the finding of the learned Single Judge regarding maintainability is manifestly erroneous.(***Whirlpool Corporation Vs. Registrar of Trademarks (1998) 8 SCC 1*** *(Para 14-16.)*.

(d) The Council it its award has not decided the following jurisdictional issues :

i) the reference made under Section 18 was not maintainable since the Respondent No.2 was not a micro or small enterprise and therefore not a 'supplier' within the meaning of Section 2(n) of the Act.

ii) The claim was made on 24.04.2014 and any claim in respect of alleged unpaid amount which accrued prior to 24.04.2011 was barred by limitation.

(e) The procedure adopted by the Council has resulted in patent jurisdictional error and the statutory scheme of dispute settlement mechanism under the Act has been circumvented. There was no conciliation conducted under Section 18(2) of the

Act read with the procedure contained in Section 62 to Section 81 of the Arbitration and Conciliation Act and there was no arbitration under Section 18(4) of the Act read with Section 23 to Section 33 of the Arbitration and Conciliation Act. The procedure under Rule 4 of the Odisha Micro Enterprises Facilitation Council Rules, 2008, has not been followed by the Council. Reliance has been placed on the decisions in the cases of :

(i) **Silpi Industries Etc. Vs. Kerala State Road Transport Corporation & Another : 2021 SCC Online Sc 439** (Para 13, 18)

(ii) ***Jharkhand Urja Vikas Nigam Ltd. Vs. State of Raj : 2021 SCC Online Sc 1257*** (Para 11-16) ;and

(iii) ***Vijeta Constructions Vs. Indus Smelters Ltd. : CA No. 5934 of 2021 dated 23.09.2021*:*2021 SCC Online 3436*** (paras 14,15,17)

(f) The Respondent No.2 had filed Additional Affidavits on 27.01.2016 and 21.04.2016. The Appellant filed its Counter. But without any hearing or giving opportunity to lead evidence or make legal submissions, the award was passed on the same day by the Council i.e 28.06.2016. This is in violation of the principles of natural justice.

(g) In the award after noting the contents of the claim, counter and rejoinder, the award has been passed on 28.06.2016 and has been signed by all the members of the Council, but no reasons have been given for passing the award.

(h) The impugned award is vitiated as it is apparently pre-determined in as much as on 21.01.2016, Facilitation Council directed the Appellant to have an amicable settlement with the Respondent No.2 within 7 days and had observed that in the absence of communication form the Appellant "*within the stipulated period, award shall be given for payment of the outstanding dues with interest as per MSMED Act, 2006."*

(i) The conduct of Respondent No.2 has been malafide as it has suppressed and misrepresented material facts in order to claim itself as a 'small enterprise' under MSMED Act, and all amounts claimed to be due by the Respondent No.2 had been already paid and only Rs.12,109/- had been withheld. In support of such submission. Reliance placed on ;

(i) *Silpi Industries Etc. v. Kerala State Road Transport Corporation and another: 2021 SCC Online SC 439.*

SUBMISSIONS ON BEHALF OF THE RESPONDENT No.2.

6. Mr S.P.Mishra learned Senior Counsel appearing on behalf of the Respondent No.2 has made the following submissions:

(a) The MSMED Act, 2006 does not provide for clubbing of investments of different enterprises set up by same person/company (under same ownership) for the purpose of classification of industrial undertakings as Micro, Small & Medium Enterprises.

Respondent No.2 being a small enterprise met the classification criteria under Section 17 read with Section 2(n) of the MSMED Act to invoke the jurisdiction of MSMEFC.

(b) The four separate units of Respondent No.2 have been granted separate registration certificates by the competent authorities of respective States. The claims filed before the Council is confined to supplies made by the Khurda Unit/Enterprise only. The Khurda unit/Enterprise has been granted with MSME Certification by State DIC.

(c) Clubbing of various enterprises under same ownership was recognized as a determinative principle for classification vide Notification dated 29.09.2015, which was withdrawn vide subsequent Notification dated 03.03.2016 upon review by the Government of India in Department of MSME. The circulars also make it clear that there can exist several enterprises under the same ownership.

(d) The finding of the Council on the issue of jurisdiction is not amenable to challenge in a writ proceeding when the party has its remedy to raise the issue in the appellate forum under Section 34 read with Section 19 of the MSMED Act as held in :

(i) ***Punjab State Power Corporation Ltd. Vs. Emta Coal Ltd. : (2020) 17 SCC 93***, Paras 4 and 5

(ii) Bhaven Construction Vs. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. : 2022 (1) SCC 75 , Paras 25 and 26.

(e) The status of Respondent No.2 as small enterprise stands valid unless the same is revoked by the granting authority. After due inspection, Industries Department has accorded the MSME status to the Khurda unit of Respondent No.2' followed by SSI Registration, which is periodically ascertained by the said Department. Appellant's reliance on the Chartered Accountant's Certificate of Respondent No.2 and balance sheets to challemnge the status its unit as small enterprise is untenable as the nAppellant has not challenged the MSME registration of the Respondent No.2's Khurda Enterprise.

(f) The Council has followed the procedure prescribed under the MSMED Act on assuming Arbitration upon recording failure of Conciliation in tandem with provisions of Section 18(2) of MSMED Act read with Sections 65 to 81 of Arbitration and Conciliation Act. The award was passed after resorting to the conciliation mechanism and after examination of the counter, rejoinder and additional affidavits as well as calculation sheets filed by the parties.The Appellant has not raised any issue concerning bias, violation of procedural mandate amidst the proceeding.

(g) The claims are based on invoices advanced by the Respondent No.2 and were based on supplies admittedly made and the stance of the Appellant with respect to the non-payment on the ground of delay is self-contradictory as the Appellant accepted the supplies without any demur or protest and such ground of delay has been raised for the first time. The unilateral deduction of Liquidated Damages (LD) was never intimated/ communicated to the Respondent No.2 and is legally untenable and not commercially sound. (Ref ***J.G. Engineers Pvt. Ltd. Vs. Union of India : AIR 2011 SC 2477***) As the Appellant has specifically taken a stand that if the Respondent No.2 is able to establish itself as a small enterprise before the Council then the Appellant will settle at Rs.74,08,246 without considering LD it shows that unilateral imposition of LD made for the first time before the Council was only a ruse to avoid making payment of an amount due since last 10 years.

(h) A writ petition is not maintainable as alternative efficacious remedy is available and as various questions of fact had been raised .The writ petition had been filed to circumvent the remedy provided under the MSMED Act, and in order to avoid payment of statutory pre-deposit mandated under Section 19 of the said Act. The remedy under Section 34 of the Arbitration and Conciliation Act was available to the Appellant in accordance with the procedure laid down in Section 19 of the MSMED as decided in the case of ***SBP & Co. Vs. Patel Engineering Ltd. : (2005) 8 SCC 618*** **a**t paragraphs 45 and 46.

(i) The plea that the Respondent No.2's claim is barred by law of limitation cannot be considered without examination of records. claim for specific period was barred by limitation. Objection to that claim for specific period was barred by limitation was not raised the in counter or reply to the rejoinder filed by the Appellant before the Council, especially when it has been stated that cumulative amount of Rs.96,61,794/- has been deducted as LD, which was balance amount due from the Appellant.The transaction was a continuing one from 2009 to 2013. Cause of action arose only after the Appellant refused to pay the balance amount, which were being carry forward from time to time as the work was continuing since 2009 till 2013.

(j) The provisions contained under Sections 15 and 18 of the MSMED Act being a special and later legislation, will override the Arbitration and Conciliation Act as well as the Limitation Act, 1963 as per the decisions of the Supreme Court in:

(i) Gujarat State Civil Supplies Corporation Limited Vs. Mahakali Foods Pvt. Ltd. (Unit 2) & Another : SCC Online SC 1492 at **paragraphs 34, 36, 43, 47, 48 and 52,** and

(ii) ***S.R. Technologies (Unit-II) vs. Micro and Small Enterprises Facilitation Council and others*** reported in ***MANU/TL/0505/ 2023 in paras 35-38].***

(k) As per Section 16 of the Arbitration and Conciliation Act , 1996 the Arbitral Tribunal which is in the present case the Council is competent to rule on its jurisdiction and if the Appellant's contention is that the Council has no jurisdiction over should have been raised not later than the submission of the statement of defence i.e. counter claim and thereafter challenged by filing an application for setting aside such an arbitral award in accordance with Section 34 of the Act, 1996.

(l) There has been no suppression of facts. As balance amount was outstanding, the claim had been filed, which has the Council has held the same to be due and payable.

STATUTORY PROVISIONS

7. Before considering the submissions of the learned counsel, it would be apposite to refer to the aims and objectives behind enacting the MSMED Act, the relevant statutory provisions in the MSMED ACT 2006, in the Arbitration and Conciliation Act and in the Odisha Micro and Small Enterprises Facilitation Council Rules, 2008.

Objective & Necessity of MSMED Act

A single comprehensive act for development and regulation of small enterprises had been a long outstanding demand of the Sector so as to free it from a plethora of laws and regulations and visit of inspectors, which it had to face with limited awareness and

resources. The need has been emphasized from time to time by stake holders at different fora. In addition, recommendations to provide for a proper legal framework for small sector to relieve it of the requirements to comply with multiple rules and regulations were made by the Committees such as the Abid Hussain Committee (1997) and Study Group under Dr. S.P. Gupta (2000). While the small scale industries continued to be important for the economy, in the recent years the small scale services have also emerged as a significant sector contributing substantially to the economy and employing millions of workers. Therefore, it became necessary, as is the practice worldwide, to address the concerns of both the small scale industries and services together and recognize them as small enterprises. The worldwide as a composite sector. In a fast growing economy like ours, the natural mobility of small enterprises to medium ones has to be facilitated through appropriate policy interventions and legal framework. With these objectives in view, the Government came with an exclusive legislation for micro, small and medium enterprises known as the Micro, Small and Medium Enterprises Development Act, 2006.

The MSMED Act contemplates different kinds of enterprises namely micro enterprise, small enterprise and medium Enterprise and supplier. The definitions are provided in Section 2, the classification of the enterprises has been provided in Section 7 and the procedure of filing of appropriate memorandum has been provided in Section 8 .The relevant provisions are extracted below :

Section – 2 (e) *"enterprise" means an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (55 of 1951) or engaged in providing or rendering of any service or services;*

Section 2 (g) *"medium enterprise" means an enterprise classified as such under sub-clause (iii) of clause (a) or sub-clause (iii) of clause (b) of subsection (1) of section 7;*

Section 2 (h) *"micro enterprise' means an enterprise classified as such under sub-clause (i) of clause (a) or subclause (i) of clause (b) of sub-section (1) of section 7;*

Section 2 (m) *"small enterprise" means an enterprise classified as such under sub-clause (ii) of clause (a) or subclause (ii) of clause (b) of sub-section (1) of section 7.*

Section – 2 (n) *"supplier" means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of section 8, and includes,— (i) the National Small Industries Corporation, being a company, registered under the Companies Act, 1956 (1 of 1956);*

(ii) the Small Industries Development Corporation of a State or a Union territory, by whatever name called, being a company registered under the Companies Act, 1956 (1 of 1956);

(iii) any company, co-operative society, trust or a body, by whatever name called, registered or constituted under any law for the time being in force and engaged in selling goods produced by micro or small enterprises and rendering services which are provided by such enterprises;

7. Classification of enterprises*.—(1) Notwithstanding anything contained in section 11B of the Industries (Development and Regulation) Act, 1951 (65 of 1951), the Central*

Government may, for the purposes of this Act, by notification and having regard to the provisions of sub-sections (4) and (5), classify any class or classes of enterprises, whether proprietorship, Hindu undivided family, association of persons, co-operative society, partnership firm, company or undertaking, by whatever name called,—

(a) in the case of the enterprises engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951),as —

7. (i) a micro enterprise, where the investment in plant and machinery does not exceed twenty five lakh rupees;

(ii) a small enterprise, where the investment in plant and machinery is more than twenty-five lakh rupees but does not exceed five crore rupees; or

(iii) a medium enterprise, where the investment in plant and machinery is more than five crore rupees but does not exceed ten crore rupees;

(b) in the case of the enterprises engaged in providing or rendering of services, as—
(i) a micro enterprise, where the investment in equipment does not exceed ten lakh rupees; (ii) a small enterprise, where the investment in equipment is more than ten lakh rupees but does not exceed two crore rupees; or (iii) a medium enterprise, where the investment in equipment is more than two crore rupees but does not exceed five crore rupees.

Explanation 1.—For the removal of doubts, it is hereby clarified that in calculating the investment in plant and machinery, the cost of pollution control, research and development, industrial safety devices and such other items as may be specified, by notification, shall be excluded.

Explanation 2.—It is clarified that the provisions of section 29B of the Industries (Development and Regulation) Act, 1951 (65 of 1951), shall be applicable to the enterprises specified in sub-clauses (i) and (ii) of clause (a) of sub-section (1) of this section.

(2) xxxx
(3) xxx
(4) xxx.
(5) xxx.
(6) xxx
(7)xxx.
(8)xxx

(9) Notwithstanding anything contained in section 11B of the Industries (Development and Regulation) Act, 1951 (65 of 1951) and clause (h) of section 2 of the Khadi and Village Industries Commission Act, 1956 (61 of 1956), the Central Government may, while classifying any class or classes of enterprises under sub-section (1), vary, from time to time, the criterion of investment and also consider criteria or standards in respect of employment or turnover of the enterprises and include in such classification the micro or tiny enterprises or the village enterprises, as part of small enterprises.

***8. Memorandum of micro, small and medium enterprises**.—(1) Any person who intends to establish,—*

(a) a micro or small enterprise, may, at his discretion; or

(b) a medium enterprise engaged in providing or rendering of services may, at his discretion; or

(c) a medium enterprise engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), shall file the memorandum of micro, small or, as the case may be, of medium enterprise with such authority as may be specified by the State Government under sub-section (4) or the Central Government under sub-section (3): Provided that any person who, before the commencement of this Act, established—

(a) a small scale industry and obtained a registration certificate, may, at his discretion; and

(b) an industry engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951),having investment in plant and machinery of more than one crore rupees but not exceeding ten crore rupees and, in pursuance of the notification of the Government of India in the erstwhile Ministry of Industry (Department of Industrial Development) number S.O. 477(E), dated the 25th July, 1991 filed an Industrial Entrepreneur's Memorandum, shall within one hundred and eighty days from the commencement of this Act, file the memorandum, in accordance with the provisions of this Act.

(2) The form of the memorandum, the procedure of its filing and other matters incidental thereto shall be such as may be notified by the Central Government after obtaining the recommendations of the Advisory Committee in this behalf.

(3) The authority with which the memorandum shall be filed by a medium enterprise shall be such as may be specified, by notification, by the Central Government.

(4) The State Government shall, by notification, specify the authority with which a micro or small enterprise may file the memorandum.

(5) The authorities specified under sub-sections (3) and (4) shall follow, for the purposes of this section, the procedure notified by the Central Government under sub-section (2).

In case of disputes regarding the payments arising out of the agreement between the parties, the MSMED Act, 2006 also provides for a reference to the Council under Section 18 which is extracted below :

18. Reference to Micro and Small Enterprises Facilitation Council*.—(1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.*

(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.

(3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself

take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section(1) of section 7 of that Act.

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference.

Arbitration and Conciliation Act

***23. Statements of claim and defence**.—(1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.*

(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

1 [(2A) The respondent, in support of his case, may also submit a counterclaim or plead a set-off, which shall be adjudicated upon by the arbitral tribunal, if such counterclaim or set-off falls within the scope of the arbitration agreement.] (3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it. 1. Ins. by Act 3 of 2016, s. 11 (w.e.f. 23-10-2015). 161

[(4) The statement of claim and defence under this section shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing of their appointment.]

***24. Hearings and written proceedings**.—(1) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials: Provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held:*

2 [Provided further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause.]

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property. (3) All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

25. Default of a party.—*Unless otherwise agreed by the parties, where, without showing sufficient cause,— (a) the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings; (b) the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant 3 [and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited]. (c) a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.*

Odisha Micro and Small Enterprises Facilitation Council Rules, 2008.

4. *Procedure to be followed in the discharge of functions of the Council.* *- (i) The Council shall meet at least once a month.*

(ii) Atleast seven days notice shall ordinarily be given for any meeting. In case of urgency, a meeting may be called at such shorter notice, as the Chairperson may consider sufficient.

(iii) The Council may appoint/or engage the services of one or more experts in terms of Section 26 of the Arbitration and Conciliation Act, 1996.

(iv) The Council, or a party to the dispute with the approval of the Council, may apply to the Court under Section 27 of the Arbitration and Conciliation Act, 1996, for assistance in taking evidence.

(v) The reference/application of the aggrieved Micro or Small Enterprise Supplier shall contain full particulars of the supplier and its status, supplied goods or services, terms of payment, if any, agreed between the supplier and buyer, actual payment received with date, amount due and the interest duly calculated under Section 16 of the Act, supported by an affidavit with necessary Court fee stamp affixed thereon. The Chairperson of the Council may require any petitioner to provide further particulars of the claim or any relevant document in support of the claim, as he may consider necessary for the purpose of the proceedings. If the petitioner fails or omits to do so within fifteen days of receipt of such communication or within such further time as the Chairperson may, for sufficient cause, allow, the Council may terminate the proceedings without prejudice to the right of the petitioner to make fresh reference if he is otherwise entitled so to do. The petitioner shall also simultaneously send a copy of the reference to the buyer or buyers against whom the reference is directed.

(vi) The reference/application shall be acknowledged forthwith if it is delivered at the office of the Council. Where the reference/application is received by registered post, its receipt shall be acknowledged on the same day. The Chairperson shall cause the buyer to furnish his detailed response to the reference within fifteen days of receipt of the reference by the buyer or within such further time not exceeding fifteen days, as he may, for sufficient cases, allow.

(vii) On receipt of a reference under Section 18 of the Act, the Chairperson of the Council shall cause the reference and the buyer's response thereto to be examined and on being satisfied with the reference making a prima faice case of delayed payment, cause the reference to be placed before the Council at its next immediate meeting for consideration. The Chairperson shall also ensure that each reference received within

two weeks of the date of the last preceding meeting of the Council is examined and, if found in order, is placed for consideration of the Council at its next immediate meeting.

(viii) The Council shall either itself conduct conciliation in each reference placed before it or seek the assistance of any institute or canter providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation. The provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 shall apply to such a reference as if the conciliation was initiated under Part-III of that Act.

(ix) The Council or the institute to which it has been referred for conciliation shall require the supplier and the buyer concerned to appear before it by issuing notices to both parties in this behalf. On the appearance of both parties, the Council or the institute shall first make efforts to bring about conciliation between the buyer and the supplier. The institute shall submit its report to the Council within fifteen days of reference from the Council or within such period as the Council may specify.

(x) When such conciliation does not lead to settlement of the dispute, the Council shall either itself act as an Arbitrator for final settlement of the dispute or refer it to an institute for such arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The supplier or the buyer may, either in person or through his lawyer registered with any Court, present his case before the Council or the institute during the arbitration proceedings. The institute shall submit its report to the Council within such time as the Council may stipulate.

(xi) Any decision of the Council shall be made by a majority of its members present at the meeting of the Council.

(xii) The Council shall make an arbitral award in accordance with Section 31 of the Arbitration and Conciliation Act, 1996 and within the time specified in Sub-section (5) of Section 18 of the Act. The award shall be stamped in accordance with the relevant law in force. Copies of the award shall be made available within seven days of filing of an application.

(xiii) The provisions of Sections 15 to 23 of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

(xiv) The Chairperson or any other officer authorised by the Chairperson shall forward the proceedings of every meeting of the Council including annual progress report of the Council to the Member-Secretary of the Advisory Committee constituted under Sub-section (3) of the Section 7 of the Act.

8. We are required to decide the following questions :

a) Whether the Khurda unit of the Respondent No 2 which is a company and has four units , can be separately considered as a small enterprise in order to maintain the claim under Section-18 ?

b) Whether the provisions in Section 15 to 18 of the MSMED Act prevail over the Arbitration and Conciliation Act ?

c) Whether the Council has delivered the impugned award after following the prescribed procedure for arbitration proceedings ?

d) Was the writ petition maintainable ?

e) Was the claim or any part of it barred by limitation ?

DISCUSSION AND ANALYSIS

Whether the Claim was maintainable before the Council

9. From a perusal of the objectives of the MSMED Act, it is apparent that the Act was enacted for development and regulation of small enterprises to make them free from a plethora of laws and regulations and visit of inspectors, which it had to face with limited awareness and resources and provide a proper legal framework for small sector to relieve it of the requirements to comply with multiple rules and regulations and to address the concerns of both the small scale industries and services together and recognize them as small enterprises and to facilitate the natural mobility of small enterprises to medium ones through appropriate policy interventions and legal framework. But if medium enterprises or larger eneterprises are allowed to avail the benefit under Section – 18 of the MSMED Act, by claiming to be micro or small industries by cleverly dividing themselves into smaller units for the purpose of obtaining a certificate of registration as "micro" or "small", in order to avail the benefits which are meant for micro or small enterprises, that would defeat the purpose of enactment of MSMED Act and Section – 18 of the said Act.

10. In the case ***Silpi Industries ,*** the Supreme Court has held that in order to avail of the benefits under the MSMED Act, 2006 the supplier should be registered under the provisions of the Act at the time of agreement when it entered of the agreement. The relevant portion of the said judgment is extracted below :

> *"26. Though the appellant claims the benefit of provisions under MSMED Act, on the ground that the appellant was also supplying as on the date of making the claim, as provided under Section 8 of the MSMED Act, but same is not based on any acceptable material. The appellant, in support of its case placed reliance on a judgment of the Delhi High Court in the case of* ***GE T&D India Ltd. v. Reliable Engineering Projects and Marketing,*** *but the said case is clearly distinguishable on facts as much as in the said case, the supplies continued even after registration of entity under Section 8 of the Act. In the present case, undisputed position is that the supplies were concluded prior to registration of supplier. The said judgment of Delhi High Court relied on by the appellant also would not render any assistance in support of the case of the appellant. In our view, to seek the benefit of provisions under MSMED Act, the seller should have registered under the provisions of the Act, as on the date of entering into the contract. In any event, for the supplies pursuant to the contract made before the registration of the unit under provisions of the MSMED Act, no benefit can be sought by such entity, as contemplated under MSMED Act. While interpreting the provisions of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, this Court, in the judgment in the case of* ***Shanti Conductors Pvt. Ltd. v. Assam State Electricity Board*** *has held that date of supply of goods/services can be taken as the relevant date, as opposed to date on which contract for supply was entered, for applicability of the aforesaid Act. Even applying the said ratio also, the appellant is not entitled to seek the benefit of the Act. There is no acceptable material to show that, supply of goods has taken place or any services were rendered, subsequent to registration of appellant as the unit under MSMED Act, 2006.*

By taking recourse to filing memorandum under sub-section (1) of Section 8 of the Act, subsequent to entering into contract and supply of goods and services, one cannot assume the legal status of being classified under MSMED Act, 2006, as an enterprise, to claim the benefit retrospectively from the date on which appellant entered into contract with the respondent. The appellant cannot become micro or small enterprise or supplier, to claim the benefits within the meaning of MSMED Act, 2006, by submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods and services. If any registration is obtained, same will be prospective and applies for supply of goods and services subsequent to registration but cannot operate retrospectively. Any other interpretation of the provision would lead to absurdity and confer unwarranted benefit in favour of a party not intended by legislation."

In the case of ***Gujarat State Civil Supplies Corporation Ltd.*** *(supra), it was held as follows*

"33. Following the above stated ratio, it is held that a party who was not the "supplier" as per Section 2(n) of the MSMED Act, 2006 on the date of entering into the contract, could not seek any benefit as a supplier under the MSMED Act, 2006. A party cannot become a micro or small enterprise or a supplier to claim the benefit under the MSMED Act, 2006 by submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods or rendering services. If any registration, is obtained subsequently, the same would have the effect prospectively and would apply for the supply of goods and rendering services subsequent to the registration. The same cannot operate retrospectively. However, such issue being jurisdictional issue, if raised could also be decided by the Facilitation Council/Institute/Centre acting as an arbitral tribunal under the MSMED Act, 2006.

34. The upshot of the above is that…

…(vi) A party who was not the 'supplier' as per the definition contained in Section 2(n) of the MSMED Act, 2006 on the date of entering into contract cannot seek any benefit as the 'supplier' under the MSMED Act, 2006. If any registration is obtained subsequently the same would have an effect prospectively and would apply to the supply of goods and rendering services subsequent to the registration…"

In view of the aforementioned judgements of ***Silpi Industries*** (Supra) and ***Gujarat Civil Supplies*** (Supra) the relevant date in order to confirm as to whether the MSMED Act, 2006 would be applicable and the claim was maintainable will be the date of agreement between the parties and the date of supply of goods / rendering of services. The registration of the Khurda unit is of the year 1997 as "small scale industry" and this has been updated on 06.05.2008 (Annexure 3). Any change in investment was to be updated every three months. But there has been no updation after 2008. The visit by the Committee and the report generated in the year 2015 will not come to the aid of Respondent No.2 as it is after the visit of the Committee in March 2015 which is much after the work orders, after the period of supply and after filing of the claim.

11. The two circulars produced by the Respondent No.2 and referred to by the learned Single Judge in his order dated 04.03.2022 are dated 29.09.2015 and 03.03.2016. The 29.09.2015 circular indicates that in the year 2015, it had been

decided to club enterprises together while assessing their status under the MSMED Act. This has been withdrawn on 03.03.2016 as these circulars do not relate to the period when purchase orders were placed or supply was made, they can have no bearing on this case.

12. Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 ('MSMED') can be invoked with respect to an outstanding amount to a 'supplier' under Section 17. Under Section 2 (n), a 'supplier' can only be a 'micro' or a 'small' enterprise. As per the provisions Section 2(e) and Section 7 an enterprise may be a proprietorship, HUG, AOP, cooperative society, partnership firm, company or undertaking.

13. The extracts from the annual returns of Respondent No. 2 (Annexure 7) for the years 2009-10 , 2010-11 and 2011 – 12 have not been denied by the Respondent No.2, it has only made a submission that the maintainability aspect can be decided by the Council. In the present case, the enterprise was Respondent No.2 - Gupta Power Infrastructure Limited (GPIL) which is a Company with whom purchase orders had been placed and which had had raised the invoices and cheques had been issued in its name. Respondent No. 2 admittedly has four units. The total value of its investments at the relevant time for all its units, as per its own balance sheets was as follows:

Name of Units	Investment in Plant & Machinery as per ABS FY 31.03.2011 (Rupees in Crores)	Investment in Plant & Machinery as per ABS FY 31.03.2012 (Rupees in Crores)
Khurda	2.50	2.15
Kashipur-Uttarakhand Unit-I	4.01	3.18
Kashipur-Uttarakhand Unit-II	0.00	0.11
Gummidipoondi-Chennai	0.03	0.03
Total	**6.54**	**5.47**

14. The purpose and objective of the MSMED Act would be defeated if each unit of an enterprise or company like Respondent No.2 is taken to be a separate enterprise for the purpose of maintaining a claim under Section 18. Big concerns/ companies would obtain registration of their numerous units as individual small and micro enterprise in order to avail the benefit of the speedy mechanism which has been provided for micro and small enterprises whose dues remain outstanding for products supplied by them. Enterprises which are actually "small "or "micro" would suffer as decision on their claims would get delayed. In such a situation, it would not be in the interest of justice to give a liberal interpretation to the definitions of "supplier" and "small enterprise".

15. Therefore in our considered view the four units of the Respondent No.2 constitute a single enterprise and in view of the total value of the investment towards plant and machinery for the relevent years, the classification of Respondent No.2 cannot be "small enterprise" for the purpose of maintaining the claim under Section – 18, for which the impugned award is liable to be set aside as it is without jurisdiction.

Whether the provisions in Section 15 to 18 of the MSMED Act prevail over the Arbitration and Conciliation Act?

16. There can be no second opinion regarding the proposition that the specific non obstante clauses in Section 18 (1) and (4) of the MSMED Act 2006 will have an overriding effect over any other law in force, which includes the Arbitration and Conciliation Act 1996. The Supreme Court in the case of ***Gujarat State Civil Supplies*** (supra) has held that the provisions of Chapter V of the MSMED Act 2006 will have an overriding effect over the provisions of Arbitration Act 1996 and the bar contained in Section 80 of the Arbitration Act 1996 that the Conciliator shall not act as an Arbitrator also stands superseded by the provisions contained in section 18 and 24 of the MSMED Act as the Council can itself take up the dispute for arbitration or refer it to any institute or centre as contemplated in Section 18 (3) of the MSMED Act, 2006, if the conciliation fails.

Whether the Council has delivered the impugned award after following the prescribed procedure for arbitration proceedings?

17. The relevant paragraphs of the decision of the Supreme Court in the case of ***Jharkhand Urja*** (supra), are reproduced below:

> *9. Only on the ground that even after receipt of summons the appellant has not appeared the Council has passed order/award on 06.08.2012. As per Section 18(3) of the MSMED Act, if conciliation is not successful, the said proceedings stand terminated and thereafter Council is empowered to take up the dispute for arbitration on its own or refer to any other institution. The said Section itself makes it clear that when the arbitration is initiated all the provisions of the Arbitration and Conciliation Act, 1996 will apply, as if arbitration was in pursuance of an arbitration agreement referred under sub-section (1) of Section 7 of the said Act."*
>
> *"15. The order dated 06.08.2012 is a nullity and runs contrary not only to the provisions of MSMED Act but contrary to various mandatory provisions of Arbitration and Conciliation Act, 1996. The order dated 06.08.2012 is patently illegal. There is no arbitral award in the eye of law. It is true that under the scheme of the Arbitration and Conciliation Act, 1996 an arbitral award can only be questioned by way of application under Section 34 of the Arbitration and Conciliation Act, 1996. At the same time when an order is passed without recourse to arbitration and in utter disregard to the provisions of Arbitration and Conciliation Act, 1996, Section 34 of the said Act will not apply. We cannot reject this appeal only on the ground that appellant has not availed the remedy under Section 34 of the Arbitration and Conciliation Act, 1996. The submission of the learned senior counsel appearing for the 3rd respondent that there was*

delay and laches in filing writ petition also cannot be accepted. After 06.08.2012 order, the appellant after verification of the records has paid an amount of Rs. 64,43,488/- on 22.01.2013 and the said amount was received by the 3rd respondent without any protest. Three years thereafter it made an attempt to execute the order in Execution Case No. 69 of 2016 before the Civil Judge, Ranchi, which ultimately ended in dismissal for want of territorial jurisdiction, vide order dated 31.01.2017. Thereafter S.B. Civil Writ Petition No. 11657 of 2017 was filed questioning the order dated 06.08.2012 before the Rajasthan High Court. In that view of the matter it cannot be said that there was abnormal delay and laches on the part of the appellant in approaching the High Court. As much as the 3rd respondent has already received an amount of Rs. 63,43,488/- paid by the appellant, without any protest and demur, it cannot be said that the appellant lost its right to question the order dated 06.08.2012. Though the learned counsel appearing for the respondents have placed reliance on certain judgments to support their case, but as the order of 06.08.2012 was passed contrary to Section 18(3) of the MSMED Act and the mandatory provisions of the Arbitration and Conciliation Act, 1996, we are of the view that such judgments would not render any assistance to support their case."

In the case of ***M/s Vijeta Constructions*** (supra), the Supreme Court has held as follows :

"13. As per Sub-Section (3) of Section 18 after conciliation fails under Sub-Section (2) of Section 18 of the MSMED Act, and conciliation initiated under sub-section (2) is not successful, conciliation stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing ADR services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in subsection (1) of section 7 of that Act. Therefore only after the procedure under Sub-Section (2) of Section 18 is followed and the conciliation fails and then and then only the arbitration proceedings commences and thereafter the provisions of the Arbitration Act shall then apply.

14. In light of the aforesaid statutory provisions under the MSMED Act as well as the Arbitration Act, the order passed by the Facilitation Council dated 10.01.2012 which was the subject matter before the High Court is required to be tested. From the order passed by the Facilitation Council rejecting/dismissing the reference/application and the stage at which such an order was passed we are of the opinion that the Facilitation Council has not followed the procedure as was required to be followed under Section 18 of the MSMED Act read with Sections 65 to 81 of the Arbitration Act, as reproduced hereinabove. It is required to be noted that at the initial stage the Facilitation Council was performing the duty as a Conciliator for which the provisions of Sections 65 to 81 shall be applicable. It is true that at the stage of conciliation, the role of the conciliator (Facilitation Council) is to assist the parties to reach an amicable settlement of their dispute as provided under Section 67 of the Arbitration Act. At that stage the parties are not required to lead the evidence and at that stage the role of the conciliator is not to adjudicate the dispute between the parties, but to reach an amicable settlement of the dispute between the parties. Once the conciliation fails thereafter as per Sub-Section (3) of Section 18 of the MSMED Act, the arbitration proceedings commences and the conciliation proceedings stands terminated and thereafter the Facilitation Council shall either itself take up the dispute for arbitration or refer it to

any institution or centre providing ADR services for such arbitration and the provisions of the Arbitration Act shall then apply to the dispute as if the arbitration is in pursuance of an arbitration agreement referred to Sub-Section (1) of Section 7 of the Arbitration Act. At that stage and thereafter the Facilitation Council shall act as an Arbitrator and the provisions of Arbitration Act shall then apply to the dispute as if arbitration was in pursuance of an arbitration agreement referred to Sub-Section (1) of Section 7 of the Arbitration Act including the appeal under Section 34 to the district court against the award declared by the Facilitation Council or any institution or centre providing alternate dispute resolution (ADR) services to whom the dispute is referred for arbitration.

15. In the present case no such procedure has been followed by the Facilitation Council as required to be followed under Section 18 of the MSMED Act. It is to be noted that the proceedings before the Facilitation Council/Conciliator was at the stage of conciliation. It is true that at the stage of conciliation under Sub-Section (2) of Section 18, the conciliator (Facilitation Council) was not required to permit the parties to lead the evidence and adjudicate the dispute. At the same time, if there was no amicable settlement during the conciliation or under Sub-Section (2) of Section 18 then the arbitration proceedings were required to be initiated as provided under Sub-Section (3) of Section 18 which have not been initiated in the present case. Therefore, as such, the matter is required to be remitted to the Facilitation Council to follow the procedure under Section 18 of the MSMED Act by quashing and setting aside the order dated 10.01.2012 passed by the Facilitation Council as well as the impugned judgment and order passed by the High Court in writ petition No. 418 of 2012."

From a combined reading of Sections, 17,18, and Section 24 of the MSMED Act and the decisions of Supreme Court in the case of ***Jharkhand Urja*** (supra), ***Vijeta Industries*** (supra), it is forthcoming that:

i) there is a fundamental difference between conciliation and arbitration and the two proceedings cannot be clubbed. Arbitration involves adjudication of the dispute for which the claim has to be proved before the arbitrator, if necessary by adducing evidence and holding oral hearings,

ii) the Council should first conduct conciliation and on failure of conciliation, the conciliation proceedings stand terminated,

iii) even if the party does not appear on the date fixed for conciliation, the failure of conciliation should be recorded and arbitration proceedings should be initiated in accordance with the relevant provisions of the Arbitration and Conciliation Act,

iv) then the dispute is to be arbitrated either by the Council itself or by an institution to which it refers the dispute for arbitration,

v) the Council which has conducted the Conciliation can also act as an Arbitrator after initiating Arbitration proceedings,

vi) the decision of independent Arbitrator or the decision of the Council acting as an Arbitrator will constitute the award,

vii) Where award has been passed without initiating arbitration proceedings or following the procedure prescribed for arbitration, it would be illegal and a nullity as it would be contrary to the mandatory provisions of the MSMED Act and Arbitration and Conciliation Act .

On 20.01.2016 the Council had directed for amicable settlement within seven days. On 18.06.2016, a notice had been issued to the Appellant that the 45th sitting of the Council would be held on 28.06.2016 and it should appear on the scheduled date and time for settlement of the case and in default of appearance on that day, the Council would proceed with the provisions of the MSEFC Rules under the MDMED Act 2006. Neither the provisions of Rule 4 (x) of the MSFEC Rules, nor the MSMED Act or the procedure in the Arbitration Conciliation Act have been followed before passing the award. On 28.06.2016, after recording that the conciliation has failed, the Council has decided to pass award on the same day, after examining the PMT registration certificate, going through the relevant documents filed by the parties, counter and additional affidavits. It is apparent that arbitration proceedings have not been initiated after failure of conciliation. In the impugned order/award dated 28.06.2016, the history of the case, counter, rejoinder, have been referred to. It has been observed that the OP (Appellant) contended that the petitioner (Respondent No.2) was not an SSI unit but after examining the PMT Registration Certificate/EM Part-II the Council concluded that the unit was an SSI unit. It has also observed that the conciliation has failed and after going the through the relevant documents, it has decided to pass award as amicable settlement failed. Award has been passed on the same day i.e 28.06.2016. From this it is crystal clear that the procedure for arbitration has not been followed and the parties have not been given an opportunity to file their claims or adduce evidence, for which the principles of natural justice have been violated. We are therefore persuaded to hold that the impugned award is a nullity and not an arbitral award in the eye of law.

18. On a reading of the order dated 20.01.2016 (Annexure 15), the operative portion of which is extracted below , we also find force in the submission of the learned counsel for the Appellant that the Council had been pre determined to pass the award even before failure of the conciliation proceedings, which vitiates the impugned award :

> *"The Council directed the O.P. to have amicable settlement with the petitioner and inform the outcome to the Council in writing within 7 days from today i.e 20.01.2016 .if no communication is received from the O.P. within the stipulated period , award shall be given for payment of the outstanding dues with interest as per MSMED Act , 2006***"**

Was the writ petition maintainable ?

19. In ***Punjab State Power*** (supra), the Supreme Court held :

> *"4. We are of the view that a foray to the writ Court from a section 16 application being dismissed by the Arbitrator SLP (C) No. 8482/2020 can only be if the order passed is so perverse that the only possible conclusion is that there is a patent lack in inherent jurisdiction. A patent lack of inherent jurisdiction requires no argument whatsoever – it must be the perversity of the order that must stare one in the face.*
>
> *5. Unfortunately, parties are using this expression which is in our judgment in* ***Deep Industries Ltd****., to go to the 227 Court in matters which do not suffer from a patent lack*

of inherent jurisdiction. This is one of them. Instead of dismissing the writ petition on the ground stated, the High Court would have done well to have referred to our judgment in Deep Industries Ltd. and dismiss the 227 petition on the ground that there is no such perversity in the order which leads to a patent lack of inherent jurisdiction. The High Court ought to have discouraged similar litigation by imposing heavy costs. The High Court did not choose to do either of these two things."

In the case of ***Bhaven Construction Vs. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. : 2022 (1) SCC 75***, the Supreme Court has held that the issue of jurisdiction can be substantially raised before the Arbitral Tribunal in seisin of the matter under Section 16 of the Arbitration and Conciliation Act and in case a party stands aggrieved by the outcome, it must await the passing of final order to raise the same at the appellate stage in exercise of Section 34 of the said Act. The relevant paragraphs are extracted as follows:

"25. It must be noted that Section 16 of the Arbitration Act, necessarily mandates that the issue of jurisdiction must be dealt first by the tribunal, before the Court examines the same under Section 34. Respondent No. 1 is therefore not left remediless, and has statutorily been provided a chance of appeal. In ***Deep Industries case*** *(supra), this Court observed as follows:*

"22. One other feature of this case is of some importance. As stated herein above, on 09.05.2018, a Section 16 application had been dismissed by the learned Arbitrator in which substantially the same contention which found favour with the High Court was taken up. The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34." (emphasis supplied)

26. In view of the above reasoning, we are of the considered opinion that the High Court erred in utilizing its discretionary power available under Articles 226 and 227 of the Constitution herein. Thus, the appeal is allowed and the impugned Order of the High Court is set aside. There shall be no order as to costs. Before we part, we make it clear that Respondent No. 1 herein is at liberty to raise any legally permissible objections regarding the jurisdictional question in the pending Section 34 proceedings."

20. The seven Judges Bench ***in SBP & Co. Vs. Patel Engineering Ltd. : (2005) 8 SCC 618*** has held as follows:

"45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may

constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible."

In the case of ***Whirlpool Corporation*** (supra) the Supreme Court has observed that the High Court would normally not exercise writ jurisdiction under Article 227 if an effective and efficacious remedy was available, but the availability of such remedy would not operate as a bar where the impugned is wholly without jurisdiction.

21. In view of our finding that the impugned award was not an arbitral award in the eye of law and the decisions in the case of ***Punjab State Power*** (supra) and **Bhaven Construction** (supra) will not be applicable. The decision in ***SBP & Co*** (supra) regarding availability of alternative efficacious remedy under Section 34 of the Arbitration and Conciliation Act 1996, will also not apply to the facts of this case as in the absence of arbitration proceedings, the award is a nullity . As per the decision in ***Jharkhand Urja*** (supra) and ***Shilpi Industires*** (supra), such an award can be challenged in a writ petition. For the same reasons, the decisions relied on by the learned Single Judge, namely ***Bajaj Electricals Ltd*** (supra)***, Rolta India Ltd*** (supra), ***Anupam Industries Ltd*** (supra), are not applicable to this case. The observation of the learned Single Judge that the decision in ***Jharkhand Urja Vikas*** (supra) is not applicable as in that case the appellant had not appeared and on the very first day, the Council directed for payment while in the present case, there had been 45 sittings of the council is vulnerable in view of the observations of the Supreme Court in paragraph 9 of the same judgment. Its observation that the decision in ***Vijeta Construction*** (supra) is not applicable after referring to paragraph 3 of its judgment is also vulnerable in view of paragraphs 13, 14 and 15 of the decision in ***Vijeta Construction*** (supra). Therefore, in our considered view, the writ petition was maintainable for which the impugned order dated 04.06.2022 of the learned Single Judge, holding that it was not maintainable, is liable to be quashed.

Was the claim or any part barred by limitation ?

22. As we have held that the claim to be not maintainable before the Council , we do not think it necessary to examine whether the invoices on the basis of which the claim was made was barred by limitation and leave it to be decided by the appropriate Forum.

23. In view the facts and circumstances of the case and our aforesaid discussion, it is crystal clear that the claim was not maintainable under Section 18 for which passing of the award by the Council under the MSMED Act, 2006 was without jurisdiction. As the procedure laid down in Section 18 of the MSMED Act, has not been followed by the Council and the award has been passed without any arbitration

proceedings, the impugned award is a nullity, for which the writ application challenging the same was maintainable in this Court. Consequently, the impugned award dated 28.06.2016 passed by the Council in MSEFC Case No. 17 of 2014 is liable to be quashed and orders dated 04.03.2022 and 07.04.2022 passed by the learned Single Judge in W.P.(C) No.21943 of 2016 are liable to be set aside.

24. In view of the fact that the procedure laid down for Arbitration has not been followed by the Council before passing the impugned award, we would have remanded t he matter to the Council to resume the proceedings from the stage when there was failure of Conciliation. But in view of our finding that the claim of the Respondent No 2 was not maintainable under Section 18 of the MSMED Act as it was not a small enterprise, we quash the impugned award and dismiss the claim. The parties are at liberty to avail any other remedy available to them under law.

CONCLUSION

25. The Writ Appeal is accordingly allowed, the award dated 28.06.2016 passed by the Micro and Small Enterprises Facilitation Council, Cuttack in MSEFC Case No. 17/2014 (ANNEXURE 8) and the orders dated 04.03.2022 and 07.04.2022 passed by the learned Single Judge in W.P.(C)21943 of 2016 (ANNEXURE 1 SERIES) are set aside, but without any cost.

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2023 (III) ILR – CUT- 670

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

W.P.(C) NO. 27946 OF 2023

KHANI KHYATIGRASTA GRAMYA COMMITTEE .....Petitioner

-V-

THE COMMISSIONER OF COMMERCIAL TAX & GST & ANR. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Article 226 r/w Section 73 of the Central Goods and Services Tax Act, 2017 – Petitioner seeks the relief to quash the ex-parte order passed U/s. 73 of central Goods & Services Tax Act – Whether Writ is maintainable when the order has been passed as per the statutory provision? – Held, Yes – When the authority without affording any opportunity of hearing as provided under the Act issued the order creating heavy civil liability upon the Assessee, the Writ court can interfere in the order of the statutory authority.

Case Laws Relied on and Referred to :-

1. 2023 LiveLaw (SC) 7:M/s. Godrej Sara Lee Ltd. Vs. The excise and Taxation Officer-cum-Assessing Authority & Ors.
2. 2022 UPTC (Vol 112) 1760: M/s Hitech Sweet Water Technologies Pvt. Ltd Vs. State of Gujurat.
3. 2021 SCC OnLine SC 884:Assistant Commissioner of State Tax Vs. M/s Commercial Steel Limited.
4. Writ Tax No. 981 of 2023 : M/s. B.L. Pahariya Medical Store Vs. State of U.P. & Anr.
5. Writ Tax No. 551 of 2023:M/s. Mohini Traders Vs. State of U.P. & Anr.

For Petitioner : Mr. Jagamohan Pattanaik, A.Pattanaik, S.K. Sahu, J.R. Behera

For Opp. Parties : Mr. Sunil Mishra, Standing Counsel (Commercial Tax & Goods and Service Tax Organization)

JUDGMENT Date of Judgment : 09.11.2023

Dr. B.R.SARANGI, A.C.J.

1. The petitioner, by way of this writ petition, seeks to quash the *ex parte* order dated 31.01.2023 under Annexure-1 passed under Section 73 of the Central Goods and Services Tax Act, 2017/Odisha Goods and Services Tax Act, 2017 (CGST/OGST Act), by which it has been directed to pay the due amount of tax, interest and penalty within three months from the date of service of the order, failing which recovery proceeding will be initiated against it as per Section 79 of said Act.

2. The factual matrix of the case leading to filing of this writ petition is that *"Khani* Khyatigrasta *Gramya Committee",* the petitioner herein, deals with transportation of Iron Ore to Rungta Mines Limited, holding valid GSTIN 21AABAK1223111ZQ and files GST return regularly. As per the provisions, the GST returns are being filed in every month. As usual, in terms of Sections 37 and 39 of the OGST Act, the petitioner filed monthly GSTR-3B and GSTR-1 for months of July, 2017 to March, 2018. But a notice dated 20.10.2022 was issued to the petitioner under Section 61 of the OGST/CGST Act, 2017 alleging understatement of liability declared in GSTR-3B in comparison to the outward supply statement reflected in GSTR-1 of the Act.

2.1 In exercise of the powers conferred by Sub-section (3) of Section 9 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, notified the Reverse Charge Mechanism, by which CGST/SGST will have to be paid directly by the receiver of service instead of the supplier. According to the said statutory provisions, Rungta Mines Limited paid the CGST/OGST for the transportation services supplied by the petitioner and availed by the Rungta Mines Limited. But without considering the entire aspects of the matter, without verifying the records and without due application of mind, opposite parties passed an order on 31.01.2023 under Section 73 of the OGST Act,

2017 demanding tax, which is not liable to pay by the petitioner as per the Reverse Charge Mechanism provided under the Act, since the tax towards CGST/OGST had already been paid by the receiver of the GTS service, i.e., Rungata Mines Limited. That apart, such order dated 31.01.2023 has been passed in gross violation of the principle of natural justice, compliance of which is fundamental to every proceedings under the aforesaid Act and Rules. If the order dated 31.01.2023 (Annexure-1) is allowed to stand, there would be payment of double tax, which is not the aim, object and intention of the taxing provision. The most significant feature of the matter is that Section 75(4) of the GST Act, 2017 makes it clear that in cases, where an adverse decision is taken by the Assessing Officer against the assessee, personal hearing is mandatory. Admittedly, in the assessment proceedings, pertaining to the assessment in question, no personal hearing was afforded to the petitioner. Therefore, the petitioner approached this Court in the present writ petition.

3. Mr. Jagamohan Pattanaik, learned counsel for the petitioner contended that the petitioner, a registered taxpayer, assigned with GSTIN 21AABAK1223B1ZQ under CGST/OGST Act, 2017, having place of business located at Jajanga, Bamebari, Keonjhar, deals in taxable supply of goods like manpower, recruitment agency, rent-a-cab operator, works contract, Cargo Handling Services, supply of tangible goods for use services as per the registration certificate granted in its favour under the CGST/OGST Act, 2017. The petitioner submitted its returns which were scrutinized and some discrepancies were pointed out by the authority. Accordingly, notice dated 26.10.2022 in Form GST ASMT-10 prescribed under Rule 99(1) of the Central Goods and Services Tax Rules, 2017/Odisha Goods and Services Tax Rules, 2017 (CGST/OGST Rules) was issued intimating discrepancies in the returns after scrutiny pertaining to tax periods from July, 2017 to March, 2018 in exercise of power under Section 61 of the CGST/SGST Act whereby it was required to explain the reasons for the discrepancies. While issuing such notice dated 26.10.2022, the Additional State Tax Officer marked against Sl. No.3 to 5 of GST ASMT-10, i.e. "date of personal hearing, time of personal hearing and venue where personal hearing will be held" as "NA". However, in the said notice it has been indicated that the petitioner has been called upon to appear before the said authority on the date and time mentioned in the summary of the show cause notice issued in Form GST ASMT-10. The petitioner is also required to produce/upload all the evidence upon which it intended to rely in support its defence along with reply in Form ASMT-11 within thirty days. It is further stated in the notice that if the petitioner failed to submit the same or the reason submitted by it are found to be not acceptable, then proceeding under Section 73/74 of CGST/OGST Act would be initiated against it. If the petitioner pays the tax along with up-to-date interest till the date of payment in Form DRC-03 against the show cause notice, proceeding in respect of this show cause notice shall be deemed to be concluded as per the provisions under Section 73(8) of the CGST & OGST Act. It was also indicated that the authority "deserves

the right to add, amend, delete or modify in part, portion of the notice and such addition amendment, deletion or modification, if any as per the provisions made under Section 161 of the CGST/OGST Act, 2017 made shall be deemed to the (be) part and parcel of the notice".

3.1 It is contended that though the petitioner was willing to produce documents/records before the authority concerned, since the authority has *suo motu* indicated that no personal hearing will be given to the petitioner, thereby the said authority has closed her mind and passed the order without giving opportunity of hearing to the petitioner, thereby, initiation of proceeding under Section 73 of the Act and passing of the order under the said section cannot be sustained in the eye of law. It is further contended that due to non-grant of such opportunity to the petitioner, the authorities have acted arbitrarily, illegally and contrary to the provisions of law.

3.2 To substantiate his contention, he relied on the decisions in the case of ***M/s. Godrej Sara Lee Ltd. v. The excise and Taxation Officer-cum-Assessing Authority & others***, 2023 LiveLaw (SC) 7; ***M/s Hitech Sweet Water Technologies Pvt. Ltd v. State of Gujurat***, 2022 UPTC (Vol 112) 1760; ***Assistant Commissioner of State Tax v. M/s Commercial Steel Limited***, 2021 SCC OnLine SC 884; M/s. B.L. ***Pahariya Medical Store v. State of U.P. and Another***, Writ Tax No. 981 of 2023 disposed of on 22.08.2023 by Allahabad High Court; ***M/s. Mohini Traders v. State of U.P. and Another***, Writ Tax No. 551 of 2023 disposed of 03.05.2023 by Allahabad High Court.

4. Mr. Sunil Mishra, learned Standing Counsel appearing for Revenue emphatically submitted that since the petitioner did not comply with the terms of notice issued under Section 61 of the CGST/OGST Act read with Rule 99 of the CGST/OGST Rules, the authority has proceeded to determine the tax liability under Section 73 of the Act and passed order accordingly. The petitioner was directed to comply with the demand determined in the order dated 31.01.2023. It is further contended that the order which has been passed by the authority is well within the statutory provision and does not require interference of this Court.

5. This Court heard Mr. Jagmohan Pattanaik, learned counsel for the petitioner and Mr. Sunil Mishra, learned Standing Counsel (Commercial Tax & Goods and Services Tax Organization) appearing for opposite parties by hybrid mode, and perused the record. Pleadings have been exchanged between the parties and with their consent, the writ petition is being disposed of finally at the stage of admission

6. It is an admitted fact that the petitioner is a registered taxpayer under the OGST/CGST Act 2017 having valid registration number and it has been dealing in taxable supply of goods. As per the provisions made under Section 39 of the CGST/OGST Act 2017 read with the OGST/CGST Rules, 2017, the petitioner was to file returns in Form GSTR-3B, which the petitioner filed, and the same have been

self-assessed under Section 59 of the said Act. Therefore, as per the provisions made under Section 61 of the CGST/OGST Act read with Rule 99 of the OGST Rules, the returns filed for the tax periods July, 2017 to March, 2018 were scrutinized and the authority detected certain discrepancies to the tune of Rs.3,30,279.00 with respect to understatement of liability declared in Form GSTR-3B or an amount of Rs.28,47,936.00 filed under Section 39 of the CGST/OGST Act in comparison to the outward supply of Rs.31,78,214.00 vide statement reflected in GSTR-1 filed by the petitioner under Section 37 for the noted tax periods. On scrutiny, it was found that the petitioner has made incorrect self-assessment in the statutory returns. It has understated the tax liability in GSTR-3B in comparison to the outward supply statement reflected in GSTR-1 and it warrants initiation of proceeding under Section 73 of the OGST & CGST Act. It was called upon to reconcile the discrepancies vide notice dated 26.10.2022 in Form GST ASMT-10. It is apparent from the notice that against Sl. Nos. 3, 4 and 5 of said notice, so far as date of personal hearing, time of personal hearing and venue where personal hearing would be held against Sl. No.3, 4 and 5 it has been mentioned as "NA". Meaning thereby, no opportunity of personal hearing was afforded to the petitioner. Ultimately, the order to the following effect was passed:

> *"You are also hereby called upon to appear before the undersigned on the date and time mentioned in the summary of the show cause notice issued in FORM GST ASMT-10.*
>
> *While showing cause, you are also required to produce/upload all the evidence upon which he intended to rely in support his defence along with his reply in form ASMT-II within THIRTY days. If you failed to submit the same or the reason submitted by you are found to be not acceptable then proceeding U/S 73/74 of CGST/OGST Act will be initiated against you.*
>
> *If you pay the tax along with up-to-date interest till the date of payment in form DRC-03 against the show cause notice, proceeding in respect of this show cause notice shall be deemed to be concluded as per the provisions U/s 73 (8) of the CGST & OGST Act.*
>
> *The undersigned deserves the right to add, amend, delete or modify in part, portion of this notice and such addition amendment, deletion or modification, if any as per the provisions made under section 161 of the CGST/OGST Act 2017 made shall be deemed to the part and parcel of this notice.*

7. Accordingly, the proceeding under Section 73 of the Act was stated to have been initiated and the order impugned dated 31.01.2023 under Annexure-1 was passed, which is subject-matter of challenge before this Court on the ground that no opportunity of hearing was given to the petitioner. Needless to say, while issuing the notice under Section 61 of the Act, the Assessing Authority has herself given the written remarks under Sl. Nos. 3, 4 and 5 as "NA" and come to the conclusion to pay the dues as stated in the said notice. That itself is non-compliance of the principle of natural justice.

8. This Court called upon Mr. Mishra, learned Standing Counsel for Revenue to show the provision in exercise of which the authority concerned could write that

no personal hearing should be given while the notice under Section 61 of the CGST/OGST Act has been issued. Nothing has been placed to substantiate the same, rather, it is admitted that the petitioner has not been given any opportunity in compliance to the notice dated 26.10.2022 issued under Section 61 of the CGST/OGST Act and the order has been passed by the Assessing Authority without adhering to the principles of natural justice as required under law. As such, when the proceeding under Section 73 of the Act was initiated, it reveals that the petitioner had not been given opportunity of hearing.

9. In ***Assistant Commissioner of State Tax*** (supra), the apex Court held that the writ court is otherwise justified in interfering in the order of assessment where the same has been passed without complying with the principle of natural justice of being heard, because the petitioner may remain unclear unless minimum opportunity of hearing is first granted, which is the settled principle of law of the land.

10. In ***M/s. Godrej Sara Lee Ltd***. (supra), the apex Court while dealing with the matter of exercise of Article 226 of the Constitution of India and dismissal of the writ petition by a High Court on the ground that the petitioner has not availed the alternative remedy without however examining whether an exceptional case has been made out for such entertainment, observed that mere availability of an alternative remedy of appeal or revision, which the party invoking the jurisdiction of the High Court under Article 226 has not pursued, would not oust the jurisdiction of the High Court and render a writ petition "not maintainable" and where the controversy is a purely legal one and does not involve disputed questions of fact but only questions of law, then it should be decided by the High Court instead of dismissing the writ petition on the ground of an alternative remedy being available. Therefore, unless the discipline of adhering to decisions made by the higher authorities is maintained, there would be utter chaos in administration of tax laws apart from undue harassment to the assesses.

11. The High Court of Allahabad in the case of ***B. L. Pahariya Medical Store*** (supra) held that the assessee is not required to request for “opportunity of personal hearing" and it remained mandatory upon Adjudicating Authority to afford such opportunity before passing an adverse order because personal hearing would not only ensure observance of rules of natural of justice but also it would allow the authority to pass appropriate and reasoned order as may serve the interest of justice and allow a better appreciation to arise at the next/appeal stage, if required.

12. Similar view has also been taken in the case of ***Mohini Traders*** (supra), wherein the very same Allahabad High Court held that, it is mandatory to provide opportunity of personal hearing even if the assessee has opted “No” on the against column description “Date of personal hearing” on the common portal. This is because once it has been laid down by way of a principle of law that a person/assessee is not required to request for “opportunity of personal hearing” and it remained mandatory upon the Assessing Authority to afford such opportunity

before passing an adverse order. The Allahabad High Court has also justified as to why principle of natural justice is required to be given by observing that an assessment order creating heavy civil liability, observing such minimal opportunity of hearing is a must. Principle of natural justice would commend to this Court to bind the authorities to always ensure to provide such opportunity of hearing. It has to be ensured that such opportunity is granted in real terms.

13. Applying the above principle to the present case, it is admitted that the petitioner deals with the transportation of Iron Ore to Rungta Mines Limited, holding valid GSTIN and files GST returns regularly. In exercise of the powers conferred by Sub-section (3) of Section 9 of the Central Goods and Services Tax Act, 2017, the Central Government on the recommendations of the Council notified the Reverse Charge Mechanism by which CGST/SGST will have to be paid directly by the receiver of service instead of the supplier. Rungta Mines Limited paid the GST/SGST for the transportation services supplied by the petitioner and availed by the Rungta Mines Limited,which is not in dispute and cannot be disputed. Therefore, without affording any opportunity of being heard, as provided under Sec. 75(4) of GST Act, 2017 and law enunciated and noted above, the Adjudicating Authority issued the order creating heavy civil liability, observing such minimal opportunity of hearing is a must. Even without due application of mind, record already available with the Adjudicating Authority that the period in question,i.e.2017-2018, GST/OGST had already been paid by the receiver of the service i.e. Rungata Mines Limited and, thus,under the principle of Reverse Charge Mechanism, no tax under GST/OGST is payable by the petitioner.

14. It is provided under Section 61(3) of the CGST/OGST Act that in case no satisfactory explanation is furnished within a period of thirty days of being informed by the proper officer or such further period as may be permitted by him or where the registered person, after accepting the discrepancies, fails to take the corrective measure in his return for the month in which the discrepancy is accepted, the proper officer may initiate appropriate action including those under Section 65 or Section 66 or Section 67, or proceed to determine the tax and other dues under Section 73 or Section 74. In the present case, the authority chose to initiate action under Section 73. Therefore, she was required to adhere to the modality contained in said Section 73 read with Rule 142.

15. In view of the above, the notice issued intimating discrepancy in the returns under Section 61 of the CGST/OGST Act dated 26.10.2022 under Annexure-2 and the order dated 31.01.2023 passed under Section 73 of the Act *vide* Annexure-1 cannot be sustained in the eye of law and the same are liable to be quashed and are hereby quashed. The matter is remanded to the Assessing Authority to proceed *de novo* from the stage of issuance of notice intimating the discrepancy in returns after scrutiny under Section 61 of the CGST/OGST Act by affording due opportunity of hearing to the petitioner.

16. With the above observation and direction, the writ petition stands disposed of. However, there shall be no order as to costs.

2023 (III) ILR – CUT - 677

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

W.P(C) NO. 20579 OF 2022

ANSHUMAN KANUNGO .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Article 226 – Power of High Court to direct an inquiry by the CBI – When can be exercised? – Discussed with reference to case laws. (Paras 20-23)

Case Laws Relied on and Referred to :-

1. 2020 SCC Online SC 291 : Popatrao Vyankatrao Patil Vs. State of Maharashtra & Ors.
2. (1999) 6 SCC 667 : Common Cause, A Registered Society Vs. Union of India.
3. (2002) 5 SCC 521 : Secretary, Minor Irrigation & Rural Engineering Services, U.P. & Ors. Vs. Sahngoo Ram Arya & Anr.
4. (2010) 3 SCC 571 : State of West Bengal Vs. Committee for Protection of Democratic Rights.

For Petitioner : Mr. S. Palit, Sr. Adv. M/s. A.K. Pandey, K. Rath & G.C. Moharana

For Opp. Parties : Mr. P.K. Parhi, DSGI, Mr. D.R. Bhokta, CGC

M/s. N.K. Sahu, B. Swain, S.K. Nayak, A. Panda, I. Ray, S.S. Sahu and N.R. Sahoo.

JUDGMENT Date of Hearing :14.08.2023 : Date of Judgment:17.08.2023

Dr. B.R. SARANGI,J.

By means of this writ petition, the petitioner, while challenging the inaction of the Joint Entrance Examination Committee, more particularly, opposite party no.4, in manipulating the result of the petitioner depriving him to get admission in the Colleges like NIT (National Institutes of Technology) and IIT (Indian Institutes of Technology), seeks a writ of mandamus to the opposite parties, more particularly opposite party no.4, to correct his National Testing Agency (NTA) scoring from 33.1372067 to 98.8810861 and serial no.628193 to 11193 on the basis of the information supplied to him.

2. The factual matrix of the case, in brief, is that the petitioner, after passing +2 Science Examination, appeared in the Joint Entrance Examination (JEE), 2022 conducted by opposite party no.4. He was required to appear in Paper-I BE/BTECH in Session-I and Session-II in the subjects Physics, Chemistry and Mathematics. So far as Session-I is concerned, he successfully appeared in Physics, Chemistry & Mathematics. He obtained NTA score 90.0967541 in physics, 97.373599 in Chemistry and 92.3689139 in Mathematics. In this way, he secured total score as 98.8810861. The opposite party no.4 also supplied the NTA scoring sheet to the

Mail ID of the petitioner indicating his score card application and roll number on 11.07.2022. On getting such information, the petitioner became sure that he had secured finally 98.8810861.

2.1 In order to justify his credibility, he again appeared successfully in Session-II and in the said session, he also became able to secure 97.0465296 in Physics, 98.4063072 in Chemistry and 99.9902154 in Mathematics, in total he secured 98.9374067. He was also allowed to know his final scoring in the NTA, wherein he was intimated that he had secured 98.9374067. The said information was also supplied to the petitioner by opposite party no.4 on 08.08.2022 through his Mail ID. After receiving the above information, the petitioner became sure that he would be taking admission in the superior Colleges in India like IIT, NIT etc. and also became eligible to appear in the All India JEE (Advance) Entrance Examination, 2022.

2.2 When the intimation letter was not sent to the petitioner by opposite part no.4 either for admission into top Colleges or become eligible for JEE (Advance)-2022, he asked for the reason through the website and came to know that NTA score has been provided to him as 18.8810861 in respect of Session-I and 33.1374067 in respect of Session-II, whereas he was all along intimated that he had secured 98.8810816. So, this fluctuation took away the right of the petitioner to appear in the JEE (Advance)-2022 or to take admission into superior Colleges like IIT, NIT, etc. As a consequence thereof, the petitioner submitted a representation to the concerned authority for necessary correction of the scoring which was given to him finally on 07.08.2022. Since in both the Sessions, his score was more than 98% and the intimation given all through that he had secured 98.8810861 and was placed at 11193 CRL, in the final result published by opposite party no.4 on 07.08.2022 showed a different result and, as such, there is gross manipulation of the result of the petitioner. Hence, this writ petition.

3. Mr. S. Palit, learned Senior Counsel along with Mr. A.K. Pandey, learned counsel appearing for the petitioner, relying upon the document under Annexure-1, vehemently contended that the said document contains the photograph of the petitioner and QR Code, which indicates that in Session-1, he secured 98.8810861 and the said document has been duly signed by the Senior Director, NTA and the date of declaration of the result was 10.07.2022. The same thing has been indicated in Annexure-2 and Annexure-3. The petitioner was also supplied with score card vide Annexure-4, wherein his CRL number has been prescribed as 11193. Therefore, there was every likelihood that the petitioner will get admission into IIT/NIT, but no intimation was issued to him. Therefore, the petitioner submitted a representation to opposite party no.4. Since there was delay in consideration of his representation, he approached this Court by filing this writ petition, as there is gross violation in not issuing any information to the petitioner for his admission in any higher Colleges like IIT, NIT, etc.

4. Mr. P.K. Parhi, learned Deputy Solicitor General of India along with Mr. D.R. Bhokta, learned Central Government Counsel appearing for opposite parties no.1 to 4 vehemently contended that the documents relied upon by the petitioner are not genuine and, as such, the petitioner has secured 33.1374067 in Session-II and 18.8810861 in Session-I pursuant to declaration of result on 07.08.2022. Thereby, the petitioner is not eligible to get admission into a better institution like IIT or NIT. Consequentially, the relief sought by the petitioner cannot be sustained in the eye of law and, therefore, prays for dismissal of the writ petition.

5. Mr. N.K. Sahu, learned counsel appearing for opposite party no.5 contended that, on the basis of the information provided by NTA, since the petitioner has secured 33.1374067 in Session-II and 18.8810861 in Session-I, pursuant to declaration of result on 07.08.2022, he is not eligible or entitled to get admission into Colleges like IIT, NIT etc., pursuant to JEE (Advance) Examination, 2022. Therefore, the relief sought by the petitioner cannot be granted.

6. This Court heard Mr. S. Palit, learned Senior Counsel along with Mr. A.K. Pandey, learned counsel appearing for the petitioner; Mr. P.K. Parhi, learned Deputy Solicitor General of India along with Mr. D.R. Bhokta, learned Central Government Counsel appearing for opposite parties no.1 to 4 and Mr. N.K. Sahu, learned counsel appearing for opposite party no.5 in hybrid mode. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

7. The sole contention of the learned Senior Counsel appearing for the petitioner is that on the basis of QR Code given by opposite party no.4, since the documents were downloaded from the website and also intimation was issued by the NTA stating that the petitioner had secured 98.9374067, he is entitled to get admission into a better institution like IIT or NIT. Instead of doing so, relying upon a document filed by the opposite parties stating that the petitioner secured 33.1374067 in Session-II and 18.8810861 in Session-I, pursuant to declaration of result on 07.08.2022, can the denial of admission to the petitioner be justified.

8. National Testing Agency (NTA) was established by the Ministry of Human Resource Development (MHRD), now renamed as Ministry of Education, Government of India (GO), It is an independent, autonomous and self-sustained premier organization registered under the Societies Registration Act, 1860, with the following objectives:

> "*a. To conduct efficient, transparent and international standards tests in order to assess the competency of candidates for admission, and recruitment purposes.*
>
> *b. To undertake research on educational, professional and testing systems to identify gaps in the knowledge systems and take steps for bridging them*
>
> *c. To identify experts and institutions in setting questions.*
>
> *d. To produce and disseminate information and research on education and professional development standards."*

9. If an expert body is conducting the selection process through JEE (Main), 2022 comprising Session-I and Session-II and on the basis of Application No.220310216633, Roll No.OR04006811 in Session-I, the petitioner secured his NTA score as 98.8810861 and NTA score in JEE (Main) 2022 Session-II under Roll No.0414000405 as 98.9374067, as is evident from Annexures-1, 2, 3 & 4, when he was not called upon to take admission, even though such documents were provided to him, there is every likelihood of manipulation of such documents. Therefore, while entertaining the writ petition, this Court, vide order dated 23.08.2022, passed the following order:

> *"2.It is the case of the petitioner that he had appeared in the Joint Entrance Examination (Main)- 2022 in two Sessions. As per the NIA Score downloaded from the website of Ministry of Education (enclosed as Annexure-1), he secured 98.8810861 in 1st Session (Paper-l). Again he secured 98.9374067 in Session 2 of Paper-1, which is evident from the score card downloaded and enclosed as Annexure-3. However, the marks secured in Session-1, i.e., 98.8810861 was wrongly mentioned as 18.8810861, as a result of which, his all India rank was reduced and he became ineligible to appear in JEE Advanced Examination scheduled to be held on 28th August, 2022. The petitioner is also said to have ventilated his grievance through e-mail to the Secretary, Ministry of Education on 09th August, 2022 but to no avail."*

10. Thereafter, the matter was listed on 27.09.2022, 12.10.2022, 18.11.2022, 25.11.2022, 29.11.2022 and 01.12.2022. Since NIT, Rourkela was not made a party, this Court, vide order dated 23.03.2023, impleaded NIT, Rourkela, as opposite party no.5 and issued notice to it. Again the matter was listed on 17.04.2023, 17.07.2023, 19.07.2023, 21.07.2023 and on 25.07.2023, this Court passed following order:-

> *"2.Heard Mr. S. Palit, learned senior counsel appearing for the petitioner and Mr. B.K. Pardhi, learned Central Government Counsel along with Mr. P.K. Parhi, learned DSGI.*
>
> *3. Learned senior counsel appearing for the petitioner files an additional affidavit in Court today after serving copy thereof on learned Central Government Counsel. The same is accepted and be kept on record.*
>
> *4. On perusal of the affidavit, it appears that there are serious irregularities in the process of evaluation of the petitioner's answer sheet. Annexure-A/13 appended to the additional affidavit reveals that the question wise effects found by the petitioner in its answer sheet, which was down loaded in the official website of NTA.*
>
> *5. Learned senior counsel for the petitioner alleges that tampering made by the examination conducting body with the answer sheets of the petitioner. He further submitted that pursuant to earlier interim order passed by the coordinate Bench of this Court, the petitioner was allowed to appear in counseling and the Opposite Parties are not allowed to him to participate in the counseling. Accordingly, the petitioner has filed a Contempt Petition in that regard.*
>
> *6. Learned counsel for the Opposite Parties, on the other hand, sought for time to file reply affidavit on additional affidavit filed in Court today.*
>
> *7. Accordingly, list this matter day-after-tomorrow (27.07.2023) by which date reply affidavit be filed by the learned counsel for the Opposite parties positively."*

11. Then, on 27.07.2023, the petitioner filed an affidavit. On 31.07.2023, this Court passed the following order:

> *"2. Learned counsel appearing for the Opposite Parties submitted that special round of counseling is likely to commence from 3rd August, 2023 although she has received information, but no formal communication has been made in that regard. It is also submitted before this Court that Mr. N.K. Sahu, learned counsel who appears for NIT, Rourkela has some personal difficulties today.*
>
> *3. Accordingly, list this matter tomorrow (01.08.2023) along with W.P.(C) No.22473 of 2022 and CONTC No.5501 of 2022."*

12. Then, on 01.08.2023, this Court passed the following order:-

> *"1.This matter is taken up through Hybrid Arrangement (Virtual/Physical Mode).*
>
> *2. After participation in hearing on several dates, today when the matter is taken up, Mr. P.K. Parhi, learned D.S.GI. and Mr. N.K. Sahu, learned counsel appearing for the Opposite Party No.5-NIT, Rourkela, submitted before this Court that the subject matter involved in the aforesaid writ petitions fall within the roster of Division Bench.*
>
> *3. Mr. S. Palit, learned Senior Counsel appearing for the Petitioner submitted that they should have been pointed out earlier as the counseling is likely to be concluded by day after tomorrow.*
>
> *4. In such view of the matter, Registry is directed to take immediate instruction from the Hon'ble Chief Justice and place these matters before the appropriate Division Bench as expeditiously as possible."*

13. As a consequence of the above, the matter was placed before the Division Bench. On 14.08.2023, the matter was heard at length on the petitioner's claim vis-à-vis the record of NTA, as has been provided in paragraph-2 of the counter affidavit filed by opposite party no.4, which reads thus:-

> *"2. The following is the tabular presentation of the Claims of the Petitioner and the Record of NTA regarding his Score and Common Rank List (CRL), for ready reference:*

Session 1 JEE (Main) 2022		
Details / Particulars	*Claim of the Petitioner*	*Record of NTA*
NTA Score in Physics	*90.0967541*	*20.0967541*
NTA Score in Chemistry	*97.3735955*	*37.3735955*
NTA Score in Mathematics	*92.3689139*	*22.3689139*
Final NTA Score	*98.8810861*	*18.8810861*
Session 2 JEE (Main) 2022		
Details / Particulars	*Claim of the*	*Record of NTA*
NTA Score in Physics	*97.0465296*	*19.0465296*
NTA Score in Chemistry	*98.4063072*	*38.4063072*
NTA Score in Mathematics	*99.9902154*	*38.4063072*
NTA Score in total	*98.9374067*	*33.1374067*
Common Rank List (CRL) of the petitioner/candidate in General Category	*11193*	*628193*

It is apparent from the perusal of above table that the petitioner's score is nowhere closer to the cut-off marks of the qualifying candidates in General Category, which is 88.4121383. Thus the claim of the petitioner of qualifying for the JEE (Advanced)-2022 Examination stands falsified."

14. Needless to say, top 2,50,000 successful candidates(including all categories) of JEE (Main)-2022 conducted by NTA qualified to appear for JEE (Advanced)-2022 for admission into IITs. JEE (Advanced)-2022 was conducted on 28.08.2022 by the Organising Committee of seven Zonal Coordinating led by IIT Bombay as per the policy decisions and guidance of the JEE Apex Board 2022 (JAB-2022). The opposite parties no.1 to 4 have not disputed the fact that the petitioner had not appeared in the examination, but disputed the fact of securing mark by the petitioner in JEE. The result of the petitioner was also displayed in the website whenever same is available. The result/score cards of all the candidates, including the petitioner, pertaining to JEE (Advanced)-2022 were issued/displayed through NIC Server which was accessible to them. In fact, the petitioner downloaded his correct score card (having correct score) from the official website of JEE (Main), i.e., www. Jeemain.nic.in. Reliance placed on the documents by the petitioner in Annexures-1 to 4 was objected to by the opposite parties no.1 to 4 stating that the same are not genuine.

15. It may be noted that the NIC provides technical support to NTA for the JEE (Main) 2022 and basing on the result data received from NTA, NIC published Score Card(s) of Session-1 and Session-II of JEE (Main)-2022 Examination on JEE (Mains) portal. NIC through its Letter No.NIC/NTA/2022/JEEMAIN/11 dated 13.10.2022 has further certified that as per the record available in database server of NIC, the Score Card(s) having Application No.220310216633, the petitioner for Session-I & II, provide his NTA Score as 18.8810861 for Session-I and 33.1374067 for Session-II. Therefore, it is the specific case of the opposite parties no.1 to 4 that the documents under Annexures-1 to 4, on which reliance is placed by the petitioner, are not genuine. But nothing has been placed on record to show the variation with the same QR Code along with the photograph of the petitioner as downloaded from the website of the opposite parties no. 1 to 4. Merely contending that the documents relied upon under Annexures-1 to 4 are not genuine, that itself will not suffice, rather it creates doubts with regard to fairness of the opposite parties no.1 to 4 in providing information and conduct of examination.

16. It has been brought to the notice of this Court that similar complaints have been received in various States and more than 100 cases of similar nature are with the opposite parties, but they are not resolving such disputes. The contentions raised by the learned counsel appearing for the opposite parties no.1 to 4 that these are all disputed question of facts and, as such, the writ petition is not maintainable may be true, but taking into consideration the seriousness of the allegation, which has been made in this writ petition, even if it is disputed question of facts, but reliance has

been placed on Annexures-1 to 4 to the writ petition with the QR Code with the same application number, roll number with marks secured by the candidate and how subsequently the same has been disowned by opposite party no.4 saying that the same is not correct. But reasons for non-acceptance of such documents have not been indicated anywhere, rather it has been stated, without assigning any reason, that the same are forged one. The career of a student being involved in this case, this Court is of the considered view that the action of the opposite party no.4 is absolutely arbitrary, unreasonable and contrary to the provisions of law.

17. In ***ABL International Ltd. & Anr. V. Export Credit Guarantee Corporation of India Ltd. & Ors***, (2004) 3 SCC 553, the apex Court in paragraph-11 held as follows:-

> *1l. No doubt that, normally, when a petition involves disputed questions of fact and law, the High Court would be slow in entertaining the petition under Article 226 of the Constitution of India. However, it is a rule of self restraint and not a hard and fast rule. In any case, this Court in* ***ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd****., (2004) 3 SCC 553 has observed thus:*
>
> *"19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of Gunwant Kaur [(1969) 3 SCC 769] this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.""*

18. In ***Popatrao Vyankatrao Patil v. State of Maharashtra & Ors***, 2020 SCC Online SC 291, the apex Court in paragraph-13 held as follows:

> *"13. It could thus be seen, that even if there are disputed questions of fact which fall for consideration but if they do not require elaborate evidence to be adduced, the High Court is not precluded from entertaining a petition under article 226 of the Constitution. However, such a plenary power has to be exercised by the High Court in exceptional circumstances. The High Court would be justified in exercising sucha power to the exclusion of other available remedies only when it finds that the action of the State or its instrumentality is arbitrary and unreasonable and, as such, violative of Article 14 of the Constitution of India. In any case, in the present case, we find that there are hardly any disputed questions of facts."*

19. Therefore, this Court is of the considered view that even if disputed question of facts are involved in this case, as has been explained in the aforementioned judgments, taking into consideration the serious nature of allegation made by the petitioner and also opposite parties to set the dispute at rest and gather confidence in future, this Court is of the considered view that the matter should be enquired into by an independent agency other than the opposite parties, so that the confidence of the candidates, who are appearing in the examination, is not lost.

20. In ***Common Cause, A Registered Society v. Union of India***, (1999) 6 SCC 667, the apex Court in paragraph-174 of the judgment states as follows:

> *"The other direction, namely, the direction to the C.B.I. to investigate "any other offence" is wholly erroneous and cannot be sustained. Obviously, direction for investigation can be given only if an offence is, prima facie, found to have been committed or a person's involvement is prima facie established, but a direction to the C.B.I. to investigate whether any person has committed an offence or not cannot be legally given. Such a direction would be contrary to the concept and philosophy of "LIFE" and "LIBERTY" guaranteed to a person under Article 21 of the Constitution. This direction is in complete negation of various decisions of this Court in which the concept of "LIFE" has been explained in a manner which has infused "LIFE" into the letters of Article 21."*

Thus, there is no dispute with regard to the power of the High Court under Article 226 to direct an inquiry by the CBI, but said power can be exercised only in cases, where there is sufficient material to come to a prima facie conclusion that there is need for such an inquiry. Therefore, it is clear that a decision to direct an inquiry by the CBI can only be taken if the High Court, after considering the materials on record, comes to a conclusion that such materials disclose a prima facie case calling for an investigation by the CBI or any other similar agency, but, the same cannot be done as a matter of routine or merely because a party makes some sort of allegations. Taking into consideration of the same, this Court comes to a definite conclusion that since the documents, which are marked as Annexures-1 to 4 to the writ petition on being downloaded by the petitioner from the website of opposite parties no.1 to 4, have been seriously disputed and not accepted by them, this Court is of the firm view that, in order to ascertain the genuineness of those documents as at Annexures-1 to 4, the matter requires investigation by an independent and impartial agency. Therefore, under the facts and circumstances of the case, this Court thinks it appropriate that interest of justice would be best served if inquiry is conducted by the CBI.

21. In ***Secretary, Minor Irrigation & Rural Engineering Services, U.P. and others v. Sahngoo Ram Arya and Anr***., (2002) 5 SCC 521, the apex Court held that an order directing an enquiry by the CBI should be passed only when the High Court, after considering the material on record, comes to a conclusion that such material does disclose a prima facie case calling for an investigation by the CBI or any other similar agency.

22. In ***State of West Bengal v. Committee for Protection of Democratic Rights,*** (2010) 3 SCC 571, a Five-Judge Bench of the apex Court, accepting the view taken in ***Secretary, Minor Irrigation & Rural Engineering Services, U.P.*** (supra), observed as follows:

> *"In so far as the question of issuing a direction to the CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been*

reiterated that such an order is not to be passed as a matter of routine or merely because a party has leveled some allegations against the local police. This extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise the CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations."

In the aforesaid judgment, it has been held that the Supreme Court under Article 32 and the High Court under Article 226 have power to direct CBI for holding investigation of a criminal case, notwithstanding the fact that the offence in question was committed within the territory of a State. But the question is when there should be an order to this effect. The apex Court observed as follows:-

".....despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these constitutional powers. The very plentitude of the power under the said Articles requires great caution in its exercise. Insofar as the question of issuing a direction to CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has leveled some allegations against the local police. This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigation even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations."

23. Keeping in view the law laid down by the apex Court and applying the same to the present case, this Court is of the considered opinion that if the documents relied upon by the petitioner under Annexures-1 to 4, which are said to have been downloaded from the website of opposite parties no.1 to 4, are genuine, then he should get admission into his choicest institution of the country, like IIT or NIT. But, if the documents under Annexures-1 to 4 are found to be not genuine, then it is to be found out how the same has been obtained by the petitioner, so that such mistake cannot be done by the opposite parties no.1 to 4 in future. Therefore, in the interest of justice, equity and fair play, the matter is handed over to an independent agency, i.e., CBI to cause an enquiry and find out the correctness of the documents filed by the petitioner in Annexures-1 to 4 vis-à-vis the stand taken by the NTA relying upon their documents to arrive at a rationale conclusion in the matter.

Needless to say, the CBI will take all possible steps to make thorough inquiry and admission pursuant to marks secured by him, as per the documents under Annexures-1 to 4 said to have been provided by the opposite parties no.1 to 4. The inquiry report by the CBI shall be submitted as early as possible, preferably within a period of four months from the date of communication of this judgment. On receipt of the inquiry report from the CBI, the Registry is directed to place the same for consideration.

24. With the above observation and direction, the writ petition stands disposed of. But, however, under the circumstances of the case, there shall be no order as to costs.

Registry is directed to forthwith communicate a copy of this judgment, along with a copy of the brief, to the Director of CBI, New Delhi for immediate compliance.

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2023 (III) ILR – CUT- 686

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

W.P(C) NO. 24648 OF 2023

L. DIMPLE RANI .....Petitioner

-V-

DIRECTOR, HIGHER SECONDARY EDUCATION, ODISHA & ORS. .....Opp. Parties

ADVOCATE ACT, 1961 R/W RULES OF LEGAL EDUCATION, 2008 – Rule 5, proviso – Eligibility for admission into 5 yrs integrated B.A LLB Course – The university rejected the candidature of petitioner because she has completed her + 2 from National Institute of Open Schooling – Whether the stand taken by the university while denying her admission is sustainable? – Held, No – The word "Basic Qualification" appearing in the explanation to Rule 5 is the subject matter of consideration – Since, the petitioner acquired the basic qualification of +2 from NIOS, it cannot be construed that she is not eligible to take admission.

(Paras 13-14)

Case Law Relied on and Referred to :-

1. W.P.(C) No. 6752 of 2021: Vishnu Vs. Bar Council of India & Ors.

For Petitioner : M/s. T.K. Biswal, S.Mohanty, R.K. Pattnaik, S.K. Lenka

For Opp. Parties : Mr. L. Samantaray, AGA

Mr. T. K. Satapathy
M/s. A.P. Bose, D.J. Sahu, S.S. Swain

JUDGMENT Date of Judgment : 03.10.2023

Dr. B.R.SARANGI, J.

1. The petitioner, by means of this writ petition, seeks direction to opposite parties no.2 and 3 to allow her to get admission in five years integrated B.A.LL.B. (Honours) Course in Madhusudan Law University, Cuttack within a stipulated time.

2. The factual matrix of the case, in brief, is that the petitioner, who is a 20 year scheduled caste girl, after completion of her +2 Science under National Institution of Open Schooling, was interested to take admission in five years integrated B.A.LL.B. (Honours) Course in Madhusudan Law University, Cuttack. Pursuant to the advertisement issued, she applied for the said course and as per the schedule she appeared in the entrance test conducted by the University and became successful securing her rank at sl. no. 21 of the list of SC candidates.The counselling was fixed to 31.07.2023 at the campus of opposite party no.3. Though the petitioner got requisite qualification, but she was denied admission to five years integrated law course since she has completed her +2 from National Institute of Open Schooling. Hence, this writ petition.

3. Mr. T.K. Biswal, learned counsel appearing for the petitioner contended that the petitioner, having acquired +2 qualification from National Institute of Open Schooling (NIOS), appeared in the entrance examination held for five years integrated B.A.LL.B. (Honours) Course in Madhusudan Law University, Cuttack. Although she got qualified in the said entrance examination and placed at sl.no.21 of the merit list, she was denied admission into the said course on the ground that she has acquired +2 qualification from NIOS. He brought to our notice the eligibility criteria contained in the Prospectus for Academic Session 2023-24 issued by the Madhusudan Law University, Cuttack, which has been placed on record as Annexure-3, and contended that when the petitioner submitted her application for appearing in the entrance test, the petitioner had disclosed her qualification as +2 from NIOS and, as such, there is no restriction imposed in the eligibility criteria with regard to certificate issued by NIOS to get admission into the course. Therefore, once the petitioner is qualified in the entrance test, at the time of admission she cannot be denied to prosecute her studies, merely because she has obtained +2 qualification from NIOS. He also drew our attention to the notification dated 23.07.2015 issued by the Council of Higher Secondary Education, Odisha under Annexure-6, wherein it has been specifically mentioned that, in pursuance of the resolution no.01 of the Equivalent Committee Meeting of the Council of Higher Secondary Education, Odisha, Bhubaneswar held on 21.07.2015 at 4.00 P.M., it is notified that the Senior Secondary School Examination conducted by the National Institution of Open Schooling, New Delhi is equivalent to the Higher Secondary Examination conducted by the Council of Higher Secondary Education, Odisha, provided that the students have five subjects (with minimum one language paper) and, as such, the said notification superseded the previous notification no.1063 dated

29.01.2015. Thus, it is contended that the petitioner, having satisfied the eligibility criteria, as per the prospectus of the University as well as the notification issued by the Council of Higher Secondary Education, Odisha, should not have been denied to get admission in 5 years integrated law course.

3.1 Learned counsel for the petitioner further contended that a similarly situated person, having secured +2 qualification from National Institute of Open Schooling, has got admission to five years integrated B.A.LL.B. (Honours) Course, whereas the petitioner has been denied such admission, which amounts to discrimination, therefore, the petitioner has approached this Court by filing the present writ petition.

4. This Court issued notice to the opposite parties, pursuant to which Mr. T.K. Satapathy, learned counsel appearing on behalf of Madhusudan Law University produced before this Court a copy of the Rules of Legal Education, 2008 issued by the Bar Council of India (Part-IV), wherein under Rule-5 the eligibility for admission has been provided. The explanation to clause-5 (b) states that the applicants who have obtained 10+2 or graduation/post graduation through open Universities system directly, without having any basic qualification for prosecuting such studies, are not eligible for admission in the law courses. Therefore, it is contended that in view of such explanation since the petitioner has acquired 10+2 qualification from NIOS, even if he qualifies for admission to 5 years integrated law course, he has not been given admission. It is further contended that since Bar Council of India has put a restriction, the petitioner has been denied admission.

5. In course of hearing, this Court thought it proper to implead Bar Council of India as a party so that the position can be clarified for all time to come. Accordingly, on the prayer of the petitioner, this Court impleaded the Secretary, Bar Council of India as opposite party no.4 and issued notice to the said opposite party. Pursuant thereto, learned counsel Mr. A.P. Bose entered appearance and contended that Madhusudan Law University has misconstrued the explanation to clause-(b) of Rule-5, which made it clear that the applicants, who have obtained 10+2 or graduation/ post graduation through open Universities system directly without having any basic qualification for prosecuting such studies are not eligible for admission in the law course. The term "basic qualification" appearing in the said explanation was interpreted by the High Court of Judicature of Bombay Bench at Aurangabad in W.P.(C) No. 6752 of 2021 (***Vishnu v. Bar Council of India and others***), which was disposed of vide judgment dated 04.05.2022. The said judgment clarifies the "basic qualification" as contemplated under explanation to clause-(b) of Rule-5, which supports the case of the petitioner. Therefore, he contended that since the petitioner possesses the requisite qualification, denial of admission to her by the University is absolutely misconceived, which cannot be sustained in the eye of law.

6. Mr. L. Samantaray, learned Addl. Government Advocate appearing for opposite party no.1 contended that since the matter relates to admission of a student in Madhusudan Law University, the State has no objection if any decision is taken at

the level of the University. But it is contended that by virtue of the notification issued on 23.07.2015 under Annexure-6, the Council of Higher Secondary Education, Odisha has already notified that the Senior Secondary School Examination conducted by the NIOS, New Delhi is equivalent to the Higher Secondary Examination conducted by the Council of Higher Secondary Education, Odisha. Therefore, the question of denial of admission to the petitioner on the ground of acquisition of +2 qualification from NIOS does not arise.

7. This Court heard Mr. T.K. Biswal, learned counsel appearing for the petitioner; Mr. L. Samantaray, learned Addl. Government Advocate appearing for the State, Mr. T.K. Satapathy, learned counsel appearing for opposite parties no.2 and 3 and Mr. A.P. Bose, learned counsel appearing for opposite party no.4-Bar Council of India in hybrid mode and perused the records. Taking into consideration the urgency involved, since the career of a student is at stake, this Court disposes of the matter at the stage of admission.

8. So far as factual matrix is concerned, there is no dispute that the petitioner applied to take admission in five years integrated B.A.LL.B. (Honours) Course in Madhusudan Law University, pursuant to the advertisement issued by the University and participated in the process of selection. The petitioner was selected and ranked at sl. no. 21 of the merit list. However, she was denied to take admission on the ground that she had acquired her +2 qualification from NIOS. Whether such denial of admission to the petitioner is tenable in the eye of law, is the sole question to be decided by this Court in this case.

9. To answer the above question effectively, it is profitable to refer to the prospectus issued by the opposite party-Law University, which has been annexed as Annexure-3 to the writ petition. The said prospectus prescribes the eligibility criteria for five years Integrated B.A.LL.B. (Hons) course to the following effect:-

> *"An applicant who has successfully completed Senior Secondary School Programme (10+2)/ or appearing in +2 or equivalent from a recognised University of India or from a Senior Secondary Board or equivalent, constituted or recognised by the Union or by the State Government, shall be eligible for entrance examination in to 5 year B.A. LL.B. (Honours) Course.*
>
> *The Candidate belonging to the general (Unreserved) category shall have to secure at least 45 % of the total marks in aggregate and the candidates belonging to SC/ST category shall have to secure at least 40% of the total marks in aggregate for admission in to the course (original certificates along with photo copies to be submitted at the time of the counselling.*
>
> *There shall be no relaxation of marks in minimum eligibility for admission. Such minimum qualifying marks shall not automatically entitle a person to get admission."*

10. The petitioner, having satisfied the eligibility criteria mentioned in the prospectus, applied for the said course as against 120 seats and also produced all the certificates and documents as required in the prospectus. On scrutiny of the documents filed by the petitioner, the petitioner was called upon to appear in the

entrance test conducted for admission to the course. The petitioner appeared in the entrance test and having become successful her name was found place in the select list at sl. no. 21. Therefore, a right accrued in her favour to get admission in the course. As such, the question now raised with regard to acquisition of her +2 qualification from NIOS cannot stand on her way to get admission in the course. Furthermore, there is no such restriction in the prospectus, referred to above, that if a candidate qualified from NIOS he/she will be debarred from getting admission. In absence of any such restriction, when the University being satisfied with the documents submitted allowed the petitioner to participate in the selection process and the petitioner having participated in the selection process got selected, she cannot be denied to take admission in the course.

11. The contention of Mr. T.K. Satpathy, learned counsel appearing for the University is that because of the restriction imposed by the Bar Council of India in the explanation to Rule-5 dealing with the eligibility for admission under Chapter II of the Rules of Legal Education-2008, the petitioner has been denied to take admission. The said Rules framed under Section 7 (1)(h) and (i), 24 (1)(c)(iii) and (iiia), 49 (1) (af), (ag) and (d) of the Advocates Act, 1961 have statutory force. The eligibility for admission, as has been provided under Rule-5 of the said Rules, reads as follows:-

> *"5.* ***Eligibility for admission****:*
>
> *(a) Three Year Law Degree Course: An applicant who has graduated in any discipline of knowledge from a University established by an Act of Parliament or by a State legislature or an equivalent national institution recognized as a Deemed to be University or foreign University recognized as equivalent to the status of an Indian University by an authority competent to declare equivalence, may apply for a three years' degree program in law leading to conferment of LL.B. degree on successful completion of the regular program conducted by a University whose degree in law is recognized by the Bar Council of India for the purpose of enrolment.*
>
> *(b) Integrated Degree Program: An applicant who has successfully completed Senior Secondary School course ('+2') or equivalent (such as 11+1, 'A' level in Senior School Leaving certificate course) from a recognized University of India or outside or from a Senior Secondary Board or equivalent, constituted or recognized by the Union or by a State Government or from any equivalent institution from a foreign country recognized by the government of that country for the purpose of issue of qualifying certificate on successful completion of the course, may apply for and be admitted into the program of the Centres of Legal Education to obtain the integrated degree in law with a degree in any other subject as the first degree from the University whose such a degree in law is recognized by the Bar Council of India for the purpose of enrolment.*
>
> *Provided that applicants who have obtained + 2 Higher Secondary Pass Certificate or First Degree Certificate after prosecuting studies in distance or correspondence method shall also be considered as eligible for admission in the Integrated Five Years course or three years' LL.B. course, as the case may be.*
>
> ***Explanation****: The applicants who have obtained 10 + 2 or graduation / post graduation through open Universities system directly without having any basic qualification for prosecuting such studies are not eligible for admission in the law courses."*

12. To deny admission to the petitioner, emphasis has been laid on the explanation to Rule-5, which clearly speaks that the applicants who have obtained 10+2 or graduation/ post graduation through open Universities system directly without having any basic qualification for prosecuting such studies are not eligible for admission in the law courses. The very same Rule-5 was under consideration by the High Court of Judicature of Bombay Bench at Aurangabad in W.P.(C) No. 6752 of 2021, which was disposed of vide judgment dated 04.05.2022. In the said judgment, at paragraphs 23, 24 and 26 it was observed/ held as follows:-

> *"23. The words "basic qualification" appearing in the explanation to Rule 5 is the subject matter of consideration. "Basic qualification" is not defined under the Rules or the Act. In an Open University, for an admission to the Commerce graduation course, the criterion are provided. A person having qualification of H.S.C. or equivalent examination or is 11th Standard Passed, or a Government recognised certificate/ diploma of two years after S.C.C., are eligible for admission, and a person who had undergone a preparatory programme of Yashwantrao Chavan Maharashtra Open University, Nashik with minimum 40 marks is also eligible for admission to the first year degree certificate course. Equivalence is provided to the said courses.*
>
> *24. Under Government Resolution dated 20/5/2011, the Government of Maharashtra has granted equivalence of 10th and 12th to those who have passed preparatory programme and first year of graduation. The preparatory programme would be the basic course for securing admission to the first degree course in an open University. The basic course for first degree certificate would be different for different institutions. The Bar Council has not restricted the admission to the law degree course to the students passing from a regular University only. Even a student graduating in any discipline of knowledge from a equivalent national institution recognised as a deemed to be University or even a foreign University recognised as equivalent to the status of an Indian University by an authority competent to declare equivalence can apply for three year degree programme in law. It is not necessary that a foreign University recognised as equivalent to the status of an Indian University may require 10 + 2 as a basic qualification for the first degree course. A person who has completed 10 + 2 or equivalent is also considered eligible for admission to the five year integrated law degree course as per Rule 5(b).*
>
> *26. If such a restricted meaning is given to the words "basic qualification", the very purpose of proviso would stand frustrated. Proviso has clarified that an applicant, who has passed the first degree certificate after prosecuting studies in distance or correspondence method, shall also be considered as eligible for admission. The explanation cannot be interpreted in a manner it would negate the proviso and the main section. The explanation cannot take away the statutory right with which a person is bestowed with under the rule. For explanation to harmoniously survive with the proviso and the main rule will have to be interpreted in a manner that the basic qualification would mean the basic qualification as provided by that University for obtaining admission to the graduation/ post graduation or 10 + 2 course. Any other interpretation would lead to an anomalous situation and would render the Rule 5 and the proviso otiose and superfluous.*

13. In view of such position, since the petitioner acquired the basic qualification by prosecuting her higher study of +2 from NIOS, it cannot be construed that she is

not eligible to take admission. That apart, the said Rule-5 was under consideration by the Legal Education Committee of Bar Council of India in its meeting held on 30.04.2017, wherein it was resolved as follows:-

> *"The committee considered the matter in respect of basic qualification referred in the explanation to Rule – of Legal Education Rules-2008. There are two aspects for consideration; one is proviso of this rule dealing with distance and correspondence course of +2 and first degree certificate through distance and correspondence. The Committee finds, there is no difficulty which correctly recorded as per the policy of the Bar Council of India. So far explanation to this section is also correctly describes that applicant must obtain basic qualification for admission to 5 year degree course which shall be 10th and or for admission in 3 year law course basic qualification should be 12th (+2) because unless he passed these basic qualification he could not have got admission in (intermediate) +2 or graduation, hence Committee finds no reason to delete the explanation."*

14. Therefore, the stand taken by the University has no leg to stand. As a consequence thereof, the petitioner cannot be deprived of getting admission in the course, for which she has been selected by following due procedure of selection and placed at sl. no. 21 of the merit list. It is also brought to the notice of this Court that admission process has already been over. Be that as it may, since the petitioner has secured higher rank, she cannot be denied admission in the course.

15. Apart from the above, the Council of Secondary Education has also issued a notification on 23.07.2015, in pursuance of the Resolution No.01 of the Equivalent Committee Meeting of the Council of Higher Secondary Education, Odisha, Bhubaneswar held on 21.07.2015, that Senior Secondary School Examination conducted by the National Institution of Open Schooling, New Delhi is equivalent to the Higher Secondary Examination conducted by the Council of Higher Secondary Education, Odisha, provided that the students have five subjects (with minimum one language paper). The said notification has superseded the previous notification dated 29.01.2015. As such, the petitioner, having satisfied the notification dated 23.07.2015 by which equivalency has been granted, the question of denial of admission to her in the course does not arise at this stage.

16. In view of such position, this Court directs opposite parties no.2 and 3 to admit the petitioner in Madhusudan Law University, Cuttack in five years integrated B.A.LL.B. (Honours) Course for the session 2023-24 within a period of seven days from today without creating any further hindrance. If the classes have already been started, since the petitioner has missed the same because of inaction of the opposite parties no.2 and 3, they shall take necessary steps to cover up the courses by imparting extra classes to the petitioner, so that the education of a student will not be jeopardized.

17. It is made clear that this Court, vide order dated 09.08.2023, directed that one seat shall be kept reserved for the petitioner, which will be subject to result of the writ petition. In spite of above order, if there will be no seat for the petitioner, then the opposite parties no.2 and 3 shall create a seat for the petitioner and allow her to prosecute her study in Madhusudan Law University, Cuttack. Under no circumstances, the admission can be denied to the petitioner.

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

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2023 (III) ILR – CUT - 693

ARINDAM SINHA, J & SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 24151 OF 2023

RAMAKRUSHNA PANIGRAHI & ANR. .....Petitioners

-V-

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

CONSTITUTION OF INDIA, 1950 – Article 226 – Maintainability of Writ – Marfatdar of a private deity sale the property to the petitioner – The petitioner filed mutation case – Tahsildar allow the mutation but prayer for deletion of the deity's name was rejected – Petitioner challenged the impugned order by filing the present case – Whether writ is maintainable? – Held, Yes – Reason indicated. (Para-09)

Case Laws Relied on and Referred to :-
1. (1995) 1 SCC 745 : Chandigarh Administration Vs. Jagjit Singh.
2. (2009) 5 SCC 65 : State of Bihar Vs. Upendra Narayan Singh.

For Petitioners : Mr. Ashok Kumar Sarangi

For Opp. Parties: Mr. A.K. Nath
Mr. A.K. Sharma, AGA

JUDGMENT Date of Hearing 17,20.08.23 & 22.09.23 Date of Judgment: 22.09.2023

ARINDAM SINHA, J.

1. Mr. Sarangi, learned advocate appears on behalf of petitioners. He submits, his clients are purchasers of a part in a patch of land, in respect of which there was mention of the deity in the record. Other purchasers got mutation on deletion of the deity's name. In his clients' case, the mutation was allowed but prayer for deletion, rejected.

2. On earlier occasion, Mr. Sharma, learned advocate, Additional Government Advocate appearing on behalf of State had drawn attention to order dated 13th June, 2003 admitting the mutation petition, carrying direction upon the Tahsildar to add the Endowment Commissioner as party and proceed with the case. On query from Court Mr. Sharma submits, the order was made by the Commissioner (L.R.) and Settlement, Board of Revenue, Orissa, Cuttack. The Tahsildar on proceeding with the case made impugned order dated 3rd September, 2016, refusing to delete name of the deity in the RoR. In this connection, we reproduce paragraph-4 from order dated 29th August, 2023.

> *"4. State will be heard to demonstrate provision in law requiring mutation to carry name of vendor in the land record."*

3. Mr. Sharma submits, the writ petition is not maintainable since efficacious alternative statutory remedy of appeal is available to petitioners. Without prejudice, he relies on judgments of the Supreme Court.

(i) ***Chandigarh Administration v. Jagjit Singh*** reported in ***(1995) 1 SCC 745***, paragraph-8. We reproduce below a passage from the paragraph.

> *"Generally speaking, the mere fact that the respondent authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent authority to repeat the illegality or to pass another unwarranted order."*

(ii) ***State of Bihar v. Upendra Narayan Singh*** reported in ***(2009) 5 SCC 65***, paragraph 67. We reproduce below a passage from the paragraph.

> *"In our view, the approach adopted by the Division Bench was clearly erroneous. By now it is settled that the guarantee of equality before law enshrined in Article 14 is a positive concept and it cannot be enforced by a citizen or court in a negative manner. If an illegality or irregularity has been committed in favour of any individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior Court for repeating or multiplying the same irregularity or illegality or for passing wrong order."*

4. Mr. Nath, learned advocate appears on behalf of the Commissioner and submits, the deity is a perpetual minor. The Tahsildar duly maintained name of the deity in the record as the land belongs to it.

5. We have perused impugned order. Nevertheless, to be certain we made query to appearing learned advocates for demonstrating that impugned order says something about the earlier mutation made in respect of other purchasers on deletion of the deity's name, as was incorrectly done. There is no such demonstration. So

much so, we find the Commissioner of Endowments was noticed per direction made on said order dated 13th June, 2003 but inspite thereof the authority noted that the Commissioner had not responded to avail due opportunity of hearing. On top of that, we have not been provided with an answer to our query made by paragraph-4 in our order dated 29th August, 2023, reproduced above.

6. In ***Chandigarh Administration*** (supra) the Supreme Court declared the proposition that one cannot claim negative equity. It was followed in ***Upendra Narayan Singh*** (supra). By the time said decision was rendered, there were several decisions of the Supreme Court made in the meantime, reiterating the proposition. However, we do not find those decisions have application in facts of this case. The Commissioner having had been noticed, did not appear before the Additional Tahsildar. As such there was none to urge claim of the deity, being a public one. In view of absence of finding regarding the claim, petitioners cannot said to be claiming negative equity.

7. It appears from impugned order, the Additional Tahsildar relied on a report made by the Amin in stating that the land stood recorded in name of the deity. Petitioners' case is of purchase. Petitioners also say that other purchasers were successful having obtained mutation on deletion of the deity's name. Mr. Sarangi relies on view taken by a Division Bench of this Court on ***judgment dated 11th July, 1960 in First Appeal no.16 of 1955 (Commissioner of Hindu Religious Endowments v. Babaji Govinda Charan Das),*** where, in paragraph-5 (Manupatra print) appears a passage, reproduced below.

> *"The deed of settlement shows that the right of worship was itself left to the plaintiff and his successive disciples and created no right in favour of the public for such worship.* ***If the deity was a private deity, then the endowment in favour of the deity was a private debottar in respect of which the Endowments Act has no application."***
>
> (emphasis supplied)

Keeping above view in mind and on once again perusal of impugned order we find that petitioners are purchasers of land recorded in name of the deity marfat Duryodhan Patra. Right of worship, as implied by such record, was with the individual instead of the public. Hence, the land stood recorded in name of the deity. This is what the Amin had reported to the Additional Tahsildar and the authority went on to say that in view thereof and observations of the learned Joint Commissioner, he was not inclined to delete name of the deity from the RoR.

8. The Joint Commissioner by aforesaid order dated 13th June, 2003 had simply admitted the mutation petition and given direction for adding the Endowment Commissioner. This was done but the Endowment Commissioner was not represented before the Additional Tahsildar. Report of the Amin, relied upon by the authority in impugned order, in light of view expressed in ***Babaji Govinda Charan Das*** (supra) indicates that the marfatdar sold away the land to petitioners. There is no dispute that other purchasers were successful in having name of the deity deleted

in their mutation cases. Clear averment is there in paragraph-7 and supporting disclosure is at annexure-5. Mr. Sarangi hands up entries made on mutation in respect of purchaser Jagabandhu Sahu, made pursuant to order dated 3rd May, 1995 of the Additional Settlement Officer in Appeal Case no.1040 of 1994 (Jagabandhu Sahu v. State of Orissa). Copies had been circulated to Mr. Sharma and Mr. Nath. There is no reference to such deletion in impugned order, let alone as had been incorrectly made or having had been made without authority of law.

9. In aforesaid circumstances, we are unable to find petitioners are claiming negative equity and therefore are to be turned away by reliance on ***Chandigarh Administration (supra) and Upendra Narayan Singh (supra).*** A finding with reasons impeaching the sale/purchase based on relevant material could have been made. Instead,the Additional Tahsildar caused the mutation on accepting petitioners' contention of purchase but refused to delete the deity's name (vendor). The refusal appears to be based on the direction to add the Commissioner of Endowments in the mutation proceeding. Direction for addition of a party by a higher authority does not mean or imply that the added party is to succeed even though said party does not urge a contention in the adjudication. Clearly, the refusal to delete the deity's name was not based on relevant material. As such the writ petition is maintainable.

10. Impugned order is set aside and quashed.The Tahsildar/Additional Tahsildar is directed to cause the correction in the record by deleting name of the deity in respect of mutation already obtained by petitioners. It is to be done within four weeks of communication. Petitioners will communicate this order to the Tahsildar and the Additional Tahsildar.

11. The writ petition is allowed and disposed of.

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2023 (III) ILR – CUT - 696

ARINDAM SINHA, J & SIBO SANKAR MISHRA, J.

W.P.(C) NO.13324 OF 2022

ODISHA STATE DISASTER MANAGEMENT AUTHORITY .....Petitioner

-V-

PRESIDING OFFICER, LABOUR COURT, BBSR & ORS. .....Opp. Parties

INDUSTRIAL DISPUTE ACT, 1947 – Section 2(S), 33-C(2) – The petitioner filed its objection stating that Odisha State Disaster Management Authority is not an industry and as such Sec. 33-C(2) could not have applied to the Opp-party before the Labour Court – The

Learned Labour Court was not considered the objection as preliminary issue and pronounce the order upon it but relegated for delusion with all issues in a dispute – Whether the order of Tribunal perverse in the eyes of law? – Held, No – We find that the Labour Court, by impugned order took a possible view. (Para-10)

Case Law Relied on and Referred to :-

1. (1983) 4 SCC 293 : D. P. Maheshwari Vs. Delhi Administration.
2. (2022) 6 SCC 167 : V.G. Jagdishan Vs. Indofos Industries Limited.
3. 2021 SCC OnLine SC 829 : State of Madhya Pradesh Vs. Somdutt Sharma.
4. (2018) 18 SCC 21 : M. L. Singla Vs. Panjab National Bank.
5. (1995) 1 SCC 235 : Municipal Corporation of Delhi Vs. Ganesh Razak.
6. AIR 1964 SC, 743 : The Central Bank of India Limited Vs. P.S. Rajagopalan.

For Petitioner : Mr. P. K. Rath, Sr. Adv.

For Opp. Parties : Ms. S. Pattanayak (Addl. Govt. Adv.)
Mr. A. Mishra
Mr. M. K. Panda

JUDGMENT Date of Hearing : 3.5 & 4.10 of 23 : Date of Judgment : 4.10.23

BY THE BENCH:

1. The writ petition was moved on 3rd May, 2023 before the Bench, in which one of us (Arindam Sinha,J.) was party. Mr. Rath, learned senior advocate appearing on behalf of petitioner had submitted, impugned is order dated 23rd March, 2022, whereby preliminary objection raised by his client was not at all dealt with. The objection goes to root of the matter for adjudication of alleged computation of entitlement of opposite party no.2. Said opposite party was not a workman within meaning of section 2(s) in Industrial Disputes Act, 1947. His client is not an industry. Substantive application was made disclosing the bylaws, not at all considered. In the circumstances, said opposite party could not have applied under section 33-C(2).

2. Ms. Pattanayak, learned advocate,Additional Government Advocate appears on behalf of opposite party no.1 and Mr. Panda, learned advocate, for opposite party no.3.

3. Mr. Mishra, learned advocate appears on behalf of opposite party no.2. He submits,whether or not his client is a workman, is a mixed question of law and fact. It has to be established on evidence laid. In the circumstances, there is no illegality in impugned order. He submits further, judgment of the Supreme Court in **D. P. Maheshwari vs. Delhi Administration,** reported in **(1983) 4 SCC 293** was clear declaration of the law requiring the labour Court to decide all issues in a dispute at the same time without trying some of them as preliminary issues. He relies on paragraph 1 (Manupatra print), extracted and reproduced below.

"1. It was just the other day that we were bemoaning the unbecoming devices adopted by certain employers to avoid decision of industrial disputes on merits. We noticed how they would raise various preliminary objections, invite decision on those objections in the first instance, carry the matter to the High Court under Article 226 of the Constitution and to this Court under Article 136 of the Constitution and delay a decision of the real dispute for years, sometimes for over a decade. Industrial peace, one presumes, hangs in the balance in the meanwhile. We have now before us a case where a dispute originating in 1969 and referred for adjudication by the Government to the Labour Court in 1970 is still at the stage of decision on a preliminary objection. ***There was a time when it was thought prudent and wise policy to decide preliminary issues first. But the time appears to have arrived for a reversal of that policy. We think it is better that tribunals, particularly those entrusted with the task of adjudicating labour disputes*** *where delay may lead to misery and jeopardise industrial peace,* ***should decide all issues in dispute at the same time without trying some of them as preliminary issues. Nor should High Courts in the exercise of their jurisdiction under Article 226 of the Constitution stop proceedings before a Tribunal so that a preliminary issue may be decided by them****. Neither the jurisdiction of the High Court under Article 226 of the Constitution nor the jurisdiction of this Court under Article 136 may be allowed to be exploited by those who can well afford to wait to the detriment of those who can ill afford to wait by dragging the latter from Court to Court for adjudication of peripheral issues, avoiding decision on issues more vital to them. Article 226 and Article 136 are not meant to be used to break the resistance of workmen in this fashion.* ***Tribunals and Courts who are requested to decide preliminary questions must therefore ask themselves whether such threshold part-adjudication is really necessary and whether it will not lead to other woeful consequences****. After all tribunals like Industrial Tribunals are constituted to decide expeditiously special kinds of disputes and their jurisdiction to so decide is not to be stifled by all manner of preliminary objections journeyings up and down. It is also worthwhile remembering that the nature of the jurisdiction under Article 226 is supervisory and not appellate while that under Article 136 is primarily supervisory but the Court may exercise all necessary appellate powers to do substantial justice.* ***In the exercise of such jurisdiction neither the High Court nor this Court is required to be too astute to interfere with the exercise of jurisdiction by special tribunals at interlocutory stages and on preliminary issues****."*

(emphasis supplied)

4. In reply, Mr. Rath relies on several other judgments of the Supreme Court.

i) **V. G. Jagdishan vs. Indofos Industries Limited**, reported in **(2022) 6 SCC 167**, inter alia, paragraph 15. The paragraph is reproduced below.

"15. In D.P. Maheshwari which is pressed into service by the learned Senior Advocate appearing on behalf of the appellant, in support of the submission that the Labour Court ought not to have given the decision only on preliminary issue and ought to have disposed of all the issues, whether preliminary or otherwise at the same time. ***On facts the said decision is not applicable to the facts of the case on hand****. In the aforesaid decision no absolute proposition of law was laid down by this Court that even the issue touching the jurisdiction of the court cannot be decided by the court as a preliminary issue and the court has to dispose of all the issues, whether preliminary or otherwise, at the same time. When the issue touches the question of territorial jurisdiction, as far as possible the same shall have to be decided first as preliminary issue.* ***Therefore, in the***

> ***present case, the Labour Court did not commit any error in deciding the issue with respect to the territorial jurisdiction as a preliminary issue in the first instance****."*
> (emphasis supplied)

Mr. Rath submits, by this judgment said Court's earlier judgment in **D. P. Maheshwari** (supra) was interpreted and explained.

ii) **State of Madhya Pradesh vs. Somdutt Sharma** available at **2021 SCC OnLine SC 829**, paragraph 11. We extract and reproduce below passage therein relied upon.

> *"11. ... ... But the test is what are the predominant functions and activities of the said Department. Even if the activity of operation of pumps is carried on by few employees, the Irrigation department does not carry on manufacturing process. As it is not carrying on manufacturing process, it is not a factory within the meaning of clause(m) of section 2 of the Factories Act.* ***Therefore, the Irrigation Department of the first appellant will not be an Industrial Establishment within the meaning of Section 25L. Accordingly, Chapter VB will have no application in the present case****."* (emphasis supplied)

On query from Court he submits, even though the application was made under section 33-C(2), the declaration of law regarding chapter V-B having no application to the Irrigation Department is relevant. More so, because sub-section (2) in section 33-C is continuation of situation provided for by sub-section (1), regarding money due to a workman from an employer under, inter alia, provisions of chapter V-B. In this context he relies on **Municipal Corporation of Delhi vs. Ganesh Razak**, reported in **(1995) 1 SCC 235**, paragraph 12.

iii) **M. L. Singla vs. Panjab National Bank**, reported in **(2018) 18 SCC 21**, paragraphs 25 and 26, reproduced below.

> *"25. Assuming that the Labour Court had the jurisdiction to direct the parties in the first instance itself to adduce evidence on merits in support of the charges yet, in our opinion, it was obligatory upon the Labour Court to first frame the preliminary issue on the question of legality and validity of the domestic enquiry and confined its discussion only for examining the legality and propriety of the enquiry proceedings.*
>
> *26. Depending upon the finding on the preliminary issue on the legality of the enquiry proceedings, the Labour Court should have proceeded to decide the next questions. The Labour Court while deciding the preliminary issue could only rely upon the evidence, which was relevant for deciding the issue of legality of enquiry proceedings but not beyond it."*

5. In dealing with the cases cited by Mr. Rath, Mr. Mishra relies on **The Central Bank of India Limited vs. P.S. Rajagopalan**, reported in **AIR 1964 SC, 743,** paragraph 16 (Manupatra print). He submits, by the judgment said Court declared the scope on interpreting sub-section (2) of section 33-C, as a provision independent of other provisions in said section.

6. The labour Court, by impugned order said, inter alia, as reproduced below.

"On perusal of the case record, it is found that the applicant has filed the present case for computation of money due to him from the O.Ps. It is claimed by OP No.1 the issue in question i.e. "whether the applicant is coming under the definition of workman and whether the organization of OP No.1 is an industry" as defined in ID Act be decided as a preliminary issue before proceeding with the hearing of the case, But, it cannot be over sighted that the issue as to whether the applicant being posted as Community Mobiliser under the concerned O.P was discharging managerial duties or his job involved manual, unskilled, skilled, technical, operational clerical etc. of work is a matter of fact to be decided from the evidence likely to be adduced by the parties. Thus, the disputed issues involve matter of fact and law. As per the settled principle, had it been an issue involved with question of law the same could have taken up as a preliminary issue for deciding the fate of the reference. The issue being a mixed question of fact and law cannot be taken up for hearing as a preliminary point. Besides, the Hon'ble Apex Court in the case of ***D.P. Maheswari Vrs. Delhi Administration, reported in 1983(II)LLJ 42*** *have deprecated hearing of matters or issues in a piecemeal manner. Thus, the petition being devoid of merit stands rejected.*"

7. **D. P. Maheshwari** (supra) was judgment of the Supreme Court by a Bench of three learned Judges. It was not noticed in **M. L. Singla** (supra). By the former judgment there was clear declaration of law regarding procedure to be followed by the Tribunals entrusted with task of adjudicating labour disputes. Further declaration was for the High Courts in exercise of their jurisdiction under article 226 of the Constitution, not to stop proceedings before the Tribunals so that preliminary issues may be decided by them. The judgment went on to further declare that neither the jurisdiction of the High Court under article 226 of the Constitution nor the jurisdiction of said Court under article 136 may be allowed to be exploited by those who can well afford to wait, to the detriment of those who can ill afford to wait, by dragging the latter from Court to Court for adjudication of peripheral issues, avoiding decision on issues more vital to them. Here, we appreciate issue vital to the workman being his claim for payment of arrear salaries, in respect of which he had moved the labour Court under section 33-C(2).

8. In **V. G. Jagdishan** (supra) a Division Bench of the Supreme Court distinguished **D.P. Maheshwari** (supra) as not applicable on facts. The Bench went on to say that when the issue touches the question of territorial jurisdiction, as far as possible, same shall be decided first as preliminary issue. Therefore, in that case, the labour Court did not commit any error in deciding the issue in respect of territorial jurisdiction as a preliminary issue in the first instance. It follows that on the distinction made regarding **D. P. Maheshwari** (supra), as not applicable on facts, the Bench also found that the question decided as preliminary issue was regarding territorial jurisdiction. It merely said that the Tribunal having decided it first as preliminary issue did not commit any error. We do not find a declaration of law therein that can be relied upon as an interpretation of **D. P. Maheshwari** (supra), in diluting it to come in aid of petitioner.

9. On perusal of sub-sections (1) and (2) in section 33-C, it appears sub-section (1) provides for, inter alia, a workman to apply where any money is due to him from an employer under the provisions of chapter V-B, by himself or otherwise as provided. The application is to be made to the appropriate Government and if it is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector, who shall proceed to recover it in the same manner as an arrear of land revenue. Further provision regarding limitation is not relevant for our purpose. Sub-section (2) provides for any workman, who is entitled to receive from the employer any money or benefit which is capable of being computed in terms of money, to apply to the specified labour Court. In this context sub-section (4) provides that the amount found due by the labour Court may be recovered in the manner provided under sub-section (1), i.e., by issuance of certificate to the Collector for recovery as arrears of land revenue. So, there is essential difference between the two contingencies provided by sub-sections (1) and (2). Sub-section (1) provides for a liquidated sum of money to be recovered while sub-section (2) provides for computation of any money or benefit, which is capable of being computed in terms of money, where question arises as to the amount of money due. Therefore, we are unable to accept petitioner's contention that provision in sub-section (2) is continuation of the situation provided under sub-section (1).

10. Lastly, in dealing with **Ganesh Razak** (supra) we find that the Supreme Court, in relied upon paragraph 12, said that ratio of the decisions cited in that case clearly indicated that where the basis of the claim or entitlement of the workman towards certain benefit is disputed, there not being earlier adjudication or recommendation thereof by the employer, the dispute relating to entitlement is not incidental to the benefit claimed and is, therefore, clearly outside the scope of provision under section 33-C(2) of the Act. The declaration of law was, the labour Court has no jurisdiction to first decide the workman's entitlement and then proceed to compute the benefit. In the case at hand, the labour Court has not been able to proceed to decide on any of the issues that are involved. Petitioner is before us because its objection was not made a preliminary issue, thus not pronounced upon but relegated for decision with all issues following **D. P. Maheshwari** (supra). We find that the labour Court, by impugned order, took a possible view. Hence, there is no perversity in impugned order.

11. The writ petition is without merit and dismissed.

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2023 (III) ILR – CUT- 702

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

GCRLA NO. 65 OF 2011 & CRLA NO. 99 OF 2008

STATE OF ODISHA .....Appellant

-V-

JAGADISH DALPATI & ANR. .....Respondents

IN CRLA NO. 99 OF 2008
JAGADISH DALPATI & ANR. -V- STATE OF ODISHA

(A) INDIAN PENAL CODE, 1860 – Section 498(A) – The Appellant/ accused used to keep the Respondent no.2 as his second wife at his home while he was still married to the deceased – Whether the action of the accused constitutes cruelty U/s. 498(A) of IPC? – Held, Yes – Marrying another woman by the husband during existence of his first marriage is something which is most likely to cause trauma and grave injury to the mental health. (Paras 19-20)

(B) CRIMINAL TRIAL – Circumstantial evidence – Offences U/ss. 302/201/306/494/34 of Indian Penal Code – There are no eye witnesses and therefore due to lack of any form of direct evidence, the prosecution has tried to prove the charges through the way of circumstantial evidence – There are major loopholes in the story of the prosecution and deposition of witnesses who have supported the prosecution – Whether the acquittal order of Learned Trial Court should be interfered? – Held, No – The prosecution with several discrepancies in the matter has not been able to prove the charges against the accused beyond reasonable doubt. (Paras 16-18)

Case Laws Relied on and Referred to :-

1. AIR 1954 SC 621 : Bhagat Ram Vs. State of Punjab.
2. (1996) 10 SCC 193 : C. Chenga Reddy and Ors. Vs.State of A.P.
3. (1992 Crl.LJ 1104) : State of U.P. Vs. Ashok Kumar Srivastava.
4. Criminal Application (APL) No. 1287/2022 : Atul S/o Raju Dongre and Ors. Vs. State of Maharashtra and Anr.

For Appellant : Mr. S.S. Kanungo, AGA
Mr. M.K. Mohapatra

For Respondent : Mr. M.K. Mohapatra
Mr. S.S. Kanungo, AGA

JUDGMENT Date of Hearing: 04.07.2023 : Date of Judgment: 24.07.2023

Dr. S.K. PANIGRAHI, J.

1. Since the GCRLA No.65 of 2011 and CRLA No.99 of 2008 arise out of the same judgment and order, both the cases were heard analogously and reserved for judgment.

2. The Government Appeal is filed at the instance of the State against the judgment and order dated 25.01.2008 passed by the learned Additional Sessions Judge, Nuapada in Sessions Case No.35 of 2006 acquitting the accused-Respondents in the aforesaid Government Appeal of the charge under Sections 302/201/306/494/34 of the Indian Penal Code, 1860 (hereinafter referred to as "the Penal Code" for brevity) and the Criminal Appeal is filed by the Appellants-Jagadish Dalpati and Satyabhama Dalpati challenging the said judgment and order passed by the learned Additional Sessions Judge, Nuapada in the said case convicting and sentencing each of them to undergo R.I. for one year and to pay fine of Rs.1000/- each, in default of payment of fine, to undergo R.I. for one month each for the offence under Section 498A/34 of the Penal Code.

I. CASE OF THE PROSECUTION:

3. The short facts of the prosecution case, as it reveals from the F.I.R. and other documentary evidence is that the deceased namely Hira Dalpati got married to the accused namely Jagadish Dalpati in the year 1997 as per their caste and customs. They had a son and a daughter together. The accused on 25.05.2004 kept a married lady of his village namely Satyabhama as his wife and thereafter both Satyabhama and Jagadish started torturing the deceased. Due to regular abuse, the deceased was forced to leave the house of the accused person and stayed in her father's house.

4. However, two months prior to the death of the deceased, the accused went and brought the deceased to their home through mediation. Unfortunately, on 19.05.2006 at about 9 pm the father of the informant got information that his daughter has been killed by both the accused person and thereafter burnt the dead body. To that effect, case was registered against the Appellants and they were arrested and after completion of investigation, they were charge sheeted under Section 302 of the Indian Penal Code. After the charge was framed, the trial was completed by the Addl. Sessions Judge, Nuapada and the Appellant was acquitted. Hence, the state has filed this appeal against the order of the Sessions Judge.

II. SUBMISSION OF THE STATE/ APPELLANT:

5. Mr. S.S. Kanungo, learned counsel for the State/Appellant has contended that the learned Trial Court erroneously acquitted the accused persons without discussing the evidence in its proper perspective. The evidence of PWs.1,5,6 and 7 who have categorically implicated the involvement of the accused persons in the alleged crime. The evidence of the above witnesses have not been shaken in any manner but the learned Trial Court without taking in to consideration of those

witnesses have passed an order of acquittal. Furthermore, the case is purely based on circumstantial evidences. The prosecution has been able to prove the incriminating circumstances appearing against the accused, Jagdish Dalpati, which is given as follows:

> i. The accused had a motive to kill his wife. It is in the evidence on record that the accused kept a concubine though the deceased was his legally married wife and sometime before the occurrence the deceased had left him because of the torture on her by the accused and only two months before her death she has again brought by the accused to his house. Therefore the accused had a motive to kill her.
>
> ii. Just before the death of the deceased, she was in the house of the accused. This is an important circumstantial evidence against the accused. The burden of proving the cause of the death of the deceased lies squarely on the accused as providing U/s.106 of Indian Evidence Act. It was in his special knowledge about the missing or death of his deceased wife.
>
> iii. The most vital circumstantial evidence against the accused is his conduct. It has come in evidence that though he was asked by the P.W.6 and 7 and others not to set fire to the dead body of his wife and though he was asked to inform the Police, he did not listen to the witnesses and set fire to the dead body of the deceased, thereby causing disappearance of evidence regarding the cause of the death of deceased.

6. The accused has not been able to give answer when his attention was drawn to the incriminating circumstance appearing against him which was recorded U/s.313 Cr.P.C. by the learned Trial Court and the learned Trial Court unfortunately has not taken in to consideration any of the points mentioned above while acquitting the accused, Jagdish Dalpati from the charges under Section 302/201 IPC.

III. SUBMISSION OF THE RESPONDENTS:

7. Mr. M.K. Mohapatra, learned Counsel for the Respondents submitted that the Respondents are completely innocent. He has contended that the deceased had committed suicide and he is not liable. He has further submitted that considering that this is a case of circumstantial evidence, the prosecution has not been able to prove the charges against the accused. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person.

8. Learned Counsel has further submitted that even though the Appellants have stressed on relying on the depositions of PWs.1,5,6 and 7, however, there are several and major discrepancies in the statements of the concerned prosecution witnesses. Therefore, such depositions should be held to be unreliable.

IV. CONCLUSION:

9. In order to drive home the charge against the accused, prosecution has examined as many as 9 witnesses. There are no eye witnesses and therefore due to

lack of any form of direct evidence, the prosecution has tried to prove the charges through the way of circumstantial evidence. The Trial Court has acquitted the accused persons from the charges of 302, 306, 201, 494, 34 IPC and convicted them of harassment under Section 498(A) IPC. Therefore, it is pertinent to analyze the case through both the scenarios.

10. Before delving into the charges, it is pertinent to mention that the Trial Court has not conducted proper analysis of the charges in relation to the facts of the case. Moreover, there is lack of scrutiny of the Public Witnesses and major ingredients are missing from the judgement.

11. The prosecution has examined as many as 9 witnesses. Considering that the matter is dependent upon the circumstantial evidence, the prosecution has to establish the link beyond reasonable doubt. First and foremost, it is pertinent to mention here that the dead body of the deceased was burnt by the accused Jagadish Dalpati before it could be recovered.

12. The trial court is directed to take all such effective steps immediately in accordance with law to secure the presence of the Appellant to undergo the sentence as imposed. During investigation, the accused Jagadish Dalpati had reported to the P.W.8 (I.O.) on 18.05.2006 stating that the deceased was missing since 14.05.2006. P.W.8 had directed the A.S.I. to look into thus matter. After enquiry, the A.S.I. had reported that the accused Jagadish had two wives and the deceased had left the house on the plea of call of nature and did not return. During investigation, he found the said burnt ashes and 82 pieces of bone which had been thrown in Dhaban Nalla of the village. Further, he had seized two pieces of plastic rope from the spot and M.O.I. (axe) and M.O.II (knife) from the accused Jagadish. However, the I.O. and the prosecution have not been able to attribute the M.O.s to the death of the deceased. Therefore, any form of post mortem is not possible and thereby the death of the deceased could not be directly linked as homicidal.

13. Evidently, the prosecution has tried to prove the charges through circumstantial evidence. Out the 9 witnesses, P.W. 8 and P.W.9 are the investigating officers of the case. P.W.2, 3 and 4 have not supported the case of the prosecution. They have denied having any information regarding the death of the deceased. Moreover, P.W.4 and 9 have deposed that the M.Os. recovered from the accused are commonly available equipment in the village and cannot be particularly attributed to violent use. Therefore, the prosecution has relied on the deposition of P.W.1, 5, 6 and 7.

14. P.W.1 (Informant) is the father of the deceased. He reached the spot after the dead body of his daughter was burnt. He deposed that the accused Jagadish kept the female accused as his second wife. P.W.5 has corroborated the fact that the accused Jagadish brought a second wife to the house. He has further deposed that he

went back to his in-laws place to get back the deceased after mediation. However, in the cross-examination, the P.W.5 has not been able to place blame on the accused persons.

15. P.W. 6 has corroborated the story of the prosecution. He has further deposed that on 19.05.2004, he had met the accused Jagadish near the hotel, the latter used to work in. On asking about the whereabouts of the deceased, the accused had replied that the she had hanged herself on a Kusum tree. P.W.6 thereafter went to the spot and saw the dead body hanging. Consequently, P.W.6 met P.W.7 and they both asked the accused to report the matter and not burn the dead body. However, the accused did not pay any heed to them. This deposition has been corroborated by P.W.7.

16. However, in the cross-examination, P.W. 6 has stated that there was a cordial relationship between the accused Jagadish and the deceased. P.W,7 has stated he cannot state how the deceased died. Therefore, it is clear that there are major contradictions in the statements of the P.W. 5, 6 and 7. P.W.8 (I.O) has deposed that P.W.5 has not stated that the accused killed the deceased and burnt her. Evidently, there are major loopholes in the story of the prosecution and deposition of witnesses who have supported the prosecution. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In ***Bhagat Ram v. State of Punjab***[1], it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

17. In ***C. Chenga Reddy and Ors. v. State of A.P.***[2], the Supreme Court had observed that:

> *"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence...."*.

18. In ***State of U.P. v. Ashok Kumar Srivastava***[3]., it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. Therefore, with several

1. AIR 1954 SC 621, **2.** (1996) 10 SCC 193, **3**. (1992 Crl.LJ 1104)

discrepancies in the matter, the prosecution has not been able to prove the charges against the accused beyond reasonable doubt.

19. With regard to the charge of Section 498(A) of the I.P.C., P.W.s 1, 5, 6 and 7 have deposed and corroborated that the accused Jagadish used to keep the Respondent no.2 as his second wife at his home while he was still married to the deceased. The issue at hand would be whether the action of the accused constitutes cruelty under section 498(A) of IPC. As per explanation to Section 498-A of the IPC, cruelty means; any willful conduct of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (mental or physical) of the woman. It also includes harassment caused with a view to coercing the woman or any person related to her to meet any unlawful demand for any property or valuable security. Marrying another woman by the husband during existence of his first marriage is something which is most likely to cause trauma and grave injury to the mental health. While dealing with a similar case, the Bombay High Court in ***Atul S/o Raju Dongre and Ors. v. State of Maharashtra and Anr.***[4], held that:

> *"When a husband performs the second marriage while his first marriage is alive, a question arises as to whether such act on the part of husband would amount to cruelty within the meaning of Section 498-A of the IPC. As per explanation to Section 498-A of the IPC, cruelty means; any wilful conduct of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (mental or physical) of the woman. It also includes harassment caused with a view to coercing the woman or any person related to her to meet any unlawful demand for any property or valuable security. Here, we are concerned with wilful conduct of such a nature which has caused or which is likely to cause danger to health of non-applicant no. 2. Marrying another woman by the husband during existence of his first marriage is something which is most likely to cause trauma and grave injury to the mental health of the first wife, unless it has been done with the consent of the first wife. If the act of performance of second marriage during subsistence of the first marriage is not interpreted as amounting to cruelty contemplated under Section 498-A of the IPC, it would frustrate the legislative intent to prevent the torture to a woman by her husband or by relative of her husband and, therefore, that interpretation has to be adopted which sub-serves the object sought to be achieved by the Legislation."*

20. Therefore, this Court is of the opinion that the Respondents have been rightfully charged under Section 498(A) of IPC. The result is that this appeal is without merits and the same is liable to be dismissed. This Court, thus, confirms the judgment of conviction under Section 498(A) and order of sentence dated 25.01.2008 passed by the learned Additional Sessions Judge, Nuapada in Sessions Case No.35 of 2006.

21. So far as the GCRLA is concerned, learned Additional Government Advocate could not advance any plausible reasons for coming to a conclusion that

4. Criminal Application (APL) No.1287/2022

there are compelling and substantial reasons to overrule the judgment of the learned trial judge acquitting the accused-Respondents in the aforesaid Government Appeal of the charge under Sections 302/201/306/494/34 of the I.P.C. Therefore, there is no compelling and substantial reasons to come to the conclusions that findings arrived at by the learned trial judge were in any manner perverse or distorted or unreasonable. Therefore, there is no need to interfere with the findings recorded by the trial court so far it relates to acquittal of the Respondents. Accordingly, it is held that the Government Appeal is without merit and is liable to be dismissed.

22. Accordingly, both the GCRLA and the CRLA are dismissed.

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2023 (III) ILR – CUT- 708

D. DASH, J.

R.S.A. NO. 412 OF 2017

Md. YUNUS .....Appellant

-V-

Md. JAMAL AKHTAR
(Since Dead) by his LRs. & ORS. .....Respondents

MOHAMMEDAN LAW – Hibanama – Whether division of the properties amongst the children can be equated to "Hibanama" (gifting away)? – Held, No – In one transaction, Hiba (gift) to so many persons standing as the donees,in my considered view is not only impermissible but also highly unbelievable and unworkable. (Para-14)

For Appellant : Mr. S. P. Mishra, Sr. Adv.
Mr.S.Mishra, L.K.Maharana, N. Sharma,
A.Mohanta & E. Agarwal

For Respondents : Mr. Sidheswar Rath & Md. A.Alam

JUDGMENET Date of Hearing :26.09.2023:Date of Judgment:09.10.2023

D.DASH, J.

The Appellant, by filing this Appeal, under Section 100 of Code of Civil Procedure, 1908 (for short, 'the Code'), has assailed the judgment and decree dated 19.08.2017 & 31.08.2017 respectively passed by the learned Additional District Judge, Champua in R.F.A. No.15 of 2014.

The present Appellant, as the Plaintiff, had filed Civil Suit No.15 of 2009 in the Court of Civil Judge, Senior Division, Champua for declaration of his right, title,

interest over the suit land and confirmation of the possession over the same with the alternative prayer of recovery of possession if found to have been dispossessed and further prayer of permanent injunction restraining the original Defendant No.1 Abdul Hadi and original Defendant No.2 in the suit from interfering with the peaceful possession of the Appellant (Plaintiff) over the suit land.

At this place, it be stated that original Defendant No.1 Abdul Hadi having died during pendency of the suit, his legal representatives had been brought on record and they are the Respondent No.1(a) to 1(f). Similarly, original Defendant No.2, being dead, his legal representatives are on record as Respondent No.8(a) to 8 (h).

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

3. The Plaintiff and the Defendants are the sons and daughters of late Md. Siddique. He died on 24.07.1992. Md. Siddique was the full owner of the properties which form the subject matter of the suit as well as other properties situated at Champua and Jayantigarh. Md. Siddique during his life time had made a settlement concerning his land by way of 'Hiba' (Gift) on 11.02.1988 without receiving any consideration from his sons and daughters and pursuant to the same, he had delivered the possession of the properties to the Plaintiff and on that day, he had executed a deed of settlement by way (Hiba) of the properties including the suit land. It is said that the Hiba (gift) in respect of the suit land was complete and the Plaintiff is in possession of the same since then. He thus claims to be the absolute owner of the suit properties on or from 11.02.1988 as the donee having got those under the Hiba (Gift) made by Md. Siddique, the donor.

It is stated that the Defendant No.3 and 4 have got the properties by settlement at that mouja Champua and other Defendants did not get the properties at Champua and they do not posses the properties of Md. Siddique at Champua. Basing on the settlement by way of 'Hiba' (Gift), Md. Siddique, the Plaintiff and Defendant No.3 & 4 applied before the Tahasildar, Champua for mutation of the respective land. The Tahasildar initiated Misc. Case No.11 of 2017 under section 19(1) (C) of the Odisha Land Reforms Act (for short, 'OLR Act') and passed order for recording of the lands separately in the name of Plaintiff as well as Defendant No.3 and 4. Sometime, thereafter the Defendant No.1 and 2 had filed an application before the Tahasildar, to include their names as the heirs of Md. Siddique and cancel the RORs separately issued in favour of the Plaintiff as well as the Defendant No.4. The Tahasildar receiving such application reviewed and annulled his earlier order which is said to be void being contrary to the 'Hiba' (gift) made by Md. Siddique on 11.02.1988. The Defendant No.1 and 2 thereafter when threatened the Plaintiff to evict him from the suit land, the suit came to be filed.

4. The Defendant No.3 & 4 supported the case of the Plaintiff in their written statement.

The Defendant No.5 and 6 in their written statement besides raising many technical objections, have averred that Md. Siddique was the owner of the properties under Khata No.355 of Champua as also the other landed properties in village Jayantigarh in the district of West Singhbhum in the State of Jharkhand.

Their case is that Md. Siddique did not execute any Hiba (Gift) on 11.02.1988 nor he made the delivery of possession of the suit land in favour of the Plaintiff pursuant to that Hiba (gift). The Plaintiff and Defendant No.3 & 4 are said to have manufactured these documents by obtaining he signature of Md. Siddique and accordingly had applied for mutation which they had initially got done but later on cancelled being all such details, pointed out.

5. The Defendant No.1 & 2 in their written statement also stated that there was no such Hiba (gift) by Md. Siddique nor he had given the delivery of possession of the suit land. They stated that there has been no partition of the properties of Md. Siddique and all his properties in Champua as well as Jayantigarh are still joint although his legal heirs are possessing as per convenience. It is stated that the settlement of the family land by way of Hiba (Gift) is not known to Muslim Law and Muslim Law does not recognize the family settlement by way of Hiba (Gift). It is stated that the Plaintiff and Defendant No.3 & 4 had fraudulently suppressed the material facts and managed to obtain the record of right which was later on being rightly anulled. They questioned that the document (Ext.1) which is most relied upon by the Plaintiff and Defendant No.3 and 4 as not a Hibanama (Deed of Gift) and this not to be recognized and given effect to, as such.

6. On the above rival pleadings, the Trial Court framed as many as nine (9) issues. The most important issue concerning the acceptability of the claim of the Plaintiff that Md. Siddique had made the Hiba (Gift) and executed the Hibanama (Deed of Gift-Ext.1) had been answered by the Trial Court in favour of the Plaintiff upholding the Hiba (Gift), the Hibanama (Deed of Gift-Ext.1) made by Md. Siddique and it held the Plaintiff to be the owner in possession of the suit land being the done upon acceptance of the Hiba (Gift) at his end. Practically, all other findings accordingly flowed from there.

7. The aggrieved Defendant No.1(a) to 1(h), 2, 5 and 6 having carried an Appeal under section 96 of the Code, the First Appellate Court has arrived at a conclusion that Md. Siddique had not made any Hiba (Gift) of the suit land to the Plaintiff and the document which is said to be the Hibanama (Deed of Gift-Ext.1) is recognizable as such to be so accepted and given effect to. Thus the claim of the Plaintiff over the suit land to the exclusion of all others, founded upon that Hiba (Gift) of Md. Siddique as pleaded and the document proved in support i.e. Hibanama (Deed of Gift-Ext.1) has seen bulldozed from the arena of consideration. The Plaintiffs thus being non-suited by the First Appellate Court, is now before this Court in Second Appeal.

8. The Appeal has been admitted to answer the following substantial questions of law.

> "Whether the learned lower Appellate Court has erred in law by ignoring Hibanama which is admissible and proved as per Mahomedan Law?"

9. Mr. S. P. Mishra, learned Senior Counsel for the Appellant submitted that the First Appellate Court has completely gone wrong in refusing to accept he claim of the Plaintiff based on the Hiba (Gift) made by Md. Siddique and evidence of the execution of the document i.e. Hibanama (Deed of Gift) on 11.02.1988 which has been admitted in evidence and marked Ext.1. He submitted that the approach of the First Appellate Court in judging the real controversy as to whether the said document would be treated as Hibanama (Deed of Gift-Ext.1) or not is completely erroneous. It was submitted that one of the basis for the First Appellate Court to negate the Hiba (Gift) is the delayed application for mutation of the suit land on the strength of that Hiba (Gift) in carrying a reason therefrom that there was no delivery of possession which according to him, is wholly untenable and according to him, the other round rather sounds more probable and being in possession and enjoyment, there was no immediate necessity for mutation when there was also no threat/infringement to such right of the Plaintiff over the suit land and on the face of the evidence of P.W.2 as well as other contemporaneous documents which have been proved vide Ext.2 (amin report) and Ext.3 series (rent receipts). He further submitted that when execution of Hibanama (Deed of Gift) is not in dispute, as the Defendants have claimed that Hiba (Deed of Gift) was obtained by practicing fraud; the Defendants having failed to plead and prove all such details of fraud practised upon Md. Siddique (donor), the First Appellate Court ought not to have disturbed the decision rendered in the suit as the contesting Defendants have not been able to discharge the burden of proof of the above factual aspects lying on their shoulder. He further submitted that the document (Ext.1) reveals that there is an unequivocal declaration of the donor Md. Siddique in giving his properties to his children and when the parties are in possession of the respective properties on the basis of that Hiba (Gift) which also receive support from the evidence of the Plaintiff, P.W.1 and P.W.2 as well as the documentary evidence, the First Appellate Court is not right in ignoring that Hibanama (Deed of Gift) which is otherwise valid, admissible and proved in accordance with law.

10. Mr. S. Rath, learned Counsel for the Respondent No.1 submitted that the Trial Court having committed grave error by accepting the claim of the Plaintiff based on Hiba (Gift) and Hibanama (Ext.1), the First Appellate Court has very rightly set it at naught. He submitted that the document (Ext.1) which is said to be the Hibanama (Deed of Gift) executed by Md. Siddique even if accepted as such in entirety and said to have been executed by Md. Siddique, it cannot be termed as Hibanama (Deed of Gift) pursuant to the Hiba (Gift) intending thereunder to make Hiba (Gift) of his properties to his children. He submitted that the document (Ext.1)

can under no circumstance be construed as to be in support of Hiba (Gift) and, therefore, the claim of the Plaintiff over the suit property to the exclusion of all others founded upon that Hiba (Gift) has been very rightly repelled by the First Appellate Court. In support of the same, he has placed the document (Ext.1) in pointing out as to how the First Appellate Court has refused to accept it as a Hibanama (Deed of Gift) which according to his is correct.

11. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also gone through the rival pleadings placed by the learned Counsel for the parties in course of hearing.

12. As per Mahomedan Law, a Hiba or Gift is a transfer of property made immediately and without any exchange, by one person to another and accepted by or on behalf of the latter.

13. In the backdrop of above, the document proved by the Plaintiff in support of his claim of Hiba made by Md. Siddique in respect of the suit property in his favour stands for its construction, whether to be recognized in law and respected as such for being given effect to in accordance with that. It would be profitable therefore to reproduce the English version with that relevant clause in that so-called Hibanama (Ext.1) in Urdu which is as under:-

> "I. Md. Siddique son of late Haider Ali, am the resident of Jaintgarh, PS-Jagannathpur, Dist-Singhbhum, today on 11.02.1988, I am making partition of my landed properties amongst my sons and daughters in presence of the witnesses.
>
> 1. xx xx
>
> 2. xx xx
>
> 3. All cultivable land situated at mouza-Champua given to (1) Md. Yunus, (2) Md. Mustaque Ahmed and (3) Md. Yusuf. These cultivable lands at Champua are given on the condition that Md. Yusuf, Md. Mustaque Ahmed and Md. Yunus would give food and drink and clothes to me till death.
>
> xxxxxxx xxxxxxxx xxxxxx

14. The position of law is undisputed that Hiba (Gift) may be made orally or writing and the donor may declare the gift of any kind of property. In the instant case, in so far as the Plaintiff's claim/case is concerned; Clause-3 as above is involved. The very document at the beginning envisages the reason for bringing out this document by Md. Siddique. Even though, we accept for a moment that it was so done by him, it clearly appears to make division/distribution of all his properties i.e. the house sites and agricultural lands amongst his children. In fact that is the opening words of the document. So the very object set forth thereunder to be fulfilled under this document if we accept its due execution is to make division/distribution of the property amongst those who might have come to succeed to those properties in due course of time. Dividing the properties amongst the children cannot be equated to gifting away of the property to them in so far as the respective property allotted to them as per the said division.

That apart, in one transaction of Hiba (Gift), so many persons standing as the donees in my considered view is not only impermissible but also highly unbelievable and unworkable and then the controversy arising therefrom has to be judged separately and it may so happen that some may fall and some succeed and in that event to accept the transaction as one or more, one would fumble like anything. The document being read in entirety does not reveal that pursuant to the same, the property especially, the suit property had come to the hands of the Plaintiff exclusively and to the exclusion of others since there is no indication as to the delivery of possession of all those properties which is the mandate of Mahomedan Law law that the gift is complete only after the delivery of possession and it takes effect from the date of possession of the property delivered the done and not from that day on which the declaration was made. That apart, there is specification of the property given to the Plaintiff, Defendant No.3 and Defendant No.4 and it is written that all the three would get the property in question. That is the reason all the three had filed an application under Section 19(c)(e) of the OLR Act to amicably partition and record which conduct clearly negates the case of Gift by delivery of possession. Simply proving that the Plaintiff is in possession of the said property in view of the relationship between the parties, would not be enough to conclude that it was pursuant to the Hiba (Gift). It has to be specifically proved that pursuant to this Hiba (Gift) and execution of this Hibanama (Deed of Gift-Ext.1) by Md. Siddique as the donor, he had delivered the possession of the property in suit to the Plaintiff who physically possessed the property from that particular day, shunning his previous character as the son of the Donor but coming from that day as the donee to possess to the exclusion of all others as the absolute owner. Therefore, mere possession of the property in suit by the Plaintiff is of no significance without proof of the factum of delivery of physical possession by the donor to the donee; here by Md. Siddique to the Plaintiff. The Plaintiff has not proved any such contemporaneous document prepared shortly after the so called Hiba (Gift) made by Md. Siddique to come to a conclusion that said Hiba (Gift) of his suit property in his favour was immediately given effect to, and rather, it is seen that the Plaintiff and Defendant No.3 & 4 have woken up from slumber after more than 17 years in making a move for mutation when as per their claim of being got it by Hiba (Gift), they had all the opportunity to move for correction of the record on that very day and onwards. Thus this Court finds that the First Appellate Court has very rightly rectified the error both on facts and law committed by the Trial Court. Therefore, the decision rendered by the First Appellate Court in non-suiting the Plaintiff must receive the seal of approval.

15. The substantial questions of law being accordingly answered, it is held that this Appeal is liable to be dismissed.

16. Resultantly, the Appeal stands dismissed. There shall be however no order as to cost.

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2023 (III) ILR – CUT- 714

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

CRLA NOS. 231,218,257 & 258 OF 2018

KULU BHUYAN & ORS. .....Appellants

-V-

STATE OF ODISHA .....Respondent

(IN CRLA NO. 218 OF 2018)
MANOJ @ MUNA JENA -V- STATE OF ODISHA

(IN CRLA NO. 257 OF 2018)
PANCHANAN BEHERA & ANR. -V- STATE OF ODISHA

(IN CRLA NO. 258 OF 2018)
MANORANJAN BISOYI -V- STATE OF ODISHA

CRIMINAL TRIAL – The Trial Court convicted the Appellants for commission of offences U/Ss. 147/148/114/302/149 of the IPC – The credibility of the witness questioned – Although the P.W 10, 12 who have been projected as eye witness by the prosecution, but have not implicate the appellants in the occurrence – They simply stated that seven to eight persons came in motor cycle and assaulted the deceased – The owner of the tea stall (P.W.18) where the incident took place is also not implicating any of these accused persons to have played any role and committed the overt act against the deceased – Effect of – Held, the court is at a loss to follow the view taken by the Trial Court that the evidence of the I.O thoroughly corroborated the prosecution case – Hence appeals are allowed.

For Appellant : Mr. Asok Mohanty, Sr. Adv.
Mr. G.M. Rath, (In CRLA No.231 of 2018)
Mr.Gopal Krishna Nayak, (In CRLA No.218 of 2018)
Mr. Jyotirmaya Sahoo, (In CRLA No.257 & 258 of 2018)

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

JUDGMENT Date of Judgment: 19.10.2023

D.DASH, J.

Since in all these four appeals as at (A) to (D), the judgment of conviction and order of sentence passed by the learned Additional Sessions Judge, Bhanjanagar in S.T Case No.113 of 2013, arising out of G.R Case No.98 of 2012, corresponding to Bhanjanagar P.S. Case No.57 of 2012 of the Court of learned Sub Divisional Judicial Magistrate (SDJM), Bhanjanagar are under challenge; those were heard together for their disposal by this common judgment.

The above named nine (09) Appellants with eight (08) others stood charged for commission of offence under section 147/148/302/114/149 of the Indian Penal Code, 1860 (in short, 'the IPC'). The Trial Court in the said Trial while acquitting eight (08) others of the charges has convicted these Appellants (accused persons) for commission of offence under section 147/148/114/302/149 of the IPC and they have been sentenced as under:-

(a) rigorous Imprisonment for two (02) years each and pay fine of Rs.2000/- (Rupees Two Thousand) in default to undergo rigorous imprisonment for one Month each for the offence under section 147 of the IPC.

(b) rigorous Imprisonment for three (03) years each and pay fine of Rs.3,000/- (Rupees Three Thousand) each in default to undergo rigorous Imprisonment for three (03) months each for the offence under section 148 of the IPC; and

(c) imprisonment for life and to pay fine of Rs.5000/- in default to undergo rigorous Imprisonment for one (01) year for the offence under section 114/302/149 of the IPC.

with the stipulation that substantive sentences would run concurrently."

2. <u>Prosecution case:-</u>

On 16.02.2012 around 9.30 a.m., one Pramila Gouda, wife of Udayanath Gouda (Informant-P.W.1) presented a written report with the Inspector-in-Charge (IIC) of Bhanjanagar Police Station stating therein that in the morning hours, around 8 am, when her son Duti Krushna Gouda (deceased) had gone to Tulasipalli main road to take tea, at the relevant time, these accused persons and others in total numbering (22) twenty-two (as named in the relevant column in the Formal FIR) forming an unlawful assembly came from the side of Byaghradevi Rice Mill. They were then armed with swords, katis etc. It is further stated that they came in a group, surrounded Duti Krushna on the main road and went on inflicting injuries upon him by means of sword and kati. Receiving the injuries when Duti Krushna shouted for help, mother of Duti Krushna,Pramila (Informant-P.W.1) who was then in the nearby vegetable shop, hearing the shout of her son, rushed to the spot and requested these accused persons and others to refrain from assaulting her son. The accused persons, however, did not listen and continued to assault Duti Krushna. Duti Krushna having sustained several injuries on his person on account of such indiscriminate assault by deadly weapon was then lying on the ground and struggling for life.

The IIC, receiving the above noted written report from Pramila (Informant-P.W.1), treated the same as FIR and registering the case, took up investigation. Shortly thereafter, Duti Krushna expired. The Investigating Officer (I.O-P.W.21) then examined the informant (P.W.1) and other witnesses. He visited the spot and prepared the spot map. He also seized the blood found on the road under seizure list in presence of the witnesses. He then went to the hospital where Duti Krushna had been taken for treatment and died. The I.O (P.W.21) thereafter held inquest over the dead body of the deceased and prepared report to that effect. The dead body was

sent for post mortem examination by issuance of necessary requisition. On that day, accused persons namely Kulu Bhuyan, Manoranjan Bisoi, Rabi @ Rabindra Bisoi, Rabi @ Rabindra @ Akula Mallik, Panchanan Behera, Ananta Maharatha, Manoj @ Manoj Jena and Prabhakar Gouda were arrested. It is stated that those accused persons led the I.O. (P.W.21) and others in giving recovery of the weapons from the place where those had been kept. It is specifically stated that accused Prabhakar gave recovery of sword which was kept by the side of the rice mill. The weapon was recovered and was seized under seizure list by the I.O (P.W.21). It is further stated that accused Manoj Jena @ Muna then gave recovery of another sword which was kept by the side of a well situated near the rice mill and that too was seized. Accused Manoranjan is said to have given recovery of one sword from the northern side of the rice mill and accused Panchanan gave recovery of another sword from the western side of the rice mill. Since accused Manoj had sustained some bleeding injury on his chin, he was sent for treatment and medical examination. The above named accused persons were then forwarded in custody to Court. The wearing apparels of the deceased being produced by the Police constable, who was present at the time of Post Mortem Examination were seized under seizure list. Accused Basanta Pradhan was arrested by the I.O (P.W.21) on 19.02.2012 and he too was forwarded in custody to the Court. The weapons seized were sent by the I.O (P.W.21) to the Medical Officer to examine and opine as regards their user in causing the injuries found upon the deceased. The bed-head ticket of the deceased was seized and thereafter the I.O (P.W.21) seized the incriminating articles for their chemical examination through Court. As the I.O (P.W.21) could not apprehend few other accused persons namely, Sujit Bhuyan, Susanta Nayak, Sanjay Swain, Duti Krushna Swain, Sunil Swain, Sima Marath, Rana Naik, Dhunda Gouda and Nilamani Pradhan, he prayed before the Court in seisin of the case for issuance of NBWS.

3. On 13.06.2012, on completion of investigation, the I.O (P.W.21) submitted the Final Form placing in total nineteen (19) accused persons to face the Trial for commission of offence under section 147/148/114/302/ 149 of the IPC.

4. Learned S.D.J.M., Bhanjanagar, having received the Final Form as above took cognizance of the said offences and after observing the formalities committed the case as against the eighteen(18) accused persons to face the Trial before the Court of Sessions. Since one out of those 19 accused persons, namely, Ranka Nayak, s/o- Bhagaban Nayak could not be apprehended, his case was spilt up.

Thus, the case against eighteen (18) accused persons being committed to the court of Sessions, Trial commenced by framing charge against them for the said offences.

It be stated at this stage that at the towards the fag end of the trial one accused, namely, Ananta Maharatha having died, the case stood abated as against

him. So, finally, seventeen (17) accused persons faced the trial in the first round leaving the second round for that absconding accused, namely Ranka Nayak.

5. The prosecution, in course of trial, has examined in total twenty-three (23) witnesses. Out of them, the mother of Duti Krushna Gouda (deceased), who has lodged the F.I.R.(Ext.1) has been examined as P.W.1 and P.W.5, namely, Udayanath Gouda is the father of the deceased-Durikrushna. They have been projected as the eye-witnesses from the side of the prosecution.

P.W.2 is another eye-witness who says to have gone near the place of occurrence at the relevant time and so also P.W.7. P.W.3 is an after occurrence witness whereas P.W.4 is a witness to the inquest and so also P.W.6 is a witness to the seizure of incriminating materials by the Investigating Officer (P.W.21) at the spot and so also P.W.10, P.W.12, P.W.13, P.W.17 and P.W.18. The Doctor who had conducted the post mortem examination over the dead body of the deceased has been examined as P.W.9 and the Investigating Officer (I.O.) is (P.W.21).

6. Besides leading the evidence by examining the above witnesses, the prosecution has proved several documents which have been admitted in evidence and marked Ext.1 to Ext.21. Out of those, the important are the F.I.R. (Ext.1), inquest report (Ext.2), spot map (Ext.10) and Post Mortem Examination Report (Ext.4). The recorded statements of the accused persons, namely, Manoranjan Bisoi, Muna @ Manoj Jena, Pravakar Gouda and Panchanan Behera have been admitted in the evidence and marked Ext.12, Ext.13, Ext.14 and Ext.17. The report of the Chemical Examiner is Ext.22 whereas the Biological and Serological examination report is Ext.23.

7. The accused persons, in support of their defence and false implication on account of prior enmity, have examined seven witnesses as D.W.1 to D.W.7.

8. The Trial Court on going through the evidence of the prosecution witnesses and the relevant documents while acquitting eight (8) accused persons, namely, Basanta Pradhan, Susanta Nayak, Sanjay Swain, Duti Krushna Swain, Sunil Swain, Dillip Mallik, Sima Maharatha and Gunda Gouda of all the charges, has found the prosecution to have well proved the charges against these nine (9) accused persons, namely, Kulu Bhuyan, Sujit Bhuyan, Manoranjan Bisoi, Rabindra Bhuyan, Rabindra @ Akuli Mallik, Panchanan Behera, Muna @ Manoj Jena, Pravakar Gouda and Nilamani Pradhan (Appellants in all these Appeals as at (A) to (D).

9. Mr. Asok Mohanty, learned Senior Counsel for the Appellants in Criminal Appeal as at 'A' at the outset instead of raising any controversy as regards the nature of death of Duti Krushna Gouda to be homicidal, inviting out attention to the judgment passed by the Trial Court contended that the Trial Court has not at all undertaken the exercise of appreciation of evidence let in during the trial, which is its primary duty in finally saying whether those pass through the test of reliability and acceptability. He submitted that the Trial Court having simply reproduced the

depositions of all the witnesses including that of the I.O. (P.W.21) in its own language has finally concluded that the charges against these nine (9) accused persons have been established. He further submitted that in the entire judgment there has been no discussion of the evidence of the eye-witnesses and the infirmities contained therein as pointed out which in fact are glaring to come to a conclusion as to whether their versions are reliable to conclude that the prosecution has established the complicity of all these accused persons beyond reasonable doubt. He contended that when the Trial Court going through the evidence of the prosecution witnesses has disbelieved the prosecution case insofar as eight (8) accused persons are concerned, the conclusion arrived at to the complicity of these nine (9) accused persons stood proved through their version is without any reason/s.

Placing the deposition of P.W.1, who is the Informant and has lodged the F.I.R. (Ext.1), who happens to be the mother of the deceased, he submitted that her presence at the spot at the relevant time cannot to be believed when the F.I.R. version as well as the evidence of her husband (P.W.5) are gone through with the evidence of other prosecution witnesses who have been projected as the eye-witnesses to the occurrence. He submitted that here prosecution witnesses coming forward to say about the complicity of these accused persons are highly interested as they were the members of the rival group of these accused persons and when for such rivalry earlier criminal cases had been instituted. He, therefore, urged for strict scrutiny of their evidence as according to him the tendency always has remained to roping as many persons as possible which can be seen on comparison of the F.I.R. and Final Form.

It was submitted that when P.W.1 says to have gone to the spot to purchase vegetable, her presence is to be doubted in view of the evidence of P.W.10, P.W.17, P.W.18 and P.W.22 and more so when P.W. 1 neither in the F.I.R. nor in her statement has indicated about the presence of P.W.5 at the relevant time at the spot, P.W.5 has, however, stated to have gone with P.W.1 near the place where the assault upon their son was going on. He then placing the depositions of all other witnesses finally contended that in this case there being no consistency in the evidence of all these witnesses as to the involvement of these accused persons, the Trial Court has gone completely wrong in concluding that the prosecution has established the charges against these accused persons beyond reasonable doubt.

Learned counsel for the Appellants (accused persons) of other three Appeals as at (B) to (D) have repeated the submission of the learned Senior Counsel, Mr. Mohanty in further pointing out the discrepancies in the evidence of those prosecution witnesses who are said to be the eye-witnesses to the occurrence, which would be discussed later. They submitted that when some of the Appellants like Manoj @ Muna have not been named by the P.Ws and there is also no positive finding that they did any overt act, the Trial Court without even coming to conclude that they were present there in prosecution of the common object of the unlawful assembly in holding them guilty all the charges.

10. Mr. P.K. Mohanty, learned Additional Standing Counsel while supporting the finding of guilt against these accused persons as has been held by the Trial Court submitted that the evidence of the mother and father of the deceased (P.W.1 and P.W.5) when receive corroboration from the evidence of other witnesses, merely because, P.W.5 has not stated about the presence of P.W.1 and so also P.W.1 has not stated about the presence of P.W.5; the prosecution case in view of evidence of other witnesses cannot be doubted. According to him, the Trial Court on detail discussion of evidence on record has rightly held these accused persons to have committed the murder of Duti Krushna by causing several injuries by means of deadly weapons all over his body leading to his death.

11. Keeping in view the submissions made, we have carefully read the impugned judgment of conviction. We have also extensively travelled through the depositions of the witnesses (P.W.1 to P.W.23) examined from the side of the prosecution as well as those of D.W.1 to D.W.7 and have perused the documents admitted in evidence and marked Ext.1 to Ext.23 from the side of the prosecution.

12. Although the Trial Court has not recorded any finding with regard to the nature of death of the deceased to be homicidal, which was/is not under challenge, we find the same from evidence of the Doctor (P.W.8) with the evidence of I.O. (P.W.21) and their reports as well as the evidence of other witnesses who had seen the deceased with several injuries on his persons. The Doctor (P.W.8) in his evidence has stated that the deceased had received several incised wounds all over his body and those injuries were ante mortem in nature and the death was on account of the injury to the brain as well as the cut injuries all over the body causing hamerohhage and shock leading to death. Practically, there is even no attempt to impeach the evidence of P.W.8. The I.O. (P.W.21) has also noted all such injuries in his inquest report (Ext.2.) Besides the above, we find the evidence of P.W.1, P.W.5 and other witnesses who had seen the deceased with such injuries all over his body. In view of the above evidence on record, we conclude that the death of Duti Krushna was homicidal in nature.

13. In order to address the rival submission, in judging the sustainability of the finding of guilt against these accused persons as has been returned by the Trial Court, we are called upon to undertake the exercise of scrutiny of the evidence of the prosecution witnesses in appreciating their version in a just and proper manner.

14. The mother of the deceased who has been examined in the Trial as P.W.1 is the Informant and she had lodged the F.I.R. (Ext.1) which has set the criminal law into motion. Admittedly, she has not written this F.I.R. (Ext.1) in her own hand. It is stated that the F.I.R. (Ext.1) was scribed at the Police Station when she went to the Police Station after her son was taken from the spot to the Hospital. However, she having said during her examination-in-chief that she did not know as to who wrote out that F.I.R. (Ext.1), it is not said that the F.I.R. version is not her as then told. Be that as it may, we find in her evidence that she having specifically named accused

Kulu Bhuyan, Sujit Bhuyan, Manoranjan Bisoi, Akuli Mallik and Ananta Maharatha (dead), has not named other thirteen (13) accused persons who too were facing the Trial, even though she has said to have known all those accused persons, i.e., eighteen (18) then present in the dock as they are the co-villagers. Interestingly, we find that in the F.I.R., twenty-two (22) persons have been implicated to be the assailants of Duti Krushna. One name, i.e., the name of accused Manoranjan Bisoi has been written twice and, accordingly, the case stood registered against twenty-two accused persons. It has been specifically mentined in the F.I.R. that all those twenty-two accused persons forming an unholy combination came running from a Rice Mill holding sword, kati etc. and went on indiscriminately causing injuries upon Duti Krushna.

On completion of investigation, the I.O. (P.W.21) has, however, found no material to be available to implicate persons like Sabita Bhuyan w/o. accused Sujit, Bandita Bisoi w/o- accused Manoranjan, Sunita Swain and w/o- Biswanath. This it appears that this P.W.1 during Trial having implicated Kulu, Sujit, Manoranjan, Akuli and Ananta (dead) in total five (5) has not implicated any other accused persons facing the Trial by their name. It would be clearly evident from her deposition that when she states that others; she, however, does not state the other accused persons in the dock. But then she has improved her version in saying that other accused persons were also armed with sword and kati at that time and then all accused persons entered inside that Rice Mill. At the same time, she is not stating as to who are those other accused persons who were holding the sword and kati but not assaulting. This witness, however, has admitted that her sons were accused persons in the murder case initiated for the death of one Dandapani Bisoi who happens to be the father of accused, Manoranjan and father in-law of one of the F.I.R. named accused, i.e., Banita who has been exonerated in the Final Form submitted on completion of investigation.

15. In the F.I.R. (Ext.1) it has been mentioned that P.W.1 (Informant) heard the cry of her son when she was purchasing vegetables from a shop which was near about the tea stall where the incident took place where her son Duti Krushna was taking tea. She has further averred in the F.I.R. that immediately hearing the cry she having rushed to the spot, requested the assailants not to assault her son, which was not listened to. Though nowhere it been stated that at any point of time during the occurrence her husband P.W.5 had gone to that place, nonetheless her husband (P.W.5) has stated that at the relevant time he was going from his house for morning walk and saw the accused persons, which he means twenty-two (22) as would reveal from his prior sentence of his deposition recorded during Trial to be assaulting her son Duti Krushna @ Lulu. He has further stated that at that time, his wife (P.W.1) had gone to the local market to purchase vegetable and seeing the assault on their son, he with his wife (P.W.1) shouted for help from both the side. Thus when P.W.1 is totally silent with regard to the arrival or presence or shouting of her husband (P.W.5), P.W.5's statement stands that he had very much seen the incident and he

with his wife (P.W.1) had shouted for help seeing the assault on their son. Moreover, when P.W.1 is implicating five (5) accused persons by name, P.W.5 has implicated twenty-two (22) accused persons whereas out of the said twenty-two (22) as named in the F.I.R. actually there were twenty-one who had been implicated and the Trial was going on against eighteen (18) leaving only one (1) who absconded. Be that as it may, this P.W.5 is not naming anyone. But it has been stated by him that on that day, seventeen (17) accused persons were in the dock and he further states to have found those accused persons being armed with sword and kati were assaulting her son when he does not state that other one not present in dock on that day or about the absconding accused.

16. Another feature appears on going through the evidence of P.W.1 and P.W.5 which tells upon their credibility and affect ultimately the reliability. It has been stated by P.W.1 that after the incident her son was taken to the Hospital and died on the way and thereafter, she came to the police station. She does not state that she too had accompanied her son to the Hospital or that her husband (P.W.5) had gone. But P.W.5 states that he shifted his son to the Hospital. The evidence of P.W.5 as regards the presence of P.W.1 at the spot at the relevant time was not there in his previous statement before Police during investigation. The attention of P.W.5 to such omission in his previous statement being drawn that has been proved through the I.O. (P.W.21).

P.W.7 the other eye-witness does not state that P.W.1 and P.W.5 had also accompanied their son to the Hospital when he states that he with others shifted deceased-Lalu to the Hospital and that is also the version of P.W.10 who P.W.10 does not also state that P.W.1 and P.W.5 had accompanied Lalu to the Hospital although he states the name of others who had accompanied him in shifting Lalu to the Hospital. The version of P.W.14 is also not on the score that P.W.1 and P.W.5 had accompanied Lalu to the hospital from the spot and that is also the state of affair in the evidence of P.W.17 and P.W.18.

17. The witness of P.W.2 who has come to the witness box as an eye-witness is also not stating that P.W.1 and P.W.5 had accompanied Lalu to the Hospital. His evidence is also not to the effect that P.W.1 and P.W.5 were present near the spot and had rushed to the place where their son was being assaulted. It is his evidence that accused Kulu and his supports, i.e., accused Manoranjan Bisoi, Sujit Bhuyan, Nilamani Pradhan, Rabindra Mallik, Rabi Bhuyan and other accused persons (in total eighteen) arrived there and first accused Kulu after abusing the deceased Lalu gave a sword blow whereafter other accused persons assaulted Lalu. This witness P.W.2 in his previous statement before the Police has, however, not stated that accused Kulu first gave a sword blow on the back of deceased Lalu, which has been proved through the I.O. (P.W.21) after drawal of the attention of P.W.2 to such omission which in our view in the facts and circumstances cannot be brushed aside saying to be a minor one as it is the first overt act by one amongst the whole lot.

18. When such is the state of affair in the evidence of the prosecution witnesses, i.e., P.W.1, P.W.2 and P.W.5 being projected as the eye-witnesses to the occurrence, the evidence of other eye-witness P.W.7 is now required to be touched upon. He is a chance witness like P.W.2 who has stated that at the relevant time he was standing in front of saloon waiting for his turn to come for hair cutting. He has further stated that during that period accused Kulu with accused Sujit, Manu, Akuli, Rabi and others came in a group. His specific evidence is that it was only accused Kulu and Sujit were armed with kati and then accused Kulu assaulted Lalu by means of kati and seeing the accused persons when Lalu tried to escape, accused Sujit dealt a kati blow for which deceased Lalu fell down and thereafter accused Manu dealt another kati blow on Lalu and accused Akuli and Rabi followed the same path. During cross-examination, however, it has been brought out that this P.W.7 had not stated in his earlier statement before the I.O. (P.W.21) during investigation about these important facets. The attention of this witness to his previous statement has been drawn which he has replied as under:-

> "it is not a fact that I had not stated to police that the accused Kulu Bhuyan, Sujit Bhuyan, Rabi Bhuyan, Akuli Mallik, Manu Bisoi were armed with katies and that they came in a group and assaulted Lalu in the manner which I had stated in my examination-in-chief with the intention to kill him. It is not a fact that whatever I have stated in my examination-in-chief were not stated by me before the police when my statement was recorded under section 161, Cr.P.C."

That has been proved through the I.O. (P.W.21) who has deposed as follows:-

> "P.W.7 Abhimanyu Nayak had not stated before me specifically that the accused Kullu Bhuyan assaulted the deceased Lalu by means of a kati and that Lalu restrained the kati blow with his nads and that Lalu sustained injuries on his hands. P.W.7 had also not stated before me that Sujit Bhuyan assaulted Lalu while standing behind Kulu Bhuyan, and that Akuli assaulted Lalu. He had also not stated before me that the accused Rabi Bhuyan had assaulted Lalu Gouda."

The omission as aforesaid on the vital aspect and on such important fact as to the complicity of the accused persons touches upon the credibility of the evidence of the evidence of P.W.7. Therefore, what P.W.7 as stated during Trial without being corroborated by other evidence would not be safe to be relied upon.

19. Furthermore, we find from the evidence of P.W.10 that he having been projected by the prosecution as an eye-witness, is not implicating anyone in the occurrence. He simply states that seven to eight persons came in motor cycle and they assaulted the deceased. He does not implicate any one of these accused persons when P.W.12 projected as an eye witness has stated that accused Kulu Bhuyan and his supporters, the other accused pesons came in a group and assaulted Lalu by deadly weapons, we find that such was not his statement before the I.O. (P.W.21) during investigation which has also been proved through I.O. (P.W.21) after attention of P.W.12 has been drawn that he had not stated to have seen the actual

assault upon Lalu. Keeping in view the material contradiction, his evidence cannot be said to be providing any corroboration to the evidence of witnesses as earlier discussed. The other projected eye-witness-P.W.13 has also turned hostile and during cross-examination by the prosecution with the permission of the Court, we find no such material to have been elicited except to show that he had stated about the incident in his statement before the I.O. (P.W.21) during investigation. The owner of the tea stall (P.W.18) where the incident took place is then not implicating any of these accused persons to have played any role and committed the overt act as against Lalu. His positive evidence is that seven to eight persons came in three motor cycles and they assaulted the deceased-Lalu. This witness (P.W.18) is found to have not even been declared hostile by the prosecution and cross-examined so as to present before the Court that he was suppressing the truth.

With the above state of affair in the evidence of the important prosecution witnesses as discussed in detail, we are at a loss to follow the view taken by the Trial Court that the evidence of the I.O. (P.W.21) thoroughly corroborated the prosecution case.

20. In the result, the Appeals are allowed. The judgment of conviction and order of sentence dated 7th March, 2018 passed by the learned Additional Sessions Judge, Bhanjanagar in Sessions Trial No.113 of 2013 are hereby set aside.

Since the Appellants in CRLA No.231 of 2018, namely, Kulu Bhuyan, Sujit Bhuyan @ Sujit Kumar Bhuyan, Rabindra @ Rabindra Bhuyan, Rabindra @ Akula Mallik, Nilamani Pradhan, the Appellant in CRLA No.218 of 2018, namely, Manoj @ Muna Jena and the Appellant in CRLA No.258 of 2018, namely, Manoranjan Bisoi, are in jail custody, they be set at liberty forthwith, if their detention is not warranted in connection with any other case.

As the Appellants in CRLA No.257 of 2018, namely, Panchanan Behera and Pravakar Gouda are on bail; their bail bonds shall stand discharged.

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2023 (III) ILR – CUT- 723

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

JCRLA NO. 34 OF 2005

SANGADI SANIA …..…..Appellant

-V-

STATE OF ODISHA …..…..Respondent

(A) CRIMINAL TRIAL – The appellant convicted under the offence of 302 of the IPC – As per the FIR and evidence of P.W.2 there was no premeditation on the part of the appellant – The nature of weapon used has not been proved before the Trial Court in proper perspective – The prosecution did not attempt to prove the link between the accused and the use of suggested weapon of offence – The motives like revenge, greed, jealousy or suspicion are absent in the present case – Whether the appellant can be acquitted U/s. 302 of IPC? – Held, Yes – But would be liable to be convicted U/s. 304 part 1 of IPC. (Paras 19-22)

(B) CRIMINAL TRIAL – Evidence of an eyewitness – Principles for appreciation of such evidence enumerated. (Para 16)

Case Laws Relied on and Referred to :-

1. 2022 SCC OnLine 1424 : State through the Inspector of Police Vs. Laly @ Manikandan & Anr.
2. 2022 SCC OnLine SC 883 : Shahaja @ Shahajan Ismail Mohd. Shaikh Vs. State of Maharashtra.
3. (2022) 9 SCC 766 : Ajmal Vs. State of Kerala.
4. (2021) 10 SCC 706 : (2022) 1 SCC (Cri) 116 : Mohd. Rafiq Vs. State of M.P.
5. (1976) 4 SCC 382 : 1976 SCC (Cri) 659 : A.P. Vs. Rayavarapu Punnayya.
6. (2006) 11 SCC 444 : (2007) 1 SCC (Cri) 500 : Pulicherla Nagaraju Vs. State of A.P.
7. 2020 SCC OnLine SC 1323 : Tarandas Satnami (In Jail) and another Vs. State of Chhatisgarh.

For Appellant : Mr. Ambika Prasad Mishra

For Respondent : Mr. Prem Pattanaik, AGA

JUDGMENT Date of Hearing: 11.05.2023 : Date of Judgment : 02.08.2023

M. S .SAHOO, J.

The appellant, in the present Jail Criminal Appeal, Sangadi Sania, is aggrieved by the judgment dated 3.4.2003 passed by the learned Adhoc Addl. Sessions Judge, Jeypore for finding him guilty of committing offence punishable U/s.302 of the Indian Penal Code,1860 (in short 'IPC'), sentencing him to imprisonment for life and to pay a fine of Rs.1,000/- (Rupees One thousand) or in default of payment to undergo further rigorous imprisonment for three months after completion of Criminal Trial No.44 of 2012, arising out of G.R. Case No.451/2000, corresponding to Pottangi P.S. Case No.32 of 2000 committed by the learned S.D.J.M., Koraput.

Factual Matrix

2. The appellant was the sole accused facing trial before the learned Sessions Court. The incident alleged, occurred on 21.07.2000 at about 8.00 P.M. in village *Sishaguda* within the jurisdiction of *Potttangi* Police Station in the district of

Koraput. The first information report (FIR for short) was lodged at about 9.00 P.M. on 21.07.2000 in the concerned Police Station after which the P.S. Case No. 32 of 2000 was registered by the Officer-in-charge.

2.1. The FIR was orally stated before the Officer-in-charge of the Police Station who reduced the oral statement into writing in Oriya. The informant-Gumurabali Syama (P.W.4) put his thumb impression after the contents of the F.I.R. was explained and read over to him. Translated to English the F.I.R. narrates as follows :

> "*I, Gumurabali Syama, son of late Gumurabali Mulia, aged about 27 years, resident of village Sishaguda, P.S. Pottangi. Dist.Koraput today on 21.07.2000, 9.00 P.M. along with my co-villager Majhi Balu having come to the Police Station, lodge the F.I.R. orally that younger brother of Songadi Sonia has married my younger sister. Earlier my brother Gumurabali Sukra had altercation (madagola) with Sonagadi Sania. Today i.e. 21.7.2000 Friday at about 8.00 P.M. in the evening my brother Sukra after having his food was at home. At that time Songadi Sania went and called my brother as "Samudhi". Sukra listening to the call came out of house. After Sukra came out of house Sania without any further talk, stabbed Sukra with knife three to four times. My brother Sukra shouted Pesi Sania stabbed with knife. Me and Majhi Balu listening his call came out. While trying to hold Sukra, he felled down, intestine came out, he died at the said spot. Sania went away and hid him somewhere. Hearing the shout, persons from our Sahi came and saw that my brother in front of his house, where he was stabbed, was lying dead. He had bleeding injuries at chest and stomach. His intestines came out. The writing has been made as per my statement which was heard by me read by the Babu. The same being correct, I put my thumb impression.*

3. We heard the detailed arguments of Mr.Ambika Prasad Mishra, learned Legal Aid counsel for the appellant and Mr. Prem Pattanaik, then functioning as a learned Additional Government Advocate for the State.

Learned counsel for the appellant as well as learned Additional Government Advocate for the State have filed their written argument after exchanging copies thereof.

Prosecution Case

4. In the trial Prosecution alleged that the accused Sangadi Sania and deceased Gumuraballi Sukra had prior enmity. On 21.07.2000 at 8.00 P.M. in the night, while the deceased and his wife were in their house, the accused came there and called the deceased by saying "Samudhi- Samudhi" and when the deceased came out of the house being followed by his wife, the accused all on a sudden dealt stab blows by a knife on the chest and belly region of the deceased and fled away from the spot. The deceased cried/shouted, as a result of which, the neigbours P.Ws.3 and 4 rushed near him but the deceased immediately fell down on the ground and died at the spot.

4.1 As per the narrative of the prosecution P.Ws.3-Majhi Bulu and P.W.4-Gumurabali Syama (informant) were the neighbours who immediately came to the spot hearing cries of the deceased. P.W.5-Gumurabali Sashi is the son of the

deceased. P.Ws.6 & 7 are independent witnesses. P.W.8 : a police constable is the seizure witness. P.W.9 is the Investigating Officer. P.W.1 is the Medical Officer who conducted post-mortem examination.

4.2 As per statement of P.W.9, Officer-in-charge, while working at Pottangi Police Station he received oral report from P.W.4, reduced it into writing. The I.O. had made inquest and sent the dead body for post-mortem examination, seized blood stained earth and sample earth from the spot and prepared the spot map. On the next day of the incident i.e. on 22.07.2000. The I.O. arrested the accused, seized the wearing apparels of the accused on 23.07.2000. According to the I.O., he had recovered the blood stained knife from a bush nearby the Anganabadi centre of the village. Subsequently he sent the knife, the wearing apparels of the accused, the wearing apparels of the deceased and the sample earth and blood stained earth for chemical examination.

5. Learned trial court has relied upon evidence of P.Ws.2 to 5 and P.W.1 to hold the appellant guilty. Wife of the deceased P.W.2 has been treated to be the eye witnesses to the occurrence.

6. The defence did not examine any witness.

Appellant's contentions

7. It is submitted by the learned counsel for the appellant that the evidence adduced by P.W.2 is contradictory to the statement made by P.Ws.3, 4 and 5. It is the specific statement of P.W.2 in her examination in chief that "*My husband came out of the house, followed by me*". In her cross-examination, she has deposed to the suggestion "*It is not a fact that I had not stated to the I.O. that I came to outside following my husband*." However, on confrontation to the I.O. (P.W.9), the I.O has clearly stated "P.W.2 did not state before me that she followed her husband-the deceased to outside." Therefore, for the first time, P.W.2 has stated before the trial court about her presence at the spot. However, the learned trial court has placed much reliance on the said evidence. P.W.4 (Informant) has stated in his examination in chief that "*The wife of the deceased told there that Sania stabbed her husband*". In his cross-examination, he has stated that he has informed the I.O. (P.W.9) while lodging report. However, the F.I.R. is silent about it. Nevertheless, the I.O.(P.W.9) in his cross-examination has stated that "In the F.I.R. the informant has not mentioned that he heard from the wife of the deceased that Sania stabbed her husband." There is apparent contradiction in the deposition of P.W.3 and P.W.4, who were admittedly post occurrence witnesses. The statement of P.W.5, who is the son of the deceased also creates doubt in the veracity of the evidence adduced by P.W.2. P.W.5 has stated in his cross-examination that "*My mother came and called me and thereafter I went to the spot*." Nevertheless, it was a dark night as stated by the informant (P.W.4) in his cross-examination and there was no electricity. Therefore,in face of so many contradictions in the statement of witnesses, a conclusion cannot be definitely arrived at that the appellant is the author of the crime.

7.1 It is further submitted by the learned counsel for the appellant that the I.O.(P.W.9) has recovered the alleged weapon of offence, which is a folding knife, 7" long in total, having 3" edge and 4" handle; (as reveals from the details of properties seized at Column-12 of the Final Report) from a bush nearby the Anganbadi centre on 23.07.2000. Accordingly, the I.O. had prepared seizure list (Ext.11) which was signed by two witnesses, i.e. Pujari Mukunda and Gajibali Uma Moheswar Rao. However, the above witnesses were not examined by the prosecution during trial to substantiate the recovery of the weapon of offence (M.O.1). The M.O.I was sent to the Regional Forensic Science Laboratory (R.F.S.L.), Berhampur for chemical examination. The chemical examination report (Ext.13) does not reveal presence of blood in the knife. Neither any procedure was followed during recovery of M.O.1 nor the witnesses to Exhibit-11 were examined by the prosecution, which casts doubt in the veracity of the prosecution allegation against the appellant.

7.2 It is further contended by the learned counsel for the appellant that the P.W.1 is the doctor, who had conducted post mortem on the deceased and found 5 numbers of the injures on his persons. In his deposition in chief, he has stated that injury No.4 and 5 can individually cause death in the ordinary course of nature. Although MO-1(knife) was produced before him, yet, in the cross-examination, he has deposed that "My report does not reveal blood stains in the knife", which also casts doubt with regard to the weapon of offence, as alleged by the prosecution since in the chemical examination report (Ext.13) no opinion was given with regard to presence of blood.

7.3 It is further contended by the learned counsel that all the prosecution witnesses from P.W.2 to P.W.5 are the immediate relatives of the deceased and due to the fact that the deceased was taken to custody for assaulting the appellant some times before, he has been falsely implicated in this case by these interested witnesses.

Submissions on behalf of State-Respondents

8. Per contra the learned Additional Government Advocate supported the judgment by submitting that learned trial court has taken relevant evidence on record into consideration and the prosecution has proved the case beyond all reasonable doubts.

Analysis

9. The learned trial court has dealt with the requirement of proving charge under Section 302 IPC in paragraph-4 of the judgment which is quoted herein :

> *"To substantiate the charge, the prosecution has examined nine witnesses, out of whom P.W.1 is the Medical Officer, who had conducted the post-mortem examination, P.W.2 is the wife of the deceased, P.Ws.3 & 4 are the neighbours, who immediately came to the spot, hearing the cry of the deceased, P.W.5 is the son of the deceased, .W.6 & 7 are*

independent seizure witnesses, P.W.8-a police constable is also a seizure witness, and P.W.9 is the I.O. The accused has not examined any defence witness.

Brief Narration of important witnesses

10. The statement of P.W.2 that has been relied upon by the learned trial court is reproduced herein for reference :

"*The deceased is my husband. I know the accused. The occurrence took place about three years back on a Friday at about 8.00 P.M. in the night. I was inside my house along with my husband. At that time the accused came to our house and called my husband 'Samundhi-Samundhi'. My husband came out of the house, followed by me. Then the accused stabbed my husband on his chest, belly, thigh etc. by means of a knife and fled away from the spot. My husband cried 'Pessi Saia (P.W.4), Busi Dela-Bogi Asso'. Hearing the shout of my husband Syama and Bolu (P.W.3) came to the spot. My husband fell down at the spot and died. Due to the stab blow in the belly the intestine had came out M.O.1 is the knife used by the accused to stab my husband."*

P.W.2 in his cross-examination has stated there is only one room in our house. Houses of Patu Miluku, Batu Damana, Batu Jambada and Singudi Langu situate near our house. There is no electricity nearby the spot of occurrence. Ours is Sundhi Sahi. The houses of Syama and Bolu is at a distance of 25 to 30 ft from my house. It is not a fact that I had not stated to the I.O. that I came to outside following my husband.

The version of P.W.2 has been treated to be eyewitness account by the learned trial court to convict the appellant.

10.1 The evidence of P.W.3 relied upon by the learned trial court is reproduced herein :

"I know the accused. I also know the deceased. My house is very close to the house of the deceased having a common court-yard. The occurrence took place on a Friday about two years and 6 months back, at about 8.00 P.M. in the night. By then I was in my house. Hearing the cry of deceased Sukra 'Pesi Sania Churire Busi Deba-Asore Bulu'. I came running to that spot. Syama also came running there. His house is also near my house. I caught hold of the injured but he fell down and died. There was heavy bleeding from the injures on his chest belly. The intestine had come out. Syama went in search of the accused. Thereafter myself and Syama went to Pottangi P.S. and orally reported the incident to the police officer, which was reduced to writing."

P.W.3 in his cross-examination has stated the earlier case against the accused for assaulting him had been compromised. He has stated :

"*It is a fact that I had not stated to the I.O. that before two months of the incident the accused had been released from jail. I am of Tala Sahi. The house of Sukra is in Sundhi Sahi. Due to demarcation by the road there is Tala Sahi and Gundhi Sahi. There was no electric light in the house of the deceased. The house of the accused is in a different Sahi. In our house, my parents and my three children are residing. My house adjoins the house of Syama. The house of Batu Milku, Batu Jhabada and Singuda Lengu are near the house of the deceased. There are two salap trees in front of the house of the*

deceased. In Syama's house his wife and one child are residing. We saw the accused while he was fleeing away from a distance of 10' from us. I cannot say the wearing apparels of the accused or myself or Shyama at the relevant time. Two police came to the spot in the very night after I lodged report. I cannot say the details of the F.I.R. scribed by the police. The deceased is the cousin elder brother of my father. The other neighbours did not come to the spot immediately. It is not a fact that by the time of my arrival Sukra had already died. I did not see the accused giving the actual stab blow. It is not a fact that Syama did not chase the accused to trace out him. It is not a fact that I have not stated to the I.O. that Syama chased the accused to catch him. It is not a fact that the accused did not stab the deceased.

10.2 The evidence of P.W.4 relied upon by the learned trial court is reproduced herein :

"I know the accused and the deceased. About three years back on a Friday at about 8.00 PM. In the night, I was at my house. Sukra raised halla 'Sania Busila-Sania Busila'. Then I rushed near his house. Balu had first arrived there and thereafter I arrived. The wife of the deceased told there that Saia stabbed her husband. I went in search of the accused but could not get him. Then myself and Bolu went to the police station to report. I put my L.T.I in the report scribed by the police."

P.W.4 in cross-examination has stated the following :

"*I cannot say after how much time of the arrival of Balu I arrived at the spot. By the time of my arrival Sukra was already dead. There is no electric connection to my house or Balu's house. It was dark night. I have only heard the deceased crying 'Mari Galli'."*

10.3 Statement of P.W.5 relied upon by the prosecution which is quoted herein :

"I know the accused. Deceased is my father. The occurrence took place on a Friday at about 8.00 P.M. about three years back. I was in my house. I heard my father crying 'Pesi Sania Busi Dela'. Hearing this I came to outside and found that the accused was going away from the spot. My mother was catching hold of my father. Bolu and Syama (P.Ws.3 and 4 also came there). My father had bleeding injuries and he died at the spot."

In cross-examination P.W.5 has stated the following :

"*My mother came and called me and thereafter I went to the spot. There is no electricity nearby our houses. The witness volunteers-There was moon light. After my arrival, Syama and Balu came there."*

11. The evidence of the Investigating Officer P.W.9 discloses that he was the officer in charge of the Pottangi Police Station when the matter was reported i.e. on 21.7.2000, he reduced the oral statement into writing, conducted investigation, registered the P.S. Case. He proved the contents of the following exhibits and his signature on these exhibits : F.I.R. (Ext.7), The Inquest Report (Ext.4), Deadbody Challan (Ext.8), Seizure list (Ext.9), Spot Map (Ext.10). He has stated to have arrested accused on 23.7.2000. Forwarded him to court. He has not specifically stated regarding when he seized the weapon of offence, but has stated that the weapon of offence, knife was sent to the Medical Officer with a query (Ext.3/2

containing his signature Ext.3/3). He has further stated that the seized articles were sent to the Regional Forensic Science Laboratory, Berhampur through the S.D.J.M., Koraput under his forwarding letter Ext.12. The I.O. also proved the Chemical Examination Report (Ext.13). The knife was marked as M.O.I. In his cross-examination the I.O. has stated that I have not sealed M.O.I at the time of sending it to the Medical Officer, for his opinion. P.W.2 did not state before me that she followed her husband-the deceased to outside. P.W.3 has not stated before me that he chased the accused but stated that he searched for the accused with a torch light. In the F.I.R. the informant has not mentioned that he heard from the wife of the deceased that Sania stabbed her husband. P.W.4 had not stated before me that her mother was holding her father. I.O. has stated he has not mentioned in the case diary whether it was moonlit night or dark night. Knife like M.O.I is commonly available in the market.

12. This Court notes that the autopsy surgeon, P.W.1 proved the post-mortem report regarding provision of the knife stated to be the weapon of offence and in his cross-examination he has stated as follows :

> "*I have not mentioned in the report as to who produced the knife before me. In the P.M. report I have not mentioned that the injuries was sufficient to cause death in ordinary course of nature. I have not mentioned that injury no.4 and 5 or any of the injury were sufficient to cause death in the ordinary course of nature. I did not notice blood stained on the nail clippings of the accused. I have not taken the signature of the accused in Ext.2. My report does not reveal blood stains in the knife. The knife was examined in presence of L/C 118 B.N. Dhalasmanta, but I have not taken his signature in the report Ext.3.*

Regarding the further steps taken by the autopsy surgeon, he in his cross examination has stated thus :

> "*I have not drawn the blood group of the accused. I have not mentioned in the post-mortem report about the nature of the injuries whether those were simple or grievous because incised wounds are grievous in nature"*

13. The chemical-examination report, which has been marked as Ext.13 reveals that only on the wearing apparels of the deceased, human blood of 'O' group was detected, no blood stain could be detected in the knife as it had deteriorated and similarly in the full shirt of the accused, human blood was detected but no grouping could be made as it had deteriorated.

Brief Narration of important M.O. produced

14. From the chemical examination report Ext.13 it is apparent that the wearing apparel of the accused Exts. D & F were found not to contain any blood stain. The knife marked as E by the Chemical Examiner. No opinion was expressed regarding origin, group marks and regarding stain on the knife. The nail clippings of the accused marked as F by the chemical examiner were found by the chemical examiner not to contain any blood.

Case law relied upon by the learned State Counsel

15. Since the learned trial court has given no finding as to whether the recovered weapon was used for committing the crime though it was produced as M.O.I., the learned Counsel for the State has relied on the judgment rendered by the Hon'ble Supreme Court in ***State through the Inspector of Police v. Laly @ Manikandan & another Etc. : 2022 SCC OnLine 1424.*** Paragraph-7 of the said judgment is reproduced herein :

> *"7. The submission on behalf of the accused that as the original informant – Mahendran has not been examined and that the other independent witnesses have not been examined and that the recovery of the weapon has not been proved and that there is a serious doubt about the timing and place of the incident, the accused are to be acquitted cannot be accepted. Merely because the original complainant is not examined cannot be a ground to discard the deposition of PW1. As observed hereinabove, PW1 is the eye witness to the occurrence at both 9 the places. Similarly, assuming that the recovery of the weapon used is not established or proved also cannot be a ground to acquit the accused when there is a direct evidence of the eye witness. Recovery of the weapon used in the commission of the offence is not a sine qua non to convict the accused. If there is a direct evidence in the form of eye witness, even in the absence of recovery of weapon, the accused can be convicted. Similarly, even in the case of some contradictions with respect to timing of lodging the FIR/complaint cannot be a ground to acquit the accused when the prosecution case is based upon the deposition of eye witness."*
> *[Emphasis supplied]*

In the said decision rendered by the Hon'ble Supreme Court it has to be noticed that the conviction was based on the evidence of the eye witness therein i.e. P.W.1.

16. Learned State Counsel has also relied on the decision of the Hon'ble Supreme Court in Criminal Appeal No. 739 of 2017 decided on July 14, 2022 in the case of ***Shahaja @ Shahajan Ismail Mohd. Shaikh v. State of Maharashtra :*** **2022 SCC OnLine SC 883;** regarding appreciation of the evidence of an eye witness. At para-27 the Hon'ble Apex Court held that

> *"27. The appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:*
>
> *I. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.*
>
> *II. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence*

by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.

III. When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.

IV. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

V. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

VI. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

VII. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

VIII. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

IX. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

X. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

XI. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

XII. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness."

[*See* ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat***, *1983 Cri LJ 1096 : (1983) 3 SCC 217 : AIR 1983 SC 753*, ***Leela Ram v. State of Haryana***, (1999) 9 SCC 525 **:** *AIR 1999 SC 3717, and* ***Tahsildar Singh v. State of UP***, *AIR 1959 SC 1012]*

Issue before us in the present Appeal, Analysis and Conclusion

17. In our considered opinion in all probability, keeping in view of the lack of disclosure of circumstances and the details of seizure of the alleged weapon of offence : a knife; the learned trial court has not delved into the aspect whether use of the alleged weapon of offence and its recovery were proved or not. The learned trial court has marked the statement of the I.O. P.W.9 that he recovered the blood stained knife from a bush near an Anganwadi Centre, though the details of the said Anganwadi Centre is not indicated in the spot map. Learned trial court also has observed :

> *"So the chemical examiners report, neither establish that the alleged knife had been used as weapon of offence nor it establishes that the blood of the deceased was found in the shirt of the accused. During the cross-examination, P.W.9 admits that his investigation revealed that in 1999 there was a criminal case against the deceased for assaulting the accused."*

18. We accept the submissions of the learned State Counsel that evidence of P.W.2, though has some minor contradictions, remains unimpeached. In view of the law laid down by the Hon'ble Supreme Court in ***Shahajan Ismail Mohd. Shaikh*** (*supra*) and ***State v. Laly*** (*supra*) in absence of recovery of weapon the appellant can be convicted on basis of testimony of P.W.2.

19. In our considered opinion the further question that falls for our consideration is : whether the manner in which the entire incident of assault on the deceased took place, would amount to culpable homicide amounting to murder or culpable homicide not amounting to murder.

In adverting to such question it would be apt to refer to the decision rendered by the Hon'ble Supreme Court in ***Ajmal v. State of Kerala, (2022) 9 SCC 766*** wherein Hon'ble Supreme Court have held in paragraph-17, page 775 of SCC, relying upon the earlier decision rendered by the Hon'ble Supreme Court in ***Mohd. Rafiq v. State of M.P., (2021) 10 SCC 706 : (2022) 1 SCC (Cri) 116.*** In *Mohd. Rafiq* (supra) the Hon'ble Supreme Court have relied on the decisions in ***A.P. v. Rayavarapu Punnayya,(1976) 4 SCC 382 : 1976 SCC (Cri) 659; Pulicherla Nagaraju v. State of A.P., (2006) 11 SCC 444 : (2007) 1 SCC (Cri) 500,*** as quoted herein *:*

> *"17. The distinctive features and the considerations relevant for determining a culpable homicide amounting to murder and distinguishing it from the culpable homicide not amounting to murder has been a matter of debate in large number of cases. Instead of referring to several decisions on the point reference is being made to a recent decision in Mohd. Rafiq v. State of M.P. [Mohd. Rafiq v. State of M.P., (2021) 10 SCC 706 : (2022) 1 SCC (Cri) 116] , wherein Ravindra Bhatt, J. speaking for the Bench, relied*

*upon two previous judgments [**Ed.** : The reference appears to be to State of A.P. v. Rayavarapu Punnayya, (1976) 4 SCC 382 : 1976 SCC (Cri) 659; Pulicherla Nagaraju v. State of A.P., (2006) 11 SCC 444 : (2007) 1 SCC (Cri) 500] dealing with the issue as narrated in paras 11, 12 and 13 of the Report which are reproduced below : (SCC pp. 711-15)*

*"11. The question of whether in a given case, a homicide is murder [Per S. Ravindra Bhat, J.—"Sections 299 and 300IPC define the two offences. They are extracted below:**299. Culpable homicide**.—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.Illustrations(a) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.(b) A knows Z to be behind a bush. B does not know it A, intending to cause, or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.(c) A, by shooting at a fowl with intent to kill and steal it, kills B who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or to cause death by doing an act that he knew was likely to cause death.Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.Explanation 3.—The causing of the death of child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.**300. Murder**.—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—Secondly.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—Thirdly.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—Fourthly.—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.Illustrations*****Exception 1**.—**When culpable homicide is not murder**.—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.The above exception is subject to the following provisos:First.—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.Secondly.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant. Thirdly.—That the provocation is not given by anything done in the lawful exercise of the right of private defence. Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from*

*amounting to murder is a question of fact. Illustrations******Exception 2****.—Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.IllustrationsZ attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.* ***Exception 3****.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.* ***Exception 4****.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.****Exception 5****.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent. Illustration A, by instigation, voluntarily causes, Z, a person under eighteen years of age to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder."] , punishable under Section* 302 IPC, or culpable homicide, of either description, punishable under Section 304 IPC has engaged the attention of courts in this country for over one-and-a-half century, since the enactment of IPC; a wealth of case law, on this aspect exists, including perhaps several hundred rulings by this Court. The use of the term "likely" in several places in respect of culpable homicide, highlights the element of uncertainty that the act of the accused may or may not have killed the person. Section 300 IPC which defines "murder", however refrains from the use of the term likely, which reveals absence of ambiguity left on behalf of the accused. The accused is for sure that his act will definitely cause death. It is often difficult to distinguish between culpable homicide and murder as both involve death. Yet, there is a subtle distinction of intention and knowledge involved in both the crimes. This difference lies in the degree of the act. There is a very wide variance of degree of intention and knowledge among both the crimes.

12. The decision in State of A.P. v. Rayavarapu Punnayya [State of A.P. v. Rayavarapu Punnayya, (1976) 4 SCC 382 : 1976 SCC (Cri) 659] notes the important distinction between the two provisions, and their differing, but subtle distinction. The Court pertinently pointed out that : (SCC p. 386, paras 12-13)

'12. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the

third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

13. The academic distinction between "murder" and "culpable homicide not amounting to murder" has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300.'

[Underlined to Supply Emphasis]

13. The considerations that should weigh with courts, in discerning whether an act is punishable as murder, or culpable homicide, not amounting to murder, were outlined in Pulicherla Nagaraju v. State of A.P. [Pulicherla Nagaraju v. State of A.P., (2006) 11 SCC 444 : (2007) 1 SCC (Cri) 500] This Court observed that : (SCC pp. 457-58, para 29)

'29. Therefore, the Court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters — plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention."

[Underlined to Supply Emhpasis]

20. In ***Tarandas Satnami (In Jail) and another v. State of Chhatisgarh; 2020 SCC OnLine SC 1323*** in an appeal challenging judgment/order passed by the High Court confirming conviction of the appellant for offence under Section 302 of IPC, Hon'ble Supreme Court held :

"6. We have gone through the evidence of the prosecution, more particularly, the evidence of ocular testimony of the witnesses. It is not in dispute that the deceased had eloped with the wife of the Accused No. 2 - Sushil Kumar about 15 days prior to the incident. Both the accused, and the deceased are from a remote village in Durg District of Madhya Pradesh. They are rustic villagers. The evidence of the eye-witnesses consistently and cogently discloses that both the accused assaulted the deceased.

7. However, the only question to be decided in the matter on hand is as to whether the offence falls under Section 304 Part I of the IPC or not. It is now well settled that the doctrine of sudden and grave provocation is incapable of rigid construction leading to or stating any principle of universal application. While applying this principle, the primary obligation of the court is to examine from the point of view of a person of reasonable prudence whether there was such grave and sudden provocation so as to reasonably conclude that it was possible to commit the offence of culpable homicide [See : Budhi Singh v. State of Himachal Pradesh, (2012) 13 SCC 663 (para 18)].

8. In the matter on hand, in our considered opinion, the Court will have to see as to how the accused were placed in the society. As mentioned supra, they are illiterate, rustic villagers. The wife of Accused No. 2 had eloped with the deceased. Accused No.1 is none other than the uncle of Accused No. 2. It is contended by the learned counsel for the appellant, it would have been difficult for the accused to survive in the village subsequent to the incident in question. They must have been humiliated and insulted by the public at large in the village. Learned counsel for the appellants argued that the evidence must be evaluated against this backdrop.

9. As mentioned supra, the deceased had gone for taking bath, and after taking bath in a pond, he was going to go to his house through a lane in which the house of the accused is situated. Accused No. 2, who was cutting wood, saw the deceased in front of his house and immediately thereafter, he hit on the face of the deceased with the axe. Accused No. 1 also assaulted the deceased with a spade, consequent upon which, the deceased lost his life. In our considered opinion, there is no prior preparation to the incident in question. The incident had occurred whilst the deceasedwas deprived of the power of self-control immediately after seeing the deceased. The accused were suddenly and gravely provoked by seeing the deceased near their house. Although the deceased had not committed any overt act on the spot, the very presence of the deceased in front of their house had made the accused to lose their self-control, consequent upon which the incident had taken place. Hence, in our considered opinion, the offence may fall under exception (1) to Section 300 of the IPC. In view of the same, the offence committed by the accused falls under Section 304 Part I of the IPC, under the facts and circumstances of the case." *[Emphasis Supplied]*

Culpability of the accused-appellant

21. To apply the principles as enunciated in ***Ajmal*** (*supra*) following ***Mohd. Rafiq*** (*supra*) and the principles laid down in ***Tarandas*** (*supra*), the evidence presented before the learned trial court by the prosecution is analyzed as indicated herein :

As per the FIR and evidence of P.W.2 there was no premeditation on the part of the appellant-accused.

The nature of weapon used has not been proved before the learned trial court in proper perspective inasmuch as recovery of the knife and its further use, though was suggested to be the weapon, was not proved by the prosecution.

The prosecution did not attempt to prove the link between the accused and the use of suggested weapon of offence : a knife.

The medical opinion and forensic examination report does not support prosecution case regarding use of knife.

As per the evidence adduced by the prosecution, the motives like revenge, greed, jealousy or suspicion are absent in the present case.

It cannot be inferred from the evidence relied on by the prosecution accepted by the learned trial court that the appellant-accused while inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner.

The appellant-accused appears to have lost self-control.

Both the accused and the deceased are rustic villagers belonging to Scheduled Tribe category, inhabitants of underdeveloped area.

Learned counsel for the State in his arguments has relied upon the decision in **State v. Laly** (*supra*) wherein at paragrah-7 the Hon'ble Supreme Court held that conviction can be based on evidence of eye-witness, in absence of recovery of weapon. Apparently, the argument of the State is that though the prosecution did not prove recovery and use of knife that is alleged to be the weapon of offence, in view of the evidence of the P.W.2, conviction is to be sustained.

In our considered opinion, for the reasons summarised herein above, the appellant would be entitled for acquittal under Section 302 IPC but would be liable to be convicted under Section 304 Part I of IPC.

Sentence

22. The appellant-accused was arrested on 22.7.2000, forwarded to the learned court on 23.7.2000, was in jail custody till pronouncement of the judgment by the learned Adhoc Addl. Sessions Judge on 3.4.2003, sentencing the appellant to undergo rigorous imprisonment for life and pay a sum of Rs.1,000/- as fine and he was thus taken to custody and remained in custody until bail was granted by this Court by order dated 29.6.2012 which makes the total period of incarceration to be about eleven years and eleven months.

In our considered opinion, the period of incarceration already undergone by the appellant in prison shall be sufficient sentence to be imposed on the appellant. The other stipulations in the order of sentence passed by the learned sessions court as regards the fine imposed and default sentence, are maintained. Since the appellant was enlarged on bail by this Court earlier, the bail bonds stand cancelled.

23. Accordingly, the appeal is allowed to the extent above by modifying the conviction from Section 302 of I.P.C. to Section 304-I of I.P.C. and the sentence is modified as indicated above. In the facts and circumstances of the case, there shall be no order as to costs.

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2023 (III) ILR – CUT- 739

S.K. SAHOO, J.

JCRLA NO. 24 OF 2015

SATRUGHNA SAMAL .....Appellant

-V-

STATE OF ODISHA .....Respondent

INDIAN PENAL CODE, 1860 – Sections 366 and 376 – The victim was under the age of eighteen years at the time of occurrence and she seems to have left her lawful guardianship on her own accord and voluntarily joined the accused and remained in the company of appellant without any protest for seven months and allow the Appellant to have sexual intercourse with her – Whether the offence U/Ss. 366/376 of IPC would attract against the Appellant? – Held, No – The ingredients of the offence U/Ss. 366, 376 of the IPC are not attracted.

Case Laws Relied on and Referred to :-

1. A.I.R. 1965 SC 942 : S. Varadarajan Vs. State of Madras.
2. A.I.R. 1979 SC 1276 : Lalta Prasad Vs. State of Madhya Pradesh.
3. 1995 CLJ 3974 : Shyam and another Vs. State of Maharashtra.
4. (2003) 1 SCC 605 : Jinish Lal Sah Vs. State of Bihar.
5. (2013) 14 SCC 643 : Lillu @ Rajesh and Anr Vs. State of Haryana.
6. (2022) SCC OnLine SC 1494 : State of Jharkhand Vs. Shailendra Kumar Rai.

For Appellant : Mr. Sobhan Panigrahi, Amicus Curiae

For Respondent : Mr. Arupananda Das, Addl. Govt. Adv.

JUDGMENT Date of Hearing & Judgment: 23.08.2023

S.K. SAHOO, J.

The appellant Satrughna Samal faced trial in the Court of learned Assistant Sessions Judge (Special Track Court), Cuttack in S.T. Case No.178 of 2014 for commission of offences punishable under sections 366-A/376 of the Indian Penal Code (hereinafter 'I.P.C.') on the accusation that on 16.08.2010 the appellant induced the victim girl (P.W.8), who is the minor daughter of the informant (P.W.3),

to go from her house situated at village Safa under Tangi police station, Cuttack to somewhere with intent that the victim may be (or knowing that it is likely that she would be) forced (or seduced) to illicit intercourse and also committed rape on her.

The learned trial Court vide impugned judgment and order dated 17.12.2014 though acquitted the appellant of the charge under section 366-A of the I.P.C. but found him guilty of the offences punishable under sections 366/376 of the I.P.C. and sentenced him to undergo rigorous imprisonment for seven years and to pay a fine of Rs.10,000/-(rupees ten thousand), in default, to undergo rigorous imprisonment for six months more for the offence under section 376 of the I.P.C. and sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs.5,000/-(rupees five thousand), in default, to undergo rigorous imprisonment for three months more for the offence under section 366 of the I.P.C. and both the substantive sentences were directed to run concurrently.

The prosecution case:

The prosecution case, as per the first information report (hereinafter 'F.I.R.') lodged by Shri Hemanta Kumar Mohanty (P.W.3) before the I.I.C., Tangi police station, Cuttack on 19.08.2010, in short, is that his daughter/victim (P.W.8) was missing from his house since 16.08.2010 which he had intimated to the police on 18.08.2010 and thereafter he came to know on enquiry that the appellant who belonged to Safa Sabar Sahi along with his brother Mitika Samal, friends Kalia Samal and Dharama Samal had kidnapped his daughter.

On the basis of such written report, the I.I.C. of Tangi police station registered Tangi P.S. Case No.116 dated 19.08.2010 against the appellant along with three others under section 366A/34 of the I.P.C. and directed Shri Narayan Das, (P.W.10), S.I. of police, Tangi police station to take up the investigation of the case.

P.W.10, the Investigating Officer during course of investigation, examined the informant, visited the spot and prepared the spot map (Ext.7). Thereafter he examined the mother of the victim and other witnesses. On 28.03.2011, he apprehended the appellant from his house and rescued the victim girl from the house of the appellant on the same day and examined the victim. He also seized the wearing apparels of the victim so also that of the appellant and prepared the seizure lists in presence of witnesses marked as Ext.8 and Ext.9 respectively. He sent the appellant and the victim to F.M.T. Department of S.C.B. Medical College and Hospital, Cuttack for their medical examination through escorting constable. On 28.03.2011 at about 6.30 p.m., he seized the school leaving certificate of the victim on production by her father and prepared the seizure list marked as Ext.2/1. On 29.03.2011, the appellant was forwarded to the Court of J.M.F.C.(R), Cuttack and on the prayer of the I.O., the statement of the victim was recorded under section 164 Cr.P.C on 29.03.2011 and the very day, the I.O. (P.W.10) handed over the victim to her father (P.W.3) as per direction of the learned J.M.F.C.(R), Cuttack. On 09.05.2011,

the I.O. sent the seized sealed packets to S.F.S.L.,Rasulgarh, Bhubaneswar through the Court of J.M.F.C.(R), Cuttack for chemical examination. On 28.05.2011, he received the medical examination report of the victim so also of the appellant from the M.O., F.M.T., S.C.B., Medical College and Hospital, Cuttack. On 30.05.2011, he submitted the charge sheet in the case.

Charges:

The learned trial Court on 08.07.2014 framed the charges under sections 366-A/376 of the I.P.C. 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 & exhibits:

During course of trial, in order to prove its case, the prosecution has examined as many as fifteen witnesses.

P.W.1 Susanta Mohanty is the cousin of the victim who stated that on the fateful day at about 07.30 p.m. to 08.00 p.m., the parents of the victim were searching for her and upon seeing them, he also joined to trace her out.

P.W.2 Sukanti Mohanty is the mother of the victim who stated that on the date of incident, the victim had been to watch a village festival and did not return. She further stated to have come to know that the appellant kidnapped the victim and seven months after lodging of the F.I.R., police rescued the victim from Tangi. She also stated about the disclosure made by the victim regarding commission of sexual intercourse on her by the appellant.

P.W.3 Hemanta Kumar Mohanty is the father of the victim who is also informant of the case. He stated about the presentation of missing report of the victim in the police station and disclosure made by the victim about the occurrence.

P.W.4 Gayadhar Behera was working as A.S.I. of police attached to Tangi police station who is a witness to the seizure of the school leaving certificate of the victim vide seizure list Ext.2/1.

P.W.5 Ajaya Kumar Mohanty was working as a Constable at Tangi police station who stated to have taken the appellant to S.C.B. Medical College and Hospital, Cuttack as per direction of the Investigating Officer. He is a witness to the seizure of biological samples of the appellant vide seizure list Ext.3.

P.W.6 Mamilata Moharana was working as a Constable at Tangi police station, Cuttack who stated to have taken the victim to S.C.B. Medical College and Hospital, Cuttack as per direction of the Investigating Officer. She is a witness to the seizure of biological samples of the victim vide seizure list Ext.4.

P.W.7 Dr. Motirmoy Giri was working as Tutor, F.M.T. Department, S.C.B. Medical College and Hospital, Cuttack who examined the appellant on police

requisition and found that the appellant was capable of performing sexual intercourse but there was no bodily injury found to suggest forcible sexual intercourse and the genital examination did not reveal any recent sign and symptoms of sexual intercourse. He proved the medical examination report of the appellant vide Ext.5.

P.W.8 is the victim. She supported the prosecution case and stated about the appellant forcibly took her on a bicycle to his relative's house and committing rape on her. She also stated that the appellant forced her to sign a document by giving threats.

P.W.9 Dambarudhara Mohanty is an independent witness and stated that he came to know from their village discussion that the appellant kidnapped the victim.

P.W.10 Narayana Das was working as S.I. of police attached to Tangi police station and he is the Investigating Officer of the case.

P.W.11 Dr. Purnima Singh was working as the Tutor, F.M.T. Department, S.C.B. Medical College and Hospital, Cuttack who examined the victim on police requisition and found that all the secondary sexual characters were well developed. On genital examination, she found wide gapping of labia majora and labia minora was exposed and posterior commissure was obliterated and there was old tear over the hymen at 5 and 7 O'clock position and the opening admitted two fingers easily and the vaginal canal wall rugosity was felt. She proved the medical examination report of the victim vide Ext.12.

P.W.12 Narendra Kumar Khuntia and P.W.13 Pratap Kumar Das who were working as A.S.I. and Constable respectively attached to Tangi police station are witnesses to the seizure lists vide Ext.3 and 4.

P.W.14 Ramesh Chandra Mohanty is the uncle of the victim who stated that the appellant took the victim from her village. He also stated that the victim was aged about sixteen to seventeen years at the time of incident.

P.W.15 Nilima Khillar was the Headmistress of Nehru Nodal U.P. School, Safa where the victim was prosecuting her studies. She produced the school admission register which contained the date of admission and date of birth of the victim with other particulars.

The prosecution exhibited thirteen numbers of documents. Ext.1 is the F.I.R., Ext.2/1 is the seizure list in respect of school leaving certificate of the victim, Ext.3 is the seizure list in respect of two seized sealed packets, Ext.4 is the sealed packets, Ext.5 is the medical examination report, Ext.6 is the statement of P.W.8 recorded under section 164 Cr.P.C., Ext.7 is the spot map, Ext.8 and Ext.9 are the seizure lists in respect of wearing apparels of the victim and the appellant respectively, Ext.10 is the seizure list in respect of school leaving certificate of the victim (with objection), Ext.11 is the forwarding letter of J.M.F.C.(R), Cuttack,

Ext.12 is the report of P.W.11 and Ext.13 is the page containing Sl. No. 25/1980 of school admission register of the victim.

Defence plea:

The defence plea of the appellant is one of complete denial and false implication.

The defence has neither examined any witness nor exhibited any document.

Findings of the Trial Court:

The learned trial Court, after assessing the oral as well as documentary evidence on record, has been pleased to hold that the school leaving certificate indicates the date of birth as 10.06.1994 and since the case record indicates that the incident took place on 16.08.2010, the age of the victim as on the date of incident is appearing to be more than sixteen years and therefore, the ingredients of the offence under section 366-A I.P.C. would not be attracted rather the ingredients of the offence under section 366 of the I.P.C., which is lesser offence to the offence under section 366-A of the I.P.C., would be attracted. It has been further held that so far as the question of kidnapping of the victim is concerned, it appears from the case record that nobody had seen while the victim was kidnapped except the victim herself. As a matter of course, there is also no eye witness available to the incident of rape except the victim for which the appellant is charged under section 376 of the I.P.C. It has been further held that the evidence of the seizure witnesses leaves no iota of doubt regarding the steps taken by the I.O. during course of investigation of the case and the evidence of P.Ws. are appearing to be clear, cogent and trustworthy and hence, reliable. It has been further held that there was no consent at all on the part of the victim in the entire incident alleged against the appellant. The defence did not question the victim regarding the allegation of rape. Therefore, it appeared from the evidence of the victim that she was forced to move with the appellant and she was also forced to sexual intercourse by the appellant. The victim in her evidence further stated that she was produced before the Court where her statement was recorded vide Ext.6 which indicates that the appellant forcibly kidnapped the victim and kept her in the house of his maternal aunt and thereafter, took her to several places and frequently committed sexual intercourse with her despite her protest.

Contentions of the Parties:

Mr. Sobhan Panigrahi, learned Amicus Curiae appearing for the appellant contended that the finding of the learned trial Court in convicting the appellant under section 366 of the I.P.C. is completely faulty inasmuch as it appears from the materials on record that the victim had not only attained the age of discretion but also she moved with the appellant from place to place including the Court premises and she stayed with him for seven months and she had never protested before anybody while accompanying with the appellant nor tried to escape while she was

forcibly taken on a bicycle by the appellant. Learned counsel further submitted that no date of birth certificate has been proved and the entry made in the school admission register which has been proved by the Headmistress of the school being examined as P.W.15 is not acceptable as she herself stated that no document was produced at the time of admission of the victim to establish the authenticity of her date of birth. Learned counsel further submitted that the parents of the victim are silent about her date of birth and though the doctor (P.W.11), who examined her at S.C.B. Medical College and Hospital, Cuttack, stated that from the radiological examination and from the physical and dental examination, she came to know that the victim girl was more than sixteen years and less than seventeen years but neither the x-ray plates nor the x-ray reports were proved during the trial and being an opinion evidence, it cannot be said to be conclusive in nature. Learned counsel further submitted that when the victim was examined by the doctor, she described herself to be a married lady and stated to have last sexual intercourse with her husband one week prior to her examination. Therefore, if the victim had accepted the appellant as her husband and was having sexual intercourse with him regularly, it cannot be said to be a case of rape and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Arupananda Das, learned Additional Government Advocate, on the other hand, supported the impugned judgment and contended that the evidence of the victim is clinching, trustworthy and even though there is no corroboration from the medical evidence but the same cannot be a ground to discard the evidence of the victim in view of the settled position of law laid down by the Hon'ble Supreme Court and this Court and as such the appeal should be dismissed.

Analysis of Evidence:

Adverting to the contentions raised by the learned counsel for the respective parties and coming to the ingredients of the offence under section 366 of the I.P.C., the section requires that the prosecution has to prove that the appellant has kidnapped or abducted the victim girl and such kidnapping or abduction was made with an intention that the victim might be compelled or knowing that she is likely to be compelled to marry any person against her will or in order that she may be forced or seduced to illicit intercourse or that the appellant knew that she would be likely to be forced or seduced to illicit intercourse.

Kidnapping from lawful guardianship has been defined under section 361 of the I.P.C. which provides, inter alia, that if someone takes or entices any minor, who is under the age of sixteen years if a male or under eighteen years of age if a female, out of keeping of the lawful guardian of such minor without the consent of such guardian, can be said to have kidnapped the minor from lawful guardianship. Thus, one of the vital ingredient that is required to be proved is the age of the female victim to be under eighteen years of age. Similarly, so far as the abduction is concerned, which has been defined under section 362 of the I.P.C., there must be

evidence that the accused by force has compelled or by any deceitful means has induced the victim to go from any place. If such kidnapping or abduction as defined under the aforesaid sections 361 & 362 I.P.C. respectively are for the purposes which have been mentioned under section 366 of the I.P.C. then only the ingredients of the offence would be attracted.

Learned counsel for the appellant placed reliance on the decision of the Hon'ble Supreme Court in case of **S. Varadarajan -Vrs.- State of Madras reported in A.I.R. 1965 Supreme Court 942** wherein it is held that taking or enticing minor out of the lawful guardianship is an essential ingredient of the offence of kidnapping. But when the girl who though a minor had attained the age of discretion or on the verge of attaining majority where the minor leaves her father's protection knowing and having capacity to know the full import of what she is doing, voluntarily joins the accused, the accused cannot be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian. If the evidence to establish one of those things is lacking, it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfilment of the intention of the girl. But that part falls short of an inducement of the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".

Learned counsel further placed reliance in the case of **Lalta Prasad -Vrs.- State of Madhya Pradesh reported in A.I.R. 1979 Supreme Court 1276** wherein the Hon'ble Supreme Court has been pleased to hold that even though it is assumed in favour of the prosecution that the victim was below eighteen years of age but then two ingredients further must be established; (i) that she was kidnapped or abducted from the custody of her lawful guardian, and (ii) that she was kidnapped, or abducted with the intention of compelling her to marry any person against her will or in order that she may be forced or seduced to illicit sexual intercourse.

Learned counsel further placed reliance in the case of **Shyam and another -Vrs.- State of Maharashtra reported in 1995 Criminal Law Journal 3974** wherein the Hon'ble Supreme Court has been pleased to hold that when the case of the prosecution is that the accused took the victim by means of a bicycle, it was expected of her then to jump down from the bicycle, or put up a struggle and, in any case, raise an alarm to protect herself. No such steps were taken by her. It seems she was a willing party to go with the appellant on her own and in that sense, there was no 'taking' out of the guardianship of her mother and the charge under section 366 I.P.C. would fail.

In the case of **Jinish Lal Sah -Vrs.- State of Bihar reported in (2003) 1 Supreme Court cases 605**, the Hon'ble Supreme Court has been pleased to hold that the evidence on record indicates that the victim was with the appellant from 30th April to 10th May during which period she had travelled by train and stayed with the appellant without there being any evidence of her having protested or having made any effort to seek help from others or even trying to run away. In such a situation, in the absence of any other material to show to the contrary, it would be difficult to accept the prosecution case that either there was a forcible marriage or rape as contended by the prosecution to find the appellant guilty under section 366 or section 376 of the I.P.C.

Age of the victim:

Coming to the age of the of the victim, the learned trial Court seems to have relied mainly on the evidence of Headmistress of the Nehru Nodal U.P. School, Safa who has been examined as P.W.15 and proved the school admission register in which the date of birth of the victim has been mentioned to be 10.06.1994. It transpires from her evidence that the victim was admitted in the said school on 12.07.1999 and transfer certificate was issued in her favour on 28.03.2011. The school admission register entry and the transfer certificate have been marked as Ext.13 and Ext.10 respectively. However, in the cross-examination of P.W.15, it is revealed that she had not admitted the victim in the school and no document was produced before the school at the time of admission of the victim to establish the authenticity of her date of birth. At column no.10, it was noted that "PITANKA LIKHITA MATE". The word 'LIKHITA' was struck down and substituted by "KAHIBA". The substituted word "KAHIBA" is made by another person. P.W.15 specifically stated that the father of the victim had not produced any writing in respect of the date of birth of the victim and the school admission register also did not indicate as to when and by whom the word "LIKHITA" was struck down and substituted by the word "KAHIBA". The father of the victim has been examined as P.W.3 and his evidence is also silent about the date of birth of the victim. He only stated that the victim was aged about sixteen years at the time of occurrence. However, he stated that except the school leaving certificate of the victim, he had not handed over anything to the police. The mother of the victim being examined as P.W.2 is also silent about the date of birth of the victim. However, she stated that the victim was aged about sixteen years at the time of incident. Therefore, there is no oral evidence adduced by the parents of the victim regarding the date of birth of the victim nor there is any documentary evidence like the birth certificate to substantiate the correct age of the victim. Even though in the school admission register, the date of birth of the victim has been mentioned as 12.07.1999 but since there was no basis for mentioning such age in the school admission register, the same is not acceptable. The doctor (P.W.11), who examined the victim on 28.03.2011 at S.C.B. Medical College and Hospital, Cuttack stated that from the physical, dental and radiological examination, the age of the victim was found to be more than sixteen years and less

than seventeen years. Though the doctor in her evidence stated about the positions of the different bones but x-ray plates have not been produced in Court nor those were attached to the report of P.W.11 which has been marked as Ext.12. Also, the x-ray report has not been proved nor the person who conducted the x-ray has been examined. Therefore, from the evidence of the doctor (P.W.11) which is an opinion evidence relating to the age of the victim, it cannot be said with certainty that the prosecution has successfully proved that the victim was under eighteen years of age at the time of occurrence.

Analysis of the victim's evidence:

The victim (P.W.8) though stated in her examination-in-chief that on the date of incident at about 7 p.m. to 8 p.m. when she had been to fetch water from the village well, the appellant forcibly kidnapped her by means of a bicycle towards the house of his relative at village Nandua but in the cross-examination, she stated that the appellant parked his cycle at village lane at a distance of 200 meters to 300 meters away from the village well where she had gone to fetch water. She further stated that the appellant dragged her by hand towards the place where he had parked the cycle by covering the house of the nearby dwellers including her house. Had that been the state of affairs, it would have drawn the attention of others. Therefore, the evidence of the victim that the appellant dragged her towards the place where he had parked his cycle at a distance of 200 meters to 300 meters is very difficult to be accepted. The victim further stated that she sat at the rear (carrier) of the cycle and they passed 300 to 400 meters to reach village Nandua. She further stated that she did not shout for any help when the appellant was kidnapping her by means of his cycle and she did not get down from the cycle.

The father of the victim being examined as P.W.3 has stated that she got the intimation from a co-villager that the victim eloped with the appellant by means of a bicycle through their village road to Chandanpur road and the said road approached the National Highway-5 at Chhatia by covering Chandanpur, Kanpur, Bisuali, Kusupada, Amejhari, Bairee, Solara and Chhatia and the victim and the appellant went through the above villages.

In view of the conduct of the victim in sitting on the rear-carrier of bicycle of the appellant and not trying to escape from his cycle and not trying to shout to draw the attention of anyone either when she was dragged or when she was taken on the bicycle while passing through village houses clearly indicate that she was a consenting party. The victim further stated that the uncle of the appellant, the appellant and she herself came to Chandikhol Court by means of motorcycle and the Court was crowded with advocates and they reached at the Court at about 11 a.m. to 12 noon but she did not disclose anything about the incident to anybody at Chandikhol Court. She further stated that from Chandikhol, they went to the house of the sister of the appellant and they stayed there for two to four days and then they went to the house of the appellant at village Safa from where she was rescued by the

police on the next day. The conduct of the victim as narrated above indicates that not only she was a consenting party but she voluntarily accompanied the appellant from place to place and therefore, it cannot be said that the appellant induced her in any manner to leave the lawful guardianship. The evidence on record indicates that the victim stayed with the appellant for seven months and during this period, they visited number of places including the Court. When the victim was examined by the doctor, she gave her marital status to be married and having last sexual intercourse with her husband one week before her examination and therefore, the victim seems to have accepted the appellant as her husband and allowed the appellant to have sexual intercourse with her. This aspect finds corroboration from the medical report of P.W.11 who examined the victim. On genital examination of the victim, she found wide gapping of the labia majora, her labia minora was exposed and there were old tears over the hymen. All these are suggestive of the fact that the victim had frequent sexual intercourse with the appellant.

In her report, P.W.11 further stated that the vaginal opening of the victim easily admitted two fingers. The medical professionals while conducting medical examination on the victims of rape and sexual assault cases should desist from two-finger test in the private part of the victim which is also known as virginity test as the test violates the right of such victims to privacy, physical and mental integrity and dignity and hence, not at all permissible under the law. It is no less than adding an unforgettable insult to an unhealed injury. When a sexually active woman or a woman habituated to sexual intercourse can also be raped if the act of the accused comes within section 375 of I.P.C., this sort of test is certainly unscientific and traumatizing.

While declaring the 'two-finger test', the Hon'ble Supreme Court in the case of **Lillu @ Rajesh and another -Vrs.- State of Haryana reported in (2013) 14 Supreme Court Cases 643** held as follows:

> "14. Thus, in view of the above, undoubtedly, the two-finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, give rise to a presumption of consent."

Recently, the Hon'ble Supreme Court in the case of **State of Jharkhand - Vrs.- Shailendra Kumar Rai reported in (2022) SCC OnLine SC 1494**, while reiterating the dictum laid down in the case of **Lillu** (supra), ruled that any person who conducts 'two-fingers test' or 'per vaginum examination' in contravention of the directions of the Hon'ble Court shall be guilty of 'misconduct'.

No doubt the medical examination in the present case was conducted by P.W.11 in the year 2011 which is two years prior to the decision of the Hon'ble Supreme Court in the case of **Lillu** (supra), however, this Court is constrained to observe the above as it is not very infrequent to see such test being conducted by medical professionals in a routine manner while medically examining victims of

rape and sexual assaults in most of the cases which is derogatory to the invaluable dignity of the victims.

Conclusion:

In view of the foregoing discussions, in absence of any clinching evidence that the victim (P.W.8) was under the age of eighteen years at the time of occurrence and since she seems to have left her lawful guardianship on her own accord and voluntarily joined the accused and she remained in the company of the appellant without any protest for seven months and was treating the appellant to be her husband and allowing him to have sexual intercourse with her and since she seems to be a consenting party, I am of the humble view that neither the ingredients of the offence under section 366 of the I.P.C. nor section 376 of the I.P.C. are attracted against the appellant.

Accordingly, the Jail Criminal Appeal is allowed. The impugned judgment and order of conviction of the appellant under sections 366/376 of the I.P.C. and the sentence passed thereunder is hereby set aside and the appellant is acquitted of all such charges.

The appellant, who is on bail by order of this Court vide order dated 14.12.2015 passed in Misc. Case No.68 of 2015, is hereby discharged from liability of the bail bonds and the surety bonds shall also stand cancelled.

Lower Court Records with a copy of this judgment be sent down to the learned trial Court forthwith for information and necessary action.

Before parting with the case, I would like to put on record my appreciation to Mr. Sobhan Panigrahi, the learned Amicus Curiae for rendering his valuable help and assistance towards arriving at the decision above mentioned.The learned Amicus Curiae 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. Arupananda Das, learned Additional Government Advocate.

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2023 (III) ILR – CUT- 749

S.K. SAHOO, J & SIBO SANKAR MISHRA, J.

JCRLA NO. 71 OF 2004

SUDARSAN BARLA .....Appellant

-V-

STATE OF ODISHA .....Respondent

CRIMINAL TRIAL – The appellant is convicted for commission of offence U/s. 302/34 of the IPC – Suppression of the original first information report – Effect of – Held, when the original first information report seems to have been suppressed and the evidence of the solitary eye witness cannot be said to be clear, cogent, trustworthy and above board and when a part of the prosecution case relating to the involvement of the co-accused has been disbelieved by the Learned Trial Court, we are of the view that it cannot be said that the prosecution has successfully established its case beyond all reasonable doubt against the appellant.

Case Laws Relied on and Referred to :-

1. A.I.R. 1976 S.C. 2263 : Lakshmi Singh Vs. State of Bihar.
2. (1957) 1 Supreme Court Reports 981 : Vadivelu Thevar Vs.The State of Madras.
3. Vol.70 (1990) Cuttack Law Times 1 : Balgopal Panda and Ors. Vs. State.

For Appellant : Mr. Subash Ch. Pradhan

For Respondent : Smt. Saswata Patnaik, Addl. Govt. Adv.

JUDGMENT Date of Hearing:15.09.2023 : Date of Judgment: 26.09.2023

S.K. SAHOO, J.

The appellant Sudarsan Barla along with his younger brother Nirmal Barla faced trial in the Court of learned Sessions Judge, Sundargarh in Sessions Trial No.247 of 2000 for commission of offence under sections 302/34 of the Indian Penal Code (hereinafter 'I.P.C.') on the accusation that on 18.10.1999 at about 6.00 a.m. in the courtyard of the appellant in village Rengalbahal, they committed murder by intentionally causing death of their co-villager Susil Ekka (hereinafter 'the deceased) in furtherance of their common intention.

The learned trial Court vide impugned judgment and order dated 09.06.2004 has been pleased to hold the co-accused Nirmal Barla not guilty of the offence charged and acquitted him. However, the appellant was found guilty under section 302 of the I.P.C. and sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo rigorous imprisonment for one year.

Prosecution Case:

2. The prosecution case, as per the first information report (hereinafter 'F.I.R.'), lodged by Sarjus Ekka (P.W.1) before the Inspector in-charge of Rajgangpur police station on 18.10.1999 is that during the month of March in the year 1999, the appellant created disturbance with the family of the informant (P.W.1) for which a case was instituted in Rajgangpur police station. On 17.10.1999, Nuakhai festival was being observed in the village of the informant and at about 10 O' Clock in the night, song and dance was going on in a field situated near the

church and there the appellant Sudarsan Barla and his brother Nirmal Barla created disturbance with the informant (P.W.1) and his friend Sushil Barla (P.W.8) and they torn the banyan (ganji) of P.W.1 as well as P.W.8. The other persons present in that festival sent back the appellant as well as his brother Nirmal Barla to their house. After the song and dance was over, the informant (P.W.1) returned back home and intimated his brother (deceased) and his family members about the same. On the next day i.e. on 18.10.1999 at about 6 a.m., the deceased and Sushil Barla (P.W.8) came to the house of the appellant and confronted them about the last night's disturbance. All of a sudden, the appellant brought one iron strip (luha patia) and assaulted the deceased on his head as a result of which the deceased sustained bleeding injury on the head and fell down on the ground. The co-accused Nirmal Barla (acquitted) also assaulted the deceased by means of a lathi as a result of which the deceased died at the spot. After seeing the occurrence, P.W.8 became panic and rushed to the house of the informant (P.W.1) and told him about the commission of murder of the deceased by the appellant and co-accused Nirmal Barla. Hearing such incident, the informant and his family members came near the spot and found the deceased was lying dead with bleeding injury in the front courtyard of the appellant. The informant after asking his family members to guard the dead body of the deceased went to meet the ward member Bisil Kindo (P.W.6) and informed him about the occurrence. It is stated that P.W.8, who was present with the deceased had seen the occurrence.

The oral report of P.W.1 was reduced to writing by P.W.12 Ajim Khan, A.S.I. of Police, Lanjiberena Outpost on 18.10.1999 and then the written report was sent to the Inspector in-charge of Rajgangpur police station for formal registration through constable and P.W.12 himself took up investigation. During course of investigation, P.W.12 examined the informant, visited the spot, held inquest over the dead body, prepared the inquest report (Ext.2) and the dead body was sent to Rajgangpur Government Hospital for post mortem examination.

On receipt of the written report, the Inspector in-charge of Rajgangpur police station Sudarsan Sethi (P.W.10) registered Rajgangpur P.S. Case No.166 dated 18.10.1999 under sections 302/34 of the I.P.C. against the appellant and his younger brother Nirmal Barla. P.W.10 took up investigation of the case, visited the spot and he seized blood stained iron strip at the spot vide seizure list Ext.3/1, seized one lathi near the spot as per seizure list Ext.4/1 and sample earth and blood stained earth under seizure list Ext.5/1. He seized some brick pieces at the spot under seizure list Ext.6/1. The appellant was arrested and his wearing apparels were seized as per seizure list Ext.7/1. Similarly, the wearing apparels of the co-accused Nirmal Barla were also seized as per seizure list Ext.8/1. The wearing apparels of the deceased were seized as per seizure list Ext.11. The appellant and the co-accused were forwarded to Court on 19.10.1999 after medical examination. The I.O. seized blood sample and nail clippings of the appellant and co-accused on 20.10.1999 on production by the constable. The weapons of offence i.e. iron strip and lathi seized

were forwarded to the Medical Officer to examine the same and to opine whether the injuries found on the deceased could be possible by such weapon. The material objects were forwarded to the Deputy Director, R.F.S.L., Sambalpur for chemical examination and on completion of investigation, on 14.02.2000, the I.O. (P.W.10) submitted charge sheet against the appellant and his brother Nirmal Barla under sections 302/34 of the I.P.C.

Framing of Charges:

3. After submission of charge sheet, the case was committed to the Court of Session for trial after observing due committal procedure where the learned trial Court framed the charges against the appellant and the co-accused on 29.06.2001 and since the appellant and the co-accused refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute them and establish their guilt.

Prosecution Witnesses & Documents Exhibited By Prosecution:

4. During the course of trial, in order to prove its case, the prosecution has examined as many as twelve witnesses.

P.W.1 Sarjus Ekka is the informant and the elder brother of the deceased. He stated about the incident that took place on 17.10.1999 night at the place of song and dance. He further stated to have rushed to the spot on 18.10.1999 after hearing about the incident from P.W.8 and found the deceased lying dead with bleeding injuries on the front courtyard of the appellant.

P.W.2 Jaiswani Barla is the younger sister of the appellant. She stated that hearing hue and cry, she came out of the house and found the deceased was lying dead in front of court yard of her house.

P.W.3 Ananda Barla did not support the prosecution case for which he was declared hostile by the prosecution.

P.W.4 Jilapatras Ekka is the elder brother of the deceased and also a witness to the inquest report (Ext.2).

P.W.5 Srimati Ekka is the elder sister of the deceased. She stated that Sushil Barla (P.W.8) disclosed before her that the appellant and the co-accused Nirmal Barla committed murder of the deceased.

P.W.6 Basil Kindo was the ward member and also a witness to the seizure but he stated that he had no knowledge about the contents of the seizure lists in which he put his signatures. He further stated that police held inquest over the dead body in his presence and he mentioned in the inquest report (Ext.2) that the deceased died as a result of the bleeding injury which he sustained due to assault made by the appellant by means of a piece of iron strip.

P.W.7 Ashok Dehury was the constable attached to Ranjangpur police station and also a witness to the seizure list vide Ext.9 and Ext.10.

P.W.8 Sushil Barla is a co-villager of the deceased and also an eye witness to the occurrence. He supported the prosecution case.

P.W.9 Basanta Kumar Panda was the constable attached to Rajgangpur police station and also a witness to the seizure vide Ext.9, Ext.10 and Ext.11.

P.W.10 Sudarsan Sethi was the Inspector in-charge of Ranjangpur police station, who is the Investigating Officer of the case.

P.W.11 Dr. Rita Maxima Barla was the Medical Officer attached to Rajgangpur Government Hospital, who conducted the post mortem examination on the dead body of the deceased on 18.10.1999 and proved her report vide Ext.16. She also examined the appellant and the co-accused Nirmal Barla and proved her reports vide Ext.12 and Ext.13 respectively.

P.W.12 Ajim Khan was the A.S.I. attached to Lanjiberena Outpost, who reduced the oral report of P.W.1 into writing which was treated as F.I.R. and he is the first Investigating Officer of the case.

The prosecution exhibited eighteen documents. Ext.1 is the F.I.R., Ext.2 is the inquest report, Ext.3/1, Ext.4/1, Ext.5/1, Ext.6/1, Ext.7/1, Ext.8/1, Ext.9, Ext.10 and Ext.11 are the seizure lists, Ext.12 is the written requisition of the I.O., Ext.13 is the written requisition of the P.W.10, Ext.14 is the office copy of the forwarding letter, Ext.15 is the chemical examination report, Ext.16 is the post mortem report, Ext.17 is the command certificate and Ext.18 is the dead body challan.

Defence Plea, Defence Witness & Document Exhibited By Defence:

5. The defence plea of the appellant as per the accused statement recorded under section 313 of Cr.P.C. is that he was serving as a security guard in the Proton Steel Limited, Rajgangpur and he was occasionally coming to the village. Prior to the occurrence, P.W.1 and the deceased had assaulted the mother of the appellant making aspersion on her as 'witch'. In that connection, a police case was instituted against P.W.1 and the deceased for which they bore grudge against the appellant and they were bossing around the village. On 17.10.1999, after finishing his dinner, when the appellant was proceeding towards Rajgangpur for his duty, on the way where the song and dance festival was going on, he was assaulted by P.W.1 and P.W.8 for which he returned back home. On the next day, P.W.8 and the deceased came to the house of the appellant holding brickbat and bhujali. The deceased tried to assault the brother of the appellant with the brick which hit on his shoulder. When the appellant tried to forbade the deceased, the latter chased the appellant to kill him. For self defence, the appellant picked up an iron strip and assaulted the deceased with it for which he fell down and died and then the appellant sent his uncle (P.W.3) to report the matter in the police station. P.W.8 ran away from the spot holding bhujali.

One Joseph Xaxa was examined on behalf of the defence as D.W.1. He stated about the occurrence which took place on the previous day night of occurrence.

The defence exhibited one document i.e. Ext.A, which is the certified copy of the charge sheet in G.R. Case No.63 of 1999.

Findings of the Trial Court:

6. The learned trial Court after analysing the evidence of the doctor, the post mortem report findings came to hold that the death of the deceased was homicidal in nature. It was further held that since the co-accused Nirmal Barla had sustained simple injury on his left shoulder and there is no material on record to come to the conclusion that there was any reasonable cause to apprehend that the death or grievous hurt would otherwise be the consequence of any assault on him, the right of private defence is not available and the defence has not discharged the onus that was upon him. It was further held that the prosecution has failed to prove the pre-concert or previous meeting of mind between Sudarsan Barla and Nirmal Barla and therefore, the co-accused Nirmal Barla cannot be saddled with vicarious criminal liability under section 34 of the I.P.C. However, it was held that the prosecution has proved beyond all reasonable doubt that the appellant Sudarsan Barla had the requisite intention to commit murder of the deceased. The learned trial Court did not accept the contention raised by the learned defence counsel that there had been suppression of original F.I.R. Consequently, it was held that the appellant committed murder of the deceased by assaulting him with the iron plate on 18.10.1999 at about 6.00 a.m. at village Rengalbahal and accordingly, found him guilty under section 302 of the I.P.C.

Contentions of the Parties:

7. Mr. Subash Chandra Pradhan, learned counsel appearing for the appellant contended that lodging of the F.I.R. at the Lanjiberena Outpost as stated by the informant (P.W.1) is a doubtful feature. The original report which was lodged at the spot by P.W.1 has been suppressed. The injury sustained by the co-accused Nirmal Barla has not been explained and the deceased was the aggressor and he came to the house of appellant, entered into his front courtyard and not only challenged the appellant but also assaulted the co-accused Nirmal Barla by brick and therefore, the single blow given to the deceased by the appellant with the iron strip, even if taken into account, can be said to be within right of private defence of the appellant and since the evidence of the solitary eye witness cannot be said to be absolutely reliable, it is a fit case where benefit of doubt should be extended in favour of the appellant.

Smt. Saswata Patnaik, learned Additional Government Advocate appearing for the State of Odisha, on the other hand, supported the impugned judgment and contended that there is no dispute that the first information report in this case was

the oral report of P.W.1 which was reduced to writing by P.W.12, A.S.I. of Police, Lanjiberena Outpost though there is discrepancy as to where such oral report was given i.e. either at the spot in village Alanda Rengabahal or at Lanjibehera Outpost, but the same cannot be a ground to hold that the F.I.R. has been suppressed. The learned counsel further argued that nature of injury sustained by the co-accused Nirmal Barla is not so serious that the prosecution is required to give explanation about the same in absence of which it can be held that the prosecution has suppressed the genesis of the case. It is further argued that the co-accused was acquitted as no corresponding injury to his assault was noticed on the person of the deceased, but when the ocular version of P.W.8 relating to the assault made by the appellant with an iron strip on the head of the deceased is corroborated by the medical evidence, it cannot be said that the learned trial Court committed any illegality in convicting the appellant.

Whether the deceased met with a homicidal death:

8. The doctor (P.W.11), who conducted post mortem examination over the dead body of the deceased found one lacerated injury of size 18" x ½" x total thickness of the skull, situated over the right parietal region and the injury started 1" above the right eye-brow and extended up to the occipital region. On dissection, fracture of the right frontal bone, right parietal bone and the occupit was found. Laceration of meninges and laceration of brain were noticed. The doctor opined that the cause of death was due to injury to the vital organ like brain leading to haemorrhage and shock. He further stated that the injury found on the dead body of the deceased was sufficient to cause his death in ordinary course and he proved the post mortem examination report i.e. Ext.16.

The finding of the learned trial Court that it was a homicidal death has not been challenged by the learned counsel for the appellant. After going through the inquest report (Ext.2), the evidence of the doctor (P.W.11) and the post mortem report (Ext.16), we are also of the considered view that the learned trial Court has rightly came to the conclusion that it was a case of homicidal death.

Analysis of the evidence of eye witness (P.W.8):

9. Adverting to the contentions raised by the learned counsel for the respective parties and after going through the evidence on record, we find that there is no dispute that the star witness on behalf of the prosecution is P.W.8 Sushil Barla.

Law is well settled that in order to act upon the testimony of a solitary witness, the evidence must be clear, cogent, truthful, reliable and aboveboard.

P.W.8 has stated that on 17.10.1999, while Nuakhai festival was going on and song and dance were being performed in the village near a church, at about 10.00 p.m., the co-accused Nirmal Barla caught hold of his collar and torn it and when P.W.1 intervened in the matter, the said co-accused also torn the shirt of P.W.1. Since the villagers gathered, the accused persons left the spot. He has further

stated that on the next day morning at about 6.00 a.m., he himself and the deceased came to the house of the appellant and the co-accused and asked them as to why their shirts were torn during the previous night but all of a sudden, the appellant assaulted the deceased on his head by means of an iron blade which hit on his head and the deceased sustained bleeding injury and fell down. He further stated that the co-accused Nirmal Barla also assaulted the deceased by means of a lathi and seeing the incident, he became panic and left the spot and came to P.W.1, the younger brother of the deceased and narrated the entire incident before him and then he along with the family members of the deceased came near the spot and found that the deceased was lying in the front courtyard of the house of the appellant and the co-accused.

P.W.8 has stated that not only the appellant assaulted on the head of the deceased by means of an iron blade but also the co-accused Nirmal Barla assaulted the deceased by means of a lathi. Of course, he has not stated which part of the body of the deceased, the co-accused assaulted. Since only one external injury was noticed on the person of the deceased, the learned trial Court did not place any reliance on the prosecution case regarding the involvement of the co-accused Nirmal Barla and accordingly, acquitted him. Thus the evidence of P.W.8 regarding the assault made by the co-accused Nirmal Barla on the deceased is a doubtful feature.

P.W.8 was specifically asked by the learned defence counsel about the injury sustained by the co-accused Nirmal Barla on his left shoulder at the time of occurrence, but he pleaded ignorance. P.W.11 examined the co-accused Nirmal Barla on 18.10.1999 at about 01.45 p.m. on police requisition and noticed one abrasion on the left side of the neck and the injury was opined to be simple in nature. The doctor specifically stated that the injury mentioned in Ext.13/1 i.e. the injury report of co-accused Nirmal Barla could be possible by a brickbat which is the defence plea. In the case of **Lakshmi Singh -Vrs.- State of Bihar reported in A.I.R. 1976 S.C. 2263**, it is held that the witnesses, who have denied the presence of injuries on the person of the accused are lying on a most material point and therefore, their evidence is unreliable. It was further held that non-explanation of injuries affects the prosecution case and the said principle would not apply where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries.

In the case in hand, the injury sustained by the co-accused Nirmal Barla was not minor and superficial but it was on the vital part of the body like neck. The deceased and P.W.8 seems to be aggressors and on the fateful day, they came to the house of the appellant in the early morning. P.W.8 has stated that the doors of both the accused persons were closed and when they called their names, they came out of their house opening their respective doors. He has admitted that a police case was

instituted against him, the deceased and others on the allegation that they had assaulted the mother of the appellant making aspersion on her to be a 'witch' and that there was previous enmity between them and the appellant because of such criminal case. P.W.8 disclosed about the assault before P.W.1, the younger brother of the deceased and P.W.1 in turn reported the matter before P.W.12, the A.S.I. of Police. P.W.12 stated that P.W.1 reported before him that both the accused assaulted the deceased by means of iron strip and killed him. Thus, nothing was stated by P.W.1 before P.W.12 that the co-accused Nirmal Barla assaulted the deceased by bamboo lathi. Therefore, not only the evidence of P.W.8 relating to the occurrence that took place in the morning hours on 18.10.1999 is discrepant from what P.W.1 has disclosed before P.W.12 when the latter arrived in the village immediately after the occurrence was over, but also his evidence relating to the involvement of co-accused Nirmal Barla in the assault of the deceased is found to be not acceptable and moreover, he was having previous enmity with the appellant and has suppressed the injury caused to the co-accused Nirmal Barla and therefore, he cannot be said to be an absolutely reliable and truthful witness, on whom implicit reliance can be placed for convicting the appellant. If the witness is neither wholly reliable nor wholly unreliable, the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. (**Ref.: Vadivelu Thevar -Vrs.- The State of Madras reported in (1957) 1 Supreme Court Reports 981**)

Suppression of the Original First Information Report:

10. According to the eye witness (P.W.8), he intimated about the occurrence to P.W.1, who is the informant in the case and P.W.1 has stated that he along with the ward member (P.W.6) came to the Lanjiberena Outpost and reported about the occurrence orally and the police officer reduced his report into writing, read over and explained it to him and finding it to be correct, he put his signature on it and he proved the F.I.R. marked as Ext.1. However, the evidence of P.W.6 is totally silent that he accompanied P.W.1 to Lanjiberena Outpost for lodging the first information report.

P.W.12, the A.S.I. of Lanjiberena Outpost, on the other hand, stated that on 18.10.1999 at about 7.30 a.m., he was in the Lanjiberena market where he heard about the murder and mentioned the fact in Lanjiberena station diary entry bearing no.263 dated 18.10.1999 and proceeded to the case village and when he arrived at the village Alanda Rengabahal, there P.W.1 orally reported before him about the occurrence which he reduced into writing, read over and explained the same to P.W.1 and after finding the contents to be correct, P.W.1 signed the written report. P.W.12 specifically denied the suggestion given by the learned defence counsel that on the date of occurrence, P.W.1 and the ward member (P.W.6) had appeared before him at Lanjiberena Outpost and orally reported about the occurrence which he reduced into writing and on such report, both of them signed.

Therefore, there are discrepancies in the statements of witnesses P.W.1 and P.W.12 regarding the place of lodging of the first information report. Whereas P.W.12 stated that the oral report was reduced into writing by him at the spot i.e. at village Alanda Rengabahal, but the informant (P.W.1) has stated that he along with P.W.6 went to Lanjiberena Outpost and orally reported the matter which was reduced into writing and treated as F.I.R. As already stated, the evidence of P.W.6 is totally silent that he accompanied P.W.1 to the Outpost for lodging of the F.I.R. If Ext.1 is the report, which according to the informant (P.W.1), was lodged at the Outpost then what happened to the report which was orally given to P.W.12 at the spot by P.W.1 and reduced into writing. Since the report which was given at the spot was the original report, it can be said that the original first information report has been suppressed by the prosecution.

P.W.12 has stated that when he reached at village Alanda Rengabahal, P.W.1 orally reported before him that on 17.10.1999, while they were observing Nuakhai festival, the appellant Sudarsan Barla and the deceased quarrelled and they were separated and the deceased was sent to his house. On a plain reading of the first information report (Ext.1), it would appear that it is totally silent that on 17.10.1999 during the observance of the Nuakhai festival, the deceased was at all present at that place rather it indicates that whatever dispute arose, the same was between the appellant Sudarsan Barla and his brother co-accused Nirmal Barla on the one hand and the informant (P.W.1) and his friend Sushil Barla (P.W.8) on the other hand. This pre-supposes that the earlier information which was given at the spot and reduced into writing where a different picture about the incident dated 17.10.1999 was given, has been suppressed. Similarly, P.W.12 further stated that P.W.1 also reported before him that on the next day, the deceased and P.W.8 went to the house of the appellant Sudarsan Barla and the co-accused Nirmal Barla and there they quarrelled with the deceased and assaulted the deceased by means of iron strip and killed him. Thus, according to P.W.12, no information was given before him by P.W.1 that the co-accused Nirmal Barla at all used any lathi in assaulting the deceased. Since the assault by the co-accused Nirmal Barla with a lathi on the deceased has been mentioned in Ext.1, it pre-supposes that the original report which was given at the spot wherein no such information was there about the specific role played by co-accused Nirmal Barla in assaulting the deceased by lathi, has been suppressed.

Another important feature of the case is that the first information report was shown to have been received on 18.10.1999 at 9.00 a.m. at the spot and it was received at Rajgangpur police station on 18.10.1999 at 10.30 a.m. and accordingly, Rajgangpur P.S. Case No.166 dated 18.10.1999 was registered under sections 302/34 of the I.P.C. and thus, prior to 10.30 a.m., there was no information before anybody that Rajgangpur P.S. Case No.166 dated 18.10.1999 was registered on the report of P.W.1. P.W.12 has stated that when he issued the command certificate on 18.10.1999 at 8.00 a.m., he mentioned the P.S. Case No.166 of 1999. If by 8.00

a.m., the P.S. Case has not been registered, how the same was mentioned in the command certificate. It pre-supposes that either the case was registered before 8.00 a.m. at Rajgangpur police station on the basis of any report and P.S. Case number was available when the command certificate was prepared or in the command certificate, the P.S. case number has been subsequently incorporated. The prosecution has not offered any explanation in that respect.

In the case of **Balgopal Panda and Others -Vrs.- State reported in Vol.70 (1990) Cuttack Law Times 1**, it was held as follows:-

> "12. In consideration of the aforesaid facts and evidence, we do not hesitate to hold that the true first report submitted by P.W.1 was suppressed by the prosecution. Had it been treated as FIR and produced during trial, the story narrated in it would have been unfavourable to the prosecution. Therefore, while it was managed that it would not See the light of the day, a first information which suited the prosecution, but not revealing the true incident, was brought into being. In such circumstances, it would be reasonable to infer that the first information report (Ext. 1/1) contained a tainted, embellished and exaggerated story, but not the true one."

In view of the foregoing discussions, we find sufficient force in the argument advanced by the learned counsel for the appellant that the original first information report has been suppressed. Had the report prepared by P.W.12 on the first version of P.W.1 at the spot been treated as F.I.R., it might have been unfavourable to the prosecution for which it was suppressed and the second report given by P.W.1 at the Outpost was treated as F.I.R. which makes the prosecution case suspicious.

Conclusion:

11. In view of the foregoing discussions, analysing the evidence on record meticulously, dispassionately and objectively, we are of the humble view that when the original first information report seems to have been suppressed and the evidence of the solitary eye witness (P.W.8) cannot be said to be clear, cogent, trustworthy and above board and when a part of the prosecution case relating to the involvement of the co-accused Nirmal Barla in the assault of the deceased has been disbelieved by the learned trial Court, it would be risky to act upon the version of P.W.8 to convict the appellant. We are of the view that it cannot be said that the prosecution has successfully established its case beyond all reasonable doubt against the appellant.

In the result, the JCRLA is allowed. The impugned judgment and order of conviction of the appellant and the sentence passed thereunder is hereby set aside. The appellant is acquitted of the charge under section 302 of the I.P.C. The appellant, who is on bail by virtue of the order of this Court, is discharged from liability of his bail bonds. The personal bonds and the surety bonds hereby stand cancelled.

The trial Court records with a copy of this judgment be sent down to the Court concerned forthwith for information.

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2023 (III) ILR – CUT- 760

S.K. SAHOO, J & CHITTARANJAN DASH, J.

JCRLA NO. 92 OF 2005

SURYANARAYANA MUNI @ KUNA MUNI .....Appellant

- V-

STATE OF ORISSA .....Respondents

(A) INDIAN PENAL CODE, 1860 – Section 300 – Exception 4 – Necessary requirements to invoke this exception indicated with reference to case law. (Para-22)

(B) CRIMINAL TRIAL – The Appellant convicted under the offence of 302 of IPC – Plea of Appellant is that, motive has not been proved by the prosecution – Effect of – Held, when the case of the prosecution is based on evidence of eye witnesses, the existence or non-existence of motive, sufficiency or insufficiency of motive will not play such a major role as in the case which is based on circumstantial evidence. (Para-23)

(C) CODE OF CRIMINAL PROCEDURE, 1973 – Section 161 – Duty of the court while evaluating the evidence on record – Discussed. (Para-24)

Case Law Relied on and Referred to :-

1. Suresh Kumar Vs. State of H.P., 2008 Cri. LJ, SC)

For Appellant : Mr. Pulakesh Mohanty

For Respondents : Mr. Sonak Mishra, Addl. Standing Counsel

JUDGMENT Date of Judgment :15.11.2023

CHITTARANJAN DASH, J.

1. This Appeal is directed against the judgment and order dated 11.04.2005 passed by the Ad-hoc Additional Sessions Judge, FTC, Aska in Sessions Case No.21 of 2004 / Sessions Case No.53 of 2003 GDC arising out of Aska P.S. Case No.204 of 2002 corresponding to G.R. Case No.321 of 2002, wherein the Appellant who faced trial on the charge under Section 302, Indian Penal Code (herein after in short called the 'IPC'), having found guilty, has been sentenced to undergo imprisonment for life and to pay fine of Rs.5000/- (five thousand), in default to pay the fine, to undergo R.I. for three years more.

2. The prosecution case, as reveals from the F.I.R. and the case record, is that on 29.08.2022 at about 9.30 AM the deceased Prakash Chandra Muni, who was engaged as a priest in Tribideswar Temple, Aska, was preparing 'Prasad' in that temple's kitchen to offer the same to the deity. The Appellant Suryanarayana Muni @ Kuna Muni, who belongs to Sana Munisahi and also a priest in the said temple, appeared there and abused the deceased in filthy languages. On being challenged by the deceased forbidding use of such abusive language in the temple premises, the Appellant assaulted the deceased by means of a knife in front of the inner sanctum near the Bull Statue, causing grievous bleeding injuries on both side of his abdomen as well as on the rib of the chest so also on the left shoulder. After assaulting the deceased, the Appellant fled away from the spot. The informant along with others shifted the deceased to the nearby hospital, wherefrom the doctors referred the deceased to the MKCG Medical College & Hospital, Berhampur for better treatment, finding the condition of the deceased to be critical. It further reveals that in connection with the alleged incident, F.I.R. was lodged with the Aska Police, which having registered, the investigation commenced. At the time of lodging of F.I.R., since the deceased was alive and was undergoing treatment, the case was registered under Section 307, IPC along with other allied offences. Subsequently, as the deceased succumbed to the injuries, the case turned to one under Section 302, IPC.

3. In course of the investigation, the initial I.O. examined the complainant / informant and other witnesses on the very same day at about 12.20 PM, issued the Injury Requisition in respect of the injured (deceased) Prakash Chandra Muni addressing the Medical Officer, Govt. Hospital, Aska, wherefrom the injured was immediately referred to MKCG Medical College & Hospital, Berhampur. The I.O. arrested the Appellant Suryanarayana Muni @ Kuna Muni at 2.00 PM on the same day and forwarded him to Court. He visited the hospital and examined the injured at MKCG Medical College & Hospital, Berhampur, seized one gray colour towel on production by Subash Ch. Muni., which was stained with blood of the deceased, under Ext.6. He sent the requisition to the Medical Officer, MKCG Medical College & Hospital in respect to the injuries of Prakash Chandra Muni. On 03.09.2002 the I.O. received information from the Medical Authority to the effect that the injured Prakash Ch. Muni succumbed to the injuries and also received intimation slip to that effect. On receipt of the intimation, the I.O. proceeded to the hospital, held inquest over the dead body in presence of the witnesses under Ext.1. He sent the dead body of the deceased for post-mortem examination to the FMT, Department, MKCG Medical College & Hospital, Berhampur under requisition vide Ext.2 and the dead body challan under Ext.2/2. On the same day he seized the wearing apparels, a cotton sacred-thread and one Command Certificate produced by the constable after the P.M. examination. He also visited the spot and prepared the spot map under Ext.7. On 15.10.2002 he handed over the charge of the investigation to the I.I.C. on his transfer. The I.I.C. having taken over the investigation verified the Case Diary

and finally submitted Charge-sheet on 24.10.2002 against the Appellant to stand trial under Section 302, I.P.C.

4. The plea of the defence is one of complete denial and false implications.

5. Upon denial of the prosecution gravamen, the learned trial court framed charge against the Appellant under Section 302, IPC and proceeded with the trial.

6. In order to prove the culpability of the Appellant, the prosecution examined 11 witnesses in all and proved documents vide Exts. 1 to 11. The defence examined none in support of its case either oral or documentary.

7. P.W.1 – Manoranjan Panda is an eye-witness to the occurrence. In his evidence on oath he stated that in the intervening night of 2/3.09.2002 the deceased Prakash Kumar Muni died while was under treatment in the MKCG Medical College & Hospital, Berhampur. According to this witness, the occurrence took place on 29.08.2002. On that day at about 9.30 AM he had been to Tribideswar Temple to worship. River Rushikulya flows by the side of the temple towards South. He went to river Rushikulya to wash his legs and while coming to the temple, he heard exchange of words between the Appellant and the deceased and saw the accused Suryanarayan Muni stabbed the deceased on the belly, on both sides on left arm towards upper end and on the left shoulder by means of a knife, as a result the deceased sustained bleeding injury. Seeing the incident, he ran towards the Appellant, but he fled away towards Jagannath Temple carrying the knife with him. He, thereafter, along with others shifted the injured Prakash Muni to Aska Hospital. The doctor at Aska Hospital referred the injured to the MKCG Medical College & Hospital, Berhampur for further treatment. According to this witness, the injured was shifted to Berhampur Medical, where he died while undergoing treatment. The witness further stated that on 03.09.2002 at about 9.30 to 10 AM the police held the inquest over the dead body of the deceased at MKCG Medical in his presence and prepared the inquest report, which was marked Ext.1 and he proved his signature in the inquest report marked as Ext.1/1. During his cross-examination, the defence elicited that the kitchen room of Tribideswar Temple situates at a distance of about 15 to 20 feet away from the main temple. At the time of incident, besides him, one or two other devotees were present in the temple. Subash Chandra Muni, Kalia Muni and 2 to 3 other Pujakas were also present at the time of occurrence. While he entered in the temple from South entrance and Kalia Muni entered from North entrance, at the relevant time he saw Subas Ch. Muni was inside the Garbha Gruha. He further replied during the cross-examination that the deceased was standing facing towards the East at the time of occurrence and the accused was standing facing towards West. He saw the accused inflicting a knife blow on the left upper arm of the deceased and prior to that he had already inflicted other three blows which he had not seen. It is also elicited in the cross-examination to the effect that, after the incident, for the first time he met Aska Police on 03.09.2002 and he cannot say the date of his examination by the Aska Police, but by approximation he stated

that he may have been examined after a week or a fortnight. He reiterated his statements during the cross-examination to have seen the Appellant stabbing the deceased by a knife and to have fled away towards Jagannath temple.

8. P.W.2 – Deepak Raj Muni is the son of the deceased. He is a post-occurrence witness, who stated to have proceeded to the MKCG Medical College & Hospital, Berhampur on being informed that his father to have been received injuries out of the assault and who expired in the medical in the intervening night of 2/3.09.2002. He also stated that the police held inquest over the dead body of the deceased, wherein he gave his opinion that the injuries could be by means of sharp-cutting knife. He also put his signature on the inquest report, marked Ext.1/2.

9. P.W.3 – Subash Chandra Muni is another eye-witness to the occurrence. According to him, on the date of occurrence when he came to the temple, deceased Prakash Muni was performing his Pujaseva (Pali). The devotees used to worship and take Darshan of the deity standing in the adjacent hall of the main temple. There is a Bull statue made of stone installed in the Darsan Hall. He was inside the Garbha Gruha (sanctum sanctorum) of the temple. At that time he heard a hulla from the Darshan Hall, came out and saw that the Appellant was stabbing Prakash Muni on his backside shoulder and thereafter on the front side belly. Seeing the incident, he raised hullah; the Appellant threw away the knife in the river and fled away crossing the river. According to this witness, Sana Kalia, Bada Kalia and he chased the Appellant but could not catch hold of him. Thereafter, they shifted the injured Prakash Muni to Aska Hospital where he was given first aid and then was referred to MKCG Medical at Berhampur. The witness further stated that the deceased died at Berhampur Hospital while undergoing treatment. This witness is a Pujaka of Tridebeswar Temple, since the time of his father. For the last 40 years, he is doing Seba Puja of the deity at Tridebeswar Temple. In the cross-examination, this witness stated that, after the death of his father, his three brothers are doing Seva Puja of the deity in rotation and about 12 family used to worship in the temple as Priest. There are 18 to 20 Pujaka in Tridebeswar Temple and they perform Seva Puja on rotation basis. This witness though admitted that some devotees were present at the time of the alleged occurrence, he could not name them. According to the witness, at the time of occurrence the deceased was standing near the Brushava statue facing towards South. The Appellant came from Northern side. Since he came out of the Garbha Gruha, he saw both the Appellant and the deceased were exchanging words. He intervened in the quarrel and separated both of them from the quarrel. At the time of occurrence the deceased was wearing a 'Matha' and holding a towel and the accused inflicted knife blows twice on the back of the neck of the deceased. His attempt to separate the accused at the time of assault, along with 3 others could not be successful. He noticed four injuries on the person of the deceased, i.e. two injuries on the belly and two on the back just below the neck and there was profuse bleeding from the injuries. Blood was sprinkled in the Darsana Gruha. The wall of Darsana Gruha was not stained with blood. He chased the Appellant up to Bada

Munisahi and thereafter came back to the temple. He, however, did not accompany the deceased to Aska Hospital.

10. P.W.4 – Pratap Chandra Biswal is an official witness.

11. P.W.5 – Bighnaraj Mohapatra is the maternal uncle of the deceased. He stated the deceased to have received stabbed injuries on 29.08.2002 by Appellant Suryanarayan Muni. P.W.5 too is a witness to the inquest held by the police on the dead body of the deceased and signed on the inquest report.

12. P.W.6 – Kalicharan Muni is another eye-witness to the occurrence. According to him, the Appellant and the deceased both were performing Sebapuja of the deity Tribedeswar Mahaprabhu and Chandrasekhar Mahaprabhu of Aska. Both the deities are installed in one boundary in two different temples. He also deposed that he himself is a Pujari. According to him, the occurrence took place on 29.08.2002. On that day, the deceased was performing Seba Puja by offering Bhogo (Prasad) to the deity. The Appellant came to the temple and standing near the Brusava, abused the deceased. By that time the deceased was inside the kitchen, which is situated at a distance of about 7 cubits from the Hall where the statue of Brusabha is installed. The deceased came out of the kitchen and forbade the Appellant not to abuse him. There was exchange of hot words between the Appellant and the deceased, and at that time the Appellant stabbed the deceased by means of a knife on his belly, shoulders (both sides) and on the back causing bleeding injury on the persons of the deceased. The occurrence took place where the Brushabha is installed in the main hall of the temple, which is also the Darsan Hall. He caught hold of the deceased. The Appellant after assaulting the deceased, fled away from the spot. Some persons chased him, but could not catch him. Thereafter, he shifted the deceased to Aska Hospital, from where he was shifted to the MKCG Medical College & Hospital at Berhampur, as he was serious after giving first aid. Thereafter, he came back to the Police Station and lodged F.I.R. vide Ext.4.

13. Nothing material could be elicited from this witness shaking the testimony, rather the facts confronted to the witness further emboldened his version.

14. P.W.7 – Tarini Charan Muni is also an eye-witness to the occurrence. He stated that on the relevant date, the occurrence took place at about 9 AM. At that time he was present in the temple. On his arrival at the temple, he saw the Appellant Suryanarayan abusing the deceased Prakash Ch. Muni. The deceased Prakash came out from the kitchen and asked the Appellant as to why he is abusing him. During exchange of hot words, Appellant Suryanarayan whipped out a knife which was kept by him covering a towel and stabbed on the belly of the deceased Prakash Muni from his front side and thereafter he stabbed 2 to 3 times successively, causing bleeding injury on the person of the deceased. He along with others tried to catch the Appellant, but the Appellant managed to escape. Thereafter P.W.6 took the deceased to the Hospital and subsequently the deceased died at Berhampur Hospital. This

witness was subjected to incisive cross examination but nothing material could be elicited by the defence to shake his credibility.

15. P.W.8 is the doctor, who conducted post-mortem examination over the dead body of the deceased and P.W.9 is the younger brother of the deceased. He is a post-occurrence witness as well as a witness to the inquest. P.Ws.10 and 11 respectively are the Investigating Officers.

16. The learned trial court having believed the ocular evidence brought through the eye witness account, found the case of the prosecution credible and sufficient to bring home the charges against the Appellant beyond reasonable doubt and found the Appellant guilty of the offence charged and accordingly convicted him and sentenced as above stated.

17. Mr. Mohanty, learned counsel representing the Appellant assailed the impugned judgment, inter alia, on the ground that the testimony of the witnesses suffers from contradictions and are not worthy of credence to sustain conviction there under. It is further contended by the learned counsel that the incident having taken place at the spur of the moment in a fit of anger followed by a sudden provocation, it could not have been brought with the ambit of section 300 IPC. According to learned counsel the death being not one instantaneous, is sufficient to deduce that the Appellant had no intention but knowledge that the injuries is likely to cause death of the deceased and at best could be brought one under section 304 Part II of the IPC. Mr. Mohanty also submitted that the prosecution has utterly failed to bring the motive behind the assault, which is a vital element and the impugned judgment having not assessed in consonance with law and fact, is liable to be set aside.

18. Learned State Counsel Mr. Mishra, on the contrary submitted that the evidence brought by the prosecution through P.Ws.2, 3, 6 and 7 is not only consistent to each other but also coherent to themselves and corroborates the medical evidence as the nature of and place of injuries and they being natural witnesses, whose presence at the scene of occurrence is beyond doubt, has rightly been relied upon by the learned trial court. Further, Mr. Mishra pointed out that the injuries inflicted being so cruel that despite the immediate medical intervention and treatment of best kind, the injured succumbed to the injuries, which speak of not only the intention but knowledge of the Appellant in inflicting the injuries to the vital part of the body that resulted fatal. Mr. Mishra also submitted that there is evidence to the effect that the Appellant had premeditation in inflicting the assault by means of dangerous weapon having brought inside the temple with him, which, a person with prudence cannot conceive of while coming to the temple normally and giving successive blows without any kind of provocation but by inciting himself bring a clear case of murder within the meaning of section 300 IPC and as such the impugned order does not suffer from any illegality that requires interference.

19. At the outset, before delving into the merit of the case, it is imperative to examine the conclusion arrived at by the learned trial court holding the death of the deceased to be homicidal. In this context, besides the ocular versions, the evidence brought through P.W.8 (the doctor) who conducted the post-mortem examination, assumes importance. In his evidence on oath, P.W.8 stated to have conducted the post-mortem examination of the dead body of the deceased on 03.09.2002 and found as follows :-

> (i) Two drainage tube stitched by silk sutures present on either side of flank, 12 cm and 18 cm from umbilicus on right and left side respectively. So also another drainage tube on left lower chest along with anterior axillary line could be detected.
>
> (ii) Stitched wound present over the midline of abdomen, starting 3 cm below the xiphisternum extending downwards with intact black silk sutures of length 14 cm.
>
> (iii) Stitched wound obliquely placed over the right upper abdomen with intact two silk sutures measuring 2.5 cm, present 7 cm above and 2cm right lateral tube umbilicus.
>
> (iv) Stitched would obliquely present over the left lateral side of chest with intact stitches in mid-auxiliary line 29 cm below the armpit measuring 2.5cm.
>
> (v) Spindle shaped cut would of size 2cm x 1 cm muscle deep present over the tip of left shoulder with tailing downwards along with anterior auxiliary line.
>
> (vi) Spindle shape cut wound of 4cm x 1cm present over posterior aspect of left shoulder 4 cm below and 3 cm posterior to external injury no.(v).
>
> On dissection, I found the following injuries :-
>
> (vii) On exploration of external injury No.1 and 2, it was found that both the injuries were surgically maneuvered injuries and on removal of the stitches of other injuries, the following injuries detected:
>
> (viii) External injury No.(iii) causes stab wound measuring 2.5 cm x 0.5 x abdomen cavity. On further exploration and removal of stitches of stitched transverse colon, it was ascertained that the stab injury on its way it has penetrated to transverse colon up to its lumen which was found stitched with adhesion of omentun, the direction being downwards and medially.
>
> (ix) External injury No.(iv) was a stab wound measuring 2.5 cm x 0.7 cm x abdominal cavity . On further exploration and removal of stitches of the stitched splenic flexure it was ascertained that the stab injury on its way has pierced the splenic flexure which was found stitched with adhesion of omentum. The stitched size will look inflame oxidative material found stitching to it.
>
> Opinion :-
>
> (i) Above mentioned injuries were anti-mortem in nature.
>
> (ii) External injury No.(i) and ii including the corresponding injury were surgically maneuvered injuries while rests of the injuries were caused by cutting pointed weapon.
>
> (iii) The deceased died of complication arising out of above mentioned injuries (Injury No.iii & iv).

(iv) The time since death at the time of P.M. examination was around 12 hours.

(v) Dried blood stained gauge was preserved.

20. In his cross-examination, the doctor stated that no weapon of offence was produced before him. Nothing material could be brought from the doctor disputing his opinion as to the homicidal nature of death of the deceased. The inquest report proved vide Ext.4 reveals the immediate cause of death to be the injuries sustained by the deceased and goes unchallenged. Having regard to the aforesaid evidence that substantiates the cause of death to be the complications of the injuries sustained by the deceased and homicidal in nature coupled with the ocular evidence of P.Ws.1, 3, 6 & 7 who witnessed the incident and gave narration of the manner of assault, the weapon used in the assault receives well deserved conclusion by the learned trial court holding the deceased to have died of homicidal death.

21. The next question comes is whether the Appellant is the perpetrator of the act alleged. Admittedly, the prosecution case is based on the direct evidence of the eye-witnesses account. All the four witnesses claimed to have seen the occurrence being present closely to the scene of occurrence and vividly narrated the manner in which the incident took place right from the beginning till they shifted the injured to the hospital. The very fact that the place of occurrence is a temple and the witnesses being the devotees and servitors, their presence being natural cannot be doubted, more particularly at the time when the occurrence took place, which is the time normally for the devotees to come to the temple to offer prayer and the priests remain engaged in offering Puja Seva to the deities. The presence of none of these eye-witnesses can otherwise be doubted, as the witnesses (P.Ws. 3, 6 and 7) have very clearly and categorically stated that they too offer Seva Puja on rotation basis in spell. Nothing in the evidence has been brought to dispute that these eye-witnesses who got engaged in the Seva Puja of the deity on the relevant day were not in their usual turn. Further, the presence of the witness, i.e. P.W.1 as devotee at the place of occurrence is also natural. Hence, presence of these witnesses at the scene of occurrence is so close that nothing can be doubted on the version of the witnesses as to the tenor and the manner of assault narrated by them exhorted by the Appellant on the deceased. The Appellant himself being one of the Pujakas, his identity is also not in dispute. The consistent evidence of the witness that substantially corroborates their earlier statement recorded U/s. 161 Cr.P.C inspires confidence to accept their versions as truthful and above board. The witnesses have given a true account of what transpired on the day of occurrence and there was nothing to bring out in the cross examination to reject their testimony which is free from embellishment. They are credible and natural witnesses on whom the court was inclined to place reliance for further reason that the ocular version finds well corroborated to the medical evidence. There being ample of credible evidence that the Appellant used a dangerous weapon like knife and gave successive blows to the stomach of the deceased, which, according to the opinion of the doctor is fatal in nature resulting

the death of the deceased later, can reasonably be gathered that the Appellant had intention to murder.

22. The argument of the learned counsel for the Appellant that the assault is the result of a sudden provocation finds no support in the evidence. To invoke this exception, four requirements must be satisfied namely (i) it was a sudden fight, (ii) there was no premeditation, (iii) the act done was in heat of passion, and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. To sum up in a sudden fight in order to apply the Exception 4 to Section 300, IPC, the Appellant must be shown to have not taken undue advantage or that he did not act in a cruel or unusual manner inflicting the injury (***Suresh Kumar v. State of H.P., 2008 Cri. LJ, SC***). Taking the overall view in the instant case, when the evidence is seen, it emerges that the Appellant having appeared at the scene started abusing the deceased in filthy language inciting himself voluntarily being armed with knife obviously that has not been picked up anywhere from or nearby the spot and immediately stabbed the deceased when he challenged forbidding him from using such abusive language in the temple premises, fully establishes the factum of premeditation and further the successive blows given by the Appellant not only to the vital part of the body but indiscriminately to other portion too giving no opportunity to the deceased to escape. As discussed in the evidence, the intensity and gravity of the injuries are such that despite a timely medical intervention by providing best medical treatment, he succumbed to it. Consequently, none of the elements found present to deduce the act of the Appellant to be one within any of the exceptions of Section 300 IPC to consider the same as culpable homicide not amounting to murder receives a probability and the act squarely comes within the ambit of Section 300 IPC.

23. As far as the argument of Mr. Mohanty as to the absence of a motive having proved in the case, the Prosecution probabilises a short of cogent material to implicate the Appellant belies by the well settled principles of law that when the case of the Prosecution is based on evidence of eye witnesses, the existence or non-existence of motive, sufficiency or insufficiency of motive will not play such a major role as in the case which is based on circumstantial evidence, since the case of the Prosecution has to be decided on the basis of merit of the evidence of such witnesses.

24. In the result, therefore, we are of the considered view that the learned trial court is justified in holding the Appellant to be the author of the murder and has rightly convicted and sentenced him therewith. The impugned Judgment requires no interference. The same stands confirmed. The JCRLA is dismissed. Since the Appellant is on bail, he shall surrender forthwith before the learned trial court within a period of fifteen days from the date of this order to serve the sentence.

Before parting with the case, we feel it necessary to observe that this Court while in seisin of the Appeals come across the evidence recorded by the courts

during trial. It is invariably seen that the courts while recording evidence are remaining oblivious to the compliance of some procedural part that receives weight of evidence in the circumstance of the case, absence whereof preclude the court to assess its evidential value, particularly cases based on circumstantial evidence. As observed in this case too, the I.O. in his evidence although states that in course of the investigation he examined the injured and recorded his statement U/s 161 Cr.P.C with utmost promptitude, clearly disclosing the cause of injury is not taken to the evidence on record by the trial court. Needless to say that such statement becomes a dying declaration upon the death of the injured and receives great importance in the realm of the circumstantial evidence, the evidential value of such statement though is matter of evaluation but absence of taking the said statement to the evidence on record precludes the court to read the same in evidence. We are, therefore, of the view that the trial courts must remain alive to this aspect scrupulously while recording evidence.

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2023 (III) ILR – CUT- 769

KRUSHNA RAM MOHAPATRA, J & R.K PATTANAIK, J.

W.P.(C). NO. 271 OF 2013

ORISSA FOREST DEVELOPMENT CORPORATION LTD. .....Petitioner

-V-

PURNA CHANDRA PARIDA & ANR. .....Opp. Parties

INDUSTRIAL DISPUTE ACT, 1947 – Section 33(C)2 – The corporation directed to recover the amount of Rs. 52,924/- from the unutilized leave salary of the workman – Workman challenge the same in appeal – The appellate authority rejected the claim of workman – The workman challenge the same before Labour Court – The Learned Labour Court allow the prayer and directed the management to release the amount – Whether the Learned Tribunal has the Jurisdiction to adjudicate upon the undetermined claim of the workman U/s. 33(C)2 of the I.D Act? – Held, No – Section 33(C)2 of the I.D Act being in the nature of execution proceeding the Industrial Adjudicator can only compute the same on the basis of previous settlement – Hence, direction of recovery is without Jurisdiction and is not sustainable.

Case Law Relied on and Referred to :-

1. 2020 (2) OLR 977: Divisional Manager, Orissa Forest Development Corporation Ltd., Baripada Vs. Umamani Nayak & Ors.

For the Petitioner : Mr. Santosh Kumar Patnaik, Sr. Adv.
Mr. U.C. Mohapatra

For Opp. Party : Mr. Satyabrata Mohanty

JUDGMENT Date of Hearing & Judgment 26.09.2023

BY THE BENCH:

1. This matter is taken up through hybrid mode.

2. Order dated 15th September, 2012 (Annexure-10) passed by learned Presiding Officer, Labour Court, Bhubaneswar in Industrial Dispute Misc. Case No.59 of 2010 is under challenge in this writ petition, whereby allowing an application under Section 33-C(2) of the Industrial Disputes Act, 1947 (For brevity 'the Act'), the Petitioner-Management has been directed to pay a sum of Rs.52,924/- to the Opposite Party No.1-Workman within a period of three months from the date of the order failing which it would carry interest at the rate of 10% till realization.

3. Mr. Patnaik, learned Senior Advocate appearing for the Petitioner-Management submits that for shortage of trees and receipt of advance salary, the amount of Rs.52,924/- was directed to be recovered from the unutilized leave salary of the Opposite Party No.1-Workman. Assailing the same, Opposite Party No.1-Workman preferred an appeal before the Managing Director, Orissa Forest Development Corporation Limited.The said appeal has been rejected since 14th September, 2009. After dismissal of the appeal holding the Petitioner is liable to pay the aforesaid amount, the Opposite Party No.1 filed an application under Section 33-C(2) of the Act in Industrial Dispute Misc. Case No.59 of 2010 for release of his unpaid leave salary. Learned Presiding Officer, Labour Court, Bhubaneswar held that the Opposite Party No.1-Workman is entitled to the aforesaid amount.

4. Mr. Patnaik, learned Senior Advocate submits that a proceeding under Section 33-C(2) of the Act is in the nature of an execution proceeding. Only the admitted/settled dues of a workman which is capable of being computed may be entertained under Section 33-C(2) of the Act. In the instant case, learned Presiding Officer, Labour Court, Bhubaneswar exceeded his jurisdiction in adjudicating upon the claim of the Petitioner which is not due to the Opposite Party as held by the Competent Authority. In support of his submission, Mr. Patnaik, learned Senior Advocate relied upon the case of ***Divisional Manager, Orissa Forest Development Corporation Ltd., Baripada vrs. Umamani Nayak and others*** reported in 2020 (2) OLR 977, in which it is held as under:

> *"8. In view of the settled law we have no hesitation to hold that the learned Labour Court lacks jurisdiction to adjudicate upon the undetermined claim of the workman, under Section 33C(2) of the ID Act, be it for back wages or other dues. It being in the nature of execution proceeding, the Industrial Adjudicator can only compute the same on the basis of previous determination/settlement. As such, the learned Labour Court has exceeded its jurisdiction in adjudicating the claim of the workman. ……..."*

5. It is submitted that while arriving at the aforesaid conclusion, this Court has taken into consideration the settled law in the field. Learned Presiding Officer, Labour Court, Bhubaneswar failed to appreciate the same and passed the impugned order which is not sustainable and thus liable to be set aside.

6. Mr. Mohanty, learned counsel for the Workman submits hat the Opposite Party-1 (Workman) filed the aforesaid proceeding under Section 33-C(2) of the Act for determination of the entitlement to the unpaid leave salary for 300 days amounting to Rs.68,400/-. Out of the said amount, the Opposite Party No.1 was admittedly paid a sum of Rs.15,476/-.As such, he is entitled to the rest of the amount of Rs.52,924/-.The Petitioner-Management has also admitted that the Opposite Party-1- Workman is entitled to the aforesaid unpaid leave salary, but the said amount was withheld on the plea that it was deducted from the unpaid leave salary for shortage of trees and receipt of advance salary.Although a notice to show-cause was issued to the Opposite Party No.1 for recovery of such amount, but without conducting any inquiry or affording opportunity to the Opposite Party No.1, the said amount was directed to be recovered. Since the process of recovery was violative of principles of natural justice and procedure prescribed, the entire process of recovery is non est in the eye of law. As such, Opposite Party No.1 is entitled to the said amount.

7. Learned Labour Court, while adjudicating the matter, has categorically held that the notice to show-cause was not issued by the Appointing Authority and no opportunity of hearing was given to him before an order of recovery was made. Thus, holding the recovery to be bad in the eye of law learned Labour Court held that Opposite Party No.1 is entitled to the aforesaid amount.

8. It is his submission that the Petitioner-Management has never disputed the amount as due to Opposite Party No.1.Thus, the case of the Opposite Party No.1 is squarely covered under the provision under Sub-Section 2 of Section 33-C of the Act.Hence, he submits that the writ petition, being devoid of any merit, should be dismissed.

9. Taking into consideration the submission made by learned counsel for the Parties, this Court finds that the Opposite Party No.1 had filed the proceeding under Section 33-C(2) of the Act for release of Rs.52,924/- recovered from his unpaid leave salary for 300 days. It is not disputed that the Opposite Party No.1 was entitled to a sum of Rs.68,400/- towards unpaid leave salary for 300 days. He was admittedly paid a sum of Rs.15,476/-, but he was not paid a sum of Rs.52,924/-. When the Opposite Party No.1-Workman claims that he is entitled to the aforesaid amount, but the Petitioner-Management took a stand that the said amount was recovered from the Petitioner due to shortage of trees and receipt of advance salary.

10. In a proceeding under Section 33-C(2) of the Act as held by this Court in the case of ***Divisional Manager***, ***O.F.D.C.(supra),***that learned Labour Court/Industrial

Tribunal lacks jurisdiction to adjudicate upon any undetermined claim of the Workman under Section 33-C(2) of the Act be it for the back wages or other dues.It is also held that the proceeding under the said provision is in the nature of execution proceeding. Thus, the Industrial Adjudicator under the said provision is only competent to compute the entitlement of a workman on any previous determination/ settlement. In the instant case, the Petitioner-Management directed to recover an amount of Rs.52,924/- from the unpaid leave salary of the Opposite Party No.1.The Opposite Party No.1,being aggrieved, preferred an appeal which has already been dismissed vide order dated 14th September, 2009. Thus, the entitlement of the Opposite Party No.1 to the aforesaid amount requires an adjudication by the Competent Authority/Court. The said power is not available to an Industrial Adjudicator exercising power under Section 33-C(2) of the Act. As such, direction to pay the aforesaid amount to Opposite Party No.1 is without jurisdiction and hence is not sustainable.

11. Accordingly, the impugned order under Annexure-10 is not sustainable and is accordingly set aside. There shall be no order as to costs.

12. The LCR be sent back to learned Labour Court, Bhubaneswar immediately.

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2023 (III) ILR – CUT - 772

KRUSHNA RAM MOHAPATRA, J & R. K. PATTANAIK, J.

W.P.(C). NO. 3347 OF 2016

MANAGEMENT OF EXÉCUTIVE ENGINEER & ORS. .....Petitioners

-V-

BRAJA KISHORE BHOI & ORS. .....Opp. Parties

INDUSTRIAL DISPUTE ACT, 1947 – Whether the Industrial Tribunal/ Labour Court became functus officio after 30 days of the pronouncement/publication of the award and loses all powers to recall an ex-parte award of an application made by the aggrieved party after 30 days from the date of pronouncement/publication of the award? – Held, No – As per the decision of Hon'ble Supreme Court even after expiry of thirty days and publication of the award in the official gazette, an Industrial Adjudicator has Jurisdiction to entertain application to set-aside an ex-parte award. (Paras 5.1-8)

Case Laws Relied on and Referred to :-

1. 2004 (103) FLR 699 : Sangham Tape Co. Vs. Hans Raj
2. (2018) 16 SCC 567 : Haryana Suraj Malting Ltd. Vs. Phool Chand

For Petitioner : Mr. Ajodhya Ranjan Dash, AGA

For Opp. Parties : Mr. Bamadev Baral

JUDGMENT Date of Hearing & Judgment 03.10.2023

BY THE BENCH:

1. This matter is taken up through hybrid mode.

2. Petitioners-Management, in this writ petition, seeks to assail the Award dated 3rd January, 2014 (Annexure-5) passed by learned Presiding Officer,Industrial Tribunal, Bhubaneswar (for short, 'Tribunal') in I.D. Case No.31 of 2013. It also assails the order dated 11th August, 2015(Annexure-7) passed by learned Tribunal in Restoration Misc. Case No.2 of 2015,whereby an application filed for setting aside the *ex-parte* award was dismissed.

3. Mr. Dash, learned AGA appearing for the Petitioners-Management submits that pursuant to an application filed under Section 2-A (2) of the Industrial Disputes Act, 1947 (for short, 'ID Act') by the Opposite Parties-Workmen, ID Case No.31 of 2013 was initiated on the file of learned Tribunal. Although the Management, who was the 1st Party therein filed written statement, but could not contest the case by adducing evidence and taking part in the hearing. However, learned Tribunal without discussing the evidence on record, passed an award on 3rd January,2014(Annexure-5) directing to reinstate the Opposite Parties-Workmen in their respective posts forthwith without any back wages. Since the award was passed ex-parte, an application under Section 11 of the ID Act was filed to set aside the said ex-parte award in Restoration Misc. Case No.2 of 2015. Learned Tribunal relying upon the case of ***Sangham Tape Co. Vs. Hans Raj***, reported in 2004 (103) FLR 699 held that after publication of the award in the official gazette, the Tribunal becomes functus officio to entertain any application including application to set aside an ex-parte award.

3.1 It is his submission that in view of the ratio decided in the case of ***Haryana Suraj Malting Ltd. Vs. Phool Chand***, reported in (2018) 16 SCC 567, learned Tribunal has ample power to entertain an application to set aside an ex-parte award. It is further submitted that the impugned Award under Annexure-5 is cryptic one. Hence, this writ petition has been filed to set aside the impugned order under Annexure-7 and to provide an opportunity to the Petitioners-Management to adduce evidence and contest the Industrial Dispute.

4. Mr. Baral,learned counsel for Opposite Parties submits that the Petitioners-Management filed their written statement in the Industrial Dispute. They had also participated in the proceeding throughout.Although they had ample opportunity to adduce evidence,but for the reasons best known, they didn't.There is nothing on record to show that the Petitioners-Management were set *ex-parte* in the Industrial Dispute.Thus, learned Tribunal has committed no error in dismissing the

petition filed under Section 11 of the ID Act refusing to set aside the award. He, therefore, submits that the writ petition being devoid of any merit should be dismissed.

5. Heard learned counsel for the parties and perused the case laws cited.

5.1 In ***Haryana Suraj Malting Ltd.*** (supra), Hon'ble Supreme Court held as follows:-

> *"37. Merely because an award has become enforceable, does not necessarily mean that it has become binding. For an award to become binding, it should be passed in compliance with the principles of natural justice. An award passed denying an opportunity of hearing when there was a sufficient cause for non-appearance can be challenged on the ground of it being nullity. An award which is a nullity cannot be and shall not be a binding award. In case a party is able to show sufficient cause within a reasonable time for its non-appearance in the Labour Court/Tribunal when it was set ex parte, the Labour Court/Tribunal is bound to consider such an application and the application cannot be rejected on the ground that it was filed after the award had become enforceable. The Labour Court/Tribunal is not functus officio after the award has become enforceable as far as setting aside an ex parte award is concerned. It is within its powers to entertain an application as per the scheme of the Act and in terms of the rules of natural justice. It needs to be restated that the Industrial Disputes Act, 1947 is a welfare legislation intended to maintain industrial peace. In that view of the matter, certain powers to do justice have to be conceded to the Labour Court/Tribunal, whether we call it ancillary, incidental or inherent."*

Since there were divergent views to entertain an application for setting aside an ex-parte award after thirty days of its pronouncement and publication in the official gazette, ***Haryana Suraj Malting Ltd. (supra)*** was referred to larger Bench to answer the following and it was answered as above: -

> *"2. In view of the conflict between two decisions of this Court - Sangham Tape Co. v. Hans Raj [Sangham Tape Co. v. Hans Raj, (2005) 9 SCC 331 : 2005 SCC (L&S) 65] and Radhakrishna Mani Tripathi v. L.H. Patel [Radhakrishna Mani Tripathi v. L.H. Patel, (2009) 2 SCC 81 : (2009) 1 SCC (L&S) 358] , by order dated 21-1-2011 in Haryana Suraj Malting Ltd. v. Phool Chand [Haryana Suraj Malting Ltd. v. Phool Chand, (2012) 8 SCC 579 : (2012) 2 SCC (L&S) 710] , a reference to a larger Bench was made in the following terms : (Phool Chand case [Haryana Suraj Malting Ltd. v. Phool Chand, (2012) 8 SCC 579 : (2012) 2 SCC (L&S) 710], SCC pp. 579-80, paras 1-4)*
>
> *1. Whether the Industrial Tribunal/Labour Court becomes functus officio after 30 days of the pronouncement/publication of the award and loses all powers to recall an ex parte award on an application made by the aggrieved party after 30 days from the date of pronouncement/publication of the award is the question that once again arises for consideration in these cases.*
>
> *2. It may be noted that on this question two Division Bench decisions have taken apparently conflicting views. In Sangham Tape Co. v. Hans Raj [Sangham Tape Co. v. Hans Raj, (2005) 9 SCC 331: 2005 SCC (L&S) 65] a two-Judge Bench held and*

observed that an application for recall of an ex parte award may be entertained by the Industrial Tribunal/Labour Court only in case it is filed before the expiry of 30 days from the date of pronouncement/publication of the award. A contrary view was taken in Radhakrishna Mani Tripathi v. L.H. Patel [Radhakrishna Mani Tripathi v. L.H. Patel, (2009) 2 SCC 81 : (2009) 1 SCC (L&S) 358] to which one of us (Aftab Alam, J.) was a party.

3. In both cases, that is to say, Sangham Tape Co. [Sangham Tape Co. v. Hans Raj, (2005) 9 SCC 331:2005 SCC (L&S) 65] and Radhakrishna Mani Tripathi [Radhakrishna Mani Tripathi v. L.H. Patel,(2009) 2 SCC 81: (2009) 1 SCC (L&S) 358], the Court referred to and relied upon the earlier decisions in Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal [Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal, 1980 Supp SCC 420 :1981 SCC (L&S) 309] and Anil Sood v. Labour Court [Anil Sood v. Labour Court, (2001) 10 SCC 534 : (2009) 1 SCC (L&S) 494] but read and interpreted those two decisions completely differently.

4. The conflict which has arisen as a result of the two decisions can only be resolved by a larger Bench. Let these cases be,therefore, listed before a three-Judge Bench."

6. Although the impugned award under Annexure-5 does not disclose that it was passed *ex-parte*, but it appears that Petitioners-Management did not adduce any evidence in the matter. In their absence, the impugned award was passed. While entertaining an application under Section 11 of the ID Act in RMC No.2 of 2015, learned Tribunal, in its order dated 11th August, 2015, did not also make any observation as to whether the impugned award was passed ex-parte or not. On the other hand, it proceeded with the matter as if an *ex-parte* award was passed.

7. Relying upon the ratio in ***Sangham Tape Co. (supra),***learned Tribunal rejected the petition holding that it has no jurisdiction to entertain the application after thirty days of pronouncement of the award. In ***Haryana Suraj Malting Ltd.(supra),*** Hon'ble Supreme Court held that even after expiry of thirty days and publication of the award in the official gazette,an Industrial Adjudicator has jurisdiction to entertain application to set aside an ex-parte award.It appears that the case law in ***Haryana Suraj Malting Ltd. (supra)*** came after the impugned order under Annexure-7 was passed. As such, learned Tribunal had no occasion to take the same into consideration. As such, the petition in RMC No.2 of 2015 requires fresh consideration in view of the ratio in ***Haryana Suraj Malting Ltd. (supra)***.

8. Accordingly, the impugned order under Annexure-7 is set aside and the matter is remitted to the Industrial Tribunal, Bhubaneswar for fresh adjudication of RMC No.2 of 2015 in accordance with law giving opportunity of hearing to the parties concerned. In order to avoid delay, the parties are directed to appear before learned Tribunal on 6th November, 2023 to receive further instruction in the matter.

9. The writ petition is allowed to the aforesaid extent. But in the circumstances, there shall be no order as to cost.

10. Interim order dated 15th March, 2016 passed in Misc. Case No.3155 of 2016 stands vacated.

2023 (III) ILR – CUT- 776

B.P. ROUTRAY, J & CHITTARANJAN DASH, J.

CRLA NOS.126, 122, 133 OF 2017, 887 OF 2019, 247 OF 2020,
JCRLA NOS.76 & 82 OF 2018 AND CRLA NO.583 OF 2022

BANA MAJHI ……Appellant

-V-

STATE OF ODISHA ……Respondent

IN CRLA NO. 122 OF 2017
MANTU NIAL -V- STATE OF ODISHA

IN CRLA NO. 133 OF 2017
PRABESH DUNDI @ PARME DUNDI -V- STATE OF ODISHA

IN CRLA NO. 887 OF 2019
BIMAL ROUT -V- STATE OF ODISHA

IN CRLA NO.247 OF 2020
ARJUN BHOI -V- STATE OF ODISHA

IN JCRLA NO. 76 OF 2018
BIMALA ROUT -V- STATE OF ODISHA

IN JCRLA NO. 82 OF 2018
ARJUN BHOI -V- STATE OF ODISHA

IN CRLA NO. 583 OF 2022
BAIKUNTHA @ BAIJANTH RAUTI -V- STATE OF ODISHA

(A) CRIMINAL TRIAL – Offences U/ss.365/342/370/506/420/323 /326/307/201/34 of IPC – The argument of Appellants that in course of their cross examination the witnesses have given inconsistent and prevaricating replies which cast doubt to their testimonies – Whether minor inconsistency in evidence of the injured witness could weak the case of prosecution? – Held, No – The witnesses are rustic villagers and they cannot be said to have the acumen with regard to the manner of replying to the question put to them by the trained defence counsel so that they could keep their substantive evidence free from doubt.

(Paras 20-23)

(B) BONDED LABOUR SYSTEM (ABOLITION) ACT, 1976 – Sections 16 & 17 r/w offences U/s. 364-A, 365, 342, 323, 326, 307, 201, 506, 294, 370, 371, 420 r/w Sections 34, 120-B of IPC – Plea of Appellant that punishment is not proportionate to offence – The version of witnesses vouchsafe the role played by each of the Appellants is unblemished – Further, serving of the wrist from rest of the body are tacit to deduce an active knowledge of the Appellant that such injury is likely to cause death, the acts not only gruesome in nature but diabolic and dreadful

than the death of human being – Whether the punishment is disproportionate? – Held, No – The principle for appreciation and evaluation of the punishment imposed by the Trial Court indicated with reference to case laws. (Paras 34-36)

Case Laws Relied on and Referred to :-

1. 1978 CRI.L.J 766 (SC) : Inder Singh & Anr. Vs. State (Delhi Administration)
2. 2007 Vol. 1 Crimes SC-236 : Rotash Vs. State of Rajasthan.

For Appellants : Mr. Mithun Das, Mr. S.K. Mohanty, Mr. D. Nayak, Sr. Adv., Ms. Gayatri Patra (Amicus Curie)

For Respondent : Mr. Sonak Mishra, ASC

JUDGMENT Date of Judgment : 29.09.2023

CHITTARANJAN DASH, J.

1. Heard learned counsel for the parties.

2. Chief Justice P.N. Bhagwati has aptly described "the bonded labourers as "non-beings, exiles of civilization living a life worse than that of animals, for the animals are at least that of animals, for the animals are at least free to roam about as they like and they can plunder or grab food whenever they are hungry, but these outcastes of society are held in bondage and robbed of their freedom even."

3. Thus bonded labour is a situation or circumstance whereby a person is robbed off his basic human rights guaranteed to him by the constitution and is devoid of even the primary human necessities. It is a heinous act that requires be reprimanding and abolishing in letter and spirit. In the present, we are in seisin over a matter where the bonded labourers are encountered with an absolute barbaric act in the hands of so called labour contractor who not only fooled the labourers and fraudulently took away the money owed to them but also subjected them to the most monstrous act, before which even death would appear as an alluring option.

4. The sordid incident is before us in these eight Appeals which are directed against the judgment and order dated 24th December 2016 passed by the learned Addl. Sessions Judge-cum-Special Judge, Dharamgarh, Kalahandi in C.T. (Special Act) Case No.11 of 2014/C.T. (Special Act) Case No.27 of 2014. The learned court having framed charges against the Appellants in the offences U/s. 364-A, 365, 342, 323, 326, 307, 201, 506, 294, 370, 371, 420 read with Section 34 and 120-B IPC along with offence under section 3(2)(V) of the SC&ST (PA) Act 1989; Section 26 of the Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979; Section 16 & 17 of Bonded Labour System (Abolition) Act 1976 while found them not guilty in the offences U/s 294/371/34 IPC; under section 3(2)(V) of the SC & ST (PA) Act, 1989 and under section 26 of the Inter State

Migrant Workmen (Regulation of Employment of Condition of Service) Act 1979, found guilty in other offences and having convicted them there for sentenced as under:

(I) The convicts Bimal Rout, Mantu Nial, Jaysen Thela, Arjun Bhoi, Bana Majhi and Parbesh @ Parme Dundi each are sentenced to undergo imprisonment for life and payment of fine of Rs.20,000/-(Rupees Twenty Thousand) each, in default of payment of fine to undergo R.I for one year each for the offence **U/s. 364-A/34** of the IPC.

(II) The convicts Bimal Rout, Mantu Nial, Jaysen Thela,Arjun Bhoi, Bana Majhi and Parbesh @ Parme Dundi) each are sentenced to undergo R.I. for five years and to pay fine of Rs.10,000 (Rupees Ten Thousand) each in default of payment thereof to undergo R.I. for six months each for the offence **U/s.365/34** of the IPC.

(III) The convicts Bimal Rout, Mantu Nial, Jaysen Thela,Arjun Bhoi, Bana Majhi and Parbesh @ Parme Dundi each are sentenced to undergo R.I. for six months for the offence **U/s. 342/34** of the IPC.

(IV) The convicts Bimal Rout, Mantu Nial, Jaysen Thela,Arjun Bhoi, Bana Majhi and Parbesh @ Parme Dundi each are sentenced to undergo R.I. for ten years and pay fine of Rs.20,000/- (Twenty Thousand) each in default of payment of fine to undergo R.I. for one year each for the offence **U/s. 370/34** of IPC.

(V) The convicts Bimal Rout, Mantu Nial, Jaysen Thela, Arjun Bhoi, Bana Majhi and Parbesh @ Parme Dundi each are sentenced to undergo R.I. for two years for the offence **U/s. 506/34** of IPC.

(VI) The convicts Bimal Rout, Mantu Nial, Jaysen Thela,Arjun Bhoi, Bana Majhi and Parbesh @ Parme Dundi each are sentenced to undergo R.I. for three years and to pay fine of Rs.5,000/-(Rupees Five Thousand) each and in default, to undergo R.I. for six months each for the offence **U/s. 420/34** of IPC.

(VII) The convicts Bimal Rout, Mantu Nial, Jaysen Thela,Arjun Bhoi, Bana Majhi and Parbesh @ Parme Dundi) each are sentenced to undergo R.I. for two years and to pay fine of Rs.2,000/- each separately for the offence U/s. **16 & 17** of the Bonded Labour System (Abolition) Act, 1976 in default of payment of fine to undergo R.I. for three months for each of the offence **U/s. 16 & 17** of the Act, 1976.

(VIII) The convicts Jaysen Thela, Arjun Bhoi, Bana Majhi,Parbesh @ Parme Dundi and Baikuntha Rauti are sentenced to undergo R.I. for six months for the offence **U/s. 323/34** of the **IPC.**

(IX) The convicts Jaysen Thela, Arjun Bhoi, Bana Majhi,Parbesh @ Parme Dundi and Baikuntha Rauti each are sentenced to undergo R.I. for ten years and to pay a fine of Rs.10,000/-(Rupees Ten Thousand) and in default of payment of fine to undergo R.I. for one year each for the offence **U/s. 326/34** of the IPC.

(X) The convicts Jaysen Thela, Arjun Bhoi, Bana Majhi,Parbesh @ Parme Dundi and Baikuntha Rauti each are sentenced to undergo imprisonment for life and to pay a fine of Rs.20,000/- (Rupees Twenty Thousand) in default of payment of fine to undergo R.I. for one year each for the offence **U/s.307/34** of the IPC.

(XI) The convicts Jaysen Thela, Arjun Bhoi, Bana Majhi,Parbesh @ Parme Dundi and Baikuntha Rauti each are sentenced to undergo R.I. for one year and to pay a fine of

Rs.5,000/- (Rupees Five Thousand) in default to payment of fine to undergo R.I. for three months each for the offence **U/s. 201/34** of the IPC.

(XII) All the convicts, i.e. Bimal Rout, Mantu Nial, Jaysen Thela, Arjun Bhoi, Bana Majhi, Baikuntha Rauti, and Parbesh @ Parme Dundi each are sentenced to undergo imprisonment for life with payment of fine of Rs. 20,000/- (Rupees Twenty Thousand) each and in default of payment of fine to undergo R.I. for one year each for the offence, i.e. criminal conspiracy U/s.120-B of the IPC for having conspired for offence **U/s. 364-A/365/342** and **307** read with **34** of the IPC and section 16 & 17 of the Bonded Labour System (Abolition) Act, 1976 with further direction that the substantive sentences are to run concurrently.

5. Succinctly, the prosecution case, as reveals from the FIR and the case record, is that the Appellant Bimal Rout, Mantu Nial and the absconded accused Parsuram Naik persuaded Nilambar Dhangda Majhi, Dialu Nial and other labourers of their village as well as the nearby village to go to Raipur with them for being engaged for work in brick-kiln in order to earn more wages, i.e. @ Rs.20,000/- per month. Being allured by the said Appellants Bimal Rout, Mantu Nial and Parsuram Naik, the persons namely Nilambar Dhangda Majhi and his wife Manjula Majhi, Amarsingh Naik and his wife Ambika Naik, Jaya Parabhoye, Bhumisuta Parabhoye, Dialu Nial, Mahendra Kar and Pipula Naik were taken by the said three Appellants initially to village Sinapali in a vehicle. At Sinapali three other Appellants, namely,Arjun Bhoi, Bana Majhi and Jaysen Thela joined the above named three Appellants. All the above said Appellants thereafter proceeded to the house of the other Appellant, namely, Parbesh @ Parme Dundi at village Kotamal where the labourers were kept in the house of Parbesh Dundi for about eight days. During the said period, the owner of the brick-kiln came to the house of Parbesh Dundi. The Appellant Parbesh Dundi allegedly gave some amount to the Appellant Bimal Rout, and Bimal Rout out of the said money gave some amount to the labourers including Nilambar Dhangda Majhi and Dialu Nial.However, immediately thereafter, Appellant Bimal Rout took away the said amount from all the labourers on the plea that he would give the said money to their respective family members in the village. In the same night the Appellants Parbesh Dundi and Jaysen Thela asked all the labourers to get ready to proceed to Hyderabad for being engaged in the work. Thereafter, the Appellants Parbesh Dundi, Jaysen Thela, Arjun Bhoi, Bana Majhi, Mantu Nial, Bimal Rout and Parsuram Naik took them to Khariar and from there to Raipur Railway Station.

6. At Raipur Railway Platform, Parbesh Dundi and Parsuram Naik picked up quarrel with each other for their respective share in money. Appellant Parbesh Dundi forced the labourers including Nilambar Dhangda Majhi and Dialu Nial to get into the train to proceed to Hyderabad but the labourers did not agree for the same. Appellant Parbesh Dundi and other Appellants threatened to kill them if they would not proceed to Hyderabad for being engaged in labour work. So, out of fear all the labourers boarded the train at Raipur Railway Station. The Appellants too moved in the train along with them. While they were proceeding, the labourers namely

Amarsingh Naik, his wife Ambika Naik and Mahendra Kar got down from the train in the next railway station and managed to escape. When the train stopped in the subsequent railway station, other three labourers namely, Jay Parabhoye, his wife Bhumisuta Parabhoye and Manjula Dhangda Majhi wife of Nilambar Dhangda Majhi managed to escape from the train. Thereafter when the train reached in another railway station, the Appellants forced the two labourers Nilambar Dhangda Majhi and Dialu Nial to get down from the train. They took Nilambar Dhangda Majhi and Dialu Nial to Raipur by train. At that time some other persons were waiting for them in that station at the instance of Appellant Parbesh Dundi. The Appellants namely, Bimal Rout and Parsuram Naik along with his sister Pipula Naik managed to escape from the railway station leaving Nilambar Dhangda Majhi and Dialu Nial in the custody of other Appellants. Thereafter, Appellant Parbesh Dundi, Arjun Bhoi, Bana Majhi threatened to kill Nilambar Dhangda Majhi and Dialu Nial and also assaulted them. The Appellants Bana Majhi, Parbesh Dundi and Arjun Bhoi took Nilambar Dhangda Majhi and Dialu Nial to Kantabanji by train.

7. From Kantabanji said Nilambar Dhangda Majhi and Dialu Nial were taken to the house of Parbesh Dundi at village Kotamal. The above mentioned three Appellants, namely, Bana Majhi, Arjun Bhoi and Parbesh Dundi assaulted Nilambar Dhangda Majhi and Dialu Nial in the house of Parbesh Dundi and demanded Rs.2,00,000/- (Two Lakhs) from Nilambar Dhangda Majhi and Dialu Nial under threat of being killed. Dialu Nial contacted his family members and his elder brother Arjun Bhoi over phone to bring Rs.2,00,000/- and to rescue them. When the Appellants did not get the demanded money, they assaulted Nilambar Dhangda Majhi and Dialu Nial time and again. The Appellants thereafter engaged Nilambar Dhangda Majhi and Dialu Nial forcibly in the cotton field of Appellant Parbesh Dundi to do the labour work.Out of fear and compulsion both Nilambar Dhangda Majhi and Dialu Nial got engaged in labour work in the cotton field of Parbesh Dundi for about 8 to 10 days. Both Nilambar Dhangda Majhi and Dialu Nial were then forcibly confined in a room in the house of the Appellant Parbesh Dundi and the door of the room was locked from outside. On one night the Appellants Arjun Bhoi, Parbesh Dundi, Baikuntha Routi, Jaysen Majhi, Gangadhar Dash and Bana Majhi took Nilambar Dhangda Majhi and Dialu Nial from the house of Parbesh Dundi to the house of Jaysen Majhi and carrying a Tangia (axe) from the house of Jaysen they took them to the nearby village. On the way, said Appellants consumed liquor, and after reaching that place inside a forest, the Appellants Arjun Bhoi, Parbesh Dundi, Baikuntha Routi, Jaysen Majhi, Gangadhar Dash and Bana Majhi asked Nilambar Dhangda Majhi and Dialu Nial to give them either their life or limbs. When they did not agree to give their lives or limbs, the Appellant Parbesh @ Parme Dundi told the other Appellants to chop the hands of Nilambar Dhangda Majhi and Dialu Nial.

8. Accordingly, on the direction of Parbesh Dundi, the Appellants caught hold of Nilambar Dhangda Majhi and Dialu Nial separately. Appellant Baikuntha Routi

and Jaysen Majhi chopped the right hand from the wrist of Nilambar Dhangda Majhi and Dialu Nial one after the other by means of Tangia (axe) resulting in decapitating the hands with severe bleeding. Being injured, both Nilambar Dhangda Majhi and Dialu Nial screamed on the spot at the top of their voice and managed to escape from the sight of the Appellants, and after walking down for an hour reached a village and went to a hotel available there. They disclosed about the incident to the owner of the hotel. The hotel owner provided polythene by which the injured tied their chopped hands and with the assistance of some of the villagers they boarded a bus and came to the District Headquarters Hospital at Bhawanipatna and underwent treatment.

9. While the injured were undergoing treatment at DHH, Bhawanipatna, their respective family members met them and attended, where-after the IIC, Town PS, Bhawanipatna proceeded to the hospital and informed the IIC, Jaipatna, the jurisdictional police. On the basis of the information, the IIC, Jaipatna made the Station Diary Entry bearing No.296 of 2013 and proceeded to DHH, Bhawanipatna. On the very next day, i.e. on 16.12.2013 the elder brother of the injured Arjun Nial of village Pipalguda lodged a written report under Ext.2. Pursuant to the FIR vide Ext.2, the IIC, Jaipatna P.S. took up the investigation. In course of investigation, the IIC, Jayapatna P.S. examined the Informant Arjun Nial, the injured victims Nilambar Dhangada Majhi and Dialu Nial, at the District Head Quarters Hospital, Bhawanipatana while they were undergoing treatment and issued injury requisition in their favour,recorded the statements of the family members of the aforesaid two injured, visited the spot where the injured Nilambar and Dialu had come to Bhawanipatana by bus, prepared the spot map under Ext.15, examined the colabourers of the injured to whom the Appellants had also taken for engaging them in work along with Nilambar and Dialu but they managed to escape from the clutches of the Appellants. However, the IIC, Jayapatna P.S. having come to know that injured Nilambar and Dialu belong to Scheduled Tribe and Schedule Caste community, so also some others belonging to the General Caste, requested the S.D.P.O., Dharmagarh to take up the investigation of the case and accordingly the S.D.P.O., Dharmagarh took up the investigation of the case as handed over to him by the IIC, Jayaptana P.S along with the connected papers. On 21.12.2013, one amongst the victim labourers of the alleged incident namely Jaya Parabhoye, who too had lodged another FIR under Ext.1 before the IIC, Jayapatna narrating the same incident as that of Ext.2, the IIC, Jayapatana P.S. registered Jayapatna P.S. Case No. 246 of 2013 under Ext.1.

10. In course of the investigation the I.O. examined the Informant, i.e. Jaya Parabhoye. In this case too, having come to know the Informant to be from Schedule Caste community with sub-caste Lohara, the IIC requested the S.D.P.O, Dharmagarh to take up the investigation in respect to the Jayapatana P.S Case No. 246 of 2013, as in the case of Jayapatana P.S. Case No. 241 of 2013. So the S.D.P.O., Dharamgarh finally took up the investigation in both the P.S. Cases. The S.D.P.O., Dharamgarh

in course of his investigation examined the IIC, Jayapatna P.S, other witnesses, recorded their statements U/s.161 Cr.P.C, visited the spot and prepared the Spot Map in respect to the place from where the labourers were taken first by the Appellants Bimal Rout, Purshuram Naik and Mantu Nial, examined others witnesses, visited the house of the Appellant Prabesh @ Parme in village Kotamal under Khariar Police Station where the victims were kept in confinement, prepared the Spot Map under Ext.20, examined other witnesses, seized the documents and incriminating materials including the vehicle, i.e. Marshal Jeep bearing Regd. No. OR-02-J-2263 from its owner Narayan Ketaki under Ext.21, took the assistance of the scientific team, i.e. DFSL, Bhawanipatna, prepared other Spot Maps under Ext.15 and 22 wherein the hands of Nilambar and Dialu were chopped inside the forest, seized the blood stain and sample earth from the spot on being produced by the Scientific Team after its collection through Seizure List under Ext.6, arrested the Appellants Baikuntha Rauti, Arjun Bhoi, Bana Majhi; arrested the other Appellants namely Bimal Rout, Parsuram Naik, Parbesh Dundi and Mantu Nial and forwarded them to the court on the next day; seized other incriminating materials, the blood stained wearing apparels; made prayer before the learned J.M.F.C., Jayapatana to take Appellant Prabesh @ Parme Dundi on police remand for the purpose of interrogation; while in police custody as the Appellant Prabesh @ Parme Dundi volunteered to give statement confessing his guilt and to give recovery of the weapon of offence concealed after the commission of crime, his statement was recorded U/s. 27 of the Evidence Act under Ext.4, subsequent to the statement the said Appellant laid the police along with the witnesses to give recovery of the "Tangia" (axe) which the I.O. seized under M.O.-II used in chopping of the right hand from the wrist of the labourers inside forest near Sindhekela; re-examined the injured Nilambar Dhangdamajhi and Dialu Nial, conducted the T.I. Parade in respect of the Appellants namely Baikunta Rauti, Gangadhar Das, Bana Majhi, Jaysen Thela, Arjun Bhoi and Prabesh Dundi, received the injury reports in respect to the injured under Exts.10 & 12 from the doctors at DHH, Bhawanipatana, made queries from the said doctors under requisitions vide Exhibits 11/4 and 13/4; sought for the opinion from the doctors as to whether the chopped wounds of injured Nilambar & Dialu under Exhibits 10 & 12 could be possible by the said weapons, i.e. Tangia (axe) and whether the wounds of the injured are fatal, if would not have been treated in time.

11. As per the order of the court, the I.O sent the seized incriminating articles including the seized weapons of offence under M.Os. I, II, IV and V to the RFSL, Berhampur. He seized the photographs of the spot under Ext.9. Upon completion of the investigation, the I.O. submitted charge-sheet in Jayapatna P.S. Case No. 241 of 2013 and 246 of 2013 against nine accused persons namely Prabesh Dundi, Jaysen Thela, Baikunta Rauti, Arjun Bhoi, Gangadhar Das, Bana Majhi, Bimal Rout, Mantu Nial and Parshuram Naik on 18.04.2014.

12. Upon commitment of the case to the court of Addl. Sessions Judge, Dharamgarh in C.T Case No.11 of 2014 against Jayapatna P.S. Case No. 241 of 2016 and C.T Case No. 27 of 2014 arising out of Jayapatna P.S. Case No.246 of 2013, both the cases were tagged for hearing under one trial. As one of the co-accused Parsuram Naik remained absent after commencement of trial, his case was split up, and out of the nine accused, the trial proceeded against the eight. One of the convict namely Jaysen thela is not in Appeal before us.Therefore, the rest seven preferred Appeal. However, as one out of the seven namely Gangadhar Das, the Appellant in CRLA No. 107 of 2017 was released prematurely from custody by the order of the Government communicated through the Directorate of Prison and Correctional services, Odisha, Bhubaneswar, he did not want to pursue his Appeal and, as such, the Appeal against the said Appellant Gangadhar Das stood disposed of as withdrawn. In the present, therefore, the Appeals are heard in respect to six Appellants namely Mantu Nial, Bana Majhi, Parbesh Dundi @ Parme Dundi, Bimal Rout, Arjun Bhoi and Baikuntha @ Baijnath Rauti as described in the Causetitle, which, having heard analogous, are disposed of by this common judgment.

13. The plea of the defence for all except Appellant Arjun Bhoi is one of complete denial and false implication. As far as the Appellant Arjun Bhoi is concerned, he disputed the happening of the entire incident.

14. Upon denial of the prosecution gravamen, the learned trial court formulated the points for determination and decided the case.

15. To prove the culpability, the prosecution examined as many as eighteen (18) witnesses and proved 33 documents vide Exts. 1 to 33/1 besides M.O - I to M.O.-VI. The defence on the other hand cited one Narayan Ketaki as D.W.1 but did not rely upon any documents.

16. Primarily the trial court considered the testimonies of the two star witnesses namely Nilambar Dhangada Majhi and Dialu Nial, the injured victims examined as P.Ws.2 and 6 besides the surrounding circumstances and the evidence of the post occurrence witnesses.

17. Regard being had to the fact that the learned trial court primarily and absolutely relied on the evidence of P.Ws.2 & 6, the injured witnesses, it is worth to reproduce them in verbatim for appreciation. The same are as follows:-

P.W. 2.

1. I know the Informant, I know the accused persons in this case. Occurrence took place about two and half years back. The accused persons namely Bimal Rout, Mantu, and Parsu told us that there will be wage of Rs.20,000/- if we work in the brick kiln at Raipur. I agreed to the same. The said three accused persons took myself and my wife along with 11 others us to Dharamgarh. Thereafter they took us to village Sinapali by a vehicle. At village Sinapali the accused persons namely Arjun, Bana and Thela accompanied with us. Thereafter the accused persons took us to the house of the accused

Parme in village Kotaml. The accused Bimal provided rice to us. We stayed in village Kotamal for about eight days. The owner of the brick kiln came to village Kotamal on being called by the accused persons namely Parma and Thela over phone. The accused Thela gave some amount to the contractor of labourers. The contractor gave some amount to the accused Parme. The accused Parme gave the said amount to accused Bimal to give the same to us. The accused Bimal was the supervisor working under the contractor. The accused Bimal gave some amount to each of us and he took the said amount from us immediately saying to give the same at hour home to our family members. Bimal left Kotamal to our village. The accused persons Parme and Thela asked us to get ready to proceed to Hyderabad for labour work on the same night. The accused persons namely Parma, Thela and another person took all of us to Khariar by a vehicle. The accused persons Parsu, Bimal and Parma took all of us to Raipur by a bus. The said three accused persons took us to Railway Platform at Raipur.The accused persons Parma and Parsu picked up quarrel between themselves relating to sharing of money. The accused Parme wanted us to get into a train to proceed to Hyderabad. Accordingly, we got into a train at Raipur Platform. The accused Parme forced us to get into the train. He threatened to kill us unless we proceed to Hyderabad for labour work.While we were proceeding by the train, the train stopped at a railway station. Three of labourers namely Amar Singh Naik, his wife Ambica Naik and Mahendra Kar got down from the train and managed to escape. When the train stopped at another station, three other labourers namely Jaya Parabhoi, Bhumisuta Parabhoi and my wife Manjula escaped from the train.When the train reached another station the accused persons namely Parsu and Bimal forced us to get down from the train. Accordingly, we got down from the train as per their direction. The accused persons Parsu and Bimal took myself and five other labourers including Dialu Nial to Railway Station wherefrom we proceeded to Raipur by a train. Bimal and Parsu were along with us. Some persons were waiting at Raipur Station at the instance of Parma. We got down from the train at Raipur Railway Station. The accused persons namely Bimal, Parsu and his sister left that place giving us in custody of the persons who were waiting at Railway Station for us. I myself and Dialu Nial were sitting at Railway Station and other labourers managed to escape from that place. The accused persons Parme, Arjun, Bana and two others came to us. They wanted us to proceed with them.They threatened to kill us if we raise shout and wanted us to proceed to a lodge. The said three accused persons and their associates took us to a hilly area (Dangar area) and assaulted me and Dialu Nial by hands. From that place they took us to a railway station wherefrom they took us to Kantabanji by train. We got down from train at Kantabanji railway station. The accused persons Parme, Arjun and Bana and their two associates took us to another place. They took us to another place by a bus. Thereafter they took myself and Dialu Nial to village Kotamal by a vehicle. They took both of us to the house of Parme. One of the associates of the said accused dealt kicks to me and Dialu Nial at the house of the accused Parme. The accused Parme asked both of us to get Rs.2,00,000/- and to contact our family members over phone accordingly. He also threatened to kill us unless Rs.2,00,000/- was given to him. Dialu Nial contacted his family members over phone. He asked the Informant to bring Rs.2,00,000/-. The accused Parme asked Dialu to contact his family members to collect Rs.2,00,000/- from Parsu and Bimal. Dialu informed the Informant accordingly. Parme also asked the Informant over phone to collect Rs.2,00,000/- from Parsu and Bimal, otherwise he threatened to kill us. I also asked the Informant over phone to inform the matter to our family members. Accused persons namely Arjun Bhoi and Parma Dundi and another person assaulted me and Dialu repeatedly. The accused Parma

engaged me and Dialu in his cotton field where we had done labour work. On that evening the accused Arjun assaulted both of us. The accused Parma and his father confined both of us in a room by locking the door from outside. We both were engaged in labour work there for about eight days. On a night six accused persons (Identified the accused persons namely Arjun Bhoi, Parbesh Dundi, Baikuntha Routi, Jaysen Thela, Gangadhar Das and Bana Majhi in dock) took me and Dialu Nial from the house of Parme near the house of Jayasen Thela by a Marshal vehicle. The wife and son of the accused Jaysen Thela brought a Tangia and a file (Instrument for sharpening) and kept the same in Marshal Vehicle. The said accused persons took me and Dialu to a strange place by the said Marshal vehicle. On the way consumed liquor. On the way Parma himself drove the vehicle. The said accused persons were talking themselves that the place as Beldungri. The said accused persons put Gamuchha on my neck and made attempt to throttle me. The accused Parbesh Dundi restrained others and told not to throttle me. He asked other to chop our hands. The said accused persons took me and Dialu to a hilly area (Dunger area). They asked us whether we want to give our lives or limbs. Parma asked other accused persons to chop our hands, the accused persons Thela and Bana caught hold of me and the accused Baikuntha chopped my right hand by means of a Tangia. I sustained severe bleeding injury by such assault. The said three accused persons also chopped the right hand of Dialu Nial by means of Tangia. We escaped from the spot. The said accused persons were searching for us. We proceeded by walk for one hour and reached a village. Thereafter we reached a hotel and disclosed about the incident to the hotel owner. He gave a polythene by which we tied our hands. With the assistance of some villagers we sat in a bus and went to Bhawanipatana Hospital. I myself and Dialu had undergone treatment at DHH. Bhawanipatana for few days and thereafter we were shifted to Burla Hospital. We had undergone treatment at Burla Hospital for some days. After returning from Burla we had attended T.I. Parade at Sub-Jail, Dharmgarh. I indentified the accused persons namely Parma Dundi, Arjun Bhoi, Jayaseen Thela and Bana Majhi in T.I. Parade. The Informant lodged FIR at the P.S.

P.W.6

1. The Informant Arjun Nial is my brother. I also know victim Nilambar Dhangadamajhi. I know the accused persons standing in the dock as well as the absentee accused Parsuram Naik. The occurrence took place about two years back. The accused persons namely Bimal and Parsu contacted us and told that there would be wage of Rs.10,000/- to each if we do labour work in a brick manufacturing factory at Hyderabad. We 12 labourers including myself and Nilambara agreed to their proposal. The accused persons namely Bimal, Parsu, and Mantu took all 12 labourers including myself and Nilambar Dhangadamajhi to village Sinapali by bus via Dharamgarh. From Sinapali the said three accused persons along with Jaysen Thela and Arjun Bhoi took us to Kotamal village by a pickup van. They took us to the house of accused Parme in village Kotamal. The accused Parme gave to each of us Rs.10,000/-. He also gave me Rs.10,000/- saying that the same will be given to our family members. From village Kotamal, the accused Parme took us to Khariar by a Marshal vehicle. Thereafter, the accused Parme took all 12 labourers including myself to Raipur by bus. From Raipur we were taken by a train by the accused Parme.He told us to proceed to Hyderabad by a train. He was all along with us. The victim Nilambar was also with us. One Parabhoye family was also with us. While we were proceeding by train there was a quarrel among the accused persons who were taking us to Hyderabad. Some of the labourers got down from the train at different

Railway Stations. The accused persons Bimal and Parshu with their families, I myself and Nilambar got down from the train at a Railway Station. The accused persons Bimal and Parsu asked me and Nilambar to proceed to Raipur. They took myself and Nilambar by train. We got down from the train at Raipur as directed by Bimal and Parshu. The accused Parme and four others were waiting for us at Raipur Railway Station. Bimal and Pursu left the Railway Station. Among those four persons who were with us are Parma, Arjun Bhoi, Bana Majhi and the son of Jaysen Thela. The said accused persons forcibly took us to a strange place in Raipur. They also assaulted me and Nilambar. They threatened to kill us and tied our hands and legs. The said accused persons took me and Nilambar to a Railway Station. They took both of us to Kantabanji by train. From Kantabanji they took both of us to a strange place by walk. From that place they took us to Khariar by bus. Thereafter, they took us to village Kotamal by jeep. They took us to the house of accused Parme. All the said accused persons assaulted me and Nilambar at the house of Parme. They forced me to contact my family members over phone to get Rs.2,00,000/- for our release. Parme gave me a mobile phone. Accordingly, I contacted my brother Arjun Nial over phone. I told my brother Arjun over phone to come with Rs.2,00,000/- for our release from the custody of the said accused persons. The accused Parme also asked my brother Arjun over phone to give him Rs.2,00,000/- for our release from their custody. The accused Parme and Arjun were repeatedly assaulting me and Nilambar,. They took both of us to their cotton filed and engaged us as labourers. They kept us as such for about ten days there. They confined me and Nilambar in a room by locking the door from outside. The said accused persons wanted both of us to leave at our house. During one night, the accused persons namely Arjun Bhoi, Jayasen Thela along with the accused persons Gangadhar, Bana, Baikuntha, Parme (indentified in dock) threatened me and Nilambar to kill us by cutting our hands and legs. The accused Jayasen Thela had brought a Tangia. All the said six accused persons took me and Nilambar to a forest by a Marshal vehicle on the same night. The accused Parme drove the vehicle and the driver of the vehicle Gangadhar assaulted both of us. They forced me and Nilambara to get down from the vehicle in the forest in the night. They took Nilambar from the vehicle by tying a Gamuchha on his face. Those six accused persons forcibly took me to a place in the forest. They were saying to cut my limbs. The accused Jayasen Thela chopped my right palm by means of a Tangia and other accused persons caught hold me. I sustained severe bleeding due to chopping of my hand and became senseless. When I regained my sense I heard those accused persons threatening to kill us. So I and Nilambar concealed ourselves in a place. The right hand of victim Nilambar was also chopped by those accused persons. Thereafter the accused persons left that place. I and Nilambara went by walk and reached a hotel nearly in the morning. We narrated the incident to the Hotel Keeper. He gave us polythene by which we tied our cut hands. I and Nilambara went to Bhawanipatna by a bus. We went to DHH, Bhawanipatna. We sent information to our family members. Thereafter our family members came to DHH, Bhawanipatna. I narrated the incident to them.My brother Arjun Nial lodged FIR. We had undergone treatment at Bhawanipatna and thereafter we were referred to Hospital at Burla. I and Nilambar had undergone treatment at Burla Hospital for about 20 days. Police took us to Jaipatna. I indentified all thefive accused persons in T.I. Parade at Sub-Jail, Dharamgarh. I identified the accused persons namely Arjun. Jayasen, Parme, driver Gangadhar and Bana Majhi in T.I. Parade in the Sub-Jail, Dharmgarh.

18. The evidence of both the injured witnesses is not only consistent to each other in substratum but is in absolute corroboration to the prosecution story. The

vivid narration made by the witnesses with regard to the manner in which they got allured to proceed from their villages for being engaged in work with a hope to earn huge remuneration, the mode of travel, the confinement made to them in different places, the threat exhorted to them, torture inflicted upon them and above all hurt caused to them are coherent not only in respect to the statements of each other but also to their earlier statements recorded under Section 161 Cr.P.C so also to the medical evidence. Both the witnesses were subjected to incisive cross-examination, but nothing material could be elicited through them to dislodge the consistent evidence in any manner. Rather the robust answer from the witnesses reinforced the unsavory manner of treatment being inflicted to the injured victims and others well substantiates the offences alleged. The testimony of the post occurrence witnesses who are none but the labourers who were allured for being engaged though has been criticized in some way or other to be not in consistent with the prosecution story, the same are not so significant to outweigh those as well as the sterling evidence of the injured witnesses which finds corroboration in substance. Conversely, the defence has not denied the story of the prosecution in its entirety, rather it is admitted in the part of the story through D.W.1 who deposed that discussion was going on by the Appellants present in the Jeep for chopping of hands of some person by them while moving into the forest after parking the Jeep in an isolated place.

19. The M.O. 2 (Tangia) is the weapon of offence wherein the right hand from wrist of the injured, i.e. P.W.2 & P.W. 6 were chopped inside the forest by the Appellants deposed to have been seized from the place of concealment pursuant to the disclosure statements of the Appellant Parbesh. To reiterate, the recovery of the weapon of offence was given by the said Appellant under the Seizure List - Ext.5 has been duly and consistently stated by P.W.11 and P.W.17. The Tangia was stained with blood. The Chemical Examination Report under Ext.32 in respect to the seized articles, i.e. the wearing apparels of the injured Dialu Nial under M.O. 1 and that of Injured Nilambar under M.O. IV so also the wooden handle of the Tangia which was stained with human blood are proved to be of same blood group that belongs to the injured.

20. The Apex Court in the matter of ***Inder Singh and another V. State (Delhi Administration) reported in 1978 CRI.L.J 766 (Supreme Court)*** held as follows:

> "While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. If a case is proved too perfectly, it is argued that it is artificial, if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty men must be callously allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes."

21. In the above premises, we do not consider merit in the argument of the Appellants that in course of their cross examination the witnesses have given

inconsistent and prevaricating replies which cast cloud to their testimonies either with respect to the presence of the Appellants or in respect to the truth of the incident. We firmly stand by our view as above for the reason that the witnesses are rustic villagers and they cannot be said to have the acumen with regard to the manner of replying to the question put to them by the trained defence counsel so that they could keep their substantive evidence free from doubt since ***it is held by Apex Court that cross examination is an unequal battle between the skilled lawyer and a naïve or rustic witness. In such an unequal battle it is always probable that a person appearing as a witness, who has no knowledge about the process of the court may fall into traps led by the skilled defence lawyer.In such a case even if the statement of a witness do not come up to the expectation of a judge or a trained lawyer, the same cannot be jettisoned in a mechanical manner.***

22. It is also trite law that while appreciating evidence in a case, the socioeconomic, cultural and educational background of the witness has to be kept in mind. In the instant case there is absolutely no evidence to refute the fact that the witnesses are daily wage labourers or at best are the persons engaged in cultivation. In such an eventuality, it is fallacious to expect that they would either depose or reply in the case being alive to the various intricacies of law which a trained lawyer is versed with.Consequently, the stray reply of the witnesses during the course of their cross examination here and there cannot jettison their version altogether,which is otherwise consistent and cogent.

23. The Apex Court also held in ***Rotash V. State of Rajasthan reported in 2007 Vol. 1 Crimes SC-236*** (Paragraph-14) as follows:

> "14. ……. The question is as to whether a person was Implicated by way of an afterthought or not must be judged having regard to the entire factual scenario obtaining in the case".

From the above, it is tacit that a duty is cast upon the court to see whether a person is implicated by way of an after-thought or not must be judged having regard to the entire factual scenario. In the instant case, the witnesses and more particularly the injured witnesses have very categorically spelt the name of the Appellants as were found present in executing the crime consistently since inception, i.e. right from the narration made in the FIR and the statement made by them before the police till the evidence is adduced during trial. Admittedly, no suggestion was either put to the witnesses or positive evidence was adduced by the defence by laying a foundation that the prosecution witnesses have deliberately implicated the Appellants. Rather, the evidence of the Defence through DW.1 reinforces and vouch safe the factum of chopping of the hands of the injured witnesses. Consequently therefore, nothing could be deduced from the testimony of the witnesses that they have hatched plan to falsely implicate the persons describing their specific overt act as well as specifying their presence leaving the real culprits. Rather it is unambiguously reiterated by these witnesses during cross examination that the

Appellants named are the perpetrators of the crime in their respective role and the same is sacrosanct when it gets absolute corroboration from the medical evidence which has not been shacked in any manner.

24. It is stated by PWs. 14 and 15 the Medical officers who examined the injured, opining that the injuries would have resulted fatal had there not been a timely medical intervention. The evidence of the Medical Officers has not been assailed in any manner. Further, the evidence of the Magistrate conducting T.I. parade also goes without challenge. Her report which she proved vide Ext.33 reveals and it is candidly deposed by the Magistrate conducting T.I. parade (P.W.18) that the injured witness, viz. P.W.2 Nilambar Dhangdamajhi correctly identified Appellants namely, Jaysen Thela Arjun Bhoi, Bana Majhi, Parbesh @ Parme Dundi, whereas P.W.6 Dialu Nial correctly identified Appellants namely Jaysen Thela,Arjun Bhoi, Bana Majhi, Parbesh @ Parme Dundi and Gangadhar Das. As such, nothing appears from the evidence that the defence at any point of time has challenged the factum of identity of the culprits. Cumulatively,therefore, the versions of the witnesses being compatible with the reality and the truth as can be gleaned from the facts established, the prosecution evidence can safely be held free from blemish and is beyond reproach to accord a conviction, as rightly done by the trial court.

25. While analyzing the point as to the offences charged that are embraced by the evidence adduced found substantiated and the Appellants who could be ascribed with the liability, the arguments advanced by Mr. D. Nayak, learned Sr. Counsel is primarily on the offence U/s. 364-A IPC. Mr. Nayak would argue that the learned court below while appreciating the evidence got swayed by the testimony of the injured witnesses without its intrinsic value and arrived at a wrong conclusion particularly in respect to the offence charged U/s 364-A IPC. According to Mr. Nayak there is neither any intention for demand of ransom in the abduction of the injured nor was it the cause of such abduction. The entire prosecution evidence consistently establishes the fact that the injured and others were allured for being engaged as labour for higher remuneration. The abduction of the injured Nilambar and Dialu Nial as forthcoming in the evidence is the result of the vengeance of the Appellant who having invested money could not get the services of the labourer. According to Mr. Nayak, this fact is clear from the evidence of P.W.2 when he stated that the Appellants asked them to tell his brother over phone to realize the money from Bimal and Mantu. No other evidence is adduced by the prosecution that the injured witnesses were abducted for ransom from their village or the place where they were asked by the Appellants to get down from the train. Mr. Nayak, therefore, canvassed to set aside the conviction of the Appellants from the said charge.

26. On the face of the above argument, Mr. Mishra, learned Addl. Standing Counsel submitted that the evidence is clear and candid to deduce that the Appellants having abducted the injured witnesses demanded ransom by threatening

to kill and executed the threat into action by chopping the hands and as such the charge U/s. 364-A IPC stands established.

27. A simple reading of the relevant provision U/s 364-A IPC stipulates that ***"whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to compel the Government or[any foreign state or international inter-governmental Organization or any other person]to do or abstain from doing any act or to pay ransom, shall be punishable with death, or imprisonment for life and shall also be liable for fine."***

28. In the case in hand, the evidence is consistent that the Appellants allured the injured and others with the prospect of working as migrant labourer in exchange of high remuneration, whereas the interse dispute between the Appellant and absconded accused namely Parsu gave a different turn to the whole episode whereby all the labourers including the wife of injured Nilambar managed to escape from the train while they were travelling by train. Having seen all the labourers including the middleman such as the Appellants Bimal and Mantu to have escaped with money leaving the injured witnesses under the custody of other Appellants namely Arjun Bhoi, Bana Majhi, Parbesh @ Parme Dundi, Baikuntha Rauti and others, they kept the injured witnesses under confinement to realize the money paid to the Appellants Bimal and Mantu. However, having failed in their endeavour in realizing the money, took revenge by causing grievous hurt to the injured. So the ingredients constituting the offence as to the factum of abduction for ransom is found absent. The learned trial court while analyzing the evidence at paragraph - 42 of the impugned judgment, observed as under:

> "By conjoint reading of the observations made above in respect of offences alleged U/s. 364A/365/342/323/326/ 307/506/370/420 read with section 34 IPC and Section 16 & 17 of the Bonded Labour System (ABOLITION) Act 1976 against the accused persons, it can safely be concluded that, the main object / purpose of all the accused persons in abducting P.Ws. 2 and 6 from their village by inducing them to pay high wages was for no other reason but to engage them as bonded labourers without any payment and to demand money from them and their relatives after keeping them under wrongful confinement with their attempt to kill for their unlawful gain"

29. The above conclusion of the learned trial court is somewhat irreconcilable vis-à-vis the prosecution evidence. While it is tell tale clear from the evidence that the entire episode started with the purpose to see the migration of labour for getting engaged as bonded labourer, the act alleged as regards demand of ransom and chopping of the hands have no nexus with the demand of money. As discussed above, it is deposed by P.W.2 that the Appellants wanted the money to be realized from co-Appellants Bimal and Mantu under threat of being killed extended to them. This further reassures that the abduction was not for the sake of demand of ransom from the injured but through them from Appellants Bimal and Nial who played the

role of middleman assuring the six other Appellants to fetch labourer from the villages to move out for their engagement in brick-kiln but took away the money acting contrary to their commitment. It is an act that suggests an absolute vengeance and not demand of ransom, and as such does not attract the provision U/s 364-A IPC. The overt act shown,however, clearly embraces the offence U/s 367 IPC and the offence U/s.367 IPC being lesser in the same order can safely be imposed against the Appellants instead of the offence U/s 364-A IPC. While in agreement with the argument advanced by Mr. Nayak in part, we hold the act alleged by the six Appellants in chopping of the hand squarely covers the offence under section 367 IPC.

30. Further, the evidence adduced by the Prosecution in respect to the offences viz; under section 365/342/370/506/420/323/326/307/201/34 IPC once again the versions of P.Ws 2 and 6 vouchsafe the role played by each of the Appellants is unblemished. It is consistent and coherently deposed by both P.Ws. 2 and 6 that the Appellants abducted them from the Railway Station to Kantabanjhi and from there to the village of Appellant Parbesh Dundi, where they forced them to work without remuneration. The Appellants kept them under confinement in the house under lock and finally took them to the isolated place in a vehicle where they extended threat and an intimidation and finally executed it in action by causing grievous hurt with a clear knowledge and in complete depravation that the chopping of the hand would render the conditions of the injured fatal. The weapon used as proved vide M.O II, the place chosen where the hands were chopped thereby depriving an immediate attention of anyone to come to their rescue was all conspired and so planned that the injured could not but to suffer and succumb to the injuries. Further, severing of the wrist from rest of the body are tacit to deduce an active knowledge of the Appellant that such injury is likely to cause death, are the acts not only of gruesome nature but diabolic and dreadful than the death of a human being. In true sense it is barbaric.

31. The said Appellants also in furtherance of their overt act, in order to disappear the evidence and screen them from legal punishment threw the cut wrist in a pond popularly called “Deheli bandh” which of course could not be traced but volunteered by Appellant Parbesh Dundi in his statement recorded U/s 27 of the Evidence Act, which found fairly established and could not be contradicted in any manner making them liable in the offence U/s. 323/342/326/307 and U/s 201/34 IPC. There is ample of evidence that the injured and others were cheated by the Appellants who having intention to deceive the labourer since inception misrepresented alluring them to give high wages did not pay any wages as conspired by them along with Appellants Bimal, Mantu and absconded accused Parsuram Naik thereby bringing them under the purview of the offence U/s 420 IPC.

32. Another crucial area requires discussion is the offence U/s 120-B IPC. As discussed above, the very act of the Appellants namely Bimal, Mantu, Arjun Bhoi, Bana Majhi, Parbesh @ Parme Dundi and Baikuntha Rauti since inception is to get

the labourers migrated being allured of higher wages for being engaged in work in the brick-kiln. In such eventuality all other acts that followed, as deposed by the injured witnesses P.Ws. 2 & 6 and others accompanying them for engagement, are held to be part of such conspiracy only and even though the Appellants Bimal and Mantu were not present at the scene of occurrence when the other Appellants got engaged in hacking the hands of the injured cannot escape the liability of the criminal conspiracy. The very act of the Appellants Bimal and Mantu in accompanying the injured and others from their village to Kotamal and from there to Raipur and further receiving money and subsequently escaping from the clutch of the other Appellants with a view to grab money taken in lieu of the arrangement of labourer leaving the injured in the custody of the Appellants are acts within the ambit of Section 120-B/34 IPC.

33. In view of the discussions as above, on a close scrutiny of the evidence and analysis thereof made by the learned trial court nothing borne out in the arguments advanced by the learned counsels for the respective Appellants to disturb the findings in respect to its conclusion drawn in holding the Appellants guilty.

34. As far as punishment imposed on the Appellants, the learned Senior Counsel as well as respective learned counsels submitted that the punishment being not proportionate to the offences proved may be considered leniently and be awarded with the imprisonment already undergone.

35. This Court referring to the decisions in ***(1983) 2 SCC 28; (2004)3 SCC 793; JT (2004) 2 SCC 348; (2005) (5) SCC 554; AIR(1991) SC 1463***;extracted the various principles enunciated by the Apex Court for appreciation and evaluation if the punishment imposed by the learned trial court is appropriate and/or requires interference. The Apex Court held as follows:

> "Undue sympathy to impose inadequate sentence would do more harm to justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc".
>
> "after giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be act of balancing of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished."
>
> "The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the Courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be.

> "Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.
>
> The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". Sevaka Perumal etc. v. State of Tamil Naidu AIR (1991) SC 1463, relied on."
>
> "In the present case, the High Court completely overlooked the evidence on record and the impugned judgment passed by it shows total non-application of mind. PW1 had noted that 1/3 of the leg was chopped off below the knee. He had categorically stated that the injury could have caused death. The Radiologist (PW14) clearly stated that the aforesaid chopping of the leg was grievous in nature. With some strange logic the High Court observed that merely on the testimony of PW1 it cannot be assumed that the injury was sufficient to cause death in ordinary course of nature. The evidence of PW5 clearly shows the gruesome nature of the attack and the intention of the accused persons. The trial court noticed that the leg was chopped out between the knee and the ankle.
>
> It is baffling as to how the High Court uniformly directed reduction of sentence to the period already undergone. There was no similarity in the period of sentence already suffered by the accused persons when the High Court passed the impugned judgment.
>
> Looked at from any angle, the judgment of the High Court is clearly unsustainable. The judgment of the trial court stands restored so far as conviction as well as the sentences are concerned."

36. Having regard to the principles above noted when the case in hand is examined, it appears that the overt act shown by the Appellants in totality right from alluring the labourers to migrate for work with higher wages, fooled them of no wages at all, keeping the injured labourer in confinement, forced them for labour without wages for days and above all inflicting injuries as said being one of gruesome nature, deserves no leniency in punishment for any offence proved. On the contrary, the second limb of the offence U/s 307 IPC to the effect that the act done wherein grievous hurt is caused to the abducted labourer, the Appellants have rightly been convicted and awarded with the punishment which is proportionate to the act done against the offences proved and require no interference. As discussed above, for the reason assigned as this Court found the evidence is short of the offence U/s.364-A IPC but established U/s 367 IPC, set aside the same and while convicting

the Appellants namely Bimal Rout, Mantu Nial, Arjun Bhoi, Bana Majhi, Baikuntha Rauti and Parbesh @ Parme Dundi in the offence U/s 367 IPC sentenced them to undergo rigorous imprisonment for 10 (ten) years each and to pay fine of Rs.2000/- (Rupees Two Thousand) each in default to undergo three months rigorous imprisonment each to follow concurrently.

37. In the result, the impugned judgment, except to the extent modified as above, stands confirmed. All the eight Appeals preferred by the six Appellants being devoid of merit, fails and stand dismissed.

38. The Appellants not in custody are directed to surrender forthwith before the trial court within 15 days from the date of this order to serve out the sentence.

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2023 (III) ILR – CUT- 794

B.P. ROUTRAY, J & CHITTARANJAN DASH, J.

JCRLA NO. 88 OF 2017

GOPLA MAJHI ……..Appellant

-V-

STATE OF ORISSA ……..Respondent

CRIMINAL TRIAL – The appellant is convicted for commission of offence U/s. 302/201 of the IPC – The appellant murdered his wife and three daughters by dealing tangia blow while they were sleeping in the night and then set the house on fire – The appellant took the plea of alibi – The appellant in his cross-examination said that he had gone to the house of one Gudi Majhi of village Sergilepa but, no attempt has been made by the appellant to examine either Gudi majhi or any other person to support his version – It is the consistent evidence of all the witnesses that the appellant behaved in a angry manner upon seeing the villagers in the morning and frightened them with Tangia – Whether the plea of alibi taken by appellant is acceptable? – Held, No.

For Appellant : Mr. P.Ramakrishna Patro

For Respondent : Mr. D.K.Mishra, A.G.A.

JUDGMENT Date of Judgment : 04.10.2023

B.P. ROUTRAY, J.

1. The Appellant is convicted for commission of murder of his wife and three daughters by dealing tangia blow while they were sleeping in the night and then set the house on fire. He is sentenced to life imprisonment.

2. The prosecution story, sans unnecessary details, is as follows:

> The Appellant Gopla Majhi is a resident of village Deheda under Biswanathpur Police Station in the district of Kalahandi. He often misbehaved village women after being alcoholic for which there was discontentment between the husband and wife. The wife namely, Tila Majhi always objected such conduct of the Appellant. This made the Appellant angry and dissatisfied with his wife. On the occurrence night,i.e. in the night of 21/22.3.2012, when the wife and three daughters had fallen asleep inside the house, the Appellant dealt Tangia (axe) blows on them to kill and then set the house on fire. After committing murder he left the house in the night. The neighbours woke up. The informant, Jamu Majhi (since dead), saw the fire in flames in the house of the Appellant. He called others, who all came, and extinguished the fire by water and found four dead bodies lying on the floor inside the house. In the early morning, the Appellant returned to village. While returning to the village, he frightened the villagers, seeing them, to assault by means of Tangia. However, the Gramarakhi was called and caught hold him.

3. The FIR was lodged by Jamu Majhi, who died afterward before deposing in the court. P.W.10, the IIC-In-charge of Biswanathpur Police Station registered the FIR and took up investigation. He held inquest over the dead bodies, sent them for postmortem examination, arrested the accused, seized the weapon of offence and took up all other formalities of investigation. The investigation was subsequently taken up by P.W.13, the Inspector-In-charge, who submitted the charge-sheet on 16.7.2012 against the accused for commission of offence under Sections 302/201 of the IPC. The Appellant pleaded innocence and not guilty. He also took the plea of alibi during his examination under Section 313 Cr.P.C. as well as in his evidence.

4. The prosecution examined thirteen witnesses. Amongst them, P.W.10 & 12 are the Investigating Officers. P.W.11 is the scribe of FIR and P.W.9 is the Postmortem Examination Doctor. P.W.1 & 3 are the cousins of the Appellant and his neighbours. As stated earlier, the informant could not be examined due to his death. P.W.2 & 4 to 7 are the fellow villagers of the Appellant and they all are post-occurrence witnesses. The FIR is marked as Ext.5 and the inquest reports have been marked from Ext.1 to 4. The postmortem examination reports are marked under Ext.11 to 14 and the chemical examination report is under Ext.25. The spot map is Ext.18. All these exhibits have been marked on behalf of the prosecution.

5. The Appellant examined himself as Defence Witness No.1. He did not produce any documentary evidence.

6. There is no eyewitness to the occurrence. No one has seen the Appellant committing the assault. Though P.W.1 has stated to have seen the Appellant while committing the assault, but his evidence to this extent is not found trustworthy. It is for the reason that he did not speak about the same before police and for the first time he deposed about same in the court. He has admitted in his cross-examination that for the first time he is stating all such facts about eye-witnessing the assault by

the Appellant on his wife and children. It is the prosecution case that the informant saw the house on fire in the night for the first time. So, had P.W.1 been witnessed it, the same could have been mentioned by the informant in the F.I.R. But the FIR does not speak so. Further, had P.W.1 been the eyewitness of the assault, his conduct would have been different than to remain silent till other people reached at the spot to extinguish the fire. It is thus appearing that P.W.1 is trying to develop his statement and therefore, his deposition to such extent is found untrustworthy.

7. The case appears based on circumstantial evidence in absence of any direct eyewitness to the occurrence. Learned trial court has also dealt with the case as such and accordingly relied on the circumstance of extra judicial confession to convict the Appellant. According to learned trial court, the confession of the Appellant made before the villagers in the morning about commission of murders of his wife and children is acceptable as creditworthy to sustain the conviction. But here we find one error committed by the trial court. The same is discussed below.

8. As per the witnesses Viz. 1 to 7, the Appellant confessed about commission of murder by him in the morning in presence of the villagers. P.W.1 to 7 have all stated in same line that on being asked, the accused told to have killed his wife and children and set the house on fire. But the fact remains that when the Appellant came to his village in the morning, he could not be controlled by the villagers and only when the Gramarakhi came there, he could able to caught hold him. This is also corroborated as per the versions stated in the FIR along with the fact that Gramarakshi guarded the spot. So, the inference arises that, whatever was stated by the Appellant before the villagers, the same was stated in presence of the Gramarakhi. Gramarakhi is undisputedly a police personnel and this has been settled in various decisions. Therefore, all such statements made by the Appellant before the villagers in presence of the Gramarakhi are definitely hit by Section 24 of the Indian Evidence Act. It is because that, no statement made in presence of the police would be admissible in evidence. This part has been completely overlooked by learned trial court. Therefore in the opinion of this Court, such extra judicial confession made by the Appellant before the villagers is inadmissible in evidence and thus cannot be used against the Appellant.

9. The other circumstance narrated by the prosecution is regarding disclosure statement of the Appellant leading to discovery of weapon of offence, i.e. the Tangia (M.O.I). As per the evidence of P.W.10, the I.O. and P.W.5, the Appellant while in police custody being inclined to give discovery of M.O.I had led the police team and witnesses to his house and brought out the axe. There is a catch here also. The fact remains that the Appellant, as per the version of P.W.1 to 7, returned to village carrying the Tangia and one thenga and he threatened the villagers to kill. Further, the prosecution case is that, since the Appellant could not be captured by the villagers, the Gramarakhi was called and he caught hold of the Appellant. So if the Appellant could be caught hold by the Gramarakhi only in the morning, then it is

obvious that he would have got the Tangia (M.O.I) also. If the Tangia was brought from the Appellant at the time he carried it in the morning itself, then the question of its concealment and recovery at a subsequent point of time does not arise at all. Therefore all such stories narrated by the prosecution regarding leading to discovery of the weapon of offence are all created one incorporated subsequently to suit prosecution case.

10. The important aspect to be emphasized here is the nature of death of all the deceased persons. They are no other than the wife and three minor daughters of the Appellant. The most tragic part is that youngest daughter was only two months old and all the deceased persons received chop wounds around their neck. The daughters received one chop wound each on their neck and the wife (Tila Majhi) received four chop wounds around her neck. The time of death of all the deceased persons corresponds the time around 3 or 4 AM in the night of the occurrence as per the opinion recorded by P.W.9. It is to be reminded here that the cause of death is not by burn or fire injury but by chop wounds consistent to the weapon of offence as the Tangia.

11. M.O.I is the weapon and identified by the witnesses in court. Said M.O.I was examined by P.W.9 who opined that all such chop wounds found on the dead body can be possible by M.O.I. Therefore, the nature of death is established to be homicidal and the injuries are consistent to M.O.I. These circumstances are unquestionable.

12. The next question comes, who could be the assailant ?

The deceased persons are admittedly the wife and children of the Appellant. This is admitted by the Appellant. It further remains undisputed that the dead bodies were found lying on the floor inside the house of the Appellant. The house was set on fire before it was doused by the witnesses. Here is a circumstance appearing against the Appellant. The Appellant being the admitted husband and father of the deceased persons, a reasonable explanation about the death of deceased persons is expected from the Appellant. The Appellant had taken the plea that one day before the occurrence he left the village and had been to village Sergilepa. The Appellant states that he did not know anything regarding the occurrence and he feigned to be ignorant of the deaths till his return in the morning. It is well settled that, in the plea of alibi the burden is on the accused to prove the same. The Appellant as D.W.1 said in his cross-examination that he had gone to the house of one Gudi Majhi, his native in village Sergilepa. But no attempt has been made by the Appellant to examine either Gudi Majhi or any other person to support his version. It is true that some of the prosecution witnesses have told that the Appellant was not seen in the village during day time on the occurrence date. But none have stated to have seen the Appellant at village Sargilepa. At the same time, it is also found that nobody has stated about his absence from the house during the evening hours or that relevant

night. It is obvious and natural on the part of the Appellant to return the house in night instead of staying in the neighbouring village Sergilepa which is only 2.5 kilometers away. It is not that the Appellant accuses any other person or any other reason for murder of his wife and children. He simply speaks his ignorance. It is of course common on the part of an offender to commit the offence behind the eyes of others. Here it is important to see the conduct of the Appellant after he was seen by the villagers in the morning. It is the consistent evidence of all such witnesses that the Appellant behaved in a angry manner upon seeing the villagers and frightened them with Tangia. He could not be controlled by the villagers until the Gramarakhi captured him. Such post occurrence conduct of the accused after commission of offence is relevant under Section 8 of the Indian Evidence Act. Had the Appellant been that innocent his behavior would have been different after knowing murder of his wife and children. It is not the case of death of wife or one child alone, but it is a case of murder of wife and three daughters at the same time. Therefore the story of innocence as narrated by the Appellant is hard to believe.

13. In a case of murder the best witness, i.e. the deceased, is made silent by the assailant. The murderer wipes out the best evidence against him. In the instant case, it is not a murder simplicitor of one person or two persons, but it is a case of four persons including one female child aged about two months. It is brutal and barbaric. The circumstance that the murder was committed in the house of the Appellant and he attempted to burn the entire house along with the dead bodies in dead of the night are pointing finger to the Appellant alone and the same is further strengthened by his subsequent conduct relevant under the principles of *res gestae,* which also points towards the guilt of the Appellant alone excluding all hypothesis of his innocence. Therefore taking all such circumstances in entirety including the cause of death, it is concluded that the prosecution has established the charges against the Appellant. The Appellant is thus found guilty of the charges as concluded by learned trial court.

14. Accordingly, the conviction and sentence of the Appellant is confirmed and the appeal is dismissed.

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2023 (III) ILR – CUT- 798

B.P. ROUTRAY, J.

BLAPL NO. 6934 OF 2023

MANORANJAN DAS .....Petitioner

-V-

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 167(2) r/w Section 37(1)(b) of the NDPS Act – The petitioner is accused for commission of offences U/s. 21(C)/29 of the NDPS Act for transporting and possessing 1kg 34 grams of brown sugar – The petitioner is languishing in the custody for more than 2 years without commencement of trial – Whether the embargo contained in Section 37(1)(b) of the NDPS Act can be dispensed with at this stage? – Held, Yes. (Para-10)

Case Laws Relied on and Referred to :-

1. (2021) 2 SCC 485 : M. Ravindran Vs. Intelligence Officer, Directorate of Revenue Intelligence.
2. (2015) 8 SCC 340 : Ravi Prakash Singh Vs. State of Bihar.
3. 2023 SCC OnLine SC 972 : Enforcement Directorate, Government of India Vs. Kapil Wadhawan and another.
4. 1995 (Supp) 3 SCC 221 : State of M.P. Vs. Rustam & Ors.
5. (2021) 2 SCC 485 : M. Ravindran Vs. Intelligence Officer, Director of Revenue Intelligence.
6. (1986) 3 SCC 141 : Chaganti Satyanarayan Vs. State of Andhra Pradesh.
7. (1992) 3 SCC 141 : CBI Vs. Anupam J Kulkarni.
8. (1996) 1 SCC 432 : State Vs. Mohd. Ashraf Bhat.
9. (2002) 2 SCC 121 : State of Maharashtra Vs. Bharati Chandmal Varma.
10. (2022) 10 SCC 51 : Satender Kumar Antil Vs. Central Bureau of Investigation.
11. 2023 SCC OnLine SC 352 : Mohd. Muslim alias Hussain Vs. State (NCT of Delhi)

For Petitioner : Mr. D. Panda

For Opp. Party : Mr. K.K. Das, Addl. Standing Counsel

JUDGMENT Date of Judgment : 04.10.2023

B.P. ROUTRAY, J.

1. The Petitioner has prayed to release him on bail under Section 439 Cr.P.C. He was arrested and remanded to custody on 4th September 2021 in connection with S.T.F. P.S. Case No.31 dated 3rd September 2021 for alleged commission of offences under Sections 21(c)/29 of the N.D.P.S. Act for transporting and possessing 1 kg 34 grams of brown sugar (heroin). Since then, the Petitioner is inside custody in connection with the aforesaid Police Case corresponding to T.R. Case No.126 of 2021 in the court of learned 1st Additional Sessions Judge-cum-Special Judge, Khordha.

2. The prayer for his release on default bail in terms of the provisions contained in Section 167 (2) of the Cr.P.C. read with Section 36-A(4) of the N.D.P.S. Act was earlier rejected by this Court in CRLMC No.625 of 2022. This Court in its order dated 25.04.2022 have held as follows:

> "xxx xxx xxx
>
> 2. Law is no more *res integra* on this issue. Recently in the case of ***M. Ravindran vs. Intelligence Officer, Directorate of Revenue Intelligence, (2021) 2 SCC 485***, the

Hon'ble Supreme Court has reiterated the law that the date on which the accused was remanded to judicial custody has to be excluded from calculation of statutory period of 180 days. It was observed at paragraph 8 of the said decision that:-

"This Court in a catena of judgments including ***Ravi Prakash Singh vs. State of Bihar, (2015) 8 SCC 340,*** has ruled that while computing the period under Section 167(2), the day on which accused was remanded to judicial custody has to be excluded and the day on which challan/charge-sheet is filed in the court to be included."

xxx xxx xxx

7. As stated above, the day of initial remand is excluded from the statutory period as held in several case laws. By excluding 4th September, 2021 from counting, 180 days completes on 3rd March, 2022 when the prayer for extension was allowed by the learned Special Judge, It goes without saying that unless statutory period of 180 days is completed, no right of default bail accrues in favour of the accused. As such in the given facts of the case, no merit is seen in the prayer of the Petitioner to release him on default bail."

3. Mr. D. Panda, learned counsel for the Petitioner submitted that recently a Three Judge Bench of Hon'ble Supreme Court taking note of the case of ***M. Ravindran vs. Intelligence Officer, Directorate of Revenue Intelligence, (2021) 2 SCC 485*** and several other case laws have held in ***Enforcement Directorate, Government of India vs. Kapil Wadhawan and another, 2023 SCC OnLine SC 972*** while answering the reference that whether the period of remand under the first proviso to Section 167 (2) of the Code of Criminal Procedure, 1973 is inclusive of the day on which the Magistrate orders remand, have clarified and declared that the stipulated 60/90 day remand period under Section 167 Cr.P.C. ought to be computed from the day when the Magistrate authorizes remand. The relevant observations are reproduced below.

"xxx xxx xxx

Simply put, the Court needs to answer whether the period of remand under the first provision to Sec.167 (2) of the Code of Criminal Procedure, 1973 (hereinafter 'CrPC') is inclusive of the day on which the Magistrate orders remand.

xxx xxx xxx

7. The prosecution relies, on the line of reasoning in ***State of M.P. Vs. Rustam & Ors., 1995 (Supp) 3 SCC 221***, which was later followed in ***Ravi Prakash Singh Vs. State of Bihar, (2015) 8 SCC 340*** and ***M. Ravindran Vs. Intelligence Officer, Director of Revenue Intelligence, (2021) 2 SCC 485*** where it was held that the date of remand is to be excluded for computing the stipulated 60/90 days period for the right of default bail to arise.

8. On the other hand, the Accused rely, *inter alia,* on ***Chaganti Satyanarayan Vs. State of Andhra Pradesh, (1986) 3 SCC 141, CBI Vs. Anupam J Kulkarni, (1992) 3 SCC 141, State Vs. Mohd. Ashraf Bhat, (1996) 1 SCC 432*** and ***State of Maharashtra Vs. Bharati Chandmal Varma, (2002) 2 SCC 121*** to contend that the first date of remand must be included for computing the remand period for determining an accused's entitlement to default bail.

> 9. Due to the aforementioned conflict in law, a judicial conundrum has arisen which is required to be resolved in this reference.
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> xxx xxx xxx
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> 50. xxx xxx xxx. We therefore declare that the stipulated 60/90 day remand period under Section 167 CrPC ought to be computed from the date when a Magistrate authorizes remand. If the first day of remand is excluded, the remand period, as we notice will extend beyond the permitted 60/90 days' period resulting in unauthorized detention beyond the period envisaged under Section 167 CrPC. In cases where the chargesheet / final report is filed on or after the 61st/91st day, the accused in our considered opinion would be entitled to default bail. In other words, the very moment the stipulated 60/90 day remand period expires, an indefeasible right to default bail accrues to the accused."

4. It is thus submitted by the Petitioner that, on the principles decided in ***Kapil Wadhawan and another*** (supra), the Petitioner is entitled to be released on bail since the charge-sheet was not submitted within the period of 180 days and the prayer for extension of investigation period was prayed and granted on 3rd March 2022 by the learned Special Judge.

5. Further, the contention of the Petitioner is that despite he is inside custody for more than 2 years, the trial is yet to commence and unlikely to be concluded in the near future. So keeping his period of custody in view and the delay in commencement of trial, he should be released on bail, and he being a resident under Khordha Town P.S., any apprehension for his abscondence from the course of law is not there.

6. The Petitioner is taken to custody on remand on 4.9.2021 and the charge-sheet was submitted on 10.3.2022. On 3rd March 2022, a further period of three months was granted by the learned Special Judge to complete the investigation on the ground of spread of COVID-19 infection and consequent lock-down situation. These facts remain undisputed. So if 4th September 2021, i.e. the date of remand of the Petitioner is included in the period of counting, 180 days completed on 2nd March 2022 and as such, 3rd March 2022 is counted as 181st day when the prayer for extension was made by the prosecution and allowed by learned Special Judge. Therefore, based on the principles propounded in ***Kapil Wadhawan and another*** (supra), the Petitioner would be entitled to default bail.

7. Further, the custodial period of the Petitioner for more than two years without commencement of trial remains undisputed at the Bar. In ***Satender Kumar Antil vs. Central Bureau of Investigation, (2022) 10 SCC 51***, the Hon'ble Supreme Court while dealing with the issue of prolonged incarceration of an accused pending trial have observed that,

> "We do not wish to deal with individual enactments as each special Act has got an objective behind it, followed by the rigour imposed. The general principle governing delay would apply to these categories also. To make it clear, the provision contained in

Section 436-A of the Code would apply to the Special Acts also in the absence of any specific provision. For example, the rigour as provided under Section 37 of the NDPS Act would not come in the way in such a case as we are dealing with the liberty of a person. We do feel that more the rigour, the quicker the adjudication ought to be. After all, in these types of cases number of witnesses would be very less and there may not be any justification for prolonging the trial. Perhaps there is a need to comply with the directions of this Court to expedite the process and also a stricter compliance of Sectin 309 of the Code."

8. In ***Mohd. Muslim alias Hussain vs. State (NCT of Delhi), 2023 SCC OnLine SC 352*****,** the Hon'ble Supreme Court has observed that grant of bail on the ground of undue delay in trial cannot be said to be fettered by Section 37 of the NDPS Act, given the imperative of Section 436-A of the Cr.P.C. which is applicable to offences under the NDPS Act too. The Hon'ble Supreme Court has observed as follows:

"**19**. The conditions which courts have to be cognizant of are that there are reasonable grounds for believing that the accused is *"not guilty of such offence"* and that he is not likely to commit any offence while on bail. What is meant by "not guilty" when all the evidence is not before the court? It can only be a *prima facie* determination. That places the court's discretion within a very narrow margin. Given the mandate of the general law on bails (Sections 436, 437 and 439, CrPC) which classify offences based on their gravity, and instruct that certain serious crimes have to be dealt with differently while considering bail applications, the additional condition that the court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted *reasonably*. Further the classification of offences under Special Acts (NDPS Act, etc.), which apply over and above the ordinary bail conditions required to be assessed by courts, require that the court records its satisfaction that the accused might not be guilty of the offence and that upon release, they are not likely to commit any offence. These two conditions have the effect of overshadowing other conditions. In cases where bail is sought, the court assesses the material on record such as the nature of the offence, likelihood of the accused co-operating with the investigation, not fleeing from justice: even in serious offences like murder, kidnapping, rape, etc. On the other hand, the court in these cases under such special Acts, have to address itself principally on two facts: likely guilt of the accused and the likelihood of them not committing any offence upon release. This court has generally upheld such conditions on the ground that liberty of such citizens have to – in cases when accused of offences enacted under special laws – be balanced against the public interest.

20. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a *prima facie* look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

21. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be

proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only *prima facie*, based on a *reasonable reading,* which does not call for meticulous examination of the materials collected during investigation (as held in *Union of India v. Rattam Malik*). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref.*Satender Kumar Antil* supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.

22. Before parting, it would be important to reflect that laws which impose stringent conditions for grant of bail, may be necessary in public interest; yet, if trials are not concluded in time, the injustice wreeked on the individual is immeasurable. Jails are overcrowded and their living conditions, more often than not, appalling. According to the Union Home Ministry's response to Parliament, the National Crime Records Bureau had recorded that as on 31st December, 2021, over 5,54,034 prisoners were lodged in jails against total capacity of 4,25,069 lakhs in the country. Of these 122,852 were convicts; the rest 4,27,165 were undertrials.

23. The danger of unjust imprisonment, is that inmates are at risk of "prisonisation" a term described by the Kerala High Court in *A Convict Prisoner v. State* as *"a radical transformation"* whereby the prisoner.

"*loses his identity. He is known by a number. He loses personal possessions. He has no personal relationships. Psychological problems result from loss of freedom, status, possessions, dignity any autonomy of personal life. The inmate culture of prison turns out to be dreadful. The prisoner becomes hostile by ordinary standards. Self-perception changes."*

24. There is a further danger of the prisoner turning to crime, "*as crime not only turns admirable, but the more professional the crime, more honour is paid to the criminal*" (also see Donald Clemmer's '*The Prison Community*' published in 1940). Incarceration has further deleterious effects – where the accused belongs to the weakest economic strata : immediate loss of livelihood, and in several cases, scattering of families as well as loss of family bonds and alienation from society. The courts therefore, have to be sensitive to these aspects (because in the event of an acquittal, the loss to the accused is irreparable), and ensure that trials – especially in cases, where special laws enact stringent provisions, are taken up and concluded speedily."

9. Further, the Supreme Court in another recent case in SLP (Crl.) No.6690 of 2022 (***Dheeraj Kumar Shukla vrs. The State of Uttar Pradesh***), involving seizure of 92 Kg and 65 Kg of Ganja from two vehicles and the accused was in custody since 24th June 2020, have held that in absence of criminal antecedents and the fact that the Petitioner was in custody for 2 ½ years, the conditions of Section 37 of the NDPS Act can be dispensed with. The relevant observations are reproduced below:

"3. It appears that some of the occupants of the 'Honda City' Car including Praveen Maurya @ Puneet Maurya have since been released on regular bail. It is true that the quantity recovered from the petitioner is commercial in nature and the provisions of Section 37 of the Act may ordinarily be attracted. However, in the absence of criminal antecedents and the fact that the petitioner is in custody for the last two and a half years,

we are satisfied that the conditions of Section 37 of the Act can be dispensed with at this stage, more so when the trial is yet to commence though the charges have been framed.

4. For the reasons stated above but without expressing any views on the merits of the case, the petitioner is directed to be released on bail subject to his furnishing bail bonds to the satisfaction of the Trial Court."

10. In the case at hand as stated above, the Petitioner is incarcerated inside custody for more than 2 years without commencement of trial and as such, this Court is inclined to observe that the embargo contained in Section 37(1)(b) of the NDPS Act can be dispensed with at this stage in respect of the Petitioner.

11. In view of the discussions made above, it is directed to release the Petitioner on bail in connection with S.T.F. P.S. Case No.31 of 2021 corresponding to T.R. Case No.126/2021 on such terms and conditions to be fixed by the learned 1st Addl. Sessions Judge-cum-Special Judge, N.D.P.S. Act, Khordha as he deems just and proper including the condition that, he shall not be involved in any other offence while on bail.

12. The BLAPL is disposed of.

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2023 (III) ILR – CUT- 804

Dr. S.K. PANIGRAHI, J.

W.P.(C) NO.13868 OF 2016

SANTANU PRADHAN .....Petitioner

-V-

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

SERVICE LAW – Appointment – Preferential qualification –The authority appointed/selected the Opp. Party as Jogana Sahayak because he had additional experience of four years as salesman, which was one of the criteria in the advertisement – Whether the petitioner who has no experience can claim consideration against the post? – Held, No – The prescription of preferential qualification not only refers to numeric superiority but also essentially related to better mental capacity, ability and maturity to bear the responsibilities, which are entrusted to the candidates after their selection to a particular post.

(Paras 12-13)

Case Laws Relied on and Referred to :-

1. 2003 SCC OnLine SC 542 : Secretary, A.P.Public Service Commission Vs. Y.V.V.R. Srinivasulu & Ors.

2. 2006 SCC OnLine SC 752 : State of U.P. and Anr. Vs. Om Prakash & Ors.
3. (1996) 6 SCC 282 : Secy. (Health) Deptt. of Health & F.W. Vs. Anita Puri (Dr).
4. (2007) 11 SCC 599 : Surinder Singh Vs. Union of India.

For Petitioner : Mr. Prafulla Kumar Rath, Sr. Adv., Mr. S.K. Behera

For Opp. Parties : Mr. Ch. Satyajit Mishra, AGA
Mr. A.K. Choudhury, Sr. Adv., Mr. K.K. Das

JUDGMENT Date of Hearing: 17.07.2023: Date of Judgment: 24.08.2023

Dr. S.K. PANIGRAHI, J.

1. The Petitioner through this Writ Petition has assailed the Selection List dated 21.04.2016 wherein the opposite party No.7- Binod Pradhan has been appointed as Jogan Sahayak in Kamira Gram Panchayat under Birmaharajpur Block but has secured less marks than the Petitioner in the 10th Class examination.

I. FACTUAL MATRIX OF THE CASE:

2. On 30.03.2016 an advertisement was published for recruitment to the post of Jogana Sahayak of several Gram Panchayats in the Birmaharajpur Block under Subarnapur district. The qualification for engagement of Jogan Sahayak was that the Candidate must be a permanent resident of the G.P.; the candidate in respect of KBK District must have passed 10th Class or equivalent to matriculation; he /she must be within the age of between 21 to 35 years from the date of advertisement and if the mark/percentage will be same in matriculation among the applicant, then the higher qualification will be considered. It was also mentioned that the selection will be based on the marking for 10th Class passed or equivalent to matriculation. The salesman engaged by Gram Panchayat for dealing with PDS may be given preference over others due to their experience in the job and the upper age limit of experienced salesman as raised by 10 years i.e. from 35 years to 45 years for engagement of Jogan Sahayak.

3. The petitioner having good academic career applied for the post of the Jogana Sahayak in respect of Kamira Gram Panchayat. The private opposite party No.7 was also an applicant to the said post. On comparative assessment of the marks secured between the petitioner and the opposite party No.7, the petitioner had secured the higher marks in comparison to his counterpart which is one of the criteria as mentioned in advertisement. However, the Opposite Party No.7 was placed at Sl.No.1 of the Selection List. Being aggrieved, the petitioner has filed this Writ Petition.

II. PETITIONER'S SUBMISSIONS:

4. Learned counsel for the petitioner contended that the petitioner had secured 1st division in the 10th class (76%) whereas the opposite party had secured 2nd Division (55%). Similarly, in the +2 examination, the petitioner was on the better

footing with respect to the mark than the opposite party No.7. He further contended that if at all the experience of the opposite party No.7 is supposed to be the basis of selection, he does not have any experience because the age of the opposite party No.7 was not 21 years or above. On the otherhand, he was below the age stipulated in the advertisement i.e. 21 to 35 for engagement of Jogan Sahayak which was formerly known as Salesman. So, the document produced by the opposite party No.7 should not be relied upon. Law regarding the word "preference" is that all the eligibility criteria being same, a candidate having experience may claim preference but in the present case, the opposite party who has secured less marks in the 10th class examination cannot be placed at serial No.1.

5. Learned Counsel has relied on a decision held in the case of ***Secretary, A.P.Public Service Commission v. Y.V.V.R. Srinivasulu and others***[1] wherein the meaning of word "preference" in the recruitment process has been well defined that:

> *"When selection is made on the additional qualification would mean other things being qualitatively and quantitatively equal, those having additional qualification would be preferred- It does not mean en bloc preference irrespective of inter se merit and suitability- It cannot work as a reservation or complete precedence- Moreover, on facts, the old rules on the basis of which preference claimed had been superseded and replaced by the new rules which deleted the preference provision- even if PSC in its advertisement referred to preference for additional qualification ignoring the new rules, the same cannot be binding on it nor can anyone on that basis claim a right to the detriment of others"*

6. Further, in this regard, he relied on another decision held by the Supreme Court in the case of ***State of U.P. and another v. Om Prakash and others.***[2]

III. OPPOSITE PARTIES' SUBMISSIONS:

7. *Per contra,* learned counsel for the opposite parties submits that there is absolutely no illegality or impropriety in placing the opposite party No.7 in Sl.No.1 during the selection process for the post of Jogana Sahayak in Kamira G.P. and the said selection has been made as per the necessary guidelines issued by the State Government from time to time. It is further submitted that pursuant to letter No.7040 dated 21.04.2012 of the Commissioner–cum-Secretary, Food Supplies & Consumer Welfare Department (in short, "FS & CW Deptt.") and letter No. 808 dated 31.12.2015 of Collector, Subarnapur procedure for engagement of the Jogan Sahayak in different Gram Panchayat under Birmaharajpur Block was initiated.

8. In Birmaharajpur Block, 10 nos. of G.P. have submitted resolution for engagement of Jogan Sahayak as they are dealing with PDS. After receipt of resolution from the G.Ps, an advertisement was published vide letter No. 420 dated 30.03.2016.Accordingly, B.D.O. Birmaharajpur /opposite party No.4 vide letter No. 522 dated 21.04.2016 directed the three applicants of Kamira G.P. namely, the

1. 2003 SCC OnLine SC 542, **2**. 2006 SCC OnLine SC 752

present petitioner, opposite party No.7 and one Binodini Pradhan to appear with original documents of HSC/Matric certificate, Mark Sheet, Residential Certificate, Caste Certificate, Character Certificate and to her related documents for verification.

9. It is further submitted that as per provision contained in the Govt. in FS & CW Deptt. Letter No. 13723 dated 12.08.2013 the working Salesman is to be given preference over others due to his experience dealing with PDS matters. The engagement of Sri Binod Padhan as Salesman of Kamira G.P. under Birmaharajpur was resolved in the G.P. monthly Meeting dated 25.10.2011 vide proposal No.4 and the engagement was legally approved by the District Panchayat Officer, Subaranapur vide order No. 1062 dated 15.12.2011. The Executive Officer of Kamira G.P. have issued experience certificate in favour of the Salesman (Opp.Party No.7). The O.P.No.4 has only adhered to the instruction of Govt. in FS & CW Deptt. In this matter and the matter of giving preference to the salesman engaged by the G.P. dealing with PDS may be given preference over others due to their experience in the job.

10. It is further submitted that apart from selection based on the career marking for 10th class passed or equivalent to matriculation, preference may be given to the salesmen engaged by the GP dealing with PDS due to their experience in the job as clearly mentioned in the advertisement made by the opposite party No.4 vide letter No. 420 dated 30.03.2016. In addition to that it is further submitted that pursuant to letter No. 13723 dated 12.08.2013 of the Govt. in FS & CW Department, preference was given to Sri Binod Pradhan/opposite party No.7 over the petitioner as he was working as Salesman and had the experience in the job. It may be true that the opposite party No.7 had secured less percentage of marks in matriculation as compared to the petitioner. However, the opposite party No.7 was placed at Sl.No.1 in the list in view of the above letter of Govt. as he was working as Salesman in Kamira G.P. having been legally appointed by the G.P. and duly approved by the District Panchayat Officer, Subarnapur as required under OGP Act and Rules which is legal and maintainable in the eye of law. Further, the criterion of selection is based on minimum qualification along with experience and condonation of the age of the salesmen who are working as Salesmen in the posts ought to be abolished and replaced with the posts of Jogana Sahayak. So, prior employment of the persons faced with abolition of posts cannot be ignored as the Education Qualification is not one and only criteria as per the advertisement and they shall get weightage. So, the reliance of the petitioner on the basis of qualification is not sustainable.

IV. COURT'S REASONING AND ANALYSIS:

11. On perusal of the documents available on the record, it is revealed that the opposite party No.7 might have secured less marks in the 10th Examination than the petitioner. However, he had additional experience of four years as Salesman which was one of the criteria of the advertisement. Accordingly, the claim of the petitioner does not merit consideration for the engagement of Jogana Sahayak in question.

12. The present matter demands a discussion on the issue of preferential qualification. It is well settled that in service jurisprudence the prescription of preferential qualification not only refers to numeric superiority but is essentially related to better mental capacity, ability and maturity to shoulder the responsibilities, which are entrusted to the candidates after their selection to a particular post. The basic object of prescribing a minimum qualification is to put a cut-off level for a particular job in accordance with the minimum competency required for the performance of that job.

13. In the present matter, the matriculation certificate is the minimum qualification and accordingly the person with more "experience" in the job would be given preference. In this regard, this Court has relied on ***Secy. (Health) Deptt. of Health & F.W. v. Anita Puri (Dr)***[3]**:**

> ***"7.*** *Admittedly, in the advertisement which was published calling for applications from the candidates for the posts of Dental Officer it was clearly stipulated that the minimum qualification for the post is B.D.S. It was also stipulated that preference should be given for higher dental qualification. There is also no dispute that M.D.S. is a higher qualification than the minimum qualification required for the post and Respondent 1 was having that degree. The question then arises is whether a person holding a M.D.S. qualification is entitled to be selected and appointed as of right by virtue of the aforesaid advertisement conferring preference for higher qualification? The answer to the aforesaid question must be in the negative. When an advertisement stipulates a particular qualification as the minimum qualification for the post and further stipulates that preference should be given for higher qualification, the only meaning it conveys is that some additional weightage has to be given to the higher qualified candidates. But by no stretch of imagination it can be construed to mean that a higher qualified person automatically is entitled to be selected and appointed.* ***In adjudging the suitability of person for the post, the expert body like Public Service Commission in the absence of any statutory criteria has the discretion of evolving its mode of evaluation of merit and selection of the candidate. The competence and merit of a candidate is adjudged not on the basis of the qualification he possesses but also taking into account the other necessary factors like career of the candidate throughout his educational curriculum, experience in any field in which the selection is going to be held, his general aptitude for the job to be ascertained in course of interview, extracurricular activities like sports and other allied subjects, personality of the candidate as assessed in the interview and all other germane factors which the expert body evolves for assessing the suitability of the candidate for the post for which the selection is going to be held. In this view of the matter, the High Court in our considered opinion was wholly in error in holding that a M.D.S. qualified person like Respondent 1 was entitled to be selected and appointed when the Government indicated in the advertisement that higher qualification person would get some preference.*** *The said conclusion of the High Court, therefore, is wholly unsustainable and must be reversed."*

14. This Court has also relied on ***Surinder Singh v. Union of India***[4]:

> *"**16.** In our view, in service jurisprudence the prescription of preferential qualification not only refers to numeric superiority but is essentially related to better mental capacity,*

3. (1996) 6 SCC 282 , **4.** (2007) 11 SCC 599

ability and maturity to shoulder the responsibilities, which are entrusted to the candidates after their selection to a particular post. All the more, it is important for efficient and effective administration. The basic object of prescribing a minimum qualification is to put a cut-off level for a particular job in accordance with the minimum competency required for the performance of that job."

15. In light of the aforesaid discussion, this Court is of the opinion that the contention of the Petitioner being devoid of any merit stands rejected.

16. Accordingly, this Writ Petition stands dismissed. No order as to costs.

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2023 (III) ILR – CUT- 809

Dr. S.K. PANIGRAHI, J.

W.P.(C) NO.10286 OF 2020

NARENDRA PARASETH …….Petitioner

-V-

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

NATURAL JUSTICE – The authority issued show cause notice for poor performance of the petitioner in his assigned duties – In the impugned order of punishment the authority introduced two unknown allegation about which the petitioner is neither heard nor supplied with the text of the same – Whether the impugned order with new allegation sustainable? – Held, No – This action stands militating against the principle of Natural Justice. (Paras 31-35)

Case Laws Relied on and Referred to :-

1. AIR 2010 SC 3493 : Union of India & Ors. Vs. Mahaveer C. Singhvi.
2. (1995) 6 SCC 749 : B.C. Chaturvedi Vs. Union of India.
3. (2011) 4 SCC 584 : State Bank of Bikaner & Jaipur Vs. Nemi Chand Nalwaya.

For Petitioner : Mr. Srinivas Mohanty

For Opp. Parties : Mr. G.R. Mohapatra, ASC

JUDGMENT Date of Hearing:17.07.2023: Date of Judgment: 24.08.2023

Dr. S.K. PANIGRAHI, J.

1. The Petitioner through this Writ Petition challenges the legality and validity of the impugned order of his disengagement dated 23.02.2018 as being a blatant violation of the principles of natural justice, sans culpability, illegal, malafide, misleading, designed, ultra vires and that infringes on the fundamental rights of the petitioner guaranteed under the Constitution of India.

I FACTUAL MATRIX OF THE CASE:

2. The DRDA, Kandhamal has issued an advertisement on 13.06.2011 inviting candidature from +2 pass out candidates for selection of Multi Purpose Assistant (Gram Rozgar Sevak) for each Gram Panchayat in the district; and pursuant to the said advertisement, the petitioner has submitted his candidature for the post of Multi Purpose Assistant (Gram Rozgar Sevak) and resultantly got selected and posted at Belghar GP vide Order dated 17.12.2011.

3. In view of the aforesaid order of engagement, the petitioner has signed an Agreement with the Gram Panchayat on 29.12.2011 and thereby executed an undertaking not to claim the posting for regularization. As a Gram Rozgar Sevak or Employment Guarantee Assistant, his role is inter alia to oversee the process of registration, distribution of job cards, provision of dated receipts against job applications and allocation of work to applicants among others.

4. Each Gram Pachayat under Mahatma Gandhi Rural Employment Guarantee Act 2005 (Mahatma Gandhi NREGA) suggests that each G.P ought to have a hierarchical managerial system like an elected representative called Sarpanch, one Executive called Panchayat Development Officer, Gram Panchayat Technical Assistant (GPTA)/JE, GRS, Mate, Data Entry Operator and thus team work to execute the purpose of guaranteeing employment to villages is necessitated.

5. While working as such, the petitioner was issued a show cause notice by the Collector. The said notice alleged that in the said Gram Panchayat, there was a shortfall in payment of wages, generation of person days and Aadhar seeding. In the said notice the information pertaining to the functioning of the Gram Panchayat was obtained by virtue of an online study where the achievements were 47.07% in respect of timely payment of wages, 32.13% in respect of generation of person days and 78.79% in respect of Aadhar seeding.

6. The Department of Panchayat Raj having regard to the poor performance in Aadhar seeding is reported to have instructed to initiate disciplinary action against GRS for poor performance under Aadhar seeding and the Collector has been pleased to issue show cause notice to the petitioner on the following heads such as:

(i) Payment of Wages,
(ii) Generation of person days
(iii) Aadhar Seeding

7. With regard to Aadhar Seeding, there must be an Aadhar Card available with the Job Card Holder; but in the villages the intending job card holders have in phased manner obtained Aadhar Card due to so many factors which is beyond the control of the petitioner or the GP but whatever Aadhar Cards were made available to the GP were taken care of and no such allegation is ever received about the refusal to accept the Aadhar Card.

8. In response to the shortfall referred to in the show-cause notice, the petitioner has submitted his reply elaborating the facts as to how people in the summer prefer to take rest at home than to work in the sun and that is the reason behind the short fall. Hence the Gram Panchayat could not fetch the attention of the people and as a matter of fact, the petitioner in the comparative achievement in the district has stood one among the best achievers.

9. The reply of the petitioner is alleged to have not reached the Collector in time as a result of which the personal appearance for personal hearing of the petitioner was directed and the petitioner appeared in person and submitted his prepared show-cause reply along with computer generated comparative data of work performance of all the GRS.

10. The Collector having not heard the petitioner has his own volition beyond the inquired points and even beyond the allegation about which the petitioner is not heard and by suppressing the letter of the Govt. referred to above has passed the impugned order of his disengagement dated 23.02.2018 which is nothing but an order of disengagement simplicitor which by itself is per se not sustainable in the law and liable to be quashed as per the settled principle of law enunciated in case laws reported in AIR 2010 SC 3493.

11. Additionally, there was a direction by the Govt, Deptt of Panchayat Raj in their Letter No. 17-NREG- 11-1069 (Pt)-1209/PR dtd 20.01.2017 to initiate Disciplinary action against GRS for poor performance under Aadhar Seeding according to which the Collector was pleased to issue notice to show-cause to the petitioner on (i) Payment of Wages,(ii) Generation of person days, and(iii) Aadhar Seeding;

12. However after hearing of the matter, the Collector was pleased to exonerate the petitioner from the allegations of Payment of Wages and Aadhar Seeding. However, apart from the above, the Collector was further pleased to introduced two unknown allegations about which the petitioner is neither heard nor supplied with the text of the same which stands militating against the principle of Natural Justice.

13. Aggrieved by the same, the petitioner approached this Court in W.P.(C) No. 5392/2018 on 30.03.2018 and upon hearing, this Court had been pleased to pass an interim order dated 04.04.2018 which in its verbatim reads as follows:

> *"Issue notice as above.*
>
> *Accept one set of process fee. As an interim measure, it is directed that in the event the work involving the petitioner has not been assigned to anybody else as yet, the petitioner shall be allowed to continue to work till the next day."*

14. In view of the above, the learned Addl. Standing Counsel for the State had communicated the above interim order to the O.Ps. vide Letter dated 05.04.2018 and advised them to take steps in accordance with the order of this Court and on being

asked, the petitioner has also submitted his joining report before the OP.3 (PD,DRDA). As a result, the Collector had then been pleased to instruct the Block Development Officer to take immediate action by way of forwarding both the letters of the learned ASC and the joining report of the petitioner vide Letter No.1567 dated 19.04.2018 and Letter No.1569 dated 19.04.2018 with an indication to take back the petitioner to run his assignments.

15. After days passed on, the BDO has not complied with the order of this Court and therefore upon advice, the petitioner has submitted his representation before the Collector, Kandhamal on 14.08.2019 with a copy to the BDO with a request to comply with the order of this Court passed on 04.04.2018 failing which there would be contemplation of instituting contempt proceeding before this Court. The Collector has taken the matter in its real perspective as to recalling the basic order of disengagement and thereby the petitioner was advised to withdraw the case and this being the positiveness in the attitude of the administration, the petitioner on his own volition has stepped back from proceeding with the case further and resultantly W.P.(C) No.5392/2018 is withdrawn with a liberty to file a better petition vide order dated 12.09.2019. However, owing to further inaction, the petitioner has filed this writ petition.

II PETITIONER'S SUBMISSIONS:

16. Learned counsel for the Petitioner(s) earnestly made the following submissions in support of his contentions:

17. As per the direction of the Government, there should be an initiation of disciplinary proceeding which requires compliance of natural justice by adopting due procedure contemplated for initiation of the said proceeding but in this case the Collector has acted on his subjective understanding and by adopting a summary procedure, has formed foundation of allegation but without providing natural justice has been dispensed with the service of the petitioner which is contrary to the settled principle of law.

18. The petitioner comes from a poor family belonging to Scheduled Caste in the district of Kandhamal and his paltry income is aimed at maintaining a family consisting of seven members and this suffering, all these days, has broken him beyond repair. The petitioner on account of the inordinate delayed action, has come to this Court to revise his stand and plead justice.

19. The impugned order is contrary to the self-admitted principle of the Deptt. of Panchayat Raj Letter No. 17- NREG-11-1069 (Pt)-1209/PR as to the initiation of departmental proceeding and since no departmental proceeding is to proceed on the face of the impugned order and since new facts are introduced in the impugned order about which no show cause is insisted for and since the impugned order is bad being simpliciter and liable to be quashed on the touch stone settled down by the Apex

Court in ***Union of India & Ors. –vrs. Mahaveer C. Singhvi***[1] and since the natural justice is not complied with as evident in the impugned order and since the post of the petitioner is still lying vacant, the petitioner is left with no other efficacious and speedy remedy other than resorting to filling this writ petition in such alternative.

III SUBMISSIONS OF OPPOSITE PARTY NOS.1 TO 4:

20. Per *contra*, learned counsel for the Opp. Parties intently made the following submissions:

21. The Collector-cum- DPC, MGNREGS, Kandhamal has issued the Orders vide letter No. 819 did.23/02/2018 disengaging Sri Narendra Paraseth, Ex- GRS, Belghar G.P under Tumudibandh Block from contractual service as he was not sincere in his duties assigned by orders of higher authorities and unable to discharge his duties assigned to him effectively. While passing the above orders sufficient and reasonable opportunity was given to Sri Narendra Paraseth, Ex- GRS, Belghar G.P.

22. Sri Narendra Paraseth, Ex-GRS, Belghar G.P has not executed his Govt. duties sincerely for which the villagers of the said G.P complaining about his capacity and request to remove from the G.P. The villagers of Belghar G.P also passed resolution in the Gram Sabha to remove the GRS from the G.P. while the Govt. is giving emphasis on Aadhar Seeding and Job card verification under MGNREGS as the release of funds under MGNREGA is linked to the performance in Aadhar Seeding and in job card verification, the GRS is showing callousness towards the Government work. Again, due to lack of monitoring and field visit, the basic aim of the Government has become failure. This poor performance of the G.P. reflects in the MGNREGA Software for which the PR & DW Department, Government of Odisha instructed to issue show cause notice to explain why poor performing Staffs should not be terminated for their services on account of gross violation of Government instruction. So, the Programme Officer i.e. Block Development Officer issued show cause notice to Sri Paraseth for his poor performance. This shows the incapacity of the GRS.

23. Each Gram Panchayat under MGNREGA suggests that each G.P has a hierarchical managerial system like an elected representative called Sarapanch, PEO, JE, Mate and DEOS and thus team work is required to execute the purpose of guaranteeing employment to villagers. But as per the Govt. Guideline the role of the GRS is more important than others who coordinate all the work at the Gram Panchyat and Panchayat Samiti Level 8.

24. The target fixed by the State Govt. to complete 100% Aadhar Seeding and job card verification under MGNREGA by 10th January 2017 vide letter No.273/PR dated 06/01/2017. It is a fact that the % (percentage) is being calculated on the basis of Monthly/Annual target and the Person days generated. The online report says that

1. AIR 2010 SC 3493

47.07% in respect of Timely payment of wages.32.13% in respect of Person days generation, 78.79% in respect of Aadhar seeding, Out of 1466 active workers only 501 Aadhar Seeding has been done for Belghar G.P. Similarly out of 1802 active wokers only 549 Aadhar Seeding has been done for Bilamal G.P. Which shows the incapacity of the GRS itself. For such negligence, he was issued a show cause notice vide letter No.1045 dated 01/06/2016 and letter No.2471/ Dtd.31/12/2016 as to why suitable action should not be taken against him, but he has not submitted any reply to the show cause notice.

25. The Department of Panchayati Raj having regard to the poor performance in the Aadhar Seeding, but the Collector, has been pleased to issue show cause notice to the petitioner on the payment of wages, the generation of the person days and the Aadhar seeding. It is well known that the payment of wages and Generation of person days are interlinked to each other. When the Generation of the person days increases, payment of wages increases. For this reason, the Collector-cum-DPC has issued show cause notice on the said ground.

26. With regard to the Aadhar Seeding, there must be an Aadhar card available with the job card holders but out of 1466 active workers only 501 Aadhar Seeding has been done for Belghar G.P. Similarly out of 1802 active wokers only 549 Aadhar seeding has been done for Bilamal G.P. where the Government wants it for 100% Aadhar seeding. This shows the incapacity of the GRS itself.

27. The Govt. has introduced the MGNREGA works as a demand based work and has facilitated the technical support and capacity building to improve the outcomes. The Ministry in Rural Development (MoRD) has set up national Employment Guarantee Fund, made budgetary allocation and ensured timely release of central share. Hence, timely payment of the wages and the generation of person days and the Aadhar seeding is the most important work of the GRS. The same also prevents the migration of labourers to other states. Hence the reply to the show cause notice was not reasonable.

28. After getting feedback from the Programme Officer i.e. BDO, Tumudibandh, The Collector, Kandhamal called for explanation and issued show cause notice to Sri Paraseth. Hence after following due procedure of law and the principle of natural justice, the disengagement order was passed by the Collector by exercising her power vide letter No.8409/PR dtd. 15/05/2017. dtd.21/03/2013 and letter No.8422.

29. The punishment Vide Order dtd.23.02.2018, under Annexure-9 has been imposed on the basis of show cause notice dated 27.07.2017. But it has been referred in the impugned order about the compliant of the general public. But the punishment has been imposed for being sincere in duty, disobedient to the orders of the Higher Authority and unable to discharge the duties assigned to him effectively, as mentioned in the last paragraph of the impugned order. The above charges were communicated to the Petitioner in the Show Cause Notice dated 27.07.2017.

IV COURT'S REASONING AND ANALYSIS:

30. Law is well settled that this Court is allowed to interfere with the findings in disciplinary matters, if the principles of natural justice or statutory regulations have been violated or if the order is found to be arbitrary, capricious, mala fide or based on extraneous considerations.

31. In ***B.C. Chaturvedi v. Union of India***[2], again a three judge bench of the Supreme Court held as under:

> *"12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of the Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support there from, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence.* ***The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.****"*

32. In ***State Bank of Bikaner & Jaipur v. Nemi Chand Nalwaya***[3], the Supreme Court held as under:

> *"7. It is now well settled that the courts will not act as an appellate court and reassess the evidence led in the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be grounds for interfering with the findings in departmental enquiries.Therefore, courts will not interfere with findings of fact recorded in departmental enquiries, except where such findings are based on no evidence or where they are clearly perverse. The test to find out perversity is to see whether a tribunal acting reasonably could have arrived at such conclusion or finding, on the material on record.* ***The courts will however interfere with the findings in disciplinary matters, if principles of natural justice or statutory regulations have been violated or if the order is found to be arbitrary, capricious, mala fide or based on extraneous considerations....****"*

2. (1995) 6 SCC 749, **3**. (2011) 4 SCC 584

33. Additionally, there was a direction by the Govt., Deptt. of Panchayat Raj in their Letter No. 17-NREG- 11-1069 (Pt)-1209/PR dated 20.01.2017 to initiate Disciplinary action against the GRS for poor performance under Aadhar Seeding according to which the Collector was pleased to issue notice to show-cause to the petitioner on (i) Payment of Wages, (ii) Generation of person days, and (iii) Adhar Seeding;

34. However after hearing of the matter, the Collector decided to exonerate the petitioner from the allegations of Payment of Wages and Aadhar Seeding. However, apart from the above the Collector was further pleased to introduced two unknown of allegations about which the petitioner is neither heard nor supplied with the text of the same which action stands militating against the principle of Natural Justice.

35. From the conspectus of factual matrix, this Court is unable to accede to the submission of the Opposite Parties. The rules of natural justice and procedural fairness cannot be given go by in such a light and casual manner, rather, they call for due compliance.

36. In light of the aforesaid discussion and having regard to the present position of law, this Court hereby quashes the impugned order of disengagement dated 23.02.2018. The Opposite Parties are hereby directed to re-conduct the disciplinary proceedings with compliance of due process and principles of natural justice.

37. Accordingly, this Writ Petition is disposed of being allowed.

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2023 (III) ILR – CUT- 816

M. S. SAHOO, J.

CRLREV NO. 86 OF 2011

ABANIKANTA MANDAL & ANR. …..….Petitioners

-V-

STATE OF ODISHA …..…..Opp.Party

PROBATION OF OFFENDERS ACT, 1958 – Section 4 – The appellants have been held to be guilty of the offence U/s. 365/34 of IPC – All the appellants had no history of any criminal antecedents – The appellants commissioned the offence in the spur of the moment – Whether the sentence can be modified U/s. 4 of the Act? – Held, Yes – Reason indicated with reference to case law. (Paras 8 -10)

Case Laws Relied on and Referred to :-

1. AIR 1981 S.C. 643: (1981) 1 SCC 447 : Ved Prakash Vs. State of Haryana.
2. 295 U.S. 490: 55 S. Ct.818 : Escos Vs. Zorhst.
3. AIR 1977 SC 1991: (1977) 3 SCC 575 : Hansa Vs. State of Punjab.
4. AIR 1972 SC 1295: (1973) 2 SCC 65 : Isher Das Vs. State of Punjab.

For Petitioners : Mr. R.N. Mishra

For Opp.Party : Mr. T.K.Praharaj, Standing Counsel

JUDGMENT Date of Hearing & Judgment: 01.11.2023

M. S. SAHOO, J.

The petition has been filed under Section 401 of the Code of Criminal Procedure read with Section 397 by the petitioners challenging the order dated 18.12.2010 passed by the learned Sessions Judge, Keonjhar in Criminal Appeal No.60 of 2008 confirming the judgment and order dated 09.05.2008 passed by the learned S.D.J.M., Champua in G.R.Case No.83 of 1999/T.C. No.309 of 2000 corresponding to Baria P.S.Case No.17 of 1999.

2. The appellants have been held to be guilty of the offence under Section 365/34 of the I.P.C., sentence of R.I. for one year has been imposed on each of the appellant and further fine of Rs.1000/- was imposed on each of the petitioners.

This Court while admitting the matter on 22.02.2011 granted bail to the petitioners and the realization fine was also stayed.

3. Learned counsel for the petitioners submits that all the accused persons had no history as far as criminal allegations are concerned. It is further submitted that the petitioners/owner of the bus acted in the spur of the moment when their property was damaged by throwing stone and the act was a immediate reaction to the said loss, the petitioners acted without any intention to commit any offence. The learned counsel submits in the alternative: if the conviction is upheld the sentence may be suitably dealt with under the provisions of Probation of Offenders Act, 1958.

4. Learned Standing Counsel for the State in his submission supported both the judgments passed by the learned trial court as well as the learned court in appeal. He refers to the statements of the witnesses, P.Ws.5, 6, 8, 10 and 11 to submit that the finding of the learned trial court in its judgment as well as the judgment of the learned Sessions Judge confirming the judgment of the learned trial court cannot be faulted with.

5. This Court has gone through the judgment passed by the learned court in appeal dated 18.12.2010 as well as the judgment of the court in the original side, S.D.J.M., Champua. The learned court of 1st instance considering the evidence on record that is the statements of P.Ws.5, 6, 8, 10 and 11 : regarding the accused persons catching hold of the old lady after she threw stone towards the bus which

broke glass (windscreen) of the bus, she being taken up in the bus and confined in the moving bus and ultimately being detained by the accused persons has given the finding that the prosecution has proved the accusations against the present petitioners. In considered opinion of this Court, the concurrent findings given by the learned courts, is not to be interfered with.

6. On perusal of the examination-in-chief as well as cross-examination of P.Ws.5, 6, 8, 10 & 11 contained in the LCR, no discrepancy can be found as far as the statement of prosecution witnesses regarding picking up the victim and confining her in the bus is concerned.

7. Having heard the learned counsel for the petitioner and the learned Standing Counsel for the State and upon considering the material on record, this Court is not inclined to the interfere with the order 18.12.2010 passed by the learned Sessions Judge, Keonjhar in Criminal Appeal No.60 of 2008 confirming the judgment and order of conviction dated 09.05.2008 passed by the learned S.D.J.M., Champua in G.R.Case No.83 of 1999 corresponding to Baria P.S.Case No.17 of 1999.

8. However regarding the sentencing this Court further considers the matter as would be indicated below.

In ***Ved Prakash v. State of Haryana: AIR 1981 S.C. 643; (1981) 1 SCC 447,*** it was held the Court must fulfil the humanizing mission of sentencing implicit in such enactments as the Probation of Offenders Act.

In ***Escos v. Zorhst : 295 U.S. 490: 55 S. Ct.818,*** it is held probation comes as an act of grace to one convicted of a crime.

In ***Hansa v. State of Punjab: AIR 1977 SC 1991: (1977) 3 SCC 575,*** the appellant was convicted for one year under Section 325, I.P.C. The occurrence took place between the parties after quarrel between the children. It was held having regard to the circumstances of the case and the nature of the offence and also the character of the offender, it is expedient to release the appellant on probation.

In ***Isher Das v. State of Punjab: AIR 1972 SC 1295; (1973) 2 SCC 65,*** the punishment was a sentence of fine also carrying with it the consequence of imprisonment in case the accused fails to pay the fine. As the object of Probation of Offenders Act is to avoid imprisonment of the person covered by the provisions of that Act, the said object cannot be set at naught by imposing a sentence of fine which would necessary entail imprisonment in case there is a default in payment of fine.

9. Considering the rival submissions of the learned counsel for the petitioners and the learned Standing Counsel regarding the order of sentence to be passed under the provisions contained in Section 4 of the Probation of Offenders Act, 1958 having regard to the circumstances of the case including the nature of offence, the character

of the offender especially the past conduct, this Court is of the opinion that it is expedient to release the petitioners on probation of good conduct, notwithstanding anything contained in any other law for the time being in force.

10. Accordingly, since the petitioners have already been released on bail by order dated 22.02.2011, this Court by exercising powers conferred under Section 4 of the Probation of Offenders Act,1958 feels it appropriate to modify the sentence imposed by the learned trial court confirmed by the learned appellate court to the extent that both the petitioners, who are already on bail granted by this Court shall be released on probation on entering into a bond before the learned trial court/court in seisin to appear and receive sentence when called upon during such period of probation and in the meantime they shall keep peace and they shall be of good behaviour.

There shall be no further order for deposit of fine and the order imposing fine stands modified.

11. The CRLREV is accordingly disposed of.

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2023 (III) ILR – CUT- 819

R.K. PATTANAIK, J.

R.S.A NO. 304 & 357 OF 2010

SUBASH CHANDRA SAMANTARAY
(Dead) through his LRs & Anr. .....Appellants

-V-

KANCHANABALA DAS
(Dead) through her LRs & Ors. .....Respondents

R.S.A NO. 357 OF 2010

SNEHALATA TRIPATHY -V- KANCHANABALA DAS (Dead) through her LRs & Ors.

PROPERTY LAW – The defendants executed the sale deed on 6th September, 1991 regarding the same property during the subsistence of the earlier deed which was executed on 12th June, 1991 – Whether the transaction is valid and sustainable under law? – Held, No – Since the second sale deed executed during the existence of the first one, which was never challenged by the defendant No.1, it is settled that, the deed executed in earlier point of time shall have to succeed.

Case Laws Relied on and Referred to :-

1. AIR 1974 Orissa 180 : Bhagabat Basudev & Ors. Vs. Api Bewa & Ors.
2. AIR 1996 SC 906 : State of Kerala Vs. M.K. Kunhikannan.
3. AIR 1938 PC 103 : Martin Cashin & Ors. Vs. Peter J. Cashin.
4. 1999 (II) OLR SC 42 : Iswar Vs. Harihar.
5. AIR 1960 SC 531 : Muralilal Vs. State of M.P.
6. 2018(II) CLR 748 : Sri Sri Brahmeswar Mahadev Bije & Ors. Vs. Baishnab Charan Biswal & Anr.
7. (1990) 1 SCC 207 : Bismillah Vs. Janeshwar Prasad.
8. (1968) 2 SCR 797 : Ningawwa Vs. Byrappa Shiddappa Hireknrabar.
9. (1970) 3 WLR 1078 : Saunders Vs. Anglia Building Society.

For Appellants : Mr. D. P. Mohanty
Mrs. Sumitra Mohanty

For Respondents : Mr. G. Mukherjee, Sr. Adv.
Ms. Samapika Mishra
Mr. D. P. Mohanty

JUDGMENT Date of Judgment : 09.10.2023

R.K. PATTANAIK, J.

1. The appellants have preferred the instant appeals under Section 100 of the Code of Civil Procedure, 1908 assailing the impugned judgment and decree promulgated in RFA No. 31 of 2003; RFA No. 70 of 2003; and RFA No. 95 of 2004 by the learned Adhoc Additional District Judge, FTC No. IV, Cuttack, whereby, the decision in T.S. No. 72 of 1997 (I) of the learned Civil Judge (Senior Division), 2nd Court, Cuttack for having decreed the suit was confirmed on the grounds inter alia that the same is untenable in law and on account of rejection of defence plea of fraud on registration with respect to the sale deed dated 12th June, 1991. As to the appeal in R.S.A No. 357 of 2010, it is at the instance of a non-party to the suit in T.S. No.72 of 1997 on similar grounds questioning the correctness and judicial propriety of the impugned findings of learned courts below.

2. In fact, deceased respondent No.1 instituted the suit seeking reliefs, such as, right, title and interest over half of the suit land to be declared in her favour and also to set aside the sale deed i.e. RSD No.4258 dated 6th September, 1991 executed by defendant Nos. 2 and 3 (deceased respondent Nos.3 and 4) and also to declare agreement dated 19th October, 1993 between defendant Nos. 1 (deceased respondent No.3) and defendant No.4 to be not binding to her and also the agreement dated 3rd November, 1993 to be void and furthermore, restraining defendant No.1 to sale or enter into any such agreement for sale in respect of the same with injunction against defendant Nos. 4, 5 and 6 from entering upon it or raise any construction thereon and to demolish any such structure or construction already put up, in the meanwhile.

The suit was contested by defendant Nos. 1 to 5. Considering the pleadings of the parties, the learned Trial Court framed as many as 16 issues and answered them all and finally, concluded that there is no fraud on registration which is claimed by the appellants with a finding that defendant Nos. 2 & 3 could not have transacted once again on 6th September, 1991 in view of the deed dated 12th June, 1991 and consequently, confirmed the right, title and interest in favour of respondent No.1 with respect to 50% share leaving the remainder of defendant No.1, as both of them had purchased schedule property vide RSD No.2504 from defendant Nos. 2 and 3. In other words, the sale deed dated 6th September, 1991 executed by defendant Nos. 2 and 3 in favour of defendant No.1 alone was declared invalid. Furthermore, the learned Trial Court directed defendant Nos. 2 and 3 to identify the land situate within the limits of jurisdiction at Cuttack to ensure delivery of the same to deceased respondent No.1 and defendant No.1, namely, deceased respondent No.2 succeeded by respondent Nos.2(a) to 2(h). Being aggrieved of, defendant Nos. 4 and 5, defendant No.1 and the appellant in RSA No. 357 of 2010 filed the appeals in RFA No. 31 of 2003; RFA No. 70 of 2003; and RFA No. 95 of 2004 respectively. The learned Lower Appellate Court considered the evidence on record with reference to the pleadings of the parties and ultimately, concurred the view of the learned Trial Court and similarly rejected the plea of fraud on registration thereby dismissing the appeals by a common judgment. So to say, the transaction in favour of defendant No.1 exclusively dated 6th September, 1991 was declared null and void.

3. As against the impugned decision of the learned Lower Appellate Court, the appellants have knocked the doors of this Court contending that respondent No.1 relinquished her share and is also a witness to the sale deed dated 6th September, 1991, on execution of which, deceased respondent No.1 acquired exclusive interest and title over the suit land, the fact which was not duly appreciated by the learned courts below. Furthermore, the impugned judgment and decree in appeals stands questioned on the ground that the land in village-Baghua measuring Ac.0.01 decimal shown to be sold by defendant Nos. 2 and 3 to be non-existent and in the circumstances and for the reason stated, by playing fraud, the jurisdiction of the Registering Authority at Cuttack was invoked and the first deed was executed, which is, hence, invalid but the said aspect was not properly looked into followed by an unusual direction to defendant Nos. 2 and 3 to identify the alleged plot. So, according to the appellants, the findings of the learned courts below are grossly erroneous and thus, not sustainable in law.

4. Heard Mr. Mohanty, learned counsel for the appellants (RSA No. 304 of 2010); Mr. Mukherjee, learned Senior Advocate for respondent No.1(a) and Ms. Mishra, learned counsel for respondent Nos. 1(b), (c) & (d) in (RSA No. 304 of 2010) besides Mrs. Mohanty, learned counsel for the appellant (RSA No.357 of 2010).

5. This Court by order dated 7th January, 2011 formulated the substantial questions of law principally to determine whether the sale deed dated 12.06.1991 i.e. Ext.1 is hit by fraud on registration and matter related to jurisdiction to entertain the suit at Cuttack.

6. Mr. Mohanty, learned counsel for the appellants in RSA No. 304 of 2010 would submit that undisputedly an area of Ac.0.01 decimal of land in respect plot under Khata No.328 of Mouza- Baghua in the district of Cuttack was included in the sale deed under Ext.1 dated 12th June, 1991 along with the property situate at Laxmisagar, Bhubaneswar and in so far as defendant No.2, one of the original owners of the same examined as D.W. 4 is concerned, he categorically admitted that the primary aim was for alienation of the property at Bhubaneswar and to avoid registration at Bhubaneswar, a small piece of land of the alleged Mouza was included so as to approach the Registering Authority at Cuttack.It is further submitted that the said inclusion of an imaginary property not properly described in the sale deed and despite being non-existent, without considering the plea of fraud on registration, the learned courts below could not have set aside the deed dated 6th September, 1991 declaring it to be invalid upholding the other deed dated 12th June, 1991 executed in favour of the plaintiff and defendant No.1. Mr. Mohanty submits that the plaintiff being a signatory to the sale deed dated 6th September, 1991 did not have locus standi to challenge it and in absence of any such fraud established,the learned courts below committed gross error in rejecting the transaction in question. According to Mr. Mohanty, on a close scrutiny, the finding on the said plea of the plaintiff about fraud and impersonation cannot be believed and sustained in law, moreover, when the sale deed dated 12th June, 1991 is ex facie found to be illegal as it was a product of fraud on registration.

7. On similar grounds, Mrs. Mohanty, learned counsel for the appellant in RSA No. 357 of 2010 challenged the findings of the learned courts below by contending that there is no such land at village-Baghua, which is a non-existent plot, whereas, the entire property intended to be sold remains at Laxmisagar, Bhubaneswar, inasmuch as, the suit before the civil court at Cuttack was not maintainable as it did not have the jurisdiction at all to adjudicate the lis due to want of cause of action. It is submitted by Mrs. Mohanty that as the sale deed under Ext.1 being an outcome of fraud on registration, the same is void, illegal and inoperative in the eye of law, whereas, the deed dated 6th September, 1991 is valid and the appellant is thus having the right, title and interest over the suit property through her vendor, namely, defendant No.5.

8. On the other hand, Mr. Mukherjee, learned Senior Advocate appearing for respondent No.1(a) in RSA No. 304 of 2010 submitted that since the alleged sale deed dated 6th September, 1991 is registered at Cuttack, in view of Section 20 CPC, the civil court at Cuttack was possessed of jurisdiction to try the suit. In reply to the plea of fraud on registration with respect to the sale deed dated 12th June, 1991, Mr.

Mukherjee refers to a decision of this Court in ***Bhagabat Basudev & others Vrs. Api Bewa & others AIR 1974 Orissa 180***. It is contended that considering the evidence of one of the vendors, namely, D.W.4, it is amply clear that after the sale deed executed on 12th June, 1991, there was delivery of possession to the vendees, namely, the plaintiff and defendant No.1 to the suit. Furthermore, Mr. Mukherjee, learned Senior Advocate refers to the evidence claiming that the father of the vendors had purchased the alleged plot through a sale deed of the year 1946 and therein the suit property bearing Plot No.2459 at village-Baghua stood described which was finally sold under the sale deed dated 12th June, 1991, so therefore, rightly, the learned courts below disbelieved its non-existence dismissing the plea of fraud on registration. Mr. Mukherjee would further submit that since the sale deed of 1946 revealed existence of property in village-Baghua, which is said to have been alienated under the sale deed dated 12th June, 1991, notwithstanding its non-existence even admitted, the plea of fraud cannot be sustained, since such selling was with a belief that the same existed in view of the sale deed executed in favour of the father of the vendors. Also referring to the evidence of D.W.4, Mr. Mukherjee, learned Senior Advocate submits that absence of consideration paid to defendant Nos. 2 and 3 by defendant No.1 at the time of execution of the sale deed dated 6th September, 1991 invalidates the entire transaction which is one of the essential conditions of sale as defined in Section 54 of Transfer of Property Act. The absence of any challenge to the sale deed dated 12th June, 1991 is yet another ground raised by Mr. Mukherjee referring to a decision of the Apex Court in the case of ***State of Kerala Vrs. M.K. Kunhikannan AIR 1996 SC 906***. That apart, it is contended that the sale deed dated 12th June, 1991 is to prevail as it was executed earlier in point of time, so therefore, in view of the settled position of law, the latter sale deed cannot be accepted. Lastly, citing a decision in ***Martin Cashin & others Vrs. Peter J. Cashin AIR 1938 PC 103***, it is contended that defendant Nos. 2 and 3 were estopped from executing the deed dated 6th September, 1991 regarding the same property during the subsistence of the earlier one. Ms. Mishra, learned counsel for respondent Nos. 1(b),(c)&(d) supported the argument advanced by Mr. Mukherjee, learned Senior Advocate for respondent No.1 (a).

9. In so far as, the sale deed dated 6th September, 1991 is concerned, the plaintiff out rightly denied to be a party to the same as a witness to its execution. In fact, the defendants claimed that the plaintiff relinquished her interest. In response to the above, the plaintiff simply declined to have consented to the execution of the sale deed dated 6th September, 1991. The evidence on record has been elaborately discussed by the learned Trial Court. The plaintiff denied that she, as a token of her consent to relinquish 50% of share, signed in the documents, such as, deed of relinquishment and sale deed dated 6th September, 1991. The above deeds have been confronted to but the plaintiff stoutly denied and disputed her signatures appearing therein. In fact, impersonation is alleged by the plaintiff in the execution of the deed of relinquishment and sale deed dated 6th September, 1991. According to the learned

Trial Court, defendant No.1 did not taking any step to prove the signatures on the alleged deeds, whether of the plaintiff or otherwise. The admitted signatures of the plaintiff on record, as it is made to understand, have been compared and the learned Trial Court finally concluded that the disputed ones do not appear to be of the plaintiffs'. Referring to Section 73 of the Evidence Act which enables a Court to compare disputed writings with admitted or proved one, learned Trial Court examined the signatures vis-à-vis the signatures appearing in the sale deed dated 6th September, 1991 and deed of relinquishment and reached at a conclusion that the signatures on both the documents are completely different than the admitted ones of the plaintiff, which was so clearly visible to the naked eye. An adverse inference in view of Section 114 of the Evidence Act was also drawn by the learned Trial Court as defendant No.1 did not enter into the witness box to lead evidence referring to a case law in ***Iswar Vrs. Harihar 1999 (II) OLR SC 42*** and other authorities.

10. One of the vendors, namely, defendant No.2 was examined as D.W.4 and it is apposite to reproduce relevant extracts of the evidence adduced by him before the Trial Court. According to D.W.4, his father purchased the land situate at Baghua through a registered sale deed in 1946 from his cousin brother but the original sale deed was misplaced. It is further deposed by D.W.4 that the land at Baghua measuring Ac.0.01 decimal was sold by him on 12th June, 1991 to the plaintiff and defendant No.1 and referred to Ext. A/3. In so far as, the sale deed dated 12th June, 1991 is concerned, according to D.W.4, the same was scribed at the office of the Sub-Registrar, Cuttack and the consideration money was paid to him and defendant No.3 and the ticket was arranged in the name of defendant No.1 and after sale, execution and registration, possession of the property was delivered. The above evidence was elicited from D.W.4 during cross-examination and he further added that the consideration of Rs.90,000/-(rupees ninety thousand) was received at a time prior to registration. It was also admitted by D.W.4 that he and his brother had been to the spot to deliver possession of the sold property. In such view of the matter, with such evidence of D.W.4, there is no denial to the fact that after the transaction, the property alienated by him and defendant No.3 was handed over to the vendees. Interestingly, D.W.4 further narrated during such cross-examination the circumstances leading to the execution of the subsequent sale deed dated 6th September, 1991, while being aware of the consequences with the admission that he did not deliver possession of the property to defendant No.1 for the reason stated. As to the first sale deed, it was duly executed, which is not in dispute. Excluding the land at Baghua, the second sale deed was executed by defendant Nos. 2 and 3. Hence, therefore, the question is, whether such execution of sale deed dated 6th September, 1991 is valid? Once a sale deed was executed on 12th June, 1991, where was the authority for defendant Nos. 2 and 3 to enter into another transaction on 6th September, 1991 exclusively with defendant No.1? In the considered view of the Court, rightly, the learned courts below held that defendant Nos. 2 and 3 could not have executed the second sale deed leaving the plaintiff, who denied any such

relinquishment of her share, which was alleged to be actuated by fraud. As it is made to understand, a deed of relinquishment dated 15th October, 1991 was confronted to the plaintiff examined as P.W.2 so also the sale deed dated 6th September, 1991 but the signatures of her appearing therein were disputed and alleged to be forged ones. It was also made to reveal through P.W.2 that the deed of relinquishment did not bear the date and month though shown to have been executed in 1993. In other words, the plaintiff declined to be a consenting party to the relinquishment deed and also the sale deed dated 6th September, 1991 by alleging fraud being played upon her at the instance of defendant No.1. Furthermore, it is interesting to take judicial notice of the fact that the deed of relinquishment was purportedly executed in 1993 long after the second sale deed arrived. The said deed of relinquishment is also an unregistered one. In any case, the Court finds that there was no authority on the part of defendant Nos. 2 and 3 to execute the sale deed dated 6th September, 1991 without the cancellation of the deed dated 12th June, 1991. The evidence on record suggests that defendant No.2 had no occasion to have met the plaintiff when the sale deeds were executed as the deed dated 12th June, 1991 and its execution was accomplished in presence of her husband. At the time of second sale deed dated 6th September, 1991, D.W.4, therefore, had no opportunity to recognize or identify P.W.2, whose presence is claimed and denied by the latter alleging impersonation. The signatures on the deeds were disputed by P.W.2, veracity of which, could not be ascertained by a scientific examination of the same with the admitted or proved ones. Nevertheless, the learned Trial Court made an attempt to compare to form an opinion with the conclusion that the ones appearing in the deeds claimed to be of P.W.2 do not tally with the admitted signatures. The learned Trial Court did not commit any error while comparing the signatures in absence of examination of the disputed signatures by a Handwriting Expert in view of Section 73 of the Evidence Act. It is settled law that in absence of any expert opinion on disputed handwritings, a court shall have to examine and consider such a point keeping in mind the basic principles coupled with its own experience and knowledge as held and observed by the Apex Court in ***Muralilal Vrs. State of M.P. AIR 1960 SC 531*** which has in fact been placed reliance on by the learned Trial Court, which verified and examined the signatures found in the second sale deed and deed of relinquishment with that of the admitted signatures borne out of record and on such comparison, distinct difference was noticed which was either letter-wise or alphabetically. When defendant No.1 relies on the second sale deed, it was incumbent upon him to prove and satisfy that in the immediate presence of P.W.2 and with her consent, it was executed, which as the Court finds, he utterly failed to do. On a conspectus of the evidence on record, it has to be concluded that the learned courts below correctly arrived at a conclusion regarding the absence and consent of the plaintiff vis-à-vis the second sale deed and its execution on 6th September, 1991 and with such concurrent findings on facts, there remains nothing to interfere. If at all, any such development had taken place to the effect that the sale deed dated 12th September, 1991 suffered on account of an imaginary plot being included, either cancellation or correction of it could have been

resorted to, which was, however, not the case, rather, defendant No.1 and the vendors entered into another transaction on 6th September, 1991, which was alleged to be without the knowledge of the plaintiff, whose consent to the same failed to be satisfactorily established.

11. The next consideration would be, whether, the learned courts below fell into error by not concluding that Ext.1, the sale deed dated 12th June, 1991 is hit by fraud on registration. Mr. Mohanty, learned counsel for the appellants in RSA No.304 of 2010 and Mrs. Mohanty, learned counsel for the appellant in RSA No. 357 of 2010 advanced an argument in unison that Ext.1 does not carry any legal value since it included a plot at Baghua which is not in existence and that led to the execution of the second sale deed on 6th September, 1991. While contending so, a decision of this Court in ***Sri Sri Brahmeswar Mahadev Bije and others Vrs. Baishnab Charan Biswal and another 2018(II) CLR 748*** is cited. In response to the above, Mr. Mukherjee, learned Senior Advocate referring to the decision in ***Bhagabat Basudev*** (supra) would submit that intention to practice fraud must be apparent which is primarily to be considered, whether, there was a property that could be transferred or as to which a genuine belief existed to convey the same irrespective of the extent of property intended to be transferred and the fact that the property is of lesser extent or that the primary intention was that registration should be at a particular place by itself and in themselves shall not constitute any act of fraud, which has been held so therein. In the instant case, neither the plaintiff nor defendant No.1 did ever allege fraud at any point of time after execution of sale deed dated 12th June, 1991. The learned Trial Court referring to the deed of 1946 held the property at Baghua to physically exist but without its proper description in the first sale deed. It has been concluded that a plot is in existence at Baghua which was intended to be sold including a property situate within the limits of Bhubaneswar and hence, for any such improper description, it could not have been alleged to be a fraud on registration. Absence of proper particulars or any such deficiency while describing the land at Baghua to make good the same, the parties could have gone for necessary correction in the sale deed. However, to allege that it was a fraud played on registration and that too, at the instance of defendant No.1 reinforced by defendant Nos. 2 and 3 is something which is beyond one's comprehension. As rightly pointed out by the learned Trial Court, the vendors cannot be allowed to blow hot and cold at the same time. If there was any error apparent on the face of the sale deed dated 12th June, 1991, it was required to be corrected or cancelled but at no stretch of imagination, it could have authorised defendant Nos.2 and 3 to execute the second sale deed bypassing the first one, when they did not have the title anymore over the same. As against the above, there has been evidence on record to suggest that the father of vendors had purchased the land at Baghua through a sale deed in 1946 which is with respect to Plot No. 2459 and hence, the learned courts below held that the property to be in existence which was later conveyed to the plaintiff and defendant No.1. Even assuming for the sake of argument that the property at Baghua

has no physical existence but defendant Nos. 2 and 3 apparently under a genuine belief entered into the transaction dated 12th June, 1991 in view of the sale deed of 1946. Under such impression, if the first sale deed has been executed, it cannot be alleged to be a product of fraud. In course of argument, it is contended that defendant No.1 and for that matter, defendant Nos. 2 and 3 cannot advance a plea of *non est factum* when the parties were aware of the consequences of the alleged transaction and for being well educated. The Apex Court in ***Bismillah Vrs. Janeshwar Prasad (1990) 1 SCC 207***; ***Ningawwa Vrs. Byrappa Shiddappa Hireknrabar (1968) 2 SCR 797***; *and* ***Saunders Vrs. Anglia Building Society (1970) 3 WLR 1078*** discussed the principles of *non est factum* outlining the parameters and the tests and acknowledged that the same are to be clearly pleaded and established. In fact, such a plea is based on the premise and pleading that the document in question to be invalid because its executor or signatory was mistaken as to the character of the same at the time of execution, a defence which is normally available under the law of contract, which allows a party thereto to escape the effect of such document. Such a plea cannot be invoked in the instant case considering the conduct of the parties morefully when the parties to the sale deed dated 12th June, 1991 were aware of the facts leading to its execution. As to the decision in ***Sri Sri Brahmeswar Mahadev Bije*** (supra), the alienation was held to be in respect of a deity's interest and therein the sale deed was executed and registered at a different place including such other land situate within the jurisdiction of the concerned Sub-Registrar which could not be proved either to be owned by the vendors or the deity, hence, apparently, found it to be non-existent and under such circumstances, it was concluded that there has been a fraud played at the time of registration and therefore, the document stands vitiated, which is not the case at hand, especially, considering the fact that there has been a land at Baghua with improper description in the sale deed dated 12th June, 1991 or assuming it not to physically exist, fraud cannot be alleged when such execution by defendant Nos. 2 and 3 was under an impression and genuine belief on account of the sale deed of 1946 executed in favour of their father. Thus, therefore, the decision (supra), which has been placed reliance on, to buttress the argument in favour of the appellants really renders no assistance to invalidate the transaction dated 12th June, 1991.

12. Since the second sale deed has come into being during the existence of the first one which was never challenged by defendant No.1, in view of the settled law, the one executed at earlier in point of time shall have to succeed, the execution of which has not been denied by the vendors, who rather admitted the same but advanced a plea and narrated the circumstances leading to the execution of the second sale deed, which cannot and by no means be countenanced for having no probative value due to lack of title. Hence, the validity of the sale deed dated 12th June, 1991 cannot be questioned and could not have been entertained by the learned courts below on any such grounds of defendant No.1 corroborated by defendant Nos. 2 and 3. In so far as the issue vis-à-vis the jurisdiction is concerned, the Court is not persuaded to take a different view than the one expressed by the learned courts

below. Accordingly, the substantial questions formulated by the Court are hereby answered. Lastly, it is to clarify that the Court refrained itself from discussing other grounds in view of the argument being chiefly confined to the above.

13. Hence, it is ordered.

14. In the result, the appeals stand dismissed.

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2023 (III) ILR – CUT- 828

SASHIKANTA MISHRA, J.

W.P.(C) NO. 19169 OF 2012 & 28001 OF 2019

SUNIRMAL MUKHERJEE .....Petitioner

-V-

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

SERVICE LAW – Regularization – The petitioner was working on daily wage basis with effect from 24.09.1988 – He prayed for Regularization – The authority conferred him temporary status w.e.f 04.09.2012 retrospectively after his retirement – Effect of – Held, this is a classic case where work was extracted from a low paid employee for as long as nearly three decades but when it came to regularising his service, he was conferred temporary status which is akin to adding insult to injury – The Opp. Parties are directed to issue necessary orders to regularise the services of petitioner. (Paras 09-11)

Case Law Relied on and Referred to :-

1. (2018) 13 SCC 432 : Sheo Narain Nagar & Ors. Vs. State of Uttar Pradesh & Anr.

For Petitioner : M/s. Manomoy Basu & M. Kanungo

For Opp. Parties : Mr. S. Pattanaik, Addl. Govt. Adv.

JUDGMENT Date of Judgment : 26.09.2023

SASHIKANTA MISHRA, J.

Both the writ applications have been filed by the same petitioner and involve similar facts and prayer for which both were heard together and are being disposed of by this common judgment.

2. The petitioner was engaged as a peon on daily wage basis on 24.09.1988 in the Research Wing of Shree Jagannath Sanskrit Visvavidyalaya, Puri. He was paid daily wage of Rs.10/-. The Research Wing was converted to a full-fledged Centre of Advanced Research in Sanskrit (CARS) in the year 1992.By order dated 17.08.2005,

the Government in Department of Higher Education granted approval for creation of three posts of Research Officer at consolidated salary of Rs.7,500/- per month, one Clerk-cum-Typist at consolidated salary of Rs.3,000/- per month and one peon at consolidated salary of Rs.2,500/- per month. The petitioner was accordingly paid the aforementioned amount as per order dated 23.08.2005 of the Government. On 09.09.2016, the Registrar of the University furnished relevant information to the Government with regard to the petitioner indicating therein that he was receiving consolidated pay of Rs.4440/- and that the posts had been sanctioned by the Government vide order dated 17.08.2005. It was also specifically mentioned that he had joined in the post on 24.09.1988. In spite of working for such long period, the petitioner's service was not regularised. The University in its letter dated 28.11.2008 submitted a proposal for granting regular scale of pay and other benefits to the employees of the Research Centre. Same was followed by some correspondence between the University and the Government but no fruitful result ensued. The petitioner therefore, approached this Court in W.P.(C) No.19169 of 2012 seeking the following relief:

> *"The petitioner therefore, most humbly prays that your Lordship may be graciously pleased to Admit this writ application, issue notice to the opposite parties, and upon hearing, be pleased to issue writ of mandamus directing the opposite parties to regularise the services of the petitioner with all service benefits for which the petitioner would be lawfully entitled consequent on such regularization, and pass any such order(s), issue direction(s), or writ(s) as would be deemed proper.*
>
> *And for which act of kindness, the petitioner as in duty bound, shall ever pray."*

3. During pendency of the above mentioned writ application, the petitioner was conferred with temporary status as per the order dated 29.11.2018 of the Vice-Chancellor of the University.Significantly, said order was passed after his retirement on superannuation on 31.08.2018. Temporary status was conferred on him w.e.f. 04.09.2012. In view of such development, the petitioner approached this Court again in W.P.(C) No. 28001 of 2019 with the following prayer.

> *"The petitioner therefore prays that this Hon'ble Court may graciously be pleased to admit this Writ Petition, issue Rule NISI in the nature of Writ of Mandamus or any other writ(s) as this Hon'ble Court deems fit and proper by calling upon the opp.parties to show cause as to why the impugned letter dtd.23.08.2018 and office order dtd.29.11.2018 passed by the Opp.parties under annexures-5 & 7 shall not be quashed and if the Opp.Parties fail to show cause or show insufficient cause, the Rule be made absolute;*
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> *And the impugned letter dtd.23.08.2018 and Office Order dtd.29.11.2018 passed by the opp.party no.3 under annexures-5 & 7 may kindly be quashed and the opp.parties be directed to reassess the financial benefit as admissible to the petitioner in the post of Peon by virtue of G.O. No.26319/HE dtd.17.08.2005 till the date of retirement of the petitioner;*
>
> *And may pass any such other order/orders as this Hon'ble Court deems fit and proper;"*

4. Notices of both the writ applications were served upon the University but there was no appearance from its side despite repeated chances being granted by this Court. The writ applications were therefore, heard in presence of the counsel for the petitioner and the State Counsel.

5. Mr. M. Basu, learned counsel for the petitioner contends that having worked for nearly 30 years, the petitioner is entitled to be regularised in service but such benefit was not granted to him and on the contrary, he was conferred with temporary status, that too after his retirement. Mr. Basu further contends that even otherwise the post, in which the petitioner was working since 1988, was created and sanctioned by the Government in the year 2005. There is no dispute that the petitioner has rendered continuous service from his date of joining. Therefore, having extracted work from the petitioner for such a long period against a sanctioned post, conferment of temporary status instead of regularising his services is illegal and grossly violative of the constitutional principles.

6. Mr. S. Pattanayak, learned Addl. Government Advocate contends that mere long continuance in a post does not automatically confer a right on an employee to claim regularisation. Moreover, it has to be seen whether his initial entry was as per Rules.

7. The facts of the case as averred by the petitioner in the writ petition find support from the documents of the University enclosed thereto. The petitioner was engaged as a peon on daily wage basis on payment of Rs.10/- per day on 24.09.1988. The order dated 17.08.2005, copy of which is enclosed under Annexure-2 series, shows that the Government accorded sanction for creation of some posts for the Advanced Research Centre in Sanskrit in the University including the post of peon carrying consolidated pay of Rs.2,500/-. The order dated 23.08.2005, also enclosed under Annexure-2 series shows that the Government also allowed consolidated salary of Rs.2,500/- per month specifically mentioning the name of the petitioner. This implies, the engagement of the petitioner in the post of Peon was accepted by the Government. The letter dated 09.09.2016 of the Registrar (copy enclosed as Annexure-3) shows that by such time, the petitioner's consolidated salary was enhanced to Rs.4400/- and it was also specifically mentioned that he was selected through due process and the principle of reservation was also followed. Thus, it appears that the fact that the petitioner was continuing against a sanctioned post on consolidated remuneration has not been disputed nor questioned either by the Government or by the University at any point of time. Under such circumstances, it is to be decided whether the petitioner's claim for regularisation bears any merit.

8. In a case involving similar facts, i.e. **Sheo Narain Nagar and others vs. State of Uttar Pradesh and another,** reported in (2018) 13 SCC 432, the Supreme Court deprecated the practice of conferring temporary status on the petitioners of the said case with retrospective effect. The Court held as follows:

"7. When we consider the prevailing scenario, it is painful to note that the decision in Umadevi (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753] has not been properly understood and rather wrongly applied by various State Governments. We have called for the data in the instant case to ensure as to how many employees were working on contract basis or ad hoc basis or daily-wage basis in different State departments. We can take judicial notice that widely aforesaid practice is being continued. Though this Court has emphasised that incumbents should be appointed on regular basis as per rules but new devise of making appointment on contract basis has been adopted, employment is offered on daily-wage basis, etc. in exploitative forms. This situation was not envisaged by Umadevi (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753] . The prime intendment of the decision was that the employment process should be by fair means and not by back door entry and in the available pay scale. That spirit of the Umadevi (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 :2006 SCC (L&S) 753] has been ignored and conveniently overlooked by various State Governments/authorities. We regretfully make the observation that Umadevi (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753] has not been implemented in its true spirit and has not been followed in its pith and substance. It is being used only as a tool for not regularising the services of incumbents. They are being continued in service without payment of due salary for which they are entitled on the basis of Articles 14, 16 read with Article 34(1)(d) of the Constitution of India as if they have no constitutional protection as envisaged in D.S. Nakara v. Union of India [D.S. Nakara v. Union of India, (1983) 1 SCC 305 : 1983 SCC (L&S) 145 : AIR 1983 SC 130] , from cradle to grave. In heydays of life they are serving on exploitative terms with no guarantee of livelihood to be continued and in old age they are going to be destituted, there being no provision for pension, retiral benefits, etc. There is clear contravention of constitutional provisions and aspiration of downtrodden class. They do have equal rights and to make them equals they require protection and cannot be dealt with arbitrarily. The kind of treatment meted out is not only bad but equally unconstitutional and is denial of rights. We have to strike a balance to really implement the ideology of Umadevi (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753] . Thus, the time has come to stop the situation where Umadevi (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753] can be permitted to be flouted, whereas, this Court has interdicted such employment way back in the year 2006. The employment cannot be on exploitative terms, whereas Umadevi (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753] laid down that there should not be back door entry and every post should be filled by regular employment, but a new device has been adopted for making appointment on payment of paltry system on contract/ad hoc basis or otherwise. This kind of action is not permissible when we consider the pith and substance of true spirit in Umadevi (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753] .

8. Coming to the facts of the instant case, there was a direction issued way back in the year 1999, to consider the regularisation of the appellants. However, regularisation was not done. The respondents chose to give minimum of the pay scale, which was available to the regular employees, way back in the year 2000 and by passing an order, the appellants were also conferred temporary status in the year 2006, with retrospective effect on 2-10-2002. As the respondents have themselves chosen to confer a temporary status to the employees, as such there was requirement at work and posts were also available at the particular point of time when order was passed. Thus, the submission

raised by the learned counsel for the respondent that posts were not available, is belied by their own action. Obviously, the order was passed considering the long period of services rendered by the appellants, which were taken on exploitative terms.

9. The High Court dismissed the writ application relying on the decision in Umadevi (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753] . But the appellants were employed basically in the year 1993; they had rendered service for three years, when they were offered the service on contract basis; it was not the case of back door entry; and there were no Rules in place for offering such kind of appointment. Thus, the appointment could not be said to be illegal and in contravention of Rules, as there were no such Rules available at the relevant point of time, when their temporary status was conferred w.e.f. 2-10-2002. The appellants were required to be appointed on regular basis as a one-time measure, as laid down in para 53 of Umadevi (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753]. Since the appellants had completed 10 years of service and temporary status had been given by the respondents with retrospective effect from 2-10-2002, we direct that the services of the appellants be regularised from the said date i.e. 2-10-2002, consequential benefits and the arrears of pay also to be paid to the appellants within a period of three months from today."

9. This Court after considering the facts of the case in light of the law laid down by the Supreme Court in the case of **Sheo Narain Nagar** (supra) feels persuaded to hold that the action of the Government authorities in conferring temporary status on the petitioner retrospectively and that too, after his retirement, is entirely unconscionable in law. This is a classic case where work was extracted from a low paid employee for as long as nearly three decades but when it came to regularising his service, he was conferred temporary status, which is akin to adding insult to injury.

10. Perusal of the impugned order, enclosed as Annexure-8 reveals that the same was issued by the Government purportedly as per Finance Department Resolution No. 31715/F dated 04.09.2012 and No. 17815/F dated 30.05.2018. In view of what has been discussed above and observed by the Supreme Court in the case of **Sheo Narain Nagar** (supra), this is nothing but an employment given on exploitative terms, particularly when it is not the case of the authorities that the petitioner's entry into the Service was illegal. This Court therefore, holds that the petitioner has made out a good case for interference by this Court.

11. In the result, both the writ applications are allowed. The opposite parties are directed to issue necessary orders to regularise the services of the petitioner from the date of sanction of the post by the Government i.e. 17.08.2005 with all consequential service and financial benefits from the said date after adjusting the amount already received by him towards consolidated remuneration and as a temporary status conferred employee. Since the petitioner has already superannuated from service, the above exercise should be completed within two months from the date of production of certified copy of this order by the petitioner.

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2023 (III) ILR – CUT- 833

SASHIKANTA MISHRA, J.

CRLMC NO. 3420 OF 2023

AJAY MOHANTY @ TUTU .....Petitioner

-V-

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

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 82 & 83 r/w Rule 326(b) of GRCO(CRL)vol.1 – Petitioner filed an application U/s. 138 of N.I Act in the court below – Inspite of issuance of conditional bailable warrant and NBW the accused did not appear – The petitioner filed an application U/ss. 82 & 83 for proclamation and attachment of property of the accused – The Court below rejected the prayer on the ground that the stipulated period of one year has not yet been elapsed with reference to Rule 326(b) of GRCO(CRL) – Whether the impugned order sustainable? – Held, No – Reference to 326(b) of GRCO is entirely misconceived. (Paras 10-12)

Case Law Relied on and Referred to :-

1. AIR 1997 SC 2494 : State Through CBI Vs. Dawood Ibrahim Kaskar & Ors.

For Petitioner : M/s. K.K.Mohapatra,U. K. Mohapatra & S. Palatasingh

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

JUDGMENT Date of Judgment : 26.09.2023

SASHIKANTA MISHRA, J.

The petitioner is the complainant in 1 CC No. 557 of 2022 filed by him in the Court of learned JMFC (C), Cuttack under Section 138 of N.I. Act in which the present opposite party No. 2 is the accused.

2. In view of the point involved in the present case, the facts leading to filling of the complaint need not be gone into detail. It would suffice to state that on request of the accused the petitioner claims to have given him a loan of Rs. 2,00,000/- in cash for construction of his house. As per the written agreement executed between them, the accused issued a cheque towards repayment of the amount which was dishonoured by the concerned bank on the ground of insufficiency of funds. After complying with the relevant statutory provisions, the petitioner filed the complaint on 10.10.2022. On 27.10.2022, the Court below took cognizance of the offence under Section 138 of N.I. Act and issued summons to the accused. Such notice was found to have been validly served on the accused as per the postal tracking report received by the Court below. In view of non- appearance of the accused pursuant to such summons, the Court below, by order dated 02.02.2023 issued conditional bailable warrant (CBW) against the accused. Since the warrant did not yield any

result the Court below, by order dated 04.04.2023 directed issuance of NBW against by the accused by recalling the CBW. This also did not yield any result. The petitioner therefore filed an application in the Court below on 11.07.2023 with prayer for issuing proclamation and attachment of property of the accused under Sections 82 and 83 of Cr.P.C. On the same day, the Court below rejected the prayer of the petitioner on the ground that the stipulated period of one year has not yet been elapsed with reference to Rule 326(b) of GRCO(Crl.) Vol.1. Said order is impugned in the present application, filed under Section 482 of Cr.P.C. with prayer to quash the same.

3. Heard Mr. K.K. Mohapatra learned counsel for the petitioner complainant and Mr. S.K.Mishra learned Additional Standing Counsel for the State.

4. Having regard to the point of law involved and the order proposed to be passed it was not felt necessary to issue notice to the accused leaving it open to him to seek variance of the order in future, if he so is advised.

5. Mr. Mohapatra, learned counsel for the complainant-petitioner submits that the Court below committed an error of law in referring to the provision under Rule 326 of GRCO (Crl.) which is not applicable to the facts of the case at all. Mr. Mohapatra further argues that as per the scheme of the Cr.P.C. the Court is required to first issue summons to the accused followed by warrant of arrest. If these modes are found not fruitful then proclamation and attachment of the property can be ordered. In the instant case the summons issued was duly served but the accused did not respond. The conditional bailable warrant issued by the Court below also did not yield the desired result. Therefore, the next option available for the Court is to issue proclamation and attachment as provided under Sections 82 and 83 of Cr.P.C. According to Mr. Mohaptra, this is a case where the accused has deliberately absconded only to frustrate the execution of warrant of arrest and therefore unless he is compelled to appear, the case of the complainant against him would be rendered infructuous.

6. Mr. Mishra on the other hand fairly submits that the reference to the provision under Rule 326 of GRCO (Crl.) by the Court below is misconceived because the same relates to sending of records to the dormant file where the accused, despite issuance of warrant and the process under Section 82 and 83 is unable to be apprehended.

7. It would be relevant to refer to Section 204 of Cr.P.C. which deals with the issue of process. The provision is quoted hereunder.

204. **Issue of Process:**

1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-

(a) A summons-case, he shall issue his summons for the attendance of the accused, or

(b) A warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87.

8. In the instant case, the Court below deemed it proper to issue summons for the attendance of the accused. Said summons having been ignored by the accused, a conditional bailable warrant was issued. Chapter-VI of the Cr.P.C. deals with the processes to compel appearance Part A whereof relates to summons containing the provisions under Sections 61 to 69. Part B relates to warrant of arrest commencing from Section 72 to Section 81 Part C relates to proclamation and attachment containing the provisions Sections 82 to 86. Section 82 and 83 read as under :

82. ***Proclamation for person absconding****.—(1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation. (2) The proclamation shall be published as follows:— (i) (a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides; (b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village; (c) a copy thereof shall be affixed to some conspicuous part of the Court-house; (ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides. (3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in clause (i) of sub-section (2), shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day. 50 1 [(4) Where a proclamation published under sub-section (1) is in respect of a person accused of an offence punishable under section 302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 of the Indian Penal Code (45 of 1860), and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a declaration to that effect. (5) The provisions of sub-sections (2) and (3) shall apply to a declaration made by the Court under sub-section (4) as they apply to the proclamation published under sub-section (1).]*

83. Attachment of property of person absconding*.—(1) The Court issuing a proclamation under section 82 may, for reasons to be recorded in writing, at any time*

after the issue of the proclamation, order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person: Provided that where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise, that the person in relation to whom the proclamation is to be issued,— (a) is about to dispose of the whole or any part of his property, or (b) is about to remove the whole or any part of his property from the local jurisdiction of the Court, it may order the attachment simultaneously with the issue of the proclamation. (2) Such order shall authorise the attachment of any property belonging to such person within the district in which it is made; and it shall authorise the attachment of any property belonging to such person without such district when endorsed by the District Magistrate within whose district such property is situate. (3) If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made— (a) by seizure; or (b) by the appointment of a receiver; or (c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or (d) by all or any two of such methods, as the Court thinks fit. (4) If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land paying revenue to the State Government, be made through the Collector of the district in which the land is situate, and in all other cases— (a) by taking possession; or (b) by the appointment of a receiver; or (c) by an order in writing prohibiting the payment of rent on delivery of property to the proclaimed person or to any one on his behalf; or (d) by all or any two of such methods, as the Court thinks fit. (5) If the property ordered to be attached consists of live-stock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court. (6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under the Code of Civil Procedure, 1908 (5 of 1908).

9. It is clear that in order to invoke Section 82 two conditions need to be satisfied namely (i) abscondance of the accused, (ii) deliberate concealment by the accused of himself to avoid execution of warrant. It is also well settled that the power of issuing a proclamation under Section 82 can be exercised by a Court only in respect of a person against whom a warrant has been issued by it. In other words, unless the Court first issues a warrant, the provisions of Section 82 and the other Sections that follow in that part cannot be invoked in a situation where inspite of it's best efforts police cannot arrest a person under Section 41. The above view was taken by the Supreme Court in the case of **State Through CBI Vs. Dawood Ibrahim Kaskar & Others,** reported in AIR 1997 SC 2494. Since the Court below has referred to a purported time stipulation of one year after issuance of warrant, it would be proper to note that neither Part B nor Part C provide for any such time stipulation either for execution of the warrant so issued or for invoking the power under Sections 82/83 of Cr.P.C. It would suffice if the Court is satisfied that the person against whom a warrant has been issued has absconded or is concealing himself so that the warrant cannot be executed. In the instant case, a summons was duly served upon the accused but he did not respond. A Conditional bailable warrant was issued but the same also did not yield the desired result and then NBW was issued but the same has also not yielded the desired result. Under such circumstances, the Court below instead of waiting indefinitely for the NBW to be

executed can always take recourse to the next step that is, issuance of proclamation and attachment as envisaged under Sections 82 and 83 of Cr.P.C.

10. Coming to the impugned order this Court finds that the Court below has referred to the provision under Rule 326. Said provision occurs under Chapter-II under the heading 'Dormant File'. Rule 326 read as follows:

> *"Dormant file- Records of the following categories of cases shall be transferred to the "Dormant File" and from the date of such transfer they shall not be shown in any periodical returns.*
>
> *(a) All cases where action has been taken under Sections 82 and 83, Criminal Procedure Code and evidence of witnesses, if any, for the prosecution has been recorded under Section 299 of the Code of Criminal Procedure.*
>
> *(b) In cases where during a period of one year from the first date of issue of process, repeated attempts to serve summons and warrants have failed on account of the fact that the whereabouts of the accused is not known and the prosecution is unable to furnish any further particulars about the whereabouts of the accused.*
>
> *(c) In police cases where action under Sections 82 and 83, Criminal Procedure Code has been taken, but the proclamation and attachment have not been effected by the police during a period of three months from the date of issue of such proclamation and attachment.*
>
> *(d) Where the address of the accused is not furnished by the prosecution within a period of three months from the date of institution of the case."*

11. This Court fails to understand as to how this provision can be made applicable to the facts of the present case inasmuch as the same relates to sending of records of certain cases to the dormant files where all possible steps to procure/compel the attendance of accused including proclamation and attachment under Sections 82 and 83 have remained unfruitful. The present case involves steps taken/to be taken further to the summons, CBW and NBW to compel the attendance of the accused. Clearly, the trial Court completely mis-directed itself in referring to the above provision of G.R.CO. This Court therefore, finds considerable force in the submission of learned counsel for the petitioner that reference to Section 326 (b) of G.R.C.O.is entirely misconceived.

12. Thus, from a conspectus of the analysis of facts and law referred hereinbefore, this Court finds that the valuable right of the complainant to validly prosecute his complaint has been thwarted by the inaction of the Police authorities in executing NBW against the accused as also the unjustified refusal of the Court below to invoke the power conferred by the provision under Sections 82/83 of Cr.P.C.

13. For the foregoing reasons therefore, the CRLMC is allowed. The impugned order is set aside. The Court below is directed to issue process under Sections 82/83 of Cr.P.C. forthwith if in the meantime, the NBW issued against the accused has not been executed.

2023 (III) ILR – CUT- 838

A.K. MOHAPATRA, J.

CRLMP NO. 523 OF 2022

BIRENDRA NATH RATH .....Petitioner

-V-

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

(A) INDIAN PENAL CODE, 1860 – Section 375 – Principle regarding general concept of consent – Discussed with reference to case laws. (Paras 13-16)

(B) INDIAN PENAL CODE, 1860 – Section 376(2)(n) – The informant has continued physical relationship with petitioner for a long time – The informant was moving around with the petitioner and she was introduced to the outsider as would be wife which she has no objection to such introduction – The informant also admitted that the petitioner was visiting her residence and they were in a relationship – Whether the offence U/s. 376(2)(n) is made out against the petitioner? – Held, No – The informant was with a consensual sexual relationship with petitioner. (Para-21)

Case Laws Relied on and Referred to :-

1. CRLA No.940 of 2019 : G. Achyut Kumar Vs. State of Odisha.
2. AIR 1992 SC 604 : State of Haryana Vs. Ch. Bhajan Lal.
3. (2003) 4 SCC 46 : Uday Vs. State of Karnataka.
4. 2020 SCC Online Del 1631 : X Vs. State.

For Petitioner : M/s. Devashis Panda, A. Mehta & D.K. Panda

For Opp. Parties : Additional Standing Counsel (For O.P No.1 to 4))

Mr. B.S. Tripathy (For O.P No.5)

JUDGMENT Date of Hearing : 29.08.2023: Date of Judgment : 02.11.2023

A.K. MOHAPATRA, J.

The present petition has been filed by invoking the jurisdiction of this Court under Articles 226 and 227 of the Constitution of the India to quash the F.I.R. under Annexure-1 to the petition, arising out of Rajgangpur P.S. Case No.23 of 2022, corresponding to G.R. Case No.35 of 2022, pending in the file of the learned J.M.F.C., Rajgangpur.

2. On perusal of the record, it appears that the Petitioner is the sole accused in the above noted G.R. case, which was initiated on the basis of a written complaint lodged by the Opposite Party No.5 at Rajgangpur Police Station alleging therein commission of offence under Sections 376(2)(n), 294 & 506 of I.P.C.

3. The prosecution story as culled out from the F.I.R. under Anexure-1 is that the Opposite Party No.5-Victim-Informant lodged a complaint before the Officer-in-

Charge, Rajgangpur Police Station on 20.01.2022, inter alia, alleging that she came to know the present Petitioner from their mutual business acquaintance and, as such, she had entered into a joint venture with him in various businesses activities. Thereafter, the Petitioner started proposing the Informant and kept on telling her that he wants to get into a relation with her and to marry her. The Informant further stated that she had conveyed to him that she is the widow and is also a single mother raising a 7 years old daughter alone under very harsh circumstances. Thus, such condition would not permit her to give consent for such marriage and hence she did not accept the proposal initially given by the Petitioner. Thereafter, the Petitioner started putting more pressure on the Informant-Victim and promised that he will convince his parents as his parents have a very modern outlook and practice modern values. She has further stated that since the Petitioner persisted on the relationship and repeatedly extended such proposal and on seeing his efforts she subsequently accepted his proposal and went into a relationship with the Petitioner.

4. The F.I.R. further reveals that from August, 2021 the Petitioner persuaded the Informant to get into a physical relationship with her which she denied initially as they were not married. On5th August, 2021, the Petitioner intimated the Informant that he had some conversation with her regarding their business and, accordingly, he told that he is coming in the evening at about 7 'O' Clock to pick her up and to have a talk with her in the car. Thereafter, the Petitioner came and picked her up and started conversation while they both were in the car. Suddenly, the Petitioner changed the route of the car and drove the car towards the empty Ranchi Road and taking advantage of the loneliness, the Petitioner made physical advances towards the Informant-Victim. The Informant has further stated that although she tried to resist but could not. Thereafter, the Petitioner forced himself into her and committed rape on her.

5. After the aforesaid incident, the Petitioner came to the residence of the Informant continuously on number of occasions. After few days the Informant came to know that the Petitioner has not even divorced his wife. She has further stated that the Petitioner told her that his divorce case is going on and very soon he is going to be separated from his wife and that at the moment the Petitioner is staying separately. The Informant stated that she believed him. She has also stated that on many occasions the Petitioner took her out of town to Bhubaneswar and Kolkata for travelling and introduced her as his would be wife and that they are getting married soon. Thereafter, they were in a physical relationship for so many days continuously at her residence.

6. Eventually, the Informant came to know the wife of the Petitioner. When she visited their house on being invited by the Petitioner's wife, the Informant could know that everything is fine between husband and wife. Moreover, the wife of the Petitioner requested the Informant to help her husband in his business as because some problem has just started in his business with the OCL Company. While this

was the position, the Petitioner started avoiding the Informant and did not pick up her calls and was not even replying to the text messages sent by the Informant. She went to the office of the Petitioner and asked the reason behind such type of behaviour, to which, the Petitioner said that he is already married and is living with his wife and, as such, he cannot marry the Informant. At that moment, the Informant realized that the Petitioner has been telling lies to her just to have physical relationship with her. When she reminded him about the promise regarding marriage and taking up her responsibility which he had promised earlier, the Petitioner denied to take any such responsibility and in fact, informed her that he is severing all relationship with her. He then asked her not to contact him anymore. He had further threatened to kill her if the Informant discloses about the relationship or makes any attempt to contact him. It is also alleged that the Petitioner had also abused her in filthy language. The Petitioner also threatened her by saying that many influential people are in contact with him and, as such, any effort by the Informant to approach the police would be futile. She has stated that she is getting threats from the relatives of the Petitioner. Finally, she has stated that the Petitioner has stopped all sorts of contact with her and he is not letting her to enter into his house. Accordingly, the Petitioner finding no other alternative has approached the Rajgangpur Police Station by filing the present F.I.R.

7. Heard Mr. Devashis Panda, learned counsel appearing for the Petitioner; Mr. B.S. Tripathy, learned counsel appearing for the Opposite Party No.5; as well as learned Additional Standing Counsel appearing for the State-Opposite Parties. Perused the petition as well as the documents annexed thereto.

8. Mr. Panda**,** learned counsel appearing for the Petitioner, at the outset, submitted that the Petitioner is a businessman having his own business establishment at Rajgangpur in Sundargarh District. The Petitioner was doing business with one Abhinandan Roy Choudhary, who got married to Opposite Party No.5-Informant. A few months after such marriage, the above named Abhinandan Roy Choudhary died in a suspicious circumstance where after the business interests of Abhinandan Roy Choudhary were being looked after by his widow, the Informant in the present case. Mr. Panda further contended that the Informant is an adult much above the age of discretion. In course of their acquaintance, both of them have developed familiarity with each other leading to the parties maintaining a physical relationship and eventually cohabitation, although the Petitioner is a married man. The marital status of the Petitioner was well within the knowledge of the Opposite Party No.5-Informant.

9. Mr. Panda, learned counsel appearing for the Petitioner further contended that in course of their business activities, a dispute arose between the Petitioner and the Opposite Party No.5 and in order to feed fat to her grudge, she has registered the F.I.R. making allegations against the Petitioner. Referring to the facts of the present case, learned counsel for the Petitioner further argued that on 5th August, 2021, as

alleged by the Informant, the Petitioner ravished her at a lonely place on the Ranchi Road. However, she has further stated that after such incident the Petitioner was going to her house on several occasions and that they were moving around and she was being introduced to outsiders as the would be wife of the Petitioner. He further contended that the statements recorded under Section 161 Cr.P.C. and 164 of Cr.P.C. reveals that the maid as well as the daughter of the Informant have been examined and in course of such examination, they have stated that the Petitioner was a frequent visitor to the Informant's house and he used to stay overnight with her in the bedroom. He further contended that the Informant herself admitted that she used to accompany the Petitioner on visits outside the town. Thus, it was contended that the relationship between the two was consensual and that there is nothing on record which would lead to the conclusion that both the Petitioner and the Informant had a non-consensual sexual intercourse.

10. Referring to the medical documents, learned counsel for the Petitioner submitted that such medical documents disclosed that in August, 2021 when she was allegedly ravished by the Petitioner, Opposite Party No.5-Informant was pregnant and that the discharge summery was issued by the hospital after she underwent a termination of pregnancy. Such medical documents have been filed by way of an additional affidavit dated 4.4.2022.

11. Learned counsel for the Petitioner also tried to draw attention of this Court to another F.I.R., i.e., F.I.R. No.148 dated 30.05.2020 registered under Sections 376/478/506/34 of the I.P.C. against one Gourav Rekhi and others, now pending in the Court of the learned A.C.J.M., Alipore, Jadavpur, West Bengal. The said F.I.R. was lodged by the Informant herself making allegation against the above named Gourav Rekhi. Referring to the aforesaid F.I.R., it is alleged by Mr. Panda, learned counsel appearing for the Petitioner, that the Informant is in the habit of luring married men to obtain sexual favours from them and to entangle them in false cases.

12. In course of his argument, Mr Panda, learned counsel appearing for the Petitioner referring to the F.I.R. under Annexure-1 submitted that the investigation into the allegation made in the F.I.R. is highly illegal, erroneous and unsustainable in law, as no prima facie case is made out on the basis of the allegation made by the Informant under Section 376(2)(n)/294/506 of the I.P.C. He further emphatically argued that even accepting the allegation made in the F.I.R. on its face value, but without conceding no case under Section 376(2)(n) of the I.P.C. is made out against the present Petitioner. It was also contended that the Investigating Officer gets power under the provisions of the Cr.P.C. to investigate into the matter whenever a cognizable offence is made out on the basis of the F.I.R. allegation. Since the F.I.R. under Annexure-1 does not reveal any cognizable offence, subsequent investigation is *void ab initio.*

13. In course of hearing, learned counsel for the Petitioner referred to the judgment of this Court in ***G. Achyut Kumar v. State of Odisha*** (CRLA No.940 of

2019 decided vide judgment dated 21.05.2020). By referring to the aforesaid judgment, learned counsel for the Petitioner submitted that in the aforesaid case, this Court had held that, the law holding that false promise to marriage amounts to rape appears to be erroneous. Moreover, the authoritative commentary on Criminal Law by Glanville William corroborates this proposition of law. Since the framers of law have specifically provided the circumstances when 'consent' amounts to 'no consent' in terms of Section 375 of I.P.C. Therefore, the consent for the sexual act on the pretext of marriage is not one of the circumstances mentioned under Section 375 of I.P.C. In view of the aforesaid finding by this Court in the above referred judgment, learned counsel for the Petitioner submitted that the present case falls under the aforesaid category. Learned counsel for the Petitioner further referring to the statements of the witnesses recorded by the police submitted that such statements would go a long away to establish the consensual physical relationship between the Petitioner and the Informant and, as such, it cannot be said that the Opposite Party No.5-Informant is a victim of any sexual offence which would warrant lodging of an F.I.R. under the alleged sections of the I.P.C. Mr. Panda, learned counsel for the Petitioner would also refer to the judgment of the Hon'ble Supreme Court in ***State of Haryana v. Ch. Bhajan Lal*** reported in ***AIR 1992 SC 604,*** and submit before this Court that the said judgment lays down the principles for quashing of a F.I.R. Referring to one of the principles, i.e., where the allegation in the F.I.R if taken at their face value and accepted in their entirety would not disclose commission of an offence and make out a case against the accused, Mr. Panda Submitted that the F.I.R. in the present case deserves to be quashed in the interest of justice and to prevent abuse of process of law.

14. In ***Uday v. State of Karnataka,*** reported in ***(2003) 4 SCC 46***, referred to by learned counsel for the Petitioner, the Hon'ble Apex Court had an occasioned to examine general concept of consent and has concluded that consent in the belief that promise of marriage was meant to be fulfilled cannot be a misconception of fact to bring it within the ambit of Section 90 of I.P.C. and finally it was held that voluntary consent depends upon facts of the case and various other factors such as the age of the girl, her education and social status and that the informant being otherwise a consenting party to consensual physical relationship with Petitioner, the case is otherwise a fit case calling for interference of this Court in exercise of its original jurisdiction as well as inherent power to quash the FIR under Annexure-1 to the petition.

15. The word consent has been defined in Stroud's Judicial Dictionary. Such definition reveals that consent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side. Further referring to observation in ***1982 QB 320 (CA)*** in the case of ***Holman v. R,*** where it has been held that consent to intercourse by a woman may be hesitant, reluctant or grudging, but if she consciously permits it, there is consent. Reference has also been made to the observation in ***Clarence v. R***, reported in ***(1888) 22 QBD 23*** wherein Stephen J.

has observed and quoted "It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification. It is too short to be true, as a mathematical formula is true."

The observations of Wills, J. have also been quoted therein with approval which reads as follows:-

> "That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to have intercourse with her, he obtains her consent by fraud, but it would be childish to say that she did not give consent."

16. Learned counsel for the Petitioner in course of his argument also referred to the judgment of the Delhi High Court in ***X v. State,*** reported in ***2020 SCC Online Del 1631***. In the said judgment, Delhi High Court has come to a conclusion that it is difficult to accept that continuing with an intimate relationship which also involves engaging in sexual activity over a significant period of time, can be construed as involuntary and secured not by affection but only on the lure of marriage.

17. Finally, it was contended by the learned counsel for the Petitioner that offence under Section 376(2)(n) of I.P.C. having not been made out on the basis of the F.I.R. allegation, the offences under Sections 294 or 506 of I.P.C. are also not made out against the Petitioner as the basic ingredients of the aforesaid two offences are lacking. Accordingly, it was submitted that the present case is a fit case which calls for interference of this Court in exercise of its original jurisdiction as well as the inherent power to quash the F.I.R.

18. Learned counsel for the Informant as well as learned Additional Standing Counsel, who were sailing in the same boat, jointly opposed the prayer for quashing of the F.I.R. as well as the investigation in the present case. It was argued by learned counsel appearing for the Opposite Parties that on the basis of the allegation made in the F.I.R., a prima facie case under Section 376(2)(n) of the I.P.C. is well made out against the present Petitioner. It was also contended that the F.I.R. story clearly reveals that the consent of the Opposite Party No.5 was obtained with a promise to marry and a promise to take up the responsibility of the Informant and her daughter. It was also contended that the Petitioner had assured that he would divorce his wife and marry the Informant in due course. However, the same did not happen. On the contrary, it is alleged that the Informant on being invited to the house of the Petitioner by his wife came to learn that they are having a good relationship and, as such, the basic premise on which the relationship was developed was based on fraud. Therefore, the Informant was lured to enter into a physical relationship on the basis of a false promise. It was also contended that such falsehood was pre-existing before the relationship started between the two. Therefore, it was urged before this Court that a clear case under Section 376(2)(n) of the I.P.C. is made out against the present Petitioner and, accordingly, he is liable to face the trial for commission of such offences.

19. Learned counsel for the Opposite Parties further drawing attention of this Court to the statement of the witnesses recorded under Section 161 of Cr.P.C. made an attempt to establish the fact that a clear case under Section 376 of I.P.C. is made out against the present Petitioner. It was also contended by the learned counsel for the Opposite Parties that the alleged crime in the F.I.R. is of heinous nature. Therefore, this Court should not interfere with the F.I.R. or the subsequent investigation or the charge sheet by invoking either the original jurisdiction or the inherent power of this Court. It was also contended that the exercise of such jurisdiction by this Court would be against the interest of justice. Hence, it was prayed that the petition is devoid of merit and, accordingly, the same should be dismissed.

20. Having heard learned counsel appearing for the respective parties and on a careful examination of the case diary as well as the statement of the witnesses recorded under Section 161 of Cr.P.C. and other relevant materials on record, this Court is of the considered view that to quash the F.I.R. and to terminate consequential investigation, this Court has to look at the F.I.R. keeping in view the principles laid down by the Hon'ble Supreme Court in ***Ch. Bhajan Lal's*** case (supra). In the event the factual allegations in the F.I.R. falls within the ambit of the seven principles laid down by the Hon'ble Supreme Court in ***Ch. Bhajan Lal's*** case (supra), only then this Court would interfere with the investigation and quashed the F.I.R.

21. Learned counsel for the Petitioner lays much emphasis on the principles as laid down in ***Ch. Bhajan Lal's*** case (supra) to the extent that in the event this Court is of the view that the allegation in the F.I.R., if taken at their face value and accepted in their entirety do not disclose commission of an offence and, as such, make out a case against the accused-Petitioner, the F.I.R. in such cases deserves to be quashed and the consequential investigation be put to an end. The factual background as narrated in the F.I.R. by the Informant herself reveals that the first encounter in August, 2021 on the lonely Ranchi Road was somewhat forcible. Thereafter, she had made adjustments with the circumstance and accordingly a request was made by the Petitioner for having a physical relationship. It further appears they continued with the physical relationship for a long time and that the Informant was moving around with the Petitioner and she was being introduced to the outsider as would be wife of the Petitioner. It appears that she had no objection to such introduction of her to the society at least there is nothing on record to reveal that she even objected to that. She also admitted that the Petitioner was visiting her residence and they were in a relationship. Considering the age of the victim as well as her understanding, social standing etc., this Court has no hesitation to come to a conclusion that she is a matured lady and capable of taking her own decisions. After the first encounter, when she did not approach the police alleging commission of an offence and subsequently accepted the Petitioner and maintained a physical relationship with her, the same would definitely speak a volume about her consent in

the physical relationship with the Petitioner. Applying the principle as discussed hereinabove with regard to consent to the facts of the present case, this Court is of the view that the conclusion would be inevitable that the Informant was with a consensual sexual relationship with the Petitioner. The belief of this Court is further strengthened by the fact that the Informant was aware of the marital status of the Petitioner and knowing the same fully well she was in a relationship with the Petitioner. Therefore, it cannot be said that she did not know about the Petitioner's marital status. Furthermore, the F.I.R. was lodged only when the Petitioner refused to marry the Informant and to take up her responsibility. Being aggrieved by such conduct of the Petitioner, the Informant has lodged the present F.I.R.

22. On a careful analysis of the factual background of the present case as well as on a plain reading of the F.I.R., this Court is convinced that no case under Section 376(2)(n) of the I.P.C. can be said to have been made out on the basis of the F.I.R. allegation. Therefore, the offence under Section 376(2)(n) of the I.P.C., so far the present Petitioner is concerned, is hereby quashed. With regard to allegations under other sections of the I.P.C., it is open to the trial court to come to a just and fair conclusion after conducting the full fledged trial by taking evidence from both the sides. Further, it is also open to the trial court to critically examine the allegations made in the F.I.R. and taking into consideration the statement of the witnesses and, accordingly, the charges may be varied/modified in the event it appears that the Petitioner is guilty of any other offences under the Indian Penal Code or any other penal statute.

23. With the aforesaid observations and directions, the CRLMP is disposed of. However, in the facts and circumstances, there shall be no order as to costs.

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2023 (III) ILR – CUT- 845

A.K. MOHAPATRA, J.

O.J.C. NO. 5428 OF 2002

BHIKARI CHARAN ROUT & ORS. .....Petitioners

-V-

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

CONSTITUTION OF INDIA, 1950 – Articles 21-A & 45 r/w Section 3 of Right of Children to Free and Compulsory Education Act, 2009 – An English medium school was opened on 03.06.1992 for the benefit of children of WALMI employees and the students living in the nearby villages – The director WALMI by letter dated 01.02.2022 directed the

principal of the institution to discontinue admission of student in the school and published an advertisement in local news paper intimating the fact that the school will be closed from academic session 2002-03 due to financial constraint – Effect of such direction – Held, the decision of the authority infringing the fundamental rights guaranteed to the children for free and compulsory education in their neighbourhood – This court further directs that since this court has arrived at a conclusion that the school is functioning, the opposite parties shall do the needful and ensure that the school is transferred to the Education Department.

Case Laws Relied on and Referred to :-

1. (1993) 1 SCC 645 : Unni Krishnan Vs. State of A.P.
2. (2014) 9 SCC 692 : State of U.P. Vs. Pawan Kumar Dwivedi.
3. (2012) 9 SCC 310 : Bharatiya Seva Samaj Trust Vs. Yogeshbhai Ambalal Patel.
4. (2009) 6 SCC 398 : Avinash Mehrotra Vs. UOI.
5. (2012) 6 SCC 1 : Unaided Private Schools of Rajasthan Vs. UOI.

For Petitioner : M/s. B.Routray, Sr.Adv., M/s.J.K.Rath, Sr.Adv.
M/s. Jaganath Pattanaik, Sr. Adv.

For Opp. Parties : Mr. R.N.Mishra, Addl. Govt. Adv.

JUDGMENT Date of Hearing : 18.10.2023 : Date of Judgment : 02.11.2023

A.K. MOHAPATRA, J.

1. By filing the present Writ Petition, the Petitioners, who are parents of the students, who are studying in Gopabandhu English Medium School, WALMI have approached this Court with a prayer to quash letter dated 01.02.2002 issued by Opposite Party No.2 under Annexure-3 to the Writ Petition as well as the advertisement/notice dated 03.02.2002 published in the daily newspaper "The Samaj" under Annexure-4. They have also made an additional prayer to direct the Opposite Parties to continue the Gopabandhu English Medium School at its existing place under the control of the Opposite Parties.

2. The background of the present Writ Petition had a chequered history involving different Writ Petitions. So far the present Writ Petition is concerned, the same is confined to the prayer made therein. To adjudicate the dispute involved in the present Writ Petition, it is imperative on the part of this Court to analyse the factual background in details before adjudicating the issue involved in the present Writ Petition.

3. The factual matrix involved in the present Writ Petition, in gist, is that the Government of Odisha in the department of Irrigation and Power initially established a project known as Water and Land Management Institute, WALMI (herein after to be referred as 'WALMI'). The said institution was established on **30.12.1985** under the direct control of the Government. The WALMI project is a

Major Irrigation Project under the Subarnarekha Irrigation Project which was established with the approval of the Hon'ble Governor of Odisha. The above named institution is governed, guided and managed by a set of Rules under the Hand Book of Instruction for the irrigation work. Rule 9(b),(c) & (e) of the aforesaid Hand Book provides for establishment of an educational institution along with staff and building. It also provides that with the establishment of the above named institution, the educational establishment shall be transferred to the Education Department for its overall management and running.

4. While the matter stood thus, on 28.04.1972 the Governing Council of WALMI in its 17th meeting under Item No.17 decided to open K.G.School in WALMI campus at Pratapnagari. Opening of such School was duly approved by the Governing Council. Accordingly, on 03.06.1992 an English Medium School namely Gopabandhu English Medium School was opened for the benefit of children of WALMI employees and the students living in the nearby villages. It is pertinent to mention here that the said School since its inception in the year 1992 was functioning without any hindrance up to the year 2002. On 01.02.2022 a letter was communicated to the Principal, Gopabandhu English Medium School by the Director of WALMI requesting him to discontinue admission of students in the School. Pursuant to the aforesaid letter dated 01.02.2002, an advertisement was published on 03.02.2002 in the local newspaper intimating the fact that Gopabandhu English Medium School will be closed from the academic session 2002-03 due to financial constraint. Similarly, an appeal was also made to any public enterprises/private organization/individual interested to take over the School.

5. Aggrieved by the aforesaid decision of the Director, WALMI, the parents of the students studying in the School as well as employees of WALMI objected to the aforesaid decision to close the School on the ground of financial constraint with effect from the academic session 2002-03. To counter such plea, it has been averred in the Writ Petition that in the financial year 2000-01, the School had received a total sum of Rs.260.16 lakhs whereas the expenditure incurred during the said period was Rs.238.59 lakhs. In view of the aforesaid financial position, it has been stated in the Writ Petition that there was no financial constraint so far as the School in question is concerned. As such there is no need to close down the School or to hand over the same to any private organization. Being aggrieved by the aforesaid decision of the Director, WALMI, the Petitioners have approached this Court by filing the present Writ Petition.

6. A Counter Affidavit has been filed on behalf of Opposite Party Nos. 1 & 2. In the said Counter Affidavit, it is averred that the present Writ Petition was earlier heard on several occasions and the hearing was concluded. However, finally this Bench after concluding the hearing allowed the parties to file their written notes. In the Counter Affidavit, it has been stated on behalf of the Opposite Parties that several Writ Petitions with similar/identical reliefs were filed before this Court

bearing OJC Nos.10094 of 1998, OJC 4426 of 2002, OJC No.6395 of 2002. All such Writ Petitions were either dismissed or disposed of thereby granting no relief to the Petitioner therein. So far the present Writ Petition is concerned, the same was earlier dismissed for default on 11.09.2014 and thereafter the same has been restored to file on an application being filed by the Petitioners.

7. The Counter Affidavit further reveals that due to financial crunch of WALMI, a decision was taken by the Governing Council to hand over the institution to a private organization/private enterprise. In the Counter Affidavit, it has been averred that WALMI is an autonomous body registered under the Societies Registration Act, 1860. The WALMI is governed by a Governing Council headed by its President, who is the Commissioner-cum-Secretary to Government department of water Resources, Odisha. Initially WALMI was being funded by US aid up to March, 1989. Thereafter, it was being funded by Water Resources Management & Training, which is an external fund scheme, was available to WALMI. Currently, the WALMI is depending upon the Grant-in-Aid Rules by the State Government for its existence.

8. Counter Affidavit further reveals that in the 25th Governing Council meeting held on 20.08.1999, it was decided to discontinue the Standard-I Class of Gopabandhu English Medium School, (in short GEMS) for the year 2000-01 and only LKG & UKG Classes were to continue for the benefit of children of faculty members of WALMI. Similarly in 24th Governing Council meeting of WALMI it was decided to discontinue the activities of such School within the WALMI campus with the observation that the students strength of GEMS is very poor and the quality of teaching is sub-standard. However, the President of WALMI directed that GEMS may continue with the stringent stipulation with regard to the standard of teaching with effort to improve the same and no student other than the children of members of the faculty/staff of WALMI should be permitted to join the said School. The aforesaid decision of the President was duly ratified by the Governing Council. It was also decided that except the post of one Assistant Teacher, no other post be retained in GEMS in view of the poor student strength. In addition to the above, a ground has also been taken that WALMI is spending a sum of Rs.2,46,800/- annually for plying of School vehicle from Pratapnagari to Cuttack. Accordingly, in the 25th Governing Council meeting held on 20.08.1999 it was decided to close down the GEMS.

9. The Counter Affidavit further reveals that WALMI is an autonomous body, being a registered body. Furthermore, it has been stated that WALMI is not an Entrepreneur as defined under the I.D.Act, 1947, nor any commercial activities takes place in WALMI. Currently, the project work done by WALMI is funded by the department of Water Resources Government of Odisha. It is also not a fact that the WALMI has been financed by Central Water Commission, CWC. Further, it has been stated that the Hand Book of Rule and Instructions issued by the Irrigation

department, Government of Odisha has absolutely no bearing on the WALMI. Even otherwise also Rule 9(b) is not applicable to WALMI. Moreover, the WALMI is not situated in a remote place and that there exists an Odia Medium School near WALMI. It has been admitted in the Counter Affidavit that pursuant to the decision of the 17th Governing Council meeting held on 28.04.1992, a decision was taken to open GEMS and accordingly the School started officially from the year 1992. A specific stand has been taken in the Counter Affidavit that the Governing Council has taken a decision to close down the /School with effect from 22.04.2002 and that the Headmistress of SCB Medical Public School would take over the said GEMS and presently the same is functioning in the WALMI campus in the name of Gopabandhu Children Academy and that 15 number of students belonging to WALMI employees and nearby villages have taken admission. It has also been stated in the Counter affidavit that one K.C.Swain was appointed as an Assistant Teacher on regular basis for the GEMS.

10. It also been stated in the Counter Affidavit that in the 21st Governing Council meeting proposal was approved for creation of one post of Principal and one of Assistant Teacher, however due to financial constraint, no Principal has ever been appointed in the GEMS. Subsequently, a decision was taken to close down the School due to poor attendance of students and sub-standard teaching in the said School. Such fact was duly intimated to the parents of the students. Pursuant to the advertisement under Anndcure-4, 15 applications were received from private parties. Finally, when SCB Medical College Public School was selected to run the School in the WALMI campus up to Class II, accordingly accommodation was provided on rental basis for running such School. In view of the aforesaid position a stand has been taken in the Counter Affidavit that WALMI is providing better educational facilities in WALMI campus and as such the allegation that the students are depriving of getting better education is baseless and vague.

11. It has also been stated in the Counter Affidavit that since the expenditure incurred in running the School was found to be unproductive, the Governing Council of WALMI took a decision to hand over the School to a private entrepreneur. It has also been categorically stated that WALMI is not an Irrigation Project. Therefore, Rule 9(b) of Hand Book issued by the Irrigation department has no application to the GEMS and that the grant-in-aid released in favour of WALMI by the State authorities is grossly inadequate to meet various expenditures' of WALMI on different heads. Therefore, to rationalise their expenditure the Governing Council of WALMI took a decision to close the School and hand over the GEMs to the SCB Medical Pubic School . It has been specifically admitted in the Counter affidavit that the sons of Petitioner Nos.1 and 2 were reading in GEMS. Finally, it has been pleaded in the Counter Affidavit that the Writ Petition is devoid of merit and the same should be dismissed.

12. Heard Mr.B.Routray, learned senior counsel appearing for the Petitioner, Mr.J.K.Rath, learned senior Advocate appearing for the intervener-Petitioner and Mr.Jaganah Pattnaik, learned senior counsel appearing for Opposite Party No.3 and Mr.R.N.Mishra, learned Additional Government Advocate for the State-Opp.Parties. Perused the pleadings as well as the materials on record.

13. Mr. B.Routray, learned Senior counsel representing the Petitioner at the outset submitted that pursuant to a decision taken in the 17th Governing Council meeting WALMI on 28.04.1992, a decision was taken to open the GEMS in the WALMI campus and accordingly the School was established with the approval of Governing Council of WALMI. While the School was functioning smoothly, on 01.02.2022 a letter was communicated to the Principal, GEMS by the Director, WALMI to discontinue admission of students. Pursuant to such letter, an advertisement was issued on 03.02.2022 thereby informing the public that the School will be closed from the academic session 2002-03 and similarly an appeal was made to public Enterprise/private organization/individual to take over the School. Although such a decision was objected to by the parents of the children as well as employees of WALMI, however, neither the Government nor the WALMI management paid any heed to such objection. It has also been contended by Mr.Routray, learned senior counsel that the plea of financial constraint is a vague and baseless ground not supported by any materials on record. Challenging the decision under Annexures-2 & 3 to the Writ Petition, the present Writ Petition has been filed with a prayer to quash the letter under Annexures-3 & 4 and for a direction to the Opposite Parties to continue GEMS at its existing place.

14. He further contended that on 17.06.2022 this Court passed an order staying operation of order under Annexue-3 with regard to closure of the School. Subsequently, the Opposite Parties appeared and filed application for vacation of the interim order dated 17.06.2002. During hearing of the aforesaid application, this Court directed the Registrar, Administration of this Court vide order dated 08.08.2002 to conduct a spot enquiry and to submit a report within one month. Accordingly, the Registrar of this Court visited the School and conducted an enquiry and finally submitted a report to this Court on 10.10.2002. As per the report, it was found that the School gate was closed and the students were sitting on road side in front of the School building exposed to sun and rain and classes were going on in open air. The report further reveals that the School gate was not opened despite order passed by this Court. The School gate was also not opened on the request of the Registrar, Administration. The report of the Registrar, Administration reveals that there are 42 students in three classes i.e. LKG, UKG and Standard-I and the students are regularly attending the classes. With regard to the management of the School, the report reveals that the SCB Medical Public School does not look after the administration of GEMS on the contrary the students of the GEMS are in a pitiable condition being exposed to sun and rain while attending the classes.

15. In course of his argument, learned senior counsel appearing for the Petitioner also contended that the GEMS is running and the students are given admission in the Schools in every year and the teachers are teaching in those classes regularly. However, he further contended that despite such factual position, the Opposite Party No.2 is not paying salary to the teachers and not maintaining the School building/infrastructures, furnitures in proper condition. It has also been contended that no care whatsoever has been taken for last six years on the pretext that the School will be given to a private agency. He also contended that Headmistress of SCB Medial Public School refused to take over the School from the academic session 2004-05.

16. Referring to the present case record, Mr.Routray, learned senior counsel further submitted that after submission of report of the Registrar, Administration before a Division Bench of this Court which was hearing the matter then, as per the roaster, the Hon'ble Division Bench after considering the report of the Registrar, Administration passed an order directing the WALMI authority to file an affidavit as to whether the School in question has been opened and the Counsel appearing for the WALMI has been asked to obtain instruction as to whether the teachers of the School are getting salary. Pursuant to the aforesaid order, an Affidavit was filed by the Deputy Director, WALMI on 22.07.2003 indicating therein that the gate was opened on 28.02.2003 and the teachers and students were allowed inside the School and the said School was continuing as usual in the WALMI campus.

17. The Affidavit dated 22.07.2003 is a part of the present case record. Mr.Routray, further contended that the Joint Secretary to Government, Department of Water Resources, vide his letter dated 13.07.2009 communicated to the Director, WALMI stating therein that Gopabandhu English Medium School is still running and the students and teachers are continuing in the School pursuant to the order of this Court. He further contended that the Collector-cum-Chairman, RTE (SSA), Cuttack vide letter dated 20.02.2013 has also communicated to the Principal of the Petitioners School to reserve 25% of the seat for admission of students belonging to weaker section and disadvantaged group of children in GEMS at the entry level class. In the aforesaid factual background, learned senior counsel for the Petitioners submitted that there is absolutely no doubt and the facts and circumstances of the present case establishes that the GEMS still exist and is functioning within WALMI campus.

18. It is also contended by the learned senior counsel appearing for the Petitioners that although the School is functioning, however, the condition of the School is precarious, as the same is not being maintained despite requests made by the teachers of the School. Furthermore, the School is still functioning inside the WALMI campus and the same has not been taken over by any private agency.

19. Mr.R.N.Mishra, learned Additional Government Advocate on the other hand contended that the present Writ Petition is not maintainable. He further submitted

that several Writ Petitions with similar/identical reliefs were also filed before this Court which were either dismissed or disposed of by granting no relief sought for therein. The present Writ Petition which was initially dismissed for default on 11.09.2014, but subsequently restored. Learned Additional Government Advocate further contended that the crux of the entire dispute in the present Writ Petition is as to whether the School in question is continuing as pleaded and argued by the Petitioner and if so, the entitlement of salary and other financial benefits in favour of the staff ? It was also contended that the original prayer in the Writ Petition is beyond the argument advanced by the Petitioner.

20. The main plank of argument advanced by Mr.Mishra, learned Additional Government Advocate is that the question with regard to running of the School has been put to rest by a judgment of this Court dated 10.08.2016 in OJC No.4426 of 2002. A coordinate Bench of this Court after considering all the relevant matters on record and by taking note of submissions made by the learned counsel appearing for the parties has arrived at a conclusion that the School in question does not exist. In course of his argument, he specifically refers to Paragraph-19 of the judgment dated 10.08.2016. So far the impact of judgment dated 10.8.2016 passed in OJC No.4426 of 2002 is concerned, the same will be discussed later on.

21. Learned Additional Government Advocate also contended that the present Writ Petition was filed by the parents of the students, who were said to be prosecuting their studies in the School in question in the year 2002. Therefore, the Writ Petition at the behest of such Petitioners is not entertainable, moreso, when the Writ Petition filed by employees of the School in question have already been dismissed. One Mr.K.C.Swain, Petitioner in OJC 4426 of 2002 approached this Court for the reliefs sought for in the said Writ Petition. The said Writ Petition was dismissed on 10.08.2016. Thereafter, a review petition bearing RVWPET No.220 of 2016 has also been dismissed on 03.10.2016. A Writ Appeal bearing W.A.No.503 of 2016 was also preferred by the abovenamed Mr.K.C.Swain, which has also been dismissed in the meantime. It was also contended by Mr.Mishra that a specific averment was taken in the said Writ Petition with regard to functioning and continuance of the School.

22. Similarly, W.A.No.500 of 2016 preferred by one Gitanjali Jagdev against the order dated 10.08.2016 in OJC No.10094 of 1998 has also been dismissed. In the said Writ Petition specific averments have also been taken with regard to continuance of the school which has not been accepted by the coordinate Bench. He also contended that the School in question does not have the certificate as required under section 18 of the Right of Children to Free and Compulsory Education Act, 2009 and that no such permission/certificate as mandatorily required under the Act has been obtained by the School in question. Therefore, it was emphatically argued by the learned Additional Government Advocate that the school in question does not exist and accordingly the Writ Petition is liable to be dismissed and no relief whatsoever can be granted in the present Writ Petition.

23. While hearing learned Additional Government Advocate this Court observes that the learned Additional Government Advocate did not assail or challenge the affidavit filed by the Deputy Director, WALMI pursuant to the direction of the Division Bench of this Court. Further, no explanation is coming forth with regard to the letter written by the Joint Secretary, Water Resources department, Government of Odisha and the letter issued by the Collector Cuttack. All the aforesaid issues were neither addressed in course of hearing nor the same has been touched in the written note of argument.

24. This Court in course of hearing observed that the conduct of WALMI in the present case appears to be very strange. Initially a counsel was representing WALMI, however when the final hearing was started and this Court considering the fact that the Writ Petition is pending since 2002 took up the hearing on day to day basis, learned counsel for the WALMI informed this Court that he has been engaged recently, therefore, he needs one month time to go through the record. At the fag end of hearing. Keeping in view the fact that Writ Petition is pending since 2002, this Court was not inclined to prolong the matter further, by granting further adjournment on the prayer of the learned counsel appearing for the WALMI. Accordingly, this Court decided to proceed with the hearing and conclude the matter as expeditiously as possible.

25. In reply to the argument advanced by learned Additional Government Advocate, Mr.Routray, learned senior Counsel appearing for the Petitioner submitted that the issue involved in the present Writ Petition is completely different and distinct than the issue involved in OJC No.4426 of 2002 and taking such a stand, learned senior Counsel submitted before this Court that the issue involved in OJC No.4426 of 2002 filed by one Mr.K.C.Swain challenging the order of termination dated 10.05.2002 by the Director, WALMI which was disposed of on 10.08.2016 by quashing the order of termination. Whereas in the present Writ Petition, letter dated 01.02.2002 regarding discontinuance of admission in GEMS and the subsequent appeal dated 03.02.2002 has been assailed by the Petitioner. Referring to the prayer in both the Writ Petitions and the parties involved in such Writ Petition, learned senior Counsel contended that neither the principles of resjudicata nor constructive resjudicata would be applicable to the facts of the present case.

26. He further contended that the parties, issues involved, the cause of action and the prayer made therein are completely different. Therefore, the principle of resjudicata would not be applicable to the present Wit Petition. He further submitted that the law is fairly well settled with regard to the applicability of the principle of resjudicata and constructive resjudicata by a catena of judgments of the Hon'ble Supreme Court as well as this Court. He further contended that the principle of resjudicata evolved through judicial pronouncements is based on a public policy that a person should not be harassed repeatedly by dragging him to Court, once the issue

involved between the parties has attained finality by way of a final adjudication by a competent court of law. In such view of the matter, learned senior counsel submitted that the principle of resjudicata would not be attracted to the fact of the present case. Therefore, the present Writ Petition is to be adjudicated on its factual background as well as keeping in view the issue involved in the present Writ Petition.

27. He also contended that the judgment dated 10.08.2016 passed in OJC No.4426 of 2002 by the coordinate Bench has proceeded on the fact that the present Writ Petition (OJC No.5428 of 2002) was dismissed for non-prosecution. However, the present Writ Petition was restored subsequently, it was never brought to the notice of the coordinate Bench before passing the judgment dated 10.08.2016. He further submitted that the issue with regard to existence and running of the School is directly and substantially an issue in the present Writ Petition. However, the same was not an issue either directly or substantially in other Writ Petition which has been heavily relied upon by the learned Additional Government Advocate. It was also contended that the existence and running of the School was not the main issue in the connected Writ Petition, rather the coordinate Bench has made an ancillary observation basing on the materials placed before the coordinate Bench. Therefore, such observation by the coordinate Bench on an ancillary issue would not operate as resjudicata and as such the same will not stand on the way of this Court in deciding the present Writ Petition on its own merit.

28. Learned senior counsel in course of his argument while repelling the submissions of the learned Additional Government Advocate on the question of binding nature of the order dated 10.08.2016 in OJC No.4426 of 2002, specifically argued before this Court that the letter of the Deputy Director, WALMI dated 22.07.2003 to the effect that the School gate was opened on 28.02.2003 and the letter dated 13.02.2017 under Annexure-22 has neither been referred to nor the same was brought to the notice of the coordinate Bench. He also submitted that the letter of the Collector, Cuttack dated 20.02.2013 addressed to the Principal of the School for reservation of 25% of the seats for two sections has also not been considered. Furthermore, the letter of the Joint Secretary department of Water Resources dated 13.07.2009 therein specifically admitting that the GEMS is still running, has not been taken into consideration while disposing of OJC No.4426 of 2002 vide letter dated 10.08.2016. He also refers to order dated 04.01.2023 passed by this Bench in the present Writ Petition, wherein as an interim, this Court had directed the State-Opposite Parties to immediately release 50% of salary payable to the teaching staff engaged in the School of the Petitioners within a period of two weeks.

29. Mr.Routray,learned senior counsel also contended that despite such direction of this Court the State-Opposite Parties have not taken any steps to release the 50% of salary in favour of the teaching staff as directed by this Court. Accordingly, they have also filed a contempt application for willful and deliberate violation of this Court's interim order by the State-Opposite Parties. He further

contended that pursuant to order dated 04.01.2023 the WALMI authorities have written a letter to the State Government seeking instruction regarding release of duty pay, leave salary from 11.05.2002 till date in favour of one Mr.K.C.Swin. In view of the aforesaid position, learned senior counsel for the Petitioner emphatically argued that the School in question is still functioning and the same could not have been closed in violation of the interim order passed earlier by this Court in the present Writ Petition.

30. During the pendency of the aforesaid Writ Petition, two intervention applications were filed. One by Smt.Gitanjali Jagdev and another by one Mr. K. C. Swain. Mr. J.K.Rath, learned senior Counsel representing intervener Smt. Gitanjali Jagdev submitted before this Court that the first intervener was validly appointed against the post of Assistant Teacher which was duly created by the Governing Council of WALMI. Mr.Rath, learned counsel further adopting the argument advanced by Mr.Routray, learned senior counsel supported the case of the Petitioner and further contended that in fact the GEMS is still running in the campus of WALMI.

31. Similarly, Mr.Jagannath Patnaik, learned senior counsel appearing on behalf of the intervener Mr.K.C.Swain also submitted before this Court that the said Mr.K.C.Swain was duly appointed as the Principal of the Gopabandhu English Medium School by a Resolution of the Governing Council of WALMI and accordingly a valid appointment letter was issued in his favour. Mr.Patnaik, learned senior counsel also adopted the argument advanced by Mr.Routray, learned senior counsel representing the Petitioners to the extent that the School is still functioning in the campus of WALMI and the same has not been closed down as of now. Both the learned senior counsels appearing for the Intervener-Petitioners submitted before this Court that once this Court holds that the School is functioning, then necessary consequential order be passed directing the authorities to pay the salary and other dues as admissible to both the interveners who have been discharging their duties sincerely and diligently all these years.

32. Having heard learned senior counsels appearing for the Petitioners as well as intervener-Petitioners and Mr.R.N.Mishra, learned Additional Government Advocate and upon careful examination of the pleadings as well as materials on record, this Court observes that the principal issue involved in the present Writ Petition which is directly and substantially an issue in the present Writ Petition is that whether the Gopabandhu English Medium School is running/functioning within the campus of WALMI or the same has been closed down?

To answer the aforesaid question, this Court is required to throw light on the chequered background of the present Writ Petition. Moreover, this Court is also required to consider the effect of judgment delivered by the coordinate Bench returning a finding on the issue which is involved in the present Writ Petition directly and substantially.

33. So far the present Writ Petition is concerned, on perusal of the Writ Petition, it appears that the same was filed by the parents of some students with a prayer to quash the letter dated 01.02.2002 under Annexue-3 and the advertisement/appeal dated 03.02.2002 published in the newspaper "The Samaj" under Annexure-4. A further prayer has also been made for a direction to the Opposite Parties to continue the Gopabandhu English Medium School at its existing place under the control of the Opposite Parties. On a careful examination of the order sheet, this Court found that the Division Bench of this Court while considering the admissibility of the Writ Petition and subsequently issuing notice to the Opposite Parties passed an interim order on 17.06.2002, the Division Bench after hearing the learned counsels for the parties was inclined to pass the following interim order.

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"xxxx Considering the aforesaid submissions, we direct as an interim measure that the impugned letter dated 01.02.2002 in Annexure-3 shall remain stayed. Liberty, however, is given to the Opposite Parties for modification of this order."

34. After careful examination of the order sheet, it reveals that the interim order has been continuing and the same has not been modified/varied in the meantime. Though an application was filed for vacation of the order dated 17.06.2002, the Division Bench vide order dated 08.08.2002 while considering the same and before passing any order on the said application for vacation of stay, expressed its desire to know the correct situation i.e. prevailing in the School. Accordingly, the Division Bench directed Mr.M.P.Mishra, Registrar (Administration) of this Court to conduct an enquiry and to submit a report to this Court within a month. It is also mentioned in the said order that the Registrar, Administration shall also find out as to whether the School is being run by the Headmistress of SCB Medical Public School and in such event, the Registrar, Administration was also directed to report as to whether the school is being run properly by the said Headmistress.

35. Pursuant to the aforesaid direction by the Division Bench, the Registrar, Administration of this Court visited the spot and conducted an enquiry by recording the statements of some of the material witnesses.Further, it appears that despite receiving the copy of the report, this Court had never vacated the interim order that was passed initially staying the letter issued for closure of the School. Moreover, the report submitted by the Registrar, Administration reveals the following findings:-

i) The Gopabandhu English Medium School is being run on road side without any assistance from the WALMI authority.

ii) The Principal of the SCB Medical Public School does not look after the management and administration of this Gopabandhu English Medium School.

iii) There has been fall in the management and administration as well as the quality of education in the Gopabandhu English Medium School.

iv) The students of Gopabandhu English Medium School are sitting in a pitiable condition on the road side exposed to sun and rain to attend classes. During heavy rain classes are being suspended at times.

v) The Gopabandhu English Medium School is without any management and administration at present, but the old students of the School continue to attend their classes in the School, notwithstanding opening of a new School in another building by the Principal, SCB Medical Public School.

36. In his report, the Registrar, Administration has categorically stated that the management of the School has not been taken over by the Principal, SCB Medical Public School. He has also stated that at present there are 42 students in three classes namely LKG, UKG and Standard-I. The students admitted that for last six months they were attending classes taken by their old teachers namely Mr.K.C.Swain and Smt.Gitanjali Jagdev. The students also stated that they are attending classes on the road side in front of the School building. The parents and teachers of Gopabandhu English Medium School also gave out the same story. Learned Registrar, Administration has also stated that the Principal of the SCB Medical Public School was examined as witness No.6 and she has admitted that she does not look after the management and administration of Gopabandhu English Medium School. On the contrary, she has stated that she has opened another English Medium School called Gopabandhu Children Academy, which is stated to be functioning inside the campus of WALMI with 18 students attending classes. This Court also had the occasion to go through the statements of witnesses.

37. On a careful analysis of the factual background of the present case, further taking into consideration the interim order passed by the Division Bench earlier on 17.06.2002, this Court is of the considered view that the GEMS was never closed. Moreover, this Court also found that despite the interim order dated 17.06.2002, the School premises was kept under lock and key and the same was not opened by showing utter disregard to the order passed by this Court. It also appears that the students admitted in the School were attending classes regularly and the interveners were taking classes on regular basis. Since the WALMI authority did not look after the management of the School, the students were attending classes in a very pitiable condition. It is also a fact that at the relevant point of time 42 students were attending classes. In view of the aforesaid materials on record, it is very difficult on the part of this Court to come to a conclusion that the School was closed down pursuant to the letter under Annexure-3 to the Writ Petition. Therefore, this Court has no hesitation in coming to a conclusion that the School in question was running and the students were attending classes and were being taught by the two interveners, who are teachers validly appointed by the Governing Council of WALMI.

38. Before adverting to analyzing the impact of judgment of the coordinate Bench of this Court, at this juncture, it is imperative to throw some light on the

provisions of the Hand Book of the Rules, Instructions, Clarifications for execution of irrigation work issued by the department of Irrigation, Government of Odisha. The said Hand Book under Clause 9(b) specifically provides for establishment of educational institution. It provides that in Major Irrigation Project due to remoteness of the area, educational facilities are not easily available upto higher secondary stage and accordingly a policy decision has been taken to establish School up to higher secondary stage by the Project authority in consultation with the education department. The teachers and staff of the School will be on deputation from education department. In case it is not possible to get staff on deputation, the post can be created with the approval of the Government.

39. Clause 9(c) further provides that after completion of the project, the educational establishment along with staff and building shall be transferred to education department for annual running and maintenance. Further, the Education department after such approval entrusted the building to State R & B department for normal annual repair. Similarly, Clause 9(c) provides that in future irrigation project School up to primary stage and small dispensary may be opened through the concerned administrative department. On careful examination of the records, this Court found that the opening of the School was duly approved by the Governing Council of WALMI and the two interveners were validly appointed as teachers i.e. Mr.K.C.Swain was appointed as Principal and Smt.Gitanjali Jagdev was appointed as Assistant Teacher. Creation of both the aforesaid posts were also approved by the Governing Council of WALMI. The record further reveals that the school was functioning from the year 1992 when the same was opened with due approval till the letter under Annexue-3 was issued in the year 2002. The letter under Annexure-3 has been specifically stayed by the Hon'ble Division Bench in the present Writ Petition at the stage of admission. Therefore, there is no doubt that the School was opened with due approval and the same was functioning by virtue of the interim order passed by this court.

40. So far OJC No.10094 of 1998 is concerned, it appears that the same was filed by Intervener Smt.Gitanjali Jagdev with a prayer for regularization of her service against the post of Assistant Teacher created by WALMI with approval of the State Government and to extend all consequential benefits including financial benefit in her favour and to pay her arrear dues as well as current salary. A coordinate Bench of this Court vide judgment dated 10.08.2016 disposed of the said Writ Petition rejecting the prayer of the Petitioner for regularization of her service on the basis of a letter of the Under Secretary to W.R. department dated 23.03.2011 to the effect that the GEMS has been closed in April, 2002 and not in existence. Accordingly, the Writ Petition of the Petitioner has been dismissed. On careful examination of the entire record of OJC No.10094 of 1998, this Court found that the learned coordinate Bench of this Court has although taken note of the report submitted by the Registrar, Administration in the present Writ Petition, however,

laying emphasis on the letter dated 23.03.2011, it has come to a conclusion that the School in question has been closed since April, 2002.

41. With profound respect to the learned coordinate Bench, this Court observes that the finding arrived at in the said Writ Petition is ignorance of the interim order passed by a Division Bench of this Court in the present Writ Petition. This Court further observes that the aforesaid finding was reached because of the fact that the present Writ Petition was dismissed for a brief period due to non-prosecution, however the same was subsequently restored to file. Had this fact been brought to the notice of the learned coordinate Bench, the decision would have been different. Furthermore, it was also observed that while deciding the said Writ Petition, learned coordinate Bench had also framed a question as to whether the Gopabandhu English Medium School is functioning in WALMI campus ? and the answer to the aforesaid question has been given by the learned coordinate Bench in negative relying upon the letter of the Under Secretary to Government dated 23.03.2011.

42. Similarly OJC No.4426 of 2002 was filed by one Mr.K.C.Swain with a prayer to quash the enquiry report submitted by the Inquiring Officer under Annexure-14 to the Writ Petition. Further, he had also challenged the order of termination of his service under Anexure-15 passed by the Opposite Parties in that case. On a careful examination of the records of the said Writ Petition, this Court observes that on the basis of certain allegations, charges were framed against Mr.K.C.Swain, the Petitioner in that case. The Inquiring Officer after conducting enquiry had recommended punishment of reversion to the post of Assistant Teacher in WALMI in the scale of pay of Rs.950-1500/- with protection of pay at Rs.1230/-, the present basic pay of the Assistant Teacher and stoppage of three consecutive annual increments with cumulative effect. However, the Disciplinary Authority vide order dated 10.05.2002 under Annexure-15 to the said Writ Petition was pleased to terminate the service of the Petitioner, who was working as Assistant Teacher in GEMS with effect from 10.05.2002.

43. Assailing such termination of Mr.K.C.Swain, the Petitioner has filed the aforesaid Writ Petition. A coordinate Bench of this Court after hearing the leaned counsel for the respective parties vide judgment dated 10.08.2016 disposed of the writ Petition by quashing the order of termination. However, it was finally observed that since the GEMS is not in existence as per the letter of the Under Secretary WR department, Government of Odisha dated 23.03.2011 no effective relief can be granted to the Petitioner. On a careful analysis of the judgment rendered by the learned coordinate Bench, this Court also observes that an issue was framed as to whether Gopabandhu English Medium School is functioning in WALMI campus, although the prayer was to quash the termination order. However, learned coordinate Bench after examining the issue has arrived at a conclusion that the GEMS is not functioning in view of the letter of the Under Secretary referred to hereinabove. However, this Court further observes that the issue of functioning of the GEMS was

not directly and substantially an issue in that Writ Petition. Considering the impact of such issue on the process of adjudication of the above referred writ Petition, learned coordinate Bench had framed the aforesaid ancillary issue. This Court further observes that while adjudicating such ancillary issue, the fact that an interim order was passed in the present Writ Petition by the Division Bench staying the decision to close down the School was not placed before the learned Single Judge.

44. Now reverting back to the facts of the present Wit Petition, this Court in the preceding paragraph has already come to a conclusion that the School in question was functioning and that the students were attending classes. Such conclusion of this Court is supported by order dated 17.06.2002 passed in Misc.Case No.5663 of 2002 by a Division Bench of this Court in the present Writ Petition. The same is also supported by the report submitted by the Registrar, Administration pursuant to the direction of the Hon'ble Division Bench of this Court, which has been specifically referred to in the preceding paragraph. It is also noteworthy to mention here that vide order dated 04.07.2008, after considering the report of the Registrar, Administration, the Division Bench of this Court which was hearing the matter earlier had directed learned Government Advocate to file an affidavit indicating as to whether the School in question has been opened as directed by this Court and to furnish information as to whether teachers of the School are getting their salary or not. The record further reveals that an affidavit was filed by one Govind Chandra Panda, the Deputy Director, WALMI on 22.07.2003 specifically stating in the said affidavit that the gate of the GEMS inside the WALMI campus has been opened since 28.02.2003 at 4.15 P.M..

45. Additionally a letter under Annexure-19 reveals that the Under Secretary to Government WR department has written to the Director WALMI requesting him to act as per the order passed by this Court on 17.06.2002. Similarly the letter under Annexure-22 written by the Joint Secretary, WR department to the Director, WALMI on 13.07.2009 also reveals that it has come to the notice of the Government in WR department that the GEMS under WALMI is running in WALMI campus and Mr.K.C.Swain is teaching the students in the School. It further reveals that the Deputy Director, WALMI has filed an affidavit in this Court that the School was running and the students and teachers are continuing in the School pursuant to the orders of this Court. It also reveals that Mr.K.C.Swain was continuing as a Teacher in Gopabandhu English Medium School as per the orders passed by this Court. Finally, a report was called for from WALMI by the Government to the effect as to why Mr.K.C.Swain, a Teacher in GEMS will not be paid his salary as per the orders of this Court. A copy of the letter dated 20.02.2013 under Annexure-23 written by the Collector to the Principal, GEMS reveals that the Principal has been requested to reserve 25% seats for admission of the weaker section. Similarly, the letter under Anexure-24 which is a copy of the Data capture form in U-DISE system. The said report pertains to the academic year 2014-15 and the data refers to the date which

has been given as 30.09.2014. The same also reveals that the School was functioning at the relevant point of time and the School has been assigned a Code i.e. 22121804752. Such data format also reveals the name of the two interveners as teachers in the said Schools.

46. The facts which have been discussed herein above are all matters of record. The Opposite Parties despite grant of several opportunities were unable to explain or controvert/ revert any of the aforesaid facts on record. Their only argument before this Court, in the present Writ Petition, is that the coordinate bench has given a finding that the School is not functioning. In such view of the matter, this Court is of the considered view that the factual aspect discussed in the preceding paragraph remains untraversed. As such the same is to be accepted by this Court due to such non-travesty.

47. The question that now falls for consideration by this Court is whether the Petitioners have any legal or Constitutional right to demand that the school in question be allowed to continue contrary to the decision under Annexure-3 to either close down the school or to hand it over to any non-governmental agency? In the aforesaid context it would be relevant to refer to Article 45 of the Constitution of India. Prior to the 86th amendment of the Constitution, Article 45 was providing that the State shall make endeavor to provide within a period of 10 years from the commencement of the Constitution for free and compulsory education for all children until they complete fourteen years of age. The aforesaid unamended Article 45 of the Constitution engaged the attention of the Hon'ble Supreme Court of India in **Unni Krishnan Vs. State of A.P.** reported in **(1993) 1 SCC 645**. The Hon'ble Supreme Court observed that children upto the age of 14 years have a fundamental right to free education. Such observation has also been quoted with approval by the subsequent judgments of the Hon'ble Apex Court in **State of U.P. Vs. Pawan Kumar Dwivedi** reported in **(2014) 9 SCC 692** and **Bharatiya Seva Samaj Trust Vs. Yogeshbhai Ambalal Patel** reported in **(2012) 9 SCC 310**.

48. The Constitution of India was amended by the 86th amendment and the Article 45 was revamped and the same now provides that the State shall endeavor to provide early childhood care and education for all children until they complete the age of six years. Simultaneously, a new Article 21-A was appended to Part-III of the Constitution as a fundamental right by the same 86th amendment, thereby making it obligatory for the State to provide free and compulsory education to all children from the age of six years to fourteen years. The aforesaid provision of new Article 21-A has come into force w.e.f. 01.04.2010. Similarly, a parallel provision was also inserted in fundamental duties chapter (Part-IV-A) in the shape of Article 51-A(k) by the very same 86th amendment to the Constitution of India. Clause (k) provides that the parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

49. On a conjoint reading and analysis of all the aforesaid provisions would clearly reveal that the constitutional goal of providing free and compulsory education to children couldn't be achieved even after the Nation got independence several decades ago. Pursuant to the 86th amendment to the Constitution, making right to free and compulsory education a fundamental right, a law was also enacted by the Parliament on 04.08.2009 viz. Right of Children to Free and Compulsory Education Act, 2009 with a preamble to provide free and compulsory education to all children from six to fourteen years of age. Section 3 of the said Act (which was amended by Act 30 of 2012 w.e.f. 01.08.2012) is relevant for the purpose of the present case and hence the same is quoted here in below;

> "Section-3 -**Right of child to free and compulsory education- (1) Every child of the age of six to fourteen years, including a child referred to in clause (d) or clause (e) of Section 2, shall have the right to free and compulsory education in a neighbourhood school till the completion of his/her elementary education.**
>
> **(2) For the purpose of Sub-section (1), no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from perusing and completing the elementary education.**
>
> **(3)…….....**
>
> **Provided……"**

50. Keeping in view the observations made by the Hon'ble Supreme Court of India in Unni Krishnan's Case (supra) and the legal as well as the Constitutional position post 2012, it is crystal clear that to achieve the dream of the framers of the Constitution to provide children free and compulsory education, the State is now under a legal and constitutional obligation to provide free and compulsory education up to the elementary level in their neighbourhood without fee, charges or expenses. In such view of the matter this court has no hesitation in coming to a conclusion that the decision under Annexure-3 as well as the appeal under Annexure-4 infringes the fundamental rights guaranteed to the children for free and compulsory education in their neighbourhood. The ground taken by the State Opp. Parties that there exists school in the nearby City or they asked the Medical Public School to take over the GEMS is absolutely illegal and the same is violative of the fundamental rights of the students of the locality.

51. Additionally, it may not be out of place reiterate the observations made by the Hon'ble Supreme Court of India in **Avinash Mehrotra Vs. UOI** reported in **(2009) 6 SCC 398** in para 39 that Article 21-A takes within its sweep not only elementary but secondary education as well. Moreover, such education shall have to provide in an environment of safety. The constitutional validity of the Right of Children to Free and Compulsory Education Act, 2009 has already been upheld by the Hon'ble Supreme Court of India in Society for **Unaided Private Schools of Rajasthan Vs. UOI** reported in **(2012) 6 SCC 1**.

52. In view of the aforesaid analysis of the fact, this Court has no hesitation in coming to a conclusion that the School in question was running/functioning and the same was not closed in view of the interim order passed by this Court staying operation of the order under Annexure-3. Now this Court has to examine the impact of the findings arrived at by the learned coordinate Bench to the effect that the School was not in existence. In reply to the aforesaid legal question, this Court would like to record here that it is well settled proposition of law that an ancillary or incidental finding in an earlier proceeding where the cause of action and issue which has been commented upon was not an issue directly or substantially, such a finding shall not operate as resjudicata while adjudicating the very same issue which was directly and substantially an issue in a collateral or subsequent proceeding. In this context, this Court would like to refer to the following principles.

i) The Doctrine of res judicata implies that no court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them litigating under the same tide in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

ii) The doctrine of res judicata as embodied in Section 11 of the Civil Procedure Code, 1908 (CPC) corresponds to what is known as "estoppel by judgment" in English law. It is a principle of convenience and rest and not of absolute justice.

iii) In *MRF Ltd. v. Manohar Parrikar*, reported in ***(2010) 11 SCC 374***, it has been observed by the Hon'ble Apex Court;

"39. The issue of merger has no bearing in the facts and circumstances of the present petitions, since, the issue that was decided by the High Court in the earlier batch of writ petitions and the issue that was raised and considered in the subsequent public interest litigation is entirely different. Secondly, in our view the principles of res judicata are also not attracted since the issue raised and considered in the subsequent public interest litigation had not been raised and considered in the earlier round of litigation. It would be worthwhile to recall the observations made by this Court in **Madhvi Amma Bhawani Amma v. Kunjikutty Pillai Meenakshi Pillai (2000) 6 SCC 301)** wherein the Court has observed that : (SCC P. 306, para-7)

"7. In order to apply the general principle of res judicata the Court must first find, whether an issue in a subsequent suit, was directly and substantially in issue in the earlier suit or proceedings, was it between the same parties, and was it decided by such court. Thus there should be an issue raised and decided, not merely any finding on any incidental question for reaching such a decision."

So if such issue is not raised and if on any other issue, if, incidentally any finding is recorded, it would not come within the periphery of principle of res judicata.

iv) In ***Jamia Masjid v.K.V.Rudrappa,****reported in* ***(2022) 9 SCC 225,*** Dr. D.Y.Chandrachud, J. speaking for the bench in para-43 of the judgment observed as follows*:*

"43. The locus classicus on the point of determining if an issue was "directly and substantially" decided in the previous suit is the decision of M.Jagannadha Rao, J.

(writing for a two-Judge bench) in *Sajjadanashin Sayed Md. BE Edr v. Musa Dadabhai Ummer (Sajjadanashim Sayed Md. B.E. Edr v. Musa Dadabhai Ummer, (2000) 3 SCC 350).* During the course of the judgment, the Court analysed the expression "directly and substantially in issue" in Section 11 and laid down the twin test of essentiality and necessity: (SCC pp. 357 & 359-60, paras 12 and 18-19)

"12 It will be noticed that the words used in Section 11 CPC are "directly and substantially in issue". If the matter was in issue directly and substantially in a prior litigation and decided against a party then the decision would be res judicata in a subsequent proceeding. Judicial decisions have however held that if a matter was only "collaterally or incidentally" in issue and decided in an earlier proceeding, the finding therein would not ordinarily be res judicata in a latter proceeding where the matter is directly and substantially in issue."

53. In view of the aforesaid certain legal position this Court has no hesitation in holding that the finding of the coordinate Bench which has been arrived at on an incidental and ancillary issue that too without referring to the interim order passed earlier in this case and many materials on record would not operate as resjudicata so far the present Writ Petition is concerned. Moreover, this Court is of the view that the principle of resjudicata is based on a public policy that a party shall not be vexed twice for the self same cause of action. In the instant case, while the original issue was pending for adjudication in the present Writ Petition the same has been considered as an ancillary issue by the coordinate Bench is not final and as such would not be binding on this Court while deciding the issue which is involved in the present Writ Petition directly and substantially.

54. In view of the aforesaid analysis of facts as well as legal position and further taking into consideration the interim order passed earlier as well as the materials on record this Court has no hesitation to hold that the School in question was functioning despite letter under Annexure-3. Moreover, the School was established pursuant to a decision of the Governing Council of WALMI in terms of Rule 9 of Hand Book and the same having been approved by the Government, there was no necessity to close down the School. Moreover, the affidavit solely basing upon which the coordinate bench has come to a conclusion that the School is not functioning is in violation of Article 45, Article 21-A, Section 3 of RTE Act, 2009 and above all in violation of the interim order passed by this Court in the present Writ Petition. Accordingly, the letter under Annexure-3 and the advertisement under Annexure-4 are hereby quashed while allowing the present Writ Petition. This Court further directs that since this court has arrived at a conclusion that the School is functioning, the Opposite Parties shall do the needful and ensure that the School is transferred to the Education department as provided under the Hand Book for its smooth management running and maintenance. With regard to the prayer made by the two interveners for payment of their salary, they are directed to approach the Opposite Party No.1 by filing an appropriate application within a month from today. In the event such an application is filed, the Opposite Party No.1 shall do well to issue necessary direction and provide funds for payment of the dues payable to both

the interveners-Petitioners namely Mr.K.C.Swain and Smt.Gitanjali Jagdev by considering their claim within a period of three months from the date of filing of such application.

55. With the aforesaid observation/direction, the Writ Petition stands allowed, however there shall be no order as to cost.

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2023 (III) ILR – CUT- 865

V. NARASINGH, J.

BLAPL NO. 11273 OF 2022

VIKASH DAHAIYA ……..Petitioner

-V-

STATE OF ODISHA ……..Opp. Party

CRIMINAL PROCEURE CODE, 1973 – Section 439 – Bail – Plea of parity – Earlier the co-accused have been released on bail on account of misrepresentation of facts by both side before the court – Whether the Bail should be granted on the ground of parity? – Held, No – The claim of parity cannot be based on unsubstantiated assertions – There cannot be any straight jacket formula for applying the said doctrine.

(Paras 21-25)

Case Laws Relied on and Referred to :-

1. (2011) 1 SC 609 : Vijaysinh Chandubha Jadeja Vs. State of Gujarat.
2. (2013) 116 CLT 124 : Prafulla Sahu @ Geda Vs. State of Orissa.
3. 1998 Crl. L.J 2374 : Chander alias Chandra Vs. State of U.P.

For Petitioner : Mr. R.L. Pattnaik

For Opp. Party : Mr. Abhinandan Pradhan, ASC

JUDGMENT Date of Hearing : 14.02.2023 : Date of Judgment: 24.02.2023

V. NARASINGH, J.

1. Heard Mr. Mr. Pattnaik, learned counsel for the Petitioner and Mr. A. Pradhan, learned Addl. Standing Counsel.

2. The Petitioner is an accused in connection with Special G.R No.36 of 2021 pending on the file of learned Sessions Judge-cum-Special Judge, Malkangiri, arising out of Mathili P.S. Case No.42 of 2021 for commission of the alleged offence under Section 20(b)(ii)(C) of the N.D.P.S Act.

3. Being aggrieved by the rejection of his application for bail U/s. 439 Cr.P.C. by the learned Addl. Sessions Judge-cum-Special Judge, Malkangiri by order dated 03.11.2022, the present BLAPL has been filed.

4. The prosecution case in brief is that on 07.03.2021 at about 12.35 A.M. on the main road of Govindpally Bus Stand, the police found two vehicles were coming in high speed from Malkangiri side. On suspicion, the police officials on duty intercepted and stopped the said vehicles. On search, it was found by the police party that four persons including driver were sitting inside the vehicle (Maruti Suzuki Tour vehicle) bearing registration number HR-22-R-4972. Similarly, in the 2nd vehicle a Toyota Corolla bearing registration number HR-12-J-1000, it was found that four persons including driver were inside the vehicle.

4-A. On further verification, it is alleged that the police party found two plastic sacks in the 1st vehicle and three sacks in the 2nd vehicle loaded in the boot of the said two vehicles. It is stated that pungent smell of Ganja was coming out from the boot of both the vehicles.

4-B. On interrogation by the police, passengers of both the vehicles alleged to have confessed that they were carrying ganja kept in the plastic sacks and loaded in the boot of the aforesaid two vehicles. They further alleged to have confessed that the ganja, which was seized from the vehicles, was procured from Chitrokonda Swabhiman area and they were transporting the same in the above noted two vehicles. Upon seizure and measurement of the contraband articles, it was found that the said articles were being transported from the place of procurement to the place of destination by using the above noted two vehicles and police team recovered a total contraband article weighing 137 Kgs. and 300 grams. Accordingly, F.I.R. was lodged by Krutibash Behera, S.I. of Mathili P.S. on 07.03.2021 and S.I Siba Prasad Bhadra took up the investigation.

5. This is the second journey of the Petitioner to this Court. By order dated 30.03.2022 in BLAPL No.2568 of 2021, this Court rejected the bail application of the Petitioner, inter alia, negating his contention of violation of Sections 42 and 50 of the N.D.P.S Act. While doing so, liberty was granted to move at a later stage.

6. A Coordinate Bench of this Court by order dated 14.10.2022 in BLAPL No.2430 of 2021 (Annexure-3) directed release of the co-accused Raghu @ Rahul Rajput Thakur on the ground of infraction of Section 50 of the N.D.P.S Act and mainly relying on the ground of parity, the Petitioner is seeking release in the present bail application.

7. Paragraph-13 of the bail application, which is relevant for the purpose, is quoted hereunder:

> "14. That it is further submitted that the present Petitioner is custody since long and till date trial has not been commenced and in between co-accused namely Raghu @ Rahul

> Rajput Thakur released on bail by this Honourable Court in BLAPL No.2430 of 2021 on dtd.14.09.2022 and as such on the ground of parity the present petitioner also liable to be released on bail for the best interest of justice."

8. On perusal of the judgment of the Coordinate Bench which is annexed to this bail application at Annexure-3 series, it is seen that after analyzing the materials on record, this Court came to the finding that there has been no infraction of mandatory stipulations of Section 42 of the N.D.P.S Act.

9. But while referring to the alleged violation of Section 50 of the N.D.P.S Act, this Court took note of the stand of the prosecution in paragraph-14 of Annexure-3. The said paragraph is extracted hereunder:

> "14. Further a careful scrutiny of note of argument submitted on behalf of the prosecution, this court observed that no specific stand has been taken in the said note of argument with regard to the compliance/non-compliance of Sections 42 and 50 of the N.D.P.S. Act. Moreover, learned counsel for the State in support of his contention contended that compliance/non-compliance of Sections 42 and 50 of the N.D.P.S. Act is a matter of trial and in that context, he relies upon judgment of the Hon'ble Supreme court in the case of **Union of India through N.C.B., Lucknow vrs. Mohammad Nawaj Khan** (Criminal Appeal No.1043 of 2021 disposed of on 22.09.2022) and **Joswin Loba vrs. State of Karnataka** vide order dated 02.02.2022 passed by Hon'ble Karnataka High Court in Criminal Petition No.6916 of 2021."

9-A. In paragraph-19 thereof, it has been stated thus:

> "19. With regard to the petitioner's assertion that mandatory provision of Section 50 of the N.D.P.S. Act has not been complied with is concerned, this Court is of the considered view that in the judgment of the Hon'ble Supreme court in the case of **Union of India through N.C.B., Lucknow vrs. Mohammad Nawaj Khan** (supra), the Hon'ble Supreme Court has categorically observed that search was conducted in presence of the Gazetted Officer in compliance to the provision of Section 50 of the N.D.P.S. Act and the same is also found to have been mentioned in the F.I.R. also. On the other hand, in the present case, upon careful examination of the F.I.R. / P.R., it is seen that there is no whisper with regard to compliance of Section 50 of the N.D.P.S. Act."

9-B. In Paragraph-20 of the judgment at Annexure-3 series, Coordinate Bench of this Court came to the finding that there has been infraction of the mandatory provisions contained in Section 50 of the N.D.P.S Act and considering the implication thereof vis-à-vis the bar contained in Section 37 of the N.D.P.S Act directed release of the co-accused Raghu @ Rahul Rajput Thakur.

9-C. Paragraph-21 of the judgment (Annexure-3) dealing with non-compliance of Section 50 of the N.D.P.S Act, is quoted hereunder for convenience of ready reference.

> 21……due to non-compliance of Section 50 of the N.D.P.S. Act, this Court is of the prima facie opinion that there exists a reasonable ground to hold that the petitioner prima facie is not guilty due to non-compliance of mandatory provision of Section 50 and the

> petitioner is likely to be acquitted by the trial court, if there are no other materials / evidence brought on record in course of trial…."

10. Learned counsel for the Petitioner, Mr. Pattnaik submitted with vehemence that in view of categorical finding of the Coordinate Bench regarding infraction of Section 50 of the N.D.P.S. Act and release of the co-accused primarily on the said count, further continuance of the Petitioner in custody is not warranted and in fact punitive since ex facie he is similarly circumstanced.

11. Per contra, learned counsel for the State Mr. Pradhan, opposed the prayer for bail submitting that though there are materials on record which unerringly point to the compliance of Section 50 of the N.D.P.S Act but the same was not brought to the kind notice of the Coordinate Bench of this Court. Hence, the said judgment would not ennure to the benefit of the Petitioner.

12. It is the further submission of the learned counsel for the State relying on the judgment of the apex Court in the case of **Vijaysinh Chandubha Jadeja vrs. State of Gujarat, (2011) 1 SC 609** that even otherwise as mandated in the said judgment that the infraction of Section 50 of the N.D.P.S Act is a matter of trial in the facts scenario of the present case and in this context, he relies on particularly Paragraph-31 of the said judgment, which is extracted hereunder:

> "31…..**Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf**."

13. This Court diligently perused the final form which is on record annexed to the earlier BLAPL No.2568 of 2021 and the copy of the FIR which is on record in the case at hand.

14. On a bare perusal of the FIR (running page 20 of the brief), it can be seen that the S.I of Police Krutibash Behera who intercepted the vehicle in which contraband (ganja) to the tune of 137 Kgs. 300 grams was allegedly being carried has categorically stated thus:

> "…As the above noted persons were in exclusive and conscious possession of Ganja which is a contraband article and constitutes an offence under NDPS Act, 1985 and caught red handed in chance detection and due to high Maoist sensitivity, there is less scope to follow the procedures laid in Sec.42 NDPS Act. **I offered them in writing to be searched in presence of any Executive Magistrate or any Gazzated officer and explained them in Hindi/Odia laid down on Sec.50 NDPS Act. They replied in writing that as there was no incriminating article with them, they wants to be search personally by me**."

15. On perusal of the Final Form adverted to hereinabove, it is clear from the statements of Constables Arjun Kirsani (C.W.2), Abhimanyu Kope (C.W.3), Laxman Marandi (C.W.4) and Home Guards, Damu Nayak, Dambarudhar Nayak

and Sukra Kope cited as charge sheeted witness Nos.5,6 and 7 respectively who accompanied S.I Krutibash Behera (C.W.1) that said C.W.1 gave an option to the accused in terms of Section 50 of the N.D.P.S Act. Independent witnesses Gupta Mandi and Lali Sagaria, charge sheeted witness nos.8 and 9 respectively, have also stated regarding compliance of Section 50 of the N.D.P.S Act.

16. Statements of the said independent witnesses (C.W Nos.8 and 9) in vernacular are extracted hereunder:

> "….TAPARE BEHERA SIR SEHI 08 JANA AVHIJUKTA NKU MAGISTRATE DWARA NA KOUNASI GAZETTED OFFICER NKA DWARA TALASI HEBA KATHA PACHARI THILE KINTU SEMANE NIJA NIJA PAKHARE KOUNASI APATIKARA JINISA NAHI SETHI PAIN SEMANE SEMANAKARA TALASI BEHERA SIR NKA PAKHARE DEBE BOLI LIKHITA AKARA RE DEI THILE..."

16-A. The S.I of Police Krutibash Behera in his statement under Section 161 Cr.P.C. has reiterated the compliance relating to Section 50 of the N.D.P.S. Act and stated as under:

> "….I offered them in writing to be searched in presence of any Executive Magistrate or any Gazzated officer and explained them in Hind/Odia laid down on Sec.50 NDPS Act. They replied in writing that as there was no incriminating article with them, they wants to be search personally by me. I briefed about the incident to the witnesses."

17. From an analysis of the materials on record it is clearly borne out that there has been compliance of Section 50 of the N.D.P.S. Act. Since such material was not brought to the kind notice of the Coordinate Bench, it resulted in finding that there was infraction of Section 50 of the N.D.P.S Act.

17-A. As already noted, such contention of the learned counsel for the Petitioner is de hors the record.

18. In the factual backdrop of the categorical recitals in the case diary as extracted hereinabove relating to adherence to mandatory prescription of Section 50 of the N.D.P.S Act while conducting personal search of the accused, the Coordinate Bench's finding regarding non-compliance thereof and consequential release of the accused on the said ground on bail is not binding.

19. The rejection of the bail application of the co-accused (present Petitioner) negating the contention regarding infraction of Sections 42 and 50 of the N.D.P.S Act was also evidently not brought to the kind notice of the Coordinate Bench.

20. Earlier bail application of the present Petitioner was rejected by order dated 30.03.2022 in BLAPL No.2568 of 2021. Paragraphs 5,7,8 and 9 of the said order is quoted hereunder for convenience of ready reference:

> "xxx xxx xxx
>
> 5. Learned Senior Counsel for the petitioner submits that there has been patent violation of Sections 42 and 50 of the N.D.P.S. Act and independent seizures have been clubbed

> together so as to attract the bar under Section-37 of the NDPS Act and on bare perusal, it cannot be seen that the statement of the witnesses have been mechanically recorded, for which the petitioner is entitled to be released on bail.
>
> xxx xxx xxx
>
> 7. Per contra, the learned counsel for the State refutes the submission relating to violation of Section-42 and 50 of the NDPS Act and seeks dismissal of the bail application on account of the bar contained in Section-37 of the NDPS Act.
>
> 8. Taking into account the quantity of seizure of the contraband being to the tune of 138Kg 300grams (net weight), in view of the bar contained in Section-37 of the NDPS Act, this Court is not inclined to entertain the application for bail at this stage. Accordingly, the BLAPL is thus stands rejected.
>
> 9. It is open for the petitioner to move this Court at a later stage, if so advised."

21. It is manifestly clear that the judgment of this Court at Annexure-3 was passed on account of misrepresentation of facts by both sides.

22. It certainly does not augur well for the justice delivery system.

23. The claim of parity cannot be based on unsubstantiated assertions. The same has to be tested on the altar of facts and law. There cannot be any straight jacket formula for applying the said doctrine.

24. On the aspect of parity, this Court in the case of **Prafulla Sahu @ Geda vrs. State of Orissa**, **(2013) 116 CLT 124** quoted with approval the dictum of Allahabad High Court in the case of **Chander alias Chandra vrs. State of U.P**, **1998 Crl. L.J 2374**, which runs thus:

> "21. Our answers to the questions referred are as follows:
>
> 1. If the order granting bail to an accused is not supported by reasons, the same cannot form the basis for granting bail to a co-accused on the ground of parity.
>
> 2. A judge is not bound to grant bail to an accused on the ground of parity even where the order granting bail to an identically placed co-accused contains reasons, if the same has been passed in flagrant violation of well settled principle and ignores to take into consideration the relevant factors essential for granting bail."

25. It is trite law that parity cannot be the sole criterion for grant of bail. It is one of the facets of consideration and there can never be a straight jacket formula in applying the rule of parity. As it is often said each case has to be decided in the given facts.

26. Even otherwise as discussed hereinabove, the question of parity in the case at hand does not arise since the materials for consideration relating to alleged non-compliance of the mandatory provision contained in Section 50 of the N.D.P.S Act was not placed for kind consideration of the Coordinate Bench for which the co-accused was directed to be released, inter alia, for infraction of such mandatory provision.

27. Hence, on an analysis of the materials on record, this Court does not find any cogent reason to deviate from its earlier order dated 30.03.2022 in BLAPL No.2568 of 2021.

28. It is needless to state here that the observations made herein are only for the purpose of consideration of the bail application and ought not to be construed as expressing any opinion relating to the merit of the contention of the Petitioner regarding infraction of the mandatory provisions of Sections 42 and 50 of the N.D.P.S Act. Such contention regarding violation of such mandatory provision has to be construed independently on its own merit during trial.

29. Accordingly, BLAPL stands rejected.

—— o ——

2023 (III) ILR – CUT- 871

V. NARASINGH, J.

BLAPL NO. 7801 OF 2023

BIJENDRA SINGH .....Petitioner

-V-

STATE OF ODISHA .....Opp Party

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 37(1)(b)(ii) – The petitioner has criminal antecedent which reveals from the case Diary – The petitioner does not ordinarily resides in the state of odisha, he has flight risk – Whether the petitioner should be enlarged on bail? – Held, No – The petitioner cannot cross the twin bars in terms of section 37(1)(b)(ii) of the Act. (Paras 27-30)

Case Laws Relied on and Referred to :-

1. 2003 (2) M.P.L.J 587 : Manisha Neema Vs. State of M.P.
2. 2021 SCC OnLine J&K 751 : Khursheed Ahmad Kanna Vs. UT of J & K.
3. 2023 LiveLaw (SC) 533 : Rabi Prakash Vs. The State of Odisha.
4. 2021 (2) Crimes 164 (SC) : Boota Singh & Ors Vs. State of Haryana.
5. (2009) 8 SCC 539 : Karnail Singh Vs. State of Haryana.
6. [2010 SCC Online SC 1248 : Vijay Singh Chandubha Jadeja Vs. State of Gujrat.
7. (2002) 3 SCC 496 : Haryana Financial Corporation Vs. Jagdamba Oil Mills.

For Petitioner : Mr. S. Manohar

For Opp. Party : Mr. A. Pradhan, ASC

JUDGMENT Date of Hearing :17.10.2023 : Date of Judgment:19.10.2023

V. NARASINGH, J.

1. Heard learned counsel for the Petitioner Mr. S. Manohar through virtual mode and Mr. A. Pradhan, learned Additional Standing Counsel for the State.

2. The Petitioner is an accused in connection with Special G.R Case No.86 of 2022 pending on the file of learned Sessions Judge-cum-Special Judge, Malkangiri, arising out of Chitrakonda P.S. Case No.62 of 2022 for commission of the alleged offence under Sections 20(b)(ii)(C) & 25 of the NDPS Act.

3. Being aggrieved by the rejection of his application for bail U/s. 439 Cr.P.C by the learned Sessions Judge-cum-Special Judge, Malkangiri by order dated 16.01.2023 in the aforementioned case, the present bail application has been filed.

4. This is the second journey of the Petitioner to this Court.

5. The earlier bail application of the Petitioner in BLAPL No.1184 of 2023 assailing the very impugned order, which is at Annexure-3 passed by the learned Special Judge, Malkangiri dated 16.01.2023 in Special G.R. Case No.86 of 2022 arising out of Chitrakonda P.S. Case No.62 of 2022 dated 20.05.2022 under Sections 20(b)(ii)(C)/25 of the NDPS Act, was disposed of as withdrawn by order dated 28.03.2023.

6. The order passed on 28.03.2023 for convenience of ready reference and brevity is extracted hereunder;

"ORDER
28.03.2023

Order No.

02. 1. Learned counsel Ms. K. Pandey appearing on behalf of Mr. S. Manohar learned counsel for the petitioner seeks permission to withdraw this bail application.

2. Accordingly, the BLAPL stands disposed of withdrawn."

7. It is apt to note that learned counsel appearing in the case at hand was the learned counsel at whose behest the said withdrawal was sought.

Maintainability

8. When this matter was taken up for consideration, learned counsel for the State Mr. A. Pradhan raised primary objection regarding maintainability inasmuch as it was the contention of the learned counsel for the State that impugned order dated 16.01.2023 was already the subject matter of consideration in BLAPL No.1184 of 2023. Since the self-same order of rejection is being assailed and there being no change of circumstance, the present BLAPL is liable to be rejected on the said ground alone and in this context, he relies on the order of the Hon'ble High Court of Madhya Pradesh in the case of ***Manisha Neema vs. State of M.P, 2003 (2) M.P.L.J 587*** and the judgment of Hon'ble High Court of Jammu and Kashmir and Ladakh in the case of ***Khursheed Ahmad Kanna vs. UT of J & K, 2021 SCC OnLine J&K 751.***

9. Per contra, the learned counsel for the Petitioner Mr. S. Manohar relied on the decisions of the Apex Court in the cases of :

i. Sundeep Kumar Bafna vs. State of Maharashtra and another, **(2014) 16 SCC 623**

ii. Rani Dudeja vs. State of Haryana, **(2017) 13 SCC 555**

iii. Sharad vs. the State of Maharashtra in Criminal Appeal No.1221/2019 (Special Leave to Appeal (Crl.) No.2232/2018) disposed of on 08.08.2019

10. The point for consideration in the case of **Sundeep Kumar Bafna (Supra)** has been set out in the very opening paragraph of the said Judgment which, is extracted hereunder for convenience of ready reference;

> "……. The futility of the appellant's endeavours to secure anticipatory bail having attained finality, he had once again knocked at the portals of the High Court of Judicature of Bombay, this time around for regular bail under Section 439 of the Code of Criminal Procedure (CrPC), which was declined with the observations that it is the Magistrate whose jurisdiction has necessarily to be invoked and not of the High Court or even the Sessions Judge. The legality of this conclusion is the gravamen of the appeal before us……..."

10.A. The Apex Court gave its finding with regard to the issue as quoted above at paragraph 24 @ page 647 and Paragraph 33 @ Page 652. The same is culled out hereunder for convenience of ready reference;

> **"24.** In this analysis, the opinion in the impugned judgment incorrectly concludes that the High Court is bereft or devoid of power to jurisdiction upon a petition which firstly pleads surrender and, thereafter, prays for bail. The High Court could have perfunctorily taken the appellant into its custody and then proceeded with the perusal of the prayer for bail; in the event of its coming to the conclusion that sufficient grounds had not been disclosed for enlargement on bail, necessary orders for judicial or police custody could have been ordained. A Judge is expected to perform his onerous calling impervious of any public pressure that may be brought to bear on him."
>
> xxx xxx xxx
>
> **"33.** In conclusion, therefore, we are of the opinion that the learned Single Judge erred in law in holding that he was devoid of jurisdiction so far as the application presented to him by the appellant before us was concerned. Conceptually, he could have declined to accept the prayer to surrender to the Court's custody, although, we are presently not aware of any reason for this option to be exercised. Once the prayer for surrender is accepted, the appellant before us would come into the custody of the Court within the contemplation of Section 439 CrPC. The Sessions Court as well as the High Court, both of which exercised concurrent powers under Section 439, would then have to venture to the merits of the matter so as to decide whether the applicant-appellant had shown sufficient reason or grounds for being enlarged on bail."

11. The issue in the case of Rani Dudeja (Supra) is set out in paragraph 2. And, in paragraph 3 thereof, the Apex Court decided the issue. It is apt to note that the same related to filing of petition for anticipatory bail under Section 438 of Cr.P.C.

11.A. Paragraph-2 and 3 of the said judgment is extracted hereunder;

> "2. The appellant approached the High Court with a petition under Section 438 CrPC. By the impugned order dated 7-3-2017, the petition was rejected on the ground that the

appellant had filed a petition earlier and the same had been withdrawn and, therefore, the appellant cannot be allowed to reagitate the matter on merits.

3. We are afraid, the stand taken by the High Court cannot be appreciated. The petition was for anticipatory bail and the one which had been filed earlier might have been withdrawn in a given situation, without inviting the Court to consider the same on merits. On change of circumstances, when another application under Section 438 CrPC was filed, the High Court should have considered the same on merits. The principle of res judicata could not have operated in an application for bail."

12. In the case of Sharad (Supra) the issue involved is extracted hereunder;

xxx xxx xxx

"Having carefully scrutinized the material available on record, we are of the considered view that the High Court has passed the impugned order, without application of its mind, by revoking the bail granted to the appellant by the Additional Sessions Judge-3, Nagpur in Misc. Criminal Application No. 1847 of 2017, on the ground that the application was not maintainable before the Trial Court as the appellant previously approached the High Court for bail and subsequently withdrew the bail application."

xxx xxx xxx

12.A. On a bare perusal of the aforementioned judgment, it is manifestly clear that it does not relate to the pointing issue regarding maintaibility, as raised by the learned counsel for the State.

13. The order of the Madhya Pradesh High Court in the case of Manisha Neema (Supra) relied upon by the learned counsel for the State the issue is stated in Paragraph-3 of the order and is quoted hereunder;

"3. The contention of the learned counsel for the applicant is that section 438 of the Criminal Procedure Code provides concurrent jurisdiction and therefore, it is the choice of the applicant to approach either of the Courts. In the application, the applicant has not mentioned the facts of the case as to how and on what basis, she has an apprehension for her arrest which may facilitate this Court to apply its mind effectively while using power under section 438 of the Code of Criminal Procedure. In the application, no reasons have been assigned as to why she has not approached and what are the special circumstances under which, the applicant filed this application directly before this Court though she is not a permanent resident of Indore. She is resident of Subhash Chowk, Sanawad (District Khargone, M.P.). The applicant has even not mentioned that as to how she is connected with the firm and whether it is a partnership firm or proprietory firm. If it is a partnership firm, then, whether she is a working partner or sleeping partner, has also not been mentioned."

13.A. And, the judgment of Hon'ble High Court of Jammu and Kashmir and Ladakh in the case of Khursheed Ahmad Kanna (supra) the issue involved, stated in paragraph 12 of the judgment is extracted hereunder;

"12. In the instant case, the petitioner has approached this Court directly without exhausting the remedy before learned Special Judge and even if petitioner did approach the said Court, yet he abandoned the application midway without actually exhausting the said remedy as the petitioner withdrew the said application. There are no exceptional

> circumstances in the case in hand which would entitle the petitioner to move the bail application directly before this Court."

14. The decisions relied upon by both the learned counsel for the Petitioner and the State do not lend any assistance, to decide the issue as to whether this Court can consider the bail application on merits when the earlier bail application was withdrawn, relating to the self-same impugned order, passed by the learned Special Judge.

15. The submission of the learned counsel for the Petitioner that since earlier bail application in respect of the self-same impugned order was withdrawn, there is no bar to assail the very order without moving the learned Special Judge de novo militates against commonsense. Inasmuch as, it does not stand to reason as to why an accused will withdraw an application when the Court is inclined to grant him bail.

16. Be that as it may, such question of maintainability is left open to be decided.

MERIT OF THE CASE

17. It is the case of the prosecution that on 20.05.2022 at about 10.30 A.M., S.I. Mr. Sarbeswar Bhoi was performing blocking duty and motor vehicle checking between Mantiriput Chowk to the road running from Balimela to Chitrakonda. Around 11 A.M. one TATA ARIA vehicle bearing Registration No.JH-05-BG-3870 was found to be coming in a high speed from Balimela side and four persons were sitting in the said Car. On seeing the police personnel, the driver and other three persons got down from the vehicle and started running towards the jungle. But they were nabbed and on interrogation they disclosed their names as Prakash Sardar, Harendra Kumar, Susil Kumar and present Petitioner Bijendra Singh.

18. On checking, police found six numbers of polythene bags in the middle seat and back side of the vehicle containing suspicious materials. In the presence of the Executive Magistrate contraband to the tune of 253 kg 300 grams Ganja was recovered from the accused persons. Since the accused persons had conscious and exclusive possession of the contraband, they were forwarded to the Court and the charge sheet in the case at hand has been filed on 14.11.2022 and the present Petitioner along with co-accused are facing trial.

19. It is stated by the learned counsel for the Petitioner that since the Petitioner is in custody from 20.05.2022 and there is no significant progress in trial, he ought to be released on bail and it is his further submission that it is the case of false implication and he also alleges noncompliance of Sections 42 and 50 of the NDPS Act.

20. It is the submission of the learned counsel for the Petitioner, Mr. Manohar that the twin condition contained in Section 37(1)(b)(ii) of the NDPS Act are satisfied in the case at hand. Hence, it ought not to deter the Court from releasing the Petitioner on bail. And, it is his further submission that inference under Section

114(g) of the Evidence Act should be drawn against the prosecution and relying on the order of the Apex Court in the case of ***Rabi Prakash vs. The State of Odisha reported in 2023 LiveLaw (SC) 533,*** Petitioner seeks release, as he is in custody since 20.05.2022.

21. Per contra, the learned counsel for the State, Mr. A. Pradhan opposes the prayer for bail in view of the bar contained in Section 37(1) of the NDPS Act and refutes the allegations relating to false implication and violation of statutory provision etc.

22. It is the further submission of the learned counsel for the State that co-accused Harendra Kumar who is similarly placed with the present Petitioner had moved this Court in BLAPL No.1183 of 2023 and the same was withdrawn with liberty to move at later stage after examination of material witnesses.

23. It is stated that the Petitioner is at all fours with said co-accused. Hence, the present BLAPL does not merit consideration.

24. To fortify his stand regarding adherence to the statutory provisions, learned counsel for the State refers to the statement of the I.O. wherein, option was given to the detainees in writing in Odia and Hindi whether they want to be searched along with the plastic bag by the Executive Magistrate or any Gazetted Officer and the requisition addressed to the Sub-Collector cum-S.D.M. Malkangiri to depute the Executive Magistrate to the spot to remain present during search and seizure.

He also relies on the statements of the independent witnesses Chaitan Nag and Dambru Nag, CSW Nos.2 & 3 respectively to fortify his submission. He also draws attention of this Court to the compliance of Section 42 of the NDPS Act with reference to case diary.

25. On the basis of recitals in the Case Diary, it is stated that the Petitioner has criminal antecedent.

25.A. The criminal antecedent relating to the Petitioner as stated in the case diary is extracted hereunder;

xxx xxx xxx

> Received the C/A verification from SHO, Daunagar PS in the name of Accused Bijendra Singh(45)S/o- Ramprasad Singh of vill-Talar PS-Daunagar Dist-Aurangabad (Bihar). From the available crime records and found he was involved in the Daunagar PS Case no.24/22 Dtd.13.01.2022 U/s-Bihar Prohibition and Excise Amendment against him. The report is enclosed here with in a separate sheet.

xxx xxx xxx

26. It is the further submission of the learned counsel for the State that since the Petitioner does not ordinarily reside in the State of Odisha, he is a flight risk and bail application does not merit consideration of this Court, on this count also.

27. The law governing the adherence to Section 42 of the NDPS Act is no longer res integra. Though total non-compliance of the Section 42 of NDPS Act can never be countenanced. (Ref: ***Boota Singh & others vs. State of Haryana; 2021 (2) Crimes 164 (SC)***.).

In the case of ***Karnail Singh vrs. State of Haryana: (2009) 8 SCC 539*** the Apex Court has clearly laid down that aspect of compliance of Section 42 of NDPS Act has to be decided in each case on its own facts.

27.A. In the factual background of the case at hand, as noted, this Court is of the considered view that there has been compliance of Section 42 of NDPS Act.

28. As regards alleged infraction of Section 50 of the NDPS Act, the submission of the learned counsel for the Petitioner, Mr. Manohar has to be tested on the touch stone of the law laid down by the Apex Court in the case of ***Vijay Singh Chandubha Jadeja vs. State of Gujrat [2010 SCC Online SC 1248***] wherein, it has been laid down that infraction of Section 50 of the NDPS Act "is a matter of trial".

29. In this context, paragraph 31 of the said judgment is culled out hereunder;

> **"31.** …….. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf."

30. On consideration of materials on record, this Court is not persuaded to hold that there is no prima facie case against the Petitioner and keeping in view the criminal antecedent of the Petitioner, as noted, in the considered opinion of this Court the Petitioner cannot cross the twin bars in terms of Section 37(1)(b)(ii) of the NDPS Act. As rightly stated by the learned counsel for the State, the Petitioner is also a flight risk and on the basis of materials the challenge to infraction of Section 42 and 50 of the NDPS Act has to be negated.

31. On a conspectus of materials on record, this Court does not find any merit in the case at hand. The bail application accordingly stands rejected.

32. It is needless to state here that the observations made herein are only for the purpose of consideration of the bail application of the Petitioner and ought not to be construed as expressing any opinion relating the complicity of the Petitioner which has to be adjudicated independently in the impending trial including the challenge to the infraction of statutory provisions, false implication etc.

33. Since trial has already commenced, as stated by the learned counsel for the State and four witnesses stated to have been examined in the meanwhile, learned Court in seisin is requested to conclude the trial expeditiously as the Petitioner is in custody since 20.05.2022.

34. Before parting with the case, it is worth stating with all humility that the Apex Court has been repeatedly reiterating not to cite judgments mechanically

without reference to the factual matrix of each case. The case at hand is a glaring instance where plethora of judgments have been relied upon by the learned counsel for both the sides relating to maintainability and the learned counsel for the Petitioner on merits oblivious of the facts. In doing so, the judgment of the Apex Court in the Case of ***Haryana Financial Corporation V. Jagdamba Oil Mills*** reported in ***(2002) 3 SCC 496*** evidently escaped the attention of the learned counsel.

35. It is high time that lawyers who, first and foremost are officers of the Court exercise discretion in citing precedents which, would go a long way in facilitating speedy and just disposal of the cases.

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2023 (III) ILR – CUT- 878

BIRAJA PRASANNA SATAPATHY, J.

W.P.(C) NO. 21917 OF 2023

ANITA MANJARI ROUT .....Petitioner

-V-

PRESIDENT, ORISSA ASSOCIATION THE BLIND, ODISHA, BHUBANESWAR & ORS. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 12, 226 – Maintainability of writ – Whether Orissa Association for Blind can be treated as 'state' as per Article 12 of the constitution of India and accordingly writ can be issued against it? – Held, No – The Association has not fulfilled the criterias as framed by the Hon'ble Apex Court in the case of Ajay Hasia vrs. Khalid Mujib Sehravardi and others.

Case Laws Relied on and Referred to :-

1. AIR 1989 SC 341 : Vidya Dhar Pande Vs. Vydut Grih Siksha Samiti & Ors.
2. AIR 1985 (SC) 364 : Manmohan Singh Jaitla Vs. Commissioner, Union Terriotory, Chandigarh & Ors.
3. 1994 LAB IC 1300 : Smt. Dipali Ghosh Vs. State of West Bengal.
4. 2014 (Suppl. –II) OLR 927 : Nagendra Nath Mohapatra Vs. State of Orissa & Ors.
5. 1981 S.C 487 : Ajay Hasia Vs. Khalid Mujib Sehravardi & Ors.

For Petitioner : M/s. N. Panda, J.K. Rout

For Opp. Parties : M/s. B. Panigrahi, A.S.C

JUDGMENT Date of Hearing: 14.08.2023 & Date of Judgment: 22.09.2023

BIRAJA PRASANNA SATAPATHY, J.

The present Writ Petition has been filed by the Petitioner inter alia with the following prayer.

> "*It is therefore, humbly prayed that this Hon'ble Court may be graciously pleased to admit the Writ Petition, issue notice to the Opp. Parties by considering the facts and the ground stated above the Opp. Parties may direct to allow the petitioner to resume her duty as "AIYA" in Utkal Blind Organization Vocational and training Centre in girls Hostel with all service benefits.*
>
> *And pass any other order/orders as would be deemed fit and proper*
>
> *And for which act of kindness, the petitioner as in duty bound shall ever pray."*

2. Since this Court taking into account the prayer made in the Writ Petition took a view that no writ can be issued as against Orissa Association for Blind and raised the question of maintainability, learned counsel appearing for the petitioner was directed to satisfy this court on the said issue.

3. Pursuant to such direction of this Court, Mr. Niranjan Panda, learned counsel appearing for the Petitioner in support of maintainability of the Writ Petition against Orissa Association for Blind contended that Orissa Association for the Blind is a sister organization of National Association for the Blind, Mumbai and All India Confederation of Blind, New Delhi. Since the Petitioner is working as an "Aiya" in Utkal Blind Organization of Vocational and Training Centre, so run by Orissa Association for the Blind with consolidated remuneration of Rs.5000/- and the Petitioner was illegally terminated from her services in violation of the principle of natural justice, the said order of termination is not sustainable in the eye of law.

3.1. It is also contended that since principle of natural justice was not followed and challenging such illegal order of termination, the Petitioner has made a representation to the Collector, Khurda under Annexure-3 and no action was taken by the said authority, necessary direction be issued to Opp. Party Nos.4 & 5 to allow the Petitioner to resume her duty in Utkal Blind Organization Vocational and Training Centre in the Girls Hostel.

3.2. On the question of maintainability of the Writ Petition against Orissa Association for Blind, learned counsel for the Petitioner relied on the decision of the Hon'ble Apex Court reported in the case of ***Vidya Dhar Pande Vs. Vydut Grih Siksha Samiti and Others***, reported in AIR ***1989 SC 341***. Hon'ble Apex court in Paragraph 7,9,11,14,15 & 16 of the said judgment has held as follows.

> ***7.*** *Two questions therefore fall for consideration namely whether the Regulations framed pursuant to a Statute can be said to have a statutory force the breach of which will entitle the aggrieved employee to get a declaration that the PG NO 448 impugned order was invalid and illegal and the employee should be allowed to continue in service or should be re- instated in service. The High Court has relied upon the decision of this Court in Dr. Ram Pal Chaturvedi v. State of Rajasthan and Ors.,(supra) as well as Indian Airlines Corporation v. Sukhdeo Rai, [1971] 2 SCC 192. In the case of Dr. Ram Pal Chaturvedi v. State of Rajasthan and Ors., the appointment of three respondents namely Dr. D.G. Ojha, Dr. P.D. Mathur and Dr. Rishi as Principal of Sr. Patel Medical College, Bikaner, Rabindra Nath Tagore Medical College, Udaipur and*

Medical College, Jodhpur respectively was challenged on the ground that though they fulfilled the qualifications prescribed by Rule 30(4) of the Rajasthan Medical Service (Collegiate Branch) Rules 1962 they had not the requisite experience as provided in Ordinance No. 65 framed under the University of Rajasthan Act of 1946 and as such their appointments were not valid and legal. The Syndicate of the Rajasthan University constituted under Section 21 of the Act is empowered under Section 29 read with Section 30 to make ordinances, consistent with the Act and statutes, to provide for the matters listed in Section.

X XX XXX XXX

9. *The question whether a regulation framed under power conferred by the provisions of a Statute has got statutory power and whether an order made in breach of the said Regulation will be rendered illegal and invalid, came up for consideration before the Constitution Bench in the case of Sukhdev Singh & Ors. v. Bhagatram Sardar Singh Raghuvanshi and Anr., [1975] 3 SCR 619. In this case it was held that:*

"There is no substantial difference between a rule and a regulation inasmuch as both are subordinate legislation under powers conferred by the statute. regulation framed under a statute applies uniform treatment to every one or to all members of some group or class. The Oil and Natural Gas Commission, the Life Insurance Corporation and Oil and Natural Gas Commissionaire all required by the statute to frame regulations inter alia for the purpose of the duties and conduct and conditions of service of officers and other employees. These regulations impose obligation on the statutory authorities. The statutory authorities cannot deviate from the conditions of service. Any deviation will be enforced by legal sanction of declaration by courts to invalidate actions in violations of rules and regulations. The existence of rules and regulations under statute is to ensure regular conduct with a distinctive attitude to that conduct as a standard. The statutory regulations h the cases under consideration give the employee a statutory status and impose restriction on the employer and the employee with no option to vary the condition."

XXX XXX XXX

11. *In Indian Airlines Corporation v. Sukhodeo Rai (AIR 1971 SC 1828) the respondent who was an employee of the Indian Airlines Corporation Was found guilty of certain charges and dismissed from service after an enquiry held in breach of the procedure laid down by the Regulations made by the appellant under Section 45 of the Air Corporation Act, 1953. A suit was filed by the respondent challenging the order of termination It was decreed by the Trial Court holding that the dismissal was illegal and Granted a declaration that he be continued to remain he service. The Appellate Court as well as the High Court confirmed the decree. On appeal this Court held that the relationship between the appellant,Indian Air lines Corporation and the respondent would in such cases be contractual i.e. as between a master PG NO 450 and servant and the termination of that relationship would not entitle the servant to a declaration that his employment had not been validly determined. The termination though wrongful in breach of the terms and conditions which governed the relationship between the Corporation and the respondent yet it did not fall under any of the three well recognised exceptions and therefore the respondent was only entitled to damages and not to a declaration that this dismissal was null and void. The respondent has sought support from this decision. We are afraid the contention is wholly untenable. The decision in Indian Airlines' case has in terms been declared to be no longer good law and has in*

terms been overruled in Sukhdev Singh's case (1975) 3 SCR 619 by the Constitution Bench. C Says Ray, C.J. speaking for the Court:

"In the Indian Airlines case this Court said that there being no obligation or restriction in the Act or the rules subject to which only the power to terminate the employment could be exercised the employee could not contend that he was entitled to a declaration that the termination of his employment was null and void. In the Indian Airlines Corporation case reliance was placed upon the decision of Kruse v Johnson, [1898] 2 Q.B. 91 for the view that not all by-laws have the force of law. This Court regarded regulation as the same thing as by-laws. In Kruse v. Johnson the Court was simply describing the effect that the county by-laws have own the public. The observations of the Court in Kruse v. Johnson, that the by-law "has the force of law within the sphere of its legitimate operation" are not qualified by the words that it is so "only when affecting the public or some section of the public. ordering something to be done or not to be done and accompanied by some sanction or penalty for its non- observance." In this view a regulation is not an agreement or contract but a law binding the corporation, its officers, servants and the members of the public who come within the sphere of its operations. The doctrine of ultra vires as applied to statutes, rules and orders should equally apply to the regulations and any other subordinate legislation. The regulations made under power conferred by the statute are subordinate legislation and have the force and effect, if validity made, as the Act passed by the competent legislature.

In U.P. Warehousing Corporation and Indian Air-lines PG NO 451 Corporation case the terms of the regulations were treated as terms and conditions of relationship between the Corporation and its employees. That does not lead to the conclusion that they are of the same nature and quality as the terms and conditions laid down in the contract employment. Those terms and conditions not being contractual are imposed by one kind of subordinate legislation, Viz. regulations made in exercise of the power conferred by the statute which constituted that Corporation. of the regulations are not terms of contract. In the Indian Airlines Corporation case under section 45 of the Air Corporations Act, 1953, the Corporation had the power to make regulations not inconsistent with the Act and the rules made by the Central Government thereunder. The Corporation bad no power to alter or modify or rescind the provisions of these regulations at its discretion which it could do in respect of the terms of contract that it may wish to enter with its employees independent of these regulations. So far as the terms of the regulations are concerned,the actions of the Corporation are controlled by the Central Government. The decisions of this Court in U.P. Warehousing Corporation and Indian Airlines Corporation are in direct conflict with decision of this Court in Naraindas Barot's case which was decided by the Constitution Bench.

XXX XXX XXX

14. *Manmohan Singh Jaitla v. Commissioner, U. T. of Chandigarh and Ors., [1984] (Supp) SCC 540 the appellant was appointed as Head Master of an aided School. He was later confirmed by the competent authority. A charge- sheet was served on the appellant and disciplinary enquiry was held against him under section 3 of the Punjab Aided Schools (Security of Service) Act. The enquiry was however, withdrawn later on and his seven years service was terminated by invoking the service agreement on ground that his service was no more required by the School. This order was challenged by a writ petition before the High Court which rejected the same in limine but by a speaking order observing that as the School cannot be said to be 'other authority' under Article 12, it was not amenable to the writ jurisdiction of the High Court. The Supreme Court negatived the said finding of the High Court and held as follows:*

"The matter can be viewed from a slightly different angle as well. After the decision of the Constitution Bench of this Court in Ajay Hasia v. Khalid Mujib Sehravardi, [1981] 1 SC 722 the aided school receiving 95% of expenses by way of grant from the public exchequer and whose employees have received the statutory protection under the 1969 Act and who is subject to the regulations made by the Education Department of the Union Territory of Chandigarh as also the appointment of Headmaster to be valid must be PG NO 453 approved by the Director of Public Instructions, would certainly be amenable to the writ jurisdiction of the High Court. The High Court unfortunately, did not even refer to the decision of the Constitution Bench in Ajay Hasia, case rendered on November 13, 1980 while disposing of the writ petition in 1983. in 1983. In Ajay Hasia case, Bhagwati, J. speaking for the Constitution Bench inter alia observed (SCC p. 737, para 9) that "where the financial assistance of the State is so much as to meet almost entire expenditure of the Corporation, it would afford some indication of the Corporation being impregnated with governmental character". Add to this "the existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality". Substituting the words 'public trust' in place of the 'corporation' and the reasons will mutatis mutandis apply to the School. Therefore, also the High Court was in error in holding that the third respondent-School was not amenable to the writ jurisdiction of the High Court."

***15**. In Indra Pal Gupta v. Managing Committee, Model Inter College, Thora [1984] 3 SCC 384 the appellant was appointed on probation for one year as Principal of Model Inter College, Thora, District Bullandshahr in accordance with the procedure prescribed by the Intermediate Education Act, 1921 (U.P. Act No. 2 of 1921) and the Regulations made thereunder. The period of probation was however, extended by the Managing Committee of the said Model Inter College for a further period of one year. On April 27, 1969 the Managing Committee adopted a resolution to terminate the services of the appellant in consideration of the report of the Manager of the College to the effect that due to his unsatisfactory services, it would not be in the interest of the Institution to permit him to continue as probationer any longer. The service of the appellant was thus terminated without complying with the mandatory procedure laid down in Regulations 35 to 38 which provided for forming a sub- committee to enquire into the allegations against the Principal and to frame definite charges against the Principal and to give him opportunity of hearing. It was held that the order of termination made in breach of the provisions of the said Regulations which were made in pursuance of the provisions of the said Act, is illegal and invalid and as such the same was quashed. The appellant was further declared to be in service of the College.*

***16**. On a conspectus of these decisions the irresistible conclusion follows that the impugned order of termination of PG NO 454 the appellant from the post of Principal of the Higher Secondary School in breach of the Regulation 79 framed under the said Act is illegal and as such the same is liable to be quashed as the Regulations have got statutory force. The appellant is liable to be re-instated in the service as Principal of the said College. We also hold that the Higher Secondary School in question though run by a private trust receives 100% grant from the Government as in evident from the affidavit sworn on behalf of the appellant and as such it is amenable to the writ jurisdiction for violation of the provisions of the said Regulations in passing the impugned order of termination of service of the appellant. We therefore, set aside the order passed by the High Court which, in our opinion, is unsustainable and direct the respondents to re-instate the appellant in the service of the said College. Considering the facts and circumstances of the case we are of the opinion that the ends of justice would be met by*

directing the respondents to pay to the appellant a sum equal to 50% of the salaries and allowances from the date of termination till his re-instatement in service as it appears that the appellant was not in employment during this period. The appeal is, therefore. allowed with costs.

3.3. Learned counsel for the Petitioner also relied on another decision of the Hon'ble Apex Court in the case of ***Manmohan Singh Jaitla Vs. Commissioner, Union Terriotory, Chandigarh & Others,*** reported in ***AIR 1985 (SC) 364***. Honble Apex court in paragraphs-7 & 8 of the said judgment has held as follows.

7. The High Court declined to grant any relief on the ground that an aided school is not 'other authority' under Act. 12 of the Constitution and is therefore not amenable to the writ jurisdiction of the High Court. TheHigh Court clearly overlooked the point that Deputy Commissioner and Commissioner are statutory authorities operating under the 969, Act.They are quasi-judicial authorities and that was not disputed. Therefore, they will be comprehended in the expression 'Tribunal' as used in Art. 227 of the Constitution which confers power of superintendence over all courts and tribunals by the High Court throughout the territory in relation to which it exercises jurisdiction.Obviously, therefore, the decision of the statutory quasi-judicial authorities which can be appropriately described as tribunal will be subject to judicial review namely a writ of certiorari by the High Court under Art.227 of the Constitution.The decision questioned before the High Court was of the DeputyCommissioner and the Commissioner exercising power under Sec. 3 of the 1969 Act. And these statutory authorities are certainly amenable to the writ jurisdiction of the High Court

8. *The matter can be viewed from a slightly different angle as well. After the decision of the Constitution Bench of this Court in Ajay Hasia etc.v. Khalid Mujib Sehrvardi & Ors. etc-(l) the aided school receiving 95%- of expenses by way of grant from the public exchequer and whose employees have received the statutory protection under the 1969 Act and who is subject to the regulations made the Education Department of the Union Territory of Chandigarh as also the appointment of Head Master to be valid must be approved by the Director of public Instructions, would certainly be amenable to the writ jurisdiction of the High Court. The High Court unfortunately, did not even refer to the decision of the Constitution Bench in Ajay Hasia's case rendered on November 13, 1980 while disposing of the writ petition in 1983. In Ajay Hasia's case, Bhagwati, J. speaking for the Constitution Bench inter alia observed that 'the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.' Add to this the existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality Substituting the words 'public trust' in place of the 'corporation' and the reasons will mutatis mutandis apply to the school. Therefore, also the High Court was in error in holding that the third-respondent school was not amenable to the writ jurisdiction of the High Court.*

3.4. Mr. N. Panda, learned counsel for the Petitioner also relied on a decision of the Calcutta High Court reported in the case of ***Smt. Dipali Ghosh Vs. State of West Bengal,*** reported in ***1994 LAB IC 1300***. The Calcutta High Court in Paragraphs- 29, 30 & 33 of the said judgment has held as follows:

29. *Lastly it was contended that the writ will not lie against the Administrator. It is too late in the day to urge this contention. Writ may also lie even against an individual. Primary education is entirely controlled by the State under the Urban Primary Education Act and Rules made thereunder. Prosecution of education is a policy of the State and any agency which promotes such policy should be treated an authority within the meaning of Art.12 of the Constitution.*

30. *In this connection, the following observations of the Supreme Court from the judgment in the Comptroller and Auditor General of India v. K.S. Jagannathan reported in AIR 1987 SC 537: (1987 Lab IC 262), throw light on the width of the extraordinary writ powers of the High Court:*

"Under Art.226 of the Constitution, every High Court has the power to issue to any person or authority, including in appropriate cases any Government throughout the territories in relation to which it exercises jurisdiction, directions, orders or writs including writs in the nature of habeas corpus, mandamus, quo warranto and certiorari, or any of them, for the enforcement of the Fundamental Rights conferred by Part III of the Constitution or for any other purpose. In Dwarkanath V. Income Tax Officer, Special Circle,Kanpur (1965) 3 SCR 536, 540: (AIR 1966 SC 81 at p. 84) this Court pointed, out that Art.226 is designedly couched I a wide language in order not to confine the power conferred by it only to the power to issue prerogative writs as understood in England, such wide language being used to enable the High Courts "to reach injustice wherever it is found" and "to mould the reliefs to meet the peculiar and complicated requirements of this country."

There is thus no doubt that the High Courts in India exercising their jurisdiction under Art.226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised he discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or an irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing whih such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Art.226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion."

33. *For the foregoing reasons, this application is allowed and the Rule is made absolute to the extent indicated above. The respondents are directed to approve appointment of the Petitioner within two weeks from the date of communication of this order. Such approval shall be effected from 16th January, 1976 when her appointment was approved by the Managing Committee upon retirement of one or more teacher of the school. The Petitioner will not be entitled to any arrear salary but her salary shall be fixed in the scale notionally from 16th January,1976 as is admissible to a primary teacher. However, she shall be paid her salary upon such notional fixation from June 1993 onwards.*

4. Mr. B. Panigrahi, learned Additional Standing Counsel with regard to maintainability of the Writ Petition against the Orissa Association for the Blind, relied on the decision of this Court Court reported in the case of ***Nagendra Nath Mohapatra Vs. State of Orissa & Others, 2014 (Suppl. – II) OLR 927***. It is contended by the learned Addl. Standing Counsel that this Court in the above noted case placing reliance on various decisions of the Hon'ble Apex Court, while deciding the meaning of State or an instrumentality of the State or other authorities within the meaning of Article 12 of the Constitution of India, ultimately held that the guideline issued by the Hon'ble Apex court in the case of ***Ajay Hasia Vs. Khalid Mujib Sehravardi & Others,*** reported in ***1981 S.C 487*** is to be followed while deciding the issue in question.

Mr. Panigrahi, learned Addl. Standing Counsel relied on Paragraphs-11 to 19 of the said order, which reads as follows-:

> ***11.*** *In Sabhaijit Tewarry v. Union of India, AIR 1975 SC 1329 the apex Court has held in no undertain terms, that a society registered under the Societies Registration Act, 1860 can never be regarded as an 'authority' within the meaning of Article 12.*
>
> ***12.*** *If the Society is an 'authority' and therefore, "State" within the meaning of 'Article 12, it must follow that it is subject to the constitutional obligation under Article 14. The true scope and ambit of Article 14 has been the subject matter of numerous decisions and it is not necessary to make any detailed reference to them and it is sufficient to State that the content and reach of Article 14 must be confused with the doctrine of classification because the view taken was that Article forbids discrimination and there would be no discrimination where the classification making the differential fulfils two conditions, namely, (i) that the classification is founded on an intellilgble differential which distinguishes persons or things that are grouped ogether from others left out of the group; (ii) that the differentia has a rational relation to the object sought to the achieved by the impugned legislative or executive action. Reference can also be made to other judgments of the apex Court in Gulam Abbas and others v. State of U.P and Others AIR 1981 SC 2198, Som Prakash v. Union of India, AIR 1981 SC 212. But all these questions have been considered by the Constitution Bench of the apex Court in Ajay Hasia v. Khalid Mujib Sehravardi and others, AIR 1981 SC 487.*
>
> ***13.*** *In Tekraj Vasandi alia Basandi v. Union of India, AIR 1988 SC 469 (paragraphs 17-A and 20), with the approval, the observations of Justice Shah in Uajm Bai case, it is held that the expression 'authority' in its etymologicalsense means a body invested with power to command or give an ultimate decision, or enforce obedience, or having a legal right to command and be obeyed. But in paragraph 20 of the Court observed as followed:*
>
> *"In a Welfare State, as has been pointed out on more than one occasion by this Court, Governmental control is very pervasive and in fact touches all aspects of social existence in the absence of a fair application of the tests to be made, there is possibility of turning every non-governmental society into agency or instrumentally of the State. That obviously would not serve the purpose and may be far from reality."*
>
> ***14.*** *In Chandra Mohan v. NCERT, AIR 1992 SC 76, in paragraph-3, the apex Court held as follows:*

"It must not be lost sight of that in the modern concept of Welfare State, independnent institutioin, corporation and agency are generally subject to State control. The State Control, however, vast and pervasive is not determinative. The financial contribution by the State is also not conclusive. The combination of State aid coupled with an unusual degree of control over the management and policies of the body and rendering of an important public service being the obligatory functions of the State may largely pont out that the body is 'State'."

15. *In Ajay Hasia (supra) the Constitution Bench summarized the relevant tests gathered from the decision in R.D Shetty for determining whether any entity is a 'State' or " Instrumentality of the State" as follows:*

(1) "One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency or Government.

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.

(3) It may also be a relevant factor whether the corporation enjoys monopoly status which is the State conferred or State protected.

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.

(5) If the functions of the corporation of public importance and closely related to governmental functions, it would be a relevant factor in classified the corporation as a instrumentality or agency of Government.

(6) Specifically, if a department of Government is transferred to a Corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government."

It was held in Ajay Hasia that if on consideration of the relevant factors, it is found that the Corporation is an instrumentality or agency of Government, it would as pointed out in the International Airport Authority's case, be an 'authority' and, therefore, 'State' within the meaning of the expression in Article 12. The same view has also been taken into consideration by the apex Court in U.P. Warehousing Corporation v. Vijay Narain, AIR 1980 SC 840.

16. *The test, which have been determined in Ajay Hasia (supra) are also held not rigid set out of principles so that a body falling within any one of them must be considered to be 'State'. The question in case would be " whether on facts, the body is financially, functionally and administratively dominated by or under the control of Government and such control must be particular to that body and must be pervasive. Therefore, the decision in Sabhaijit Tewary (supra) has been overruled by the 7 Bench judgment of the apex Court in Pradip Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111 and the apex Court by over-ruling Sabhaijit Tewary (supra) held as follows:*
"(1) simply, by holding a legal entity to be an instrumentality or agency of the State it does not necessarily become an authority within the meaning of "other authorities" in Article 12. To be an authority, the entity should have been created by a statute or under a statute and functioning with liability and obligations to the public. Further, the statute creating the entity should have been vested that entity with power to make law or issue

binding directions amounting to law within the meaning of Article 13(2) governing its relationship with other people or the affairs of other people-their rights, duties, liabilities or other legal relations. It created under a statute, then there must exist some other statute conferring on the entity such powers. In either case, it should have been entrusted with such functions as are governmental or closely associated therewith by being of public importance or being funcamental to the life of the people and hence governmental. Such authority would be the State, for, one who enjoys the powers or privileges of the State must also be subjected to limitations and obligations of the State. It is this strong statutory flavor and clear indicia of power-constitutional or statutory, and its potential or capability to act to the detriment of fundamental rights of the people, which makes it an authority, though in a given case, depending on the facts and circumstances, an authority may also be found to be an instrumentality or agency of the State and to that extent they may overlap Tests 1, 2 and 4 in Ajay Hasia enable determination of governmental ownership or control Tests 3, 5 and 6 are "functional" tests. The propounder of the tests himself has used the words suggesting relevancy of those tests for finding out if an entity was instrumentality or agency of the State. Therefore, the question whether an entity is an "authority" cannot be answered by applying Ajay Hasia tests.

(2) The tests laid down in Ajaya Hasia case relevant for the purpose of determining whether an entity is an instrumentality or agency of the State. Neither all the tests are required to be answered in the positive nor a positive answer to one or two tests would suffice It will depend upon a combination of one or more of the relevant factors depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power if need be by removing the mask or piercing the veil disguising the entity concerned."

17. *Taking into consideration Pradip Kumar Biswas (supra) the apex Court in Virendra Kumar Srivastava v. U.P. Rajya Karmachari Kalyan Nigam and another, AIR 2005 SC 411 has held that the question in each case would be whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State. Applying the test laid down in Pradip Kumar Biswas (supra), Ajay Hasia (supra), and Virendra Kumar Srivastava (supra) to the present context and on the aims and objectives of the Rules and constitution of Samiti, it does not satisfy the test to come within the meaning of State or Instrumentality of the State or other authorities so that writ can be issued against the opposite parties 2 and 3. Merely because out of 13 members of the Board of Directors, three members belong to Government. It cannot be construed that the Government has got pervasive control with the management of the Samiti, rather the Rules and Regulations of the Samiti have given its power and functions with funding management vested with the Board on which the Government has got no control merely because some funding is received from the Government, that ipse facto cannot be characterized as Governmental function In General Manager, Kisan Sahkari Chini Mills Ltd (supra) applying the tests laid down by the apex Court, it is held that the form in which the body is constituted, namely, whether it is a society or a cooperative society or a company, is not decisive. The real status of the body with respect to the control of Government would have to be applied and considered cumulatively and as such, there can be no hard-and-*

fast formula and in different facts/situations, different factors may be found to be overwhelming and indicating that the body is an authority under Article 12 of the Constitution: In this context, the bye-law, Rules and Regulations of the Samiti have been taken into consideration for coming to such conclusion.

18. *Applying the decision in Ajay Hasia (supra) to the present facts of the case, even if it is taken into consideration that the State Government has granted some grant-in-aid, but there are other source of income as per the provisions of the Rules, the 1st test laid down is not fulfilled by the Samiti So far as the 2nd test is concerned, receiving some money in the shape of grant-in-aid from the Government does not itself construe that the State Government has control over the same, rather funds are being collected from different sources as per the Rules over which the Government has got no control. More so, the entire regulatory system is managed by a body formulated under the said Rules and Regulations. Applying the test-3, there is nothing to show that the Samiti enjoys monopoly status which is state conferred and state protected in the matter of achieving its aims and objects. Now coming to test-4, it appears that the membership of the Samiti is open to different categories and the management is consisting of 13 members out of which 3 are Government officials and 10 are elected representatives from different categories. Therefore, the management of the Committee is dominated by the non-Government members.Therefore, under the Rules and Regulations, the State Government can neither issue any direction to the Samiti nor determine its policy as it is an autonomous body and as such the State has got no control at all in the functioning of the Samiti much less deep and pervasive one.*

19. *Therefore, considering the above facts and position and applying the tests envisaged by the apex Court in Ajay Hasia (supra), the Samiti cannot be considered as an "instrumentality of the State" or "agency of the Government" and cannot be said to be 'authority'. Thus, it is not a 'State' within the meaning of Article 12 of the Constitution."*

4.1. Mr. Panigrahi, learned A.S.C accordingly contended that since principle decided by the Hon'ble Apex Court in the case of Ajay Hasia is not being fulfilled by the Orissa Association for Blind, it cannot be treated as a State within the meaning of Article 12 of the Constitution of India and accordingly no writ can be issued as against Orissa Association for Blind.

5. Having heard learned counsel for the parties and taking into account the submission made and the decisions relied on by the learned counsel for the parities, this Court is of the view that in order to be covered within the definition of Article-12 of the Constitution of India, the guideline framed by the Hon'ble Apex Court in the case of Ajay Hasia as cited (supra) has to be fulfilled.

Since in the present case, no material has been placed showing fulfillment of the guideline so framed by the Hon'ble Apex Court in the case of Ajay Hasia, showing that Orissa Association for Blind is coming within the said guideline, this Court is of the view that the Orissa Association for Blind is not a State within the meaning of Article-12 of the Constitution of India. Accordingly, while holding so, this Court is not inclined to issue any direction as prayed for in the Writ Petition and dismiss the Writ Petition on that ground.

2023 (III) ILR – CUT- 889

BIRAJA PRASANNA SATAPATHY, J.

WPC (OAS) NO. 9 OF 2011

PURNA CHANDRA PANDA …….Petitioner

-V-

D.G. & I.G. OF POLICE & ORS. …….Opp Parties

SERVICE LAW – Notional promotion – The petitioner was not consider for promotion to the rank of Deputy Superintendent of police due to pendency of disciplinary proceeding – Petitioner superannuated on 30.09.2021 – The petitioner was exonerated & promoted with effect from 08.01.1999 by notification dated 24.07.2002 but not allowed to get any financial benefit except allowing the financial benefit for one day i.e for 30.09.2001(the date of superannuation) – Whether allowing financial benefit for one day is sustainable? – Held, No – Since, the petitioner was exonerated from charges in the proceeding and was extended with the benefit of promotion, the said benefit should not have been extended on notional basis – The petitioner is eligible and entitled to get the financial benefit @ 50% from 08.01.1999 to 29.09.2001. (Para-6)

For Petitioner : M/s. S.K. Purohit.

For Opp. Parties : M/s. B. Panigrahi, Addl. Standing Counsel.

JUDGMENT Date of Hearing:13.09.2023 : Date of Judgment : 22.09.2023

BIRAJA PRASANNA SATAPATHY, J.

1. This matter is taken up through Hybrid Mode.

2. Heard Mr. S.K. Purohit, learned counsel for the Petitioner and Mr. B. Panigrahi, learned Addl. Standing Counsel for the State-Opposite Parties.

3. The Petitioner has filed the present Writ Petition inter alia with the following prayer:-

> *"(i) Direct the Respondent to release the revised pension as per the Annexure-5 along with other retrial benefits, quashing the word 'notionally' as occurring in line 3 of Annexure-2 and line of Annexure-5.*
>
> *(ii) Direct the Respondents to pay the Arrears w.e.f. 1.2.99 till 29.9.2001 in D.S.P. Scale.*
>
> *(iii) And all this Original Application with cost and penal interest.*
>
> *(iv) Pass any further order/direction as deemed fit and proper by your lordships"*

4. It is contented that the Petitioner was initially appointed as a Sub-Inspector of Police, where he joined on 01.01.1966. Petitioner subsequently was promoted to the rank of Inspector of Police. Thereafter, because of the pendency of a disciplinary

proceeding against the Petitioner, Petitioner was not considered for his promotion to the rank of Deputy Superintendent of Police and his claim was kept in a sealed cover. Accordingly, while continuing as such in the rank of Inspector of Police, Police Training School, Angul, Petitioner retired from his service on attainting the age of superannuation on 30.09.2001.

4.1. It is contended that subsequent to his retirement on 30.09.2001 and after closure of the proceeding, Petitioner though was promoted to the rank of Deputy Superintendent of Police w.e.f. 08.01.1999 vide Notification dtd.24.07.2002 of Opposite Party No.2 under Annexure-2, but the Petitioner was not allowed to get any financial benefit w.e.f. 08.01.1999 till he attained the age of superannuation, save and except allowing the said financial benefit for one day i.e. for 30.09.2001.

4.2. It is contended that because of the pendency of the proceeding, the Petitioner though was eligible, was not given the benefit of promotion to the rank of Deputy Superintendent of Police and the same was kept in a sealed cover. After his retirement on 30.09.2001 and on closure of the proceeding, Petitioner was extended with the benefit of promotion to the rank of Deputy Superintendent of Police w.e.f. 08.01.1999 vide Notification dtd.24.07.2002 under Annexure-2.

4.3. It is contended that since the Petitioner was exonerated from the charges in the proceeding and he was given the benefit of promotion w.e.f. 08.01.1999 to the rank of Deputy Superintendent of Police vide Notification dtd.24.07.2002 under Annexure-2, Petitioner is eligible and entitled to get all service and financial benefits as due and admissible w.e.f. 08.01.1999. But Opposite Party No.1 while issuing the notification with extension of the benefit of promotion to the rank of Deputy Superintendent of Police under Annexure-2 extended the said benefit notionally w.e.f. 08.01.1999 and by allowing the financial benefit for one day only i.e. 30.09.2001.

4.4. Learned counsel for the Petitioner contended that since the Petitioner could not get the benefit of promotion because of the pendency of the proceeding and after closure of the proceeding, the Petitioner was extended with the benefit, he is eligible and entitled to get the financial benefit w.e.f. 08.01.1999 and the direction contained in the Notification dtd.24.07.2002 under Annexure-2 to treat the same on notional basis w.e.f. 08.01.1999 save and except allowing financial benefit for one day i.e. 30.09.2001 is not sustainable in the eye of law and it requires interference of this Court.

4.5. In support of his aforesaid submission, learned counsel for the Petitioner relied on the decision of the Hon'ble Apex Court in the case of ***State of Kerala and Others vs. E.K. Bhaskaran Pillai***. Hon'ble Apex Court in Para-4 of the said judgment has held as follows:-

> *"4. Learned counsel for the State has submitted that grant of retrospective benefit on promotional post cannot be given to the incumbent when he has not worked on the said*

post. Therefore, he is not entitled to any benefit on the promotional post from 15.6.1972. In support thereof, the learned counsel invited our attention to the decisions of this Court in Paluru Ramkrishnaiah & Ors. Vs. Union of India & Anr. [(1989) 2 SCC 541], Virender Kumar, G.M., Northern Railways Vs. Avinash Chandra Chadha & Ors.[(1990) 3 SCC 472], State of Haryana & Ors. Vs. O.P. Gupta & Ors. [(1996) 7 SCC 533], A.K. Soumini Vs. State Bank of Travancore & Anr.[(2003) 7 SCC 238] and Union of India & Anr. Vs. Tarsem Lal & Ors. [(2006) 10 SCC 145]. As against this, the learned counsel for the respondent has invited our attention to the decisions given by this Court in Union of India & Ors. Vs. K.V. Jankiraman & Ors.[(1991) 4 SCC 109], State of A.P. Vs. K.V.L. Narasimha Rao & Ors.[(1999) 4 SCC 181], Vasant Rao Roman Vs. Union of India & Ors. [1993 Supp. (2) SCC 324] and State of U.P. & Anr. Vs. Vinod Kumar Srivastava [(2006) 9 SCC 621]. We have considered the decisions cited on behalf of both the sides. So far as the situation with regard to monetary benefits with retrospective promotion is concerned, that depends upon case to case. There are various facets which have to be considered. Sometimes in a case of departmental enquiry or in criminal case it depends on the authorities to grant full back wages or 50 per cent of back wages looking to the nature of delinquency involved in the matter or in criminal cases where the incumbent has been acquitted by giving benefit of doubt or full acquittal. Sometimes in the matter when the person is superseded and he has challenged the same before Court or Tribunal and he succeeds in that and direction is given for reconsideration of his case from the date persons junior to him were appointed, in that case the Court may grant sometime full benefits with retrospective effect and sometimes it may not. Particularly when the administration has wrongly denied his due then in that case he should be given full benefits including monetary benefit subject to there being any change in law or some other supervening factors. However, it is very difficult to set down any hard and fast rule. The principle 'no work no pay' cannot be accepted as a rule of thumb. There are exceptions where courts have granted monetary benefits also. However, so far as present case is concerned, as per directions given by the Court, petitioner's case was considered and it was found that persons junior to him were appointed and he was wrongly denied. Therefore, the petitioner was promoted from retrospective effect i.e. 15.9.1961 but he was not paid the benefit of promotion in terms of arrears of salary. Therefore, he approached the Court and learned Single Judge did not give him the monetary benefit of the promotional post from retrospective effect in terms of arrears of salary. In the review application, the benefit was given from the date he filed O.P. No. 585 of 1975 i.e. 15.6.1972. This appears to be reasonable. The petitioner did not approach the Court for the back wages from 15.9.1961 but he filed a petition dated 15.6.1972 and the Court granted the benefit from the date of filing of the petition before the Court i.e. 15.6.1972. The incumbent in the meanwhile has retired on 31.7.1980. Therefore, looking to the facts and circumstances of the case, the view taken by the High Court appears to be justified and there is no ground to interfere in it".

5. Mr. Panigrahi, learned Addl. Standing Counsel on the other hand made his submission basing on the stand taken in the counter affidavit so filed by Opposite Party. It is contended that the Petitioner because of the pendency of the proceeding was not extended with the benefit of promotion to the rank of Deputy Superintendent of Police and while continuing in the rank of Inspector of Police, Petitioner retired from his service on attaining the age of superannuation on 30.09.2001. After his retirement and on closure of the proceeding wherein the Petitioner was exonerated, the Petitioner was extended with the benefit of promotion

to the rank of Deputy Superintendent of Police w.e.f. 08.01.1999 vide notification dtd.24.07.2002.

5.1. It is contended that since the Petitioner never worked and discharged duty in the rank of Deputy Superintendent of Police, while being extended with the benefit of promotion, the same was extended notionally w.e.f. 08.01.1999 and the Petitioner was allowed the financial benefit for one day i.e. 30.09.2001.

5.2. It is accordingly contended that since the Petitioner never discharged his duty as against the post of Deputy Superintendent of Police, he has been rightly allowed the benefit of promotion w.e.f. 08.01.1999 on notional basis with financial benefit for one (1) day and the benefit so extended vide Notification dtd.24.07.2002 under Annexure-2 needs no interference.

6. Having heard learned counsel for the Parties and after going through the materials available on record, this Court finds that the Petitioner while continuing in the rank of Inspector of Police, though he was found eligible for his promotion to the rank of Deputy Superintendent of Police, but he was not given with the said benefit because of the pendency of the proceeding.

6.1. It is found that while continuing in the rank of Inspector of Police, the Petitioner retired from his service on attainting the age of superannuation on 30.09.2001. Subsequent to his retirement and when the proceeding was closed with exoneration of the Petitioner from the charges, Petitioner was given the benefit of promotion to the rank of Deputy Superintendent of Police w.e.f. 08.01.1999. Since the Petitioner was exonerated from the charges in the proceeding in question and was extended with the benefit of promotion w.e.f. 08.01.1999 vide Notification dtd.24.07.2002 under Annexure-2, as per the considered view of this Court, the said benefit should not have been extended on notional basis. However, placing reliance on the decision so cited by the learned counsel for the Petitioner in the case of ***State of Kerala and Others vs. E.K. Bhaskaran Pillai***, this Court is of the view that the Petitioner is eligible and entitled to get the financial benefit w.e.f. 08.01.1999, but @ 50% of the entitlement for the period from 08.01.1999 to 29.09.2001. While holding so this Court directs Opposite Party No.1 to extend the financial benefits in favour of the Petitioner as due and admissible for the period from 08.01.1999 to 29.09.2001 @ 50% of the entitlement.The benefit as directed be sanctioned and disbursed in favour of the Petitioner within a period of three (3) months from the date of receipt of this order.

7. With the aforesaid observations and directions, the Writ Petition stands disposed of.

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2023 (III) ILR – CUT- 893

MURAHARI SRI RAMAN, J.

WPC (OAC) NO. 2513 OF 2016

BALARAM BEHERA .....Petitioner

-V-

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

ODISHA CIVIL SERVICES (REHABILITATION ASSISTANCE) RULE, 1990 – Rule 2(b) – The petitioner being son of deceased employee applied under the Rule for an appointment – Though the wife of deceased Government employee is alive but found to be unfit as per report submitted by the District Medical Board – Whether an application made under the Rehabilitation Assistance Scheme could be rejected on the ground that the first legal heir had not applied? – Held, No – The Rule does not debar the family member placed in the 2nd preference to get the appointment in case the member placed in the 1st preference is unfit medically.

Case Laws Relied on and Referred to :-

1. 2022 LiveLaw (SC) 690 : Central Bank of India Vs. Nitin.
2. 2018 (II) OLR 10 : Ajit Kumar Barik Vs. State of Odisha & Ors.
3. W.P.(C) No.4239 of 2018 : State of Odisha Vs. Kartika Bhoi.
4. (2022) 1 SCC 30 : State of Uttar Pradesh & Ors Vs. Premlata.

For Petitioner : M/s. Sameer Kumar Das, S.K. Mishra, P.K. Behera

For Opp. Parties : Mr. Sachidananda Nayak, ASC

JUDGMENT Date of Hearing : 31.10.2023: Date of Judgment : 06.11.2023

MURAHARI SRI RAMAN, J.

THE CHALLENGE:

Questioning the propriety of returning the documents (except death and legal heir certificate) enclosed to Letter No.94, dated 28.01.2015 of the Deputy Superintendent, Government Ayurvedic Hospital, Bhubaneswar, who suggested for consideration of appointment of the son of deceased Government employee, died in harness, under the Odisha Civil Service (Rehabilitation Assistance) Rules, 1990 (in short, "RA Rules"), citing that wife of the deceased Government employee comes first in the order of preference, the petitioner had approached the Odisha Administrative Tribunal, Cuttack Bench, Cuttack by way of filing Original Application under Section 19 of the Administrative Tribunals Act, 1985, which was registered as O.A. No.2513 (C) of 2016, with a prayer to direct the opposite party No.2-Director, AYUSH, Odisha, Bhubaneswar "to engage the applicant under the Rehabilitation Assistance Scheme of the State Government in any of the available vacancy and to grant all consequential service and financial benefits to him".

1.1. After abolition of the Odisha Administrative Tribunal by virtue of Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training)Notification F.No. A-11014/10/2015-AT [G.S.R.552(E).],dated 2nd August, 2019), the said case having been transferred to this Court, O.A. No. 2513 (C) of 2016 has been re-registered as WPC (OAC) No.2513 of 2016.

THE FACTS:

2. The factual matrix as adumbrated by the petitioner reveals that father of the petitioner, Late Mukunda Behera, who was working as cook in Government Ayurvedic Hospital, Bhubaneswar, having joined on 06.05.1977, died in harness on 08.10.2014 leaving behind wife, two sons and one daughter.

2.1. The first legal heir, namely, Smt. Pramila Behera, mother of the petitioner, though comes first in order of preference as per Rule 2(b) of the RA Rules, was found to be suffering from "Hypertension with poly arthritis". Since the physician advised rest due to ill-health, the Establishment Officer, Directorate of AYUSH by Letter bearing No.5951-OE-I(a)-5/2015/AYUSH, dated 27.06.2015 requested the Chief District Medical Officer, Khordha for convening Medical Board "for examination of health condition of Smt. Behera and report findings of the Board to this Directorate for further action".

2.2. Accordingly, on the request *vide* Letter No.6767, dated 25.07.2015 of the Chief District Medical Officer, Khordha, the District Medical Board being constituted comprising Specialist in Orthopaedic, Specialist in Opthalmology and Specialist in Medicine, the following report was submitted on 05.08.2015:

> "*Medical Board examination of Smt. Pramila Behera, W/o. Late Dasarathi Behera on dated 05.08.2015 as per the CDMO, Khordha Letter No.6767 dated 25.07.2015.*
>
> *On examination and verification of treatment papers of Smt. Pramila Behera, it is found that she is suffering from Hypertension with poly arthritis. She is unable to walk properly. So she is unfit for the Govt. job."*

2.3. Since mother was found to be unfit for undertaking Government job, the petitioner, unmarried son, applied for engagement under the RA Rules, 1990, as his elder married brother and married sister expressed their unwillingness to undertake employment. Accordingly, they have sworn to affidavits indicating "no objection" in case the petitioner is given employment under the said Rules.

2.4. In consideration of the application for engagement, the Deputy Superintendent, GovernmentAyurvedic Hospital, Bhubaneswar forwarded necessary documents including affidavits showing no objection by mother, brother and sister along with such application form to the Director of AYUSH, Odisha, Bhubaneswar for consideration of appointment of the petitioner. However, the Directorate of AYUSH, Odisha, Bhubaneswar *vide* Letter No. 3594-OE.I.(a).V.5/2015/AYUSH, dated 23.03.2015 (Annexure-5) has returned the documents (except death and legal heir certificate) to the Deputy Superintendent, Government Ayurvedic Hospital.

2.5. Such action is under challenge in the present case.

ARGUMENTS RESPECTIVE COUNSELS FOR THE PARTIES:

3. Though the learned Odisha Administrative Tribunal, Cuttack Bench, Cuttack *vide* Order dated 28.10.2016 issued notice on admission and directed to file counter within four weeks, the opposite parties have chosen not to furnish counter-affidavit till date. This matter has been pending since 2016 and no explanation is forthcoming from the side of the opposite parties as to why the Order dated 28.10.2016 remained non-complied. Therefore, the matter was heard for final disposal on the consent of counsel for both the sides.

4. This Court heard Sri Sameer Kumar Das, learned advocate appearing for the petitioner and Sri Sachidananda Nayak, learned Additional Standing Counsel for the opposite parties.

5. It is submitted by Sri Sameer Kumar Das, learned counsel for the petitioner that the return of the documents in absence of plausible reason would tantamount to refusal to extend the benefit provided under the RA Rules, 1990. He further urged that the rejection is not only mechanical one, but also the Letter dated 23.03.2015 issued by the Establishment Officer to the Deputy Superintendent, Government Ayurvedic Hospital is *ex facie* untenable inasmuch as said letter requests "to furnish the documents" such as "application forms in duplicate of Smt. Pramila Behera, wife of the deceased and first legal heir with her dated signature". The application of the petitioner along with documents forwarded clearly indicated that Smt. Pramila Behera was not in a position to take up job due to ill-health as certified by the District Medical Board and the affidavits of mother, brother and sister indicated that they have "no objection", if the petitioner is allowed to be appointed as per the provisions of the RA Rules.

5.1. Referring to object of the scheme for rehabilitation assistance as provided under Rule 4 of the said RA Rules, Sri Sameer Kumar Das, learned counsel for the petitioner cited that it is a compassionate measure of saving the family of a Government servant from immediate distress when the Government servant suddenly dies while in service. The benefit of employment so extended is to one of the family members with a pious obligation that in case of sudden death of the breadwinner of the family, his family should not face starvation. The scheme aims at restricting deterioration of economic condition of the family of the Government servant. In a catena of decisions it has been stressed that equal opportunity should be provided to all the aspirants as mandated under Articles 14 and 16 of the Constitution of India, yet in respect of appointment on compassionate ground offered to a dependent of the deceased employee, such benefit is an exception to the said norm. The compassionate ground is a concession and not a right. The underlying principle of compassionate appointment under the Rehabilitation Assistance Scheme is that it is not a source of recruitment, but a means to enable the

family of the deceased to get over a sudden financial crisis. The compassionate appointment as an exception is in favour of the dependents of a deceased dying-in-harness and leaving his family in penury and without means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet. A provision is made in the Rules to provide gainful employment to one of the dependents of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. Regard may be had to the observations made in *State of Uttar Pradesh and Others Vrs. Premlata, (2022) 1 SCC 30.* Reliance is also placed on the decision *vide Order dated 07.08.2023* passed in *W.P.(C) No.1723 of 2016 (Suryamani Nayak Vrs. State of Odisha and Others)* and it has been asserted that the said decision squarely applies to the facts of the present case.

5.2. Sri Sameer Kumar Das, learned counsel for the petitioner put forth that for the aforesaid purpose, Rule 8 is the guiding provision which lays mode of appointment, whereas Rule 9 provides for condition of service. The petitioner having adhered to the manner of approaching the authority concerned, there was no occasion for the Director of AYUSH to return the documents, which leads to denial of succor to the family of the deceased Government servant.

5.3. *Per contra,* Mr. Sachidananda Nayak, learned Additional Standing Counsel appearing for the opposite parties-State of Odisha submitted that reading of Annexure-5, *i.e*., Letter dated 23.03.2015 reveals that the documents returned to the Deputy Superintendent, Government Ayurvedic Hospital, Bhubaneswar with a request to furnish application form in duplicate of Smt. Pramila Behera, wife of the deceased, who happens to be the first legal heir with her dated signature. It is inconceivable to construe said letter to mean that the Government has refused to extend the benefit of rehabilitation assistance under the provisions of the RA Rules, 1990 to the family of the deceased Government employee who died in harness, rather said letter is in conformity with the definition of the term "family members" contained in clause (b) of Rule 2 of the RA Rules. Therefore, he submitted that the application of the petitioner, who is son of the deceased Government employee, was not eligible for appointment when the first legal heir, *i.e*., wife of the deceased employee was available. Opposing the contentions raised by the petitioner, Sri Sachidananda Nayak, learned Additional Standing Counsel vehemently argued that the action of the opposite party No.2 cannot be said to be unjustified and illogical.

DISCUSSIONS AND ANALYSIS:

6. It is gathered from the arguments and submissions with reference to RA Rules that the scheme for compassionate appointment acts as an umbrella for the family of the deceased, while struck in a heavy downpour. Compassionate appointment is an exception to the rule of equality, which enables the dependent family members of a medically incapacitated employee who has no option, but to

retire, or a deceased employee, to tide over the immediate crisis caused by the incapacitation or death of the breadwinner. Compassionate Appointment excludes equally or more meritorious candidates, much in need of a job, from the zone of consideration. Consideration for compassionate appointment must, therefore, be strictly in accordance with the prevalent rules for compassionate appointment applicable to the deceased/prematurely retired employee. [See, *Central Bank of India Vrs. Nitin, 2022 LiveLaw (SC) 690*].

7. Given aforesaid perspective with regard to compassionate appointment, from the rival contentions and documents available on record, the sole issue that falls for consideration of this Court is whether son, second legal heir of deceased Government employee, is entitled to apply for appointment under the Odisha Civil Service (Rehabilitation Assistance) Rules, 1990, even as wife of deceased Government employee is available, but found to be unfit as per report submitted by the District Medical Board?

8. Considering the rival contentions *vis-a-vis* perusal of record transpires that the contention of Sri Sameer Kumar Das is acceptable, inasmuch as the Disctrict Medical Board constituted pursuant to request made by the Chief District Medical Officer, *vide* Letter dated 05.08.2015 in Annexure-8 certified that Smt. Pramila Behera, wife of the deceased Government employee, was not fit enough to undertake Government job. Furthermore, the affidavits, as available at Annexure-4 series, indicate that the elder brother and sister showed indifference to undertake employment under the RA Rules. Further, Smt. Pramila Behera also filed affidavit affirming "no objection" if her son, namely Balaram Behera, the present petitioner, gets employment under the aforesaid Rules. Under such premise, it is apparent from the Letter dated 23.03.2015 indicating return of documents with request to furnish application form with dated signature of Smt. Pramila Behera, wife of deceased employee, is fallacious inasmuch as such request is contrary to report of the duly constituted District Medical Board.

8.1. This Court is fortified with Coordinate Bench decision in the aforesaid case of *Suryamani Nayak,* as referred to by Sri Sameer Kumar Das, the learned counsel for the petitioner. *Vide* Order dated 07.08.2023, it has been observed as follows:

> *"The issue that fell for consideration before the coordinate Bench was whether an application made under the Rehabilitation Assistance Scheme could be rejected on the ground that the first legal heir had not applied. After referring to the relevant rules this Court held as follows:*
>
> *'11. Rule 16 of the aforesaid Rules provides that the State Government where satisfied that the operation of all or any provisions of these rules causes undue hardship in any particular case, it may dispense with or relax the provisions to such extent as it may considered necessary for dealing with the case a just and equitable manner. Relying upon this provision, a Division Bench of this Court in Smt. Ketaki Manjari Sahu Vrs. State of Orissa and others, 1998 (II) OLR 452, has held that in some abnormal cases when the petitioner wants to help the family in distress, even the rule can be relaxed to*

*give rehabilitation assistance to an alternate candidate if the facts and circumstances of the case justifies the same. Rule 16 of the aforesaid Rules is in fact an extension of the principle of the Government being a model employer looking after the welfare of the citizens of the State. Even in cases, where Rules do not permit, the State Government may relax the Rules to extend that benefit to the deserving persons in a just and equitable manner.' ***"*

8.2. The Division Bench of this Court in the case of *Ajit Kumar Barik Vrs. State of Odisha and Others, 2018 (II) OLR 10,* considered certificate of Medical Board certifying widow of the petitioner therein to be unfit for undertaking job, and made the following observations:

"*6. The Rules as contended in the above paragraph nowhere restricted the jurisdiction of the appointing authority to consider the application for appointment in a suitable available vacancy under his control. The Rules also define "Family Members" means include the following members in order of performance—*

(i) Wife/Husband;

(ii) Sons or step sons or sons legally adopted through a registered deed;

(iii) Unmarried daughters and unmarried step daughters;

(iv) Widowed daughter or daughter-in-law residing permanently with the affected family;

(v) Unmarried or widowed sister permanently residing with the affected family

(vi) Brother of unmarried Government servant who was wholly dependent on such Government servant at the time of death.

7. Of course the first preference is to be given wife/husband of the deceased employee then son and unmarried daughter. However, no where it was stated that in the case a family member in order of preference in the hierarchy is unfit and a medical certificate furnished to that effect, claim shall not be considered for engagement of the other eligible members in case of distress condition of the family. Therefore, the finding given by the Tribunal in the impugned order that she is not prepared to accept Group-'D' post and offered it to her son in ignoring the material on records is not sustainable."

8.3. Said *Ajit Kumar Barik's* case was carried to the Hon'ble Supreme Court of India by the State of Odisha in *S.L.P. (Civil) Diary No.35835 of 2018*, which came to be disposed of with the following Order on 26.10.2018:

"*Delay condoned.*

We find no reason to entertain this Special Leave Petition, which is, accordingly, dismissed.

Pending application(s), if any, shall stand disposed of"

8.4. Yet another case, namely, *State of Odisha Vrs. Kartika Bhoi, W.P.(C) No.4239 of 2018,* which came to be disposed of on 25.04.2018 by a Division Bench, this Court took similar view. It is pertinent to have regard to following observations made in the said Order:

"*The Tribunal took into consideration the rules which were provided under Orissa Civil Service (Rehabilitation Assistance) Rules, 1990, such as Rule 2(b) as well as Rule 5. It*

has further observed that Rule 2(b) has only stipulated the family members in the order of preference. The Tribunal rather quoted the provision of Rule 5, which provides the appointment to be made in deserving cases and passed in the impugned order as indicated above.

For ready reference, the provisions of Rule 2(b) and Rule 5 of the said Rules is quoted as hereunder:

2(b) Family Members shall mean and include the following members in order of preference –

(i) Wife/Husband;

(ii) Sons or step sons or sons legally adopted through a registered deed;

(iii) Unmarried daughters and unmarried step daughter;

(iv) Widowed daughter or daughter-in-law residing permanently with the affected family.

(v) Unmarried or widowed sister permanently residing with the affected family;

(vi) Brother of unmarried Government servant who was wholly dependent on such Government servant at the time of death.

*****

In deserving cases, a member of the family of the Government servant who dies while in service may be appointed to any Group C or Group D posts only by the appointing authority of that Deceased Government servant provided he/she possesses requisite qualification prescribed for the post in the relevant recruitment rules or instructions of the Government without following the procedure prescribed for recruitment to the post either by statutory rules or otherwise irrespective of the fact that recruitment is made by notification of vacancies to the Employment Exchange or through recruitment examination under relevant recruitment rules. At the time of notifying such vacancies to the Employment Exchange or the examining authority, the employer shall clearly mention that the vacancy is proposed to be filled up under rehabilitation assistance scheme and so, sponsoring of candidates by Employment Exchange or the examining authority is not necessary.

In view of the above, it does not mean that in case the person who is coming under 1st preference and was medically declared unfit for such appointment or is found not suitable, then automatically the other members in the order of preference will be extinguished from the zone of consideration.

Rule 2(b) of 1990 Rules does not debar the family member placed in the 2nd preference to get the appointment in case the member placed in the 1st preference is unfit medically. The Tribunal has quashed the rejection order as it was illegal and arbitrary one and held that the ground of rejection to the effect that it contravenes Rule 2(b) of the 1990 Rules is not at all sustainable. In view of such finding of the Tribunal, we are not inclined to interfere with the same, since there is no error apparent on the face of it."

8.5. This Court in Division Bench, while considering "no objection" submitted by mother, brother and sister in *State of Odisha & Ors. Vrs. Biranchi Nayak, W.P.(C) No.33872 of 2020, vide* Order dated 18.10.2021, repelling the contention that since the spouse of the deceased employee (mother of the opposite party) was available to be given compassionate appointment, the opposite party could not have

applied as it violates the provision of Rule 2(b) read with Rule 9(7) of the RA Rules, 1990 and the Government was justified in rejecting the application of the opposite party for appointment under the Rehabilitation Assistance Scheme, observed as follows:

> *"7. We perused the impugned order. Learned Tribunal, while disposing of the Original Application, has given a specific finding that, when the mother, younger brother and sister of the opposite party have sworn an affidavit in favour of the opposite party showing their "no objection" for his appointment under the Rehabilitation Assistance Scheme, there is no violation of Rule 2(b) read with Rule 9(7) of the OCS (RA) Rules, 1990 especially when, admittedly the family of the deceased employee is a destitute family and in distress.*
>
> *8. Having heard learned Additional Government Advocate and Mr. P.K. Mishra, learned counsel appearing for Opp. Party, we fail to understand in what way, the order of the learned Tribunal has come to prejudice a welfare State, which should look after the well-being of all sundry. Here, there is clear intention on the part of the other family members, namely, mother, brothers and sister of opposite party for compassionate appointment of opposite party in place of his deceased father. They must have expressed such intention on the trust, faith and belief that the opposite party, being appointed in place of his deceased father, shall revive the family from destitution."*

CONCLUSION:

9. In view of the legal position as set forth by the Division Bench and the coordinate Bench of this Court coupled with the purport of compassionate appointment as discussed by the Hon'ble Supreme Court *vis-à-vis* documents available on record and taking note of fact of non-filing of the counter-affidavit by the opposite parties, the return of documents by Letter dated 23.03.2015 (Annexure-5) to the Deputy Superintendent, Government Ayurvedic Hospital, Bhubaneswar cannot be held to be proper. Therefore, it is directed that the opposite party No.2-Director, AYUSH, Odisha, Bhubaneswar shall call for the documents, which were returned to the Deputy Superintendent, Government Ayurvedic Hospital, Bhubaneswar by Letter dated 23.03.2015 (Annexure-5) within a period of fifteen days from today and also take into consideration the documents, which formed part of the present writ petition to take appropriate decision in the light of the discussions and observations made hereinabove. The opposite party No.2 shall be entitled to scrutinize whether the application for compassionate appointment fulfils all other requirements in accordance with the law. The process of consideration of the application shall be completed within a period of three months from today.

9.1. Needless to observe that for taking appropriate decision as directed *supra* the opposite party No.2 may also call for such other document(s) which may be required as envisaged under the RA Rules.

9.2. In the result, the writ petition is allowed with the aforesaid observation and direction, but in the circumstances, there shall be no order as to costs.

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2023 (III) ILR – CUT- 901

SANJAY KUMAR MISHRA, J.

WP(C) NO. 13096 OF 2019

PRAVAT KUSUM MANDAL .....Petitioner

-V-

ODISHA STATE MEDICAL CORPORATION, BHUBANESWAR & ANR. .....Opp. Parties

SERVICE LAW – Probation – In the appointment order of the petitioner, it has been mentioned that appointee would be on probation for a period of one year from the date of his joining and the period of probation can be extended for a further period of one year or more as per the satisfaction of the authority – The authority extended the probation period of petitioner after two years – The authority terminated the service of petitioner during the period of probation – Whether the order of termination is sustainable? – Held, No – As no communication was made to the petitioner regarding his unsatisfactory performance, his case deserve to be considered for the purpose of permanent absorption/regularization – Impugned order set aside.

Case Laws Relied on and Referred to :-

1. AIR 1968 SC 1210 : State of Punjab Vs. Dharam Singh.
2. 1986 (Suppl.) SCC 95 :Om Parkash Maurya Vs. U.P. Cooperative Sugar Factories Federation, Lucknow & Ors.
3. (1987) 4 SCC 482 : State of Gujarat Vs. Akhilesh C. Bhargav & Ors.
4. 1987 (Supp) SCC 643 : M.K. Agarwal Vs. Gurgaon Gramin Bank & Ors.
5. (1998) 3 SCC 321 : Wasim Beg Vs. State of U.P. & Ors.
6. AIR 1966 SC 175 : G.S. Ramaswamy & Ors. Vs. The Inspector-General of Police, Bangalore.
7. AIR 1966 SC 1842: State of Uttar Pradesh Vs. Akbar Ali Khan.
8. (2001) 7 SCC 161 : High Court of M.P. through Registrar Vs. Satya Narayan Jhavar.
9. (2005) 1 SCC 132 : Registrar, High Court of Gujarat and another Vs. C.G. Sharma.
10. (2010) 8 SCC 155 : Kazia Mohammed Muzzammil Vs. State of Karnakata and Anr.

For Petitioner : Ms. D. Mahapatra

For Opp. Parties : Mr. N. Barik, Mr. S.N. Pattnaik, AGA

JUDGMENT Date of Hearing: 13.07.2023 & Date of Judgment: 05.10.2023

SANJAY KUMAR MISHRA, J.

The Petitioner has preferred the Writ Petition being aggrieved by Office Order dated 25.07.2019 (Annexure-3), vide which his services were terminated w.e.f. 25.07.2019 (Fore Noon).

2. The factual matrix of the case, in nutshell, is that the Opposite Party No.1 i.e. Odisha State Medical Corporation Limited, shortly, 'the Corporation', which is being controlled by the State Government, published an Advertisement on 26.10.2016 inviting online applications from eligible candidates for filling up different posts of the Corporation, including the post of Manager-Procurement (Drugs and Surgical), which was a single unreserved post. The Petitioner, who was previously working under the VIMSAR since 01.04.2011, having the requisite qualification and experience, was selected to be appointed as Manager-Procurement (Drugs and Surgical). He was issued with the order of appointment on 10.03.2017, pursuant to which he joined in the said post on 14.03.2017. In Clause 1 of the said appointment order, it has been mentioned that the appointee would be on probation for a period of one year from the date of his joining and the period of probation can be extended for a further period of one year or more as per the satisfaction of the Authority. Further, it was mentioned therein that during the period of probation, the services of the Petitioner can be terminated by the Appointing Authority on issuing one month's notice or payment of one month's salary in lieu of the said notice period.

It is further case of the Petitioner that immediately after his appointment, the Odisha State Medical Corporation Ltd Employees' Service Rules, 2017, shortly, Service Rules, 2017, came into force with effect from 22.09.2017 and the same is applicable to all the employees recruited by the Corporation i.e. the employees, who are already in the roll of the Corporation by the said time.

As per Sub-Rule 10.1 of Rule 10 of the Service Rules, 2017, all the employees directly recruited by the Corporation shall be on probation for one year from the date of joining. Sub-Rule 10.2 of Rule 10 of the said Rules prescribes that the Appointing Authority may extend the probation period for a further period of one year at a time considering the ability, suitability and performance of the employee and inform the employee concerned the reason for such extension. Sub-Rule 10.3 of Rule 10 prescribes that the Appointing Authority shall regularize the employee concerned in the post on successful completion of the probation period on the basis of his ability, suitability and performance by a written order. Sub-Rule 10.4 of Rule 10 prescribes that if during the period of probation and extended period thereof, the performance, progress and conduct of the Petitioner are not found satisfactory or up to the standard required for the post, the probation shall be cancelled and he shall be terminated from service by giving him one month's gross salary or one month's salary in lieu thereof.

It is further case of the Petitioner that as per Clause 1 of the terms of appointment, the probation is for a period of one year from the date of joining, which can be extended for a further period of one year or more as per the satisfaction of the Authority. But as per Rule 10 of the Service Rules, 2017, it was settled that the probation is for one year from the date of joining and can be

extended to a further period of one year at a time considering the ability, suitability and performance of the employee and in that case the concerned employee shall be informed about such reason for extension.

Pursuant to appointment letter dated 10.03.2017, as the Petitioner joined on 14.03.2017, his period of probation of one year ended on 13.03.2018. Therefore, on completion of the said period of probation of one year, undisputedly no such order extending the period of probation has been passed by the Authority concerned. As required under Clause 1 of the appointment order, by the time the Petitioner completed his one year of probation, the Service Rules, 2017 came into force with effect from 22.09.2017. As per Rule 10 of the Service Rules, 2017, no such order has been passed before 14.03.2018, extending the period of probation. Therefore, in absence of any order of extension of probation, with reasons to do so, it is to be inferred that the Petitioner, after completion of one year, is deemed to have been confirmed in service w.e.f. 14.03.2018.

On 12.03.2019, by which time the Petitioner had already completed two years of service, an office order was issued in respect of five employees, including the present Petitioner, extending their period of probation from 14.03.2019. Neither any reason was indicated in the said office order to do so, as required under Rule 10 of the Service Rules, 2017 nor the Petitioner was informed about such reason for extending the probation period. Further, there is no such provision in the Service Rules, 2017 for extending the period of probation more than two years. Immediately thereafter i.e. on 08.04.2019, the Petitioner was asked for an explanation regarding discrepancy in the experience certificate submitted by him at the time of joining and over lapping in the period of service, where it has been stated that the Petitioner's experience certificate in VIMSAR shows that he was working there since 01.04.2011, though he joined in the Corporation as Senior Pharmacist on 12.04.2016 with due relieve order issued by the VIMSAR, Burla dated 11.04.2016.

Pursuant to the said communication seeking for explanation, the Petitioner submitted a detailed explanation on 16.04.2019 stating therein about the discrepancy and over lapping in the period of service indicating therein that though being relieved from VIMSAR on 11.04.2016, he joined as Senior Pharmacist, but he left the post on 23.04.2016 and joined back in the same contractual post under VIMSAR. On his request, the said period from 12.04.2016 to 23.04.2016 i.e. 12 days was sanctioned as leave by kind consideration of the VIMSAR Authority. The Petitioner further explained that for a period of 12 days he has neither claimed any pecuniary benefits from the Corporation nor the said over lapping period of 12 days has been claimed as experience for selection to the present post under the Corporation. As after submitting such explanation on 16.04.2019, no such further order was passed by the Corporation, it was presumed by the Petitioner that the issue has been set at rest for all purposes.

While the matter stood thus, an Office Order was issued on 25.07.2019 by the Managing Director of the Corporation resorting to the terms and conditions stipulated in Clause 1 of the appointment letter, by which the services of the Petitioner was terminated w.e.f. 25.07.2019 with one month's salary in lieu of the notice period.

It is further case of the Petitioner that as the Office Order dated 12.03.2019, vide which the period of probation was extended for further period of another one year w.e.f. 14.03.2019, did not disclose any reason to do so in terms of the Service Rules, 2017 of the Corporation, the same is completely invalid. The impugned Order dated 25.07.2019, as at Annexure-3, treating the Petitioner as probationer after he completed two years four months of service, is illegal and arbitrary. The same has been passed with oblique motive to remove the Petitioner from the post and to appoint somebody else, as the Petitioner was not amenable to undue and undesirable pressure and for some other oblique purposes. Hence, the impugned Order dated 25.07.2019, being illegal and arbitrary, is liable to be quashed.

3. Being noticed, the Opposite Party No.1-Corporation has filed a Counter Affidavit taking a stand therein that the Corporation has been incorporated on 08.11.2013 under the Companies Act, 1956, in pursuance of the Government of Odisha Resolution dated 26.06.2013. It is stated that the Petitioner was selected for appointment as Manager-Procurement (Drugs & Surgical) on terms and conditions that he will be on probation for one year from the date of joining and the probation period may further be extended for another one year or more as per the satisfaction of the authority. During the period of probation, the services can be terminated by the Appointing Authority on one month's notice or in lieu of, one month's salary. Depending on satisfactory performance and conduct during the probation, the continuance and regularization in the post will be decided. The Petitioner joined in service on 14.03.2017 After Noon in the office of the Corporation.

It has further been stated that Odisha State Medical Corporation Ltd. Employees' Service Rules, 2017 was framed and the same came into force during the year, 2017, which is applicable to all employees recruited by the Corporation. As per the Order dated 29.06.2018 of the then Managing Director, the activities of the Petitioner were closely monitored for another six months instead of confirming him in the post, as the individual performance was far from satisfactory. Further, the probation of the Petitioner was extended vide Order dated 09.01.2019 as per the terms and conditions laid down in Clause 1 of the appointment order with intimation to the Petitioner. It has also been stated that the extension of probation for six months was for the reason that the Petitioner's probation for one year from the date of joining was not satisfactory and such extension was granted only to reassess his performance. As the performance of the Petitioner was closely monitored and it was observed that his performance is far from satisfactory, it was decided to extend his probation instead of confirming him in the said post. Such extension of probation for

one year was not confined to the present Petitioner only. Same was including four other employees whose probation period were also extended w.e.f. 14.03.2019 vide the same Order dated 12.03.2019. The said fact was communicated to the employees concerned vide Memo dated 12.03.2019.

It is stand of the Opposite Party No.1-Corporation that law is well settled that in absence of maximum period of probation specified in the letter of appointment, if the employee continues beyond the probation period, cannot be deemed to be confirmed. A probationer does not have a right over the post. His position therefore, is similar to a temporary employee. In other words, employee's service can be terminated on the basis of overall assessment of the performance by the employer.

It is further stand of the Corporation that with regard to performance of the Petitioner, the same being far from satisfactory, Show-Cause notices were issued to him previously. Also W.P.(C) No.8471 of 2019 was filed by one Sunil Kumar Mishra before this Court making some allegations against the Petitioner. However, the services of the Petitioner were brought to an end as per Clause 1 of the terms and conditions of the appointment order and not on the basis of allegations made by Sunil Kumar Mishra.

4. In response to the Counter Affidavit, a Rejoinder Affidavit has been filed by the Petitioner reiterating the stand taken in the Writ Petition. That apart, it has been pleaded in the Rejoinder that as per the advertisement the recruitment to the post was made in the regular scale of pay. There was no stipulation for appointment on probation or on contractual basis so far as the post of Manager-Procurement (Drugs & Surgical) is concerned.

The Petitioner was selected in a regular recruitment process. An order of appointment was issued in his favour vide Annexure-1. Though there was no such norm prescribed in the advertisement, while issuing the appointment letter it was indicated therein that during the period of probation of the Petitioner, his services can be terminated by the Appointing Authority on one month's notice or in lieu of, one month's salary. It was further indicated therein that depending on satisfactory performance and conduct during the probation period, the continuance and regularization of the post will be decided. However, the Petitioner having no choice, had accepted the same and joined under the Opposite Party No.1. Reiterating the provisions under Rule 2 as well as Rule 10 of the Odisha State Medical Corporation Ltd. Employees' Service Rules, 2017, which has been annexed to the Rejoinder Affidavit as Annexure-5, it has been stated that as per Sub-Rule 2.1 of Rule 2 of the Service Rules, 2017, the same is applicable to all the employees appointed before the said Rules came into force. So far as Sub-Rule 2.1 in Rule 2, the same is applicable to the employees engaged for a limited tenure. Since the Petitioner was recruited by the Corporation through a recruitment process, Sub-Rule 2.1 in Rule 2

shall govern the service condition of the Petitioner, though he was recruited before the said Rules came into force.

As per Sub-Rule 10.1 in Rule 10 of the Service Rules, 2017, the period of probation of an employee should be for one year from the date of joining and in terms of Sub-Rule 10.2 in Rule 10, the period of probation can be extended for a further period of one year considering the ability, suitability and performance of the Petitioner and the employee concerned has to be intimated the reason for such extension. Sub-Rule 10.3 in Rule 10 of the Service Rules, 2017 specifies that on completion of the probation period i.e. two years, and considering the ability, suitability and performance of the employee, the Appointing Authority shall regularize the service of the concerned employee by a written order. Though in the present case, the order of appointment was issued on 10.03.2017, on completion of one year probation period, no such order of extension of further period of one year was issued in favour of the Petitioner. However, on completion of two years probation period, a letter was issued under Annexure-2 extending the probation period for a further period of one year and the reason thereof has not been intimated to the Petitioner, which is clearly in contravention of the provisions enshrined under Sub-Rule 10.2 of Rule 10 of the Service Rules, 2017. Thus, the Petitioner's service is deemed to have been regularized as the service of the Petitioner was found to be satisfactory and suitable to hold the said post within the period of two years of probation as per Sub-Rule 10.2 in Rule 10 of the Service Rules, 2017. While the Petitioner was going to complete three years of probation, he got the letter of termination, as at Annexure-3 and the reason thereof has not been assigned in the said letter. Since after completion of the said probation period the Petitioner is deemed to be a regular employee of the Corporation, while taking any disciplinary action, the Authority concerned has to follow the procedure as per the Rules. The most important feature is to give reason for termination and before issuing an order of termination, the principles of natural justice is to be followed, which was not done so far as the Petitioner is concerned. Hence, the order of termination is not sustainable and liable to be quashed.

It is further stated in the Rejoinder that the Service Rules, 2017 came into force on 22.09.2017. Applicability of the said Rule is having retrospective effect. Thus, Clause 1 of the order of appointment cannot override the said statutory Service Rules, 2017. Law is well settled that any Guideline/Notification, which is not in consonance with the statute, has no legal sanctity and cannot be applied. It has further been stated that the Corporation in its Counter has admitted as to applicability of the Service Rules, 2017 to all the employees recruited by the Corporation. Hence, Clause 1 contained in the order of appointment of the Petitioner has no force to be implemented as the same is in clear violation of Service Rules, 2017. Further, as required under Sub-Rule 10.2 in Rule 10 of the Service Rules, 2017, the reason for such extension was never communicated to the Petitioner. Thus, the presumption is that the Authorities have found that the conduct of the Petitioner

is satisfactory and up to the standard required for the post. Under such circumstances, they cannot take a plea that applying Clause1 of the order of appointment, the services of the Petitioner can be terminated by giving him one month's salary in lieu of the notice period.

It is further stand of the Petitioner that in view of Rule 10 of the Service Rules, 2017, the Authorities have no competency to extend the probation period after two years. It has further been stated in the Rejoinder Affidavit that the Corporation has admitted that the Authorities have taken into consideration the Writ Petition filed by one Sunil Kumar Mishra, but no show cause notice was issued before the order of termination was passed vide Annexure-3. It has been clarified that the case filed by Sunil Kumar Mishra is no way connected with the service of the Petitioner. However, with an oblique motive, Mr. Mishra made a complaint against the Petitioner, which was enquired into and the Inquiry Report was submitted on 29.07.2019 i.e. much after his termination. Thus, before the enquiry was conducted on the allegation of Sunil Kumar Mishra, which influenced the mind of the Authority for issuance of termination order, had the Opposite Party No.1 waited for the final outcome of the said enquiry, the decision could have been otherwise. To demonstrate such averment made in the Rejoinder, copy of the inquiry report has been annexed to the Rejoinder as Annexure-6. It has also been clarified in the Rejoinder that as per the said Inquiry Report, it was found by the Enquiring Officer that the allegation of Petitioner working in two Government Organizations to be incorrect, as he was relieved from the VIMSAR on 14.03.2017 and joined in the present post on 14.03.2017, though the letter was issued on 16.03.2017, it cannot be said that the Petitioner was working in two different organizations.

5. Ms. Mahapatra, learned Counsel for the Petitioner, drawing attention of this Court to the advertisement for recruitment dated 26.10.2016, as at Annexure-4, submitted that the said advertisement was made by the Corporation inviting online applications from eligible candidates for filling up the posts created for the Corporation. The post of Manager-Procurement (Drugs & Surgical) was a single post meant for unreserved category. Being selected by facing a due regular selection process in terms of the said advertisement, though there was no such mention in the advertisement that the Manager-Procurement (Drugs & Surgical) is to be appointed first on probation basis, the Petitioner was appointed as probationer. The Petitioner had no other way than to accept the same and report for duty. Rather, it was mentioned in the said advertisement that the selected candidates will be fitted in Pay Band-3 (Rs.15600-39100) with Grade Pay of Rs.5,400/- with further stipulation that the D.A. and other allowances will be paid as per Corporation norms and the recruitment to the said post shall be made in the regular scale of pay.

Ms. Mahapatra submitted that vide the advertisement dated 26.10.2016, it was advertised to fill up the posts like Accountant, Assistant (HR & Admn.), Junior Assistant (MD's Secretariat) and few other posts initially on contractual basis. But,

so far as the post of Manager-Procurement (Drugs & Surgical), there was no such mention in the said advertisement. Rather, it was clearly mentioned that the recruitment to the said post shall be made in the regular scale of pay under the heading "Scale of Pay". She further drew attention of this Court to Sub-Rule 2.1 in Rule 2 of the Service Rules, 2017, which came into force w.e.f. 22.09.2017. From the provisions under the said Rules, it is amply clear that the employees, who are on the Roll of the Corporation as on 22.09.2017, will be governed by the Service Rules, 2017. Relying on Sub-Rule 3.25 in Rule 3 of the Service Rules, 2017, which defines 'employee', she submitted that as per the said definition, an employee means any person under the employment of Odisha State Medical Corporation Ltd other than casual or contingent workers and includes a person on deputation to the Corporation whose salary is chargeable to the funds of the Corporation. Ms. Mahapatra further submitted that there is no dispute with regard to the applicability of the Service Rules, 2017 to the Petitioner. She further drew attention of this Court to Rule 10 of the Service Rules, 2017, which details as to how an employee is to be treated when directly recruited by the Corporation and submitted that in terms of the said Rule, an employee has to be on probation for one year from the date of joining, which may be extended for a period of further one year at a time, considering his ability, suitability and performance. If it is so extended, the concerned employee has to be informed about the reason for such extension. On successful completion of probation period, the Appointing Authority shall regularize the employee concerned in the post he/she is holding by a written order.

Ms. Mohapatra submitted that in Paragraph 10 of the Counter Affidavit it has been stated that performance of the Petitioner was far from satisfactory and show cause notices were issued previously. Also one Sunil Kumar Mishra preferred W.P.(C) No.8471 of 2019 making allegations against the Petitioner. But to the said effect the Petitioner was never noticed either about his unsatisfactory performance or any show cause notice was issued by the Authority concerned, as has been falsely alleged in Paragraph 12 of the Counter Affidavit. Though it has been demonstrated in the Counter Affidavit that this is a case of termination simpliciter and the service of the Petitioner was brought to an end simply invoking the provisions in Clause 1 of the appointment letter dated 10.03.2017, but conduct of the Management well proves that such action was taken against the Petitioner as a punitive measure because of such allegation made by one Sunil Kumar Mishra, so also without issuing any show cause notice as to his poor performance or any kind of misconduct and it is not a case of termination simpliciter.

Ms. Mahapatra further submitted that as per Rule 10 of the Service Rules, 2017, since there was no communication made to the Petitioner for extension of his probation period beyond completion of one year from the date of his joining and as such communication was made much after completion of two years of probation without indicating the reason thereof, the same being contrary to the provisions enshrined under Rule 10 of the Service Rules, 2017, deserves interference by this

Court. It is submitted that a stand has been taken in Paragraph 9 of the Counter Affidavit that as per Order dated 29.06.2018 of the then Managing Director, the activities of the Petitioner were closely monitored for another six months instead of confirming him in the post as the individual performance of the Petitioner was far from satisfactory. Further, in Paragraph 12 of the Counter Affidavit, the same stand has been reiterated as to performance of the Petitioner so also alleged issuance of show cause notice to the Petitioner. But to substantiate such false stand, no documents have been appended to the Counter Affidavit. The pleadings made in Paragraphs 9 and 12 in the Counter Affidavit are not only false but also have been so pleaded intentionally to mislead this Court.

Ms. Mahapatra further submitted that law is well settled that where the appointment is made on probation for a specific period and the employee is allowed to continue in the post after expiry of probation period without any specific order as to extension of probation period or confirmation, the probationer would be deemed to be confirmed in the said post, provided the Rules do not provide contrary to it. To substantiate her submission, so also claim of the Petitioner, Ms. Mahapatra relied on the judgments of the Apex Court in **State of Punjab v. Dharam Singh**, reported in AIR 1968 SC 1210, **Om Parkash Maurya vs. U.P. Cooperative Sugar Factories Federation, Lucknow and others**, reported in 1986 (Suppl.) SCC 95, **State of Gujarat v. Akhilesh C. Bhargav and others**, reported in (1987) 4 SCC 482, **M.K. Agarwal v. Gurgaon Gramin Bank and others**, reported in 1987 (Supp) SCC 643 and **Wasim Beg v. State of U.P. and others**, reported in (1998) 3 SCC 321.

6. Mr. Barik, learned Counsel for the Corporation, reiterating the stand taken in the Counter Affidavit, submitted that as the performance of the Petitioner was far from satisfactory, rightly the same was extended further. During the extended period of probation also when the performance of the Petitioner was found to be unsatisfactory, rightly the Petitioner's services were brought to an end in terms of Clause 1 of his letter of appointment by giving him one month's pay in lieu of the notice period. Further, a query being made by the Court, Mr. Barik fairly admitted that, as per the instruction received, there is no document to demonstrate before this Court as to any communication made to the Petitioner in writing as to his poor performance. Mr. Barik also failed to apprise this Court any valid reason as to why no communication was made to the Petitioner to the said effect till completion of two years of probation period and thereafter also. He fairly admitted that though there was a stipulation in the appointment order dated 10.03.2017 of the Petitioner that he will be on probation for one year from the date of joining, which can be extended for a further period of one year or more as per the satisfaction of the Authority, even after completion of one year of probation period from the date of his joining, no further communication was made to the Petitioner extending the said period of probation beyond one year and also beyond two years from the date of such appointment. On being asked by this Court, Mr. Barik failed to explain as to the reason for not doing so by the Authority concerned though repeatedly it has been

mentioned in various Paragraphs of the Counter Affidavit filed by the Corporation that the performance of the Petitioner during his probation period was far from satisfactory. However, Mr. Barik submitted that there is no infirmity in the impugned order vide which Petitioner's services were brought to an end in terms of Clause 1 of his appointment order. The Petitioner being a probationer has no right to ask for being absorbed in the said post automatically, as has been prayed in the Writ Petition.There being no merit in the Writ Petition, the same deserves to be dismissed in limine. To substantiate his submission, Mr. Barik relied on the judgments of the Apex Court in **G.S. Ramaswamy and others v. The Inspector-General of Police, Bangalore**, reported in AIR 1966 SC 175, **State of Uttar Pradesh v. Akbar Ali Khan**, reported in AIR 1966 SC 1842, **High Court of M.P. through Registrar v. Satya Narayan Jhavar**, reported in (2001) 7 SCC 161, **Registrar, High Court of Gujarat and another v. C.G. Sharma**, reported in (2005) 1 SCC 132 and **Kazia Mohammed Muzzammil v. State of Karnakata and another**, reported in (2010) 8 SCC 155.

7. From the pleadings and documents on record, it is undisputed that an advertisement was issued on 26.10.2016 for recruitment to fill up various posts created by the Corporation and one of such posts was Manager-Procurement (Drugs & Surgical) and there being one such post, it was meant for unreserved category. The Petitioner, who was working in VIMSAR, being eligible for the said post, applied through online and got selected, so also appointed in the said post vide Order dated 10.03.2017. There was no such mention in the advertisement dated 26.10.2016 that the selected candidate for the post of Manager-Procurement (Drugs & Surgical) is to be first appointed as a probation. Rather, it was clearly mentioned in the advertisement that such post shall be made in the regular scale of pay. But in the letter of appointment dated 10.03.2017, it was indicated that the appointment of the Petitioner is purely temporary. He will be on probation for one year, which can be extended for further period of one year or more as per the satisfaction of the authority. It has further been mentioned that during the period of probation the services of the Petitioner can be terminated by the Appointing Authority on giving one month's notice or payment in lieu of the said notice period. For ready reference, the relevant portions of the advertisement dated 26.10.2016, so far as the post of Manager-Procurement (Drugs and Surgical), so also Clause 1 of the letter of appointment dated 10.03.2017 of the Petitioner are extracted below:

> "Advertisement for Recruitment
> No.2/OSMC/REC/HR/2016 Dated-26/10/2016
>
> **Odisha State Medical Corporation Ltd. (OSMC), Bhubaneswar invites online applications from eligible candidates for filling up the following posts created for the Corporation**:

Sl. No	Name of the Post	Total Nos. of posts	Reservation Category	Pay Band & Grade Pay
1	Senior Manager – IT	1	UR-1	Pay Band -3 with Grade Pay of Rs. 6,600/-
2	SeniorManager-Equipment	1	UR-1	Pay Band -3 with Grade Pay of Rs. 6,600/-
3	Manager-Procurement (Equipment)	1	UR-1	Pay Band -3 with Grade Pay of Rs. 5,400/-
4	**Manager-Procurement (Drugs & Surgical)**	**1**	**UR-1**	**Pay Band -3with Grade Pay of Rs. 5,400/-**
5	Asst.Manager-Procurement (Equipment)	1	UR-1	Pay Band -2with Grade Pay of Rs. 4,600/-
6	Asst.Manager-Procurement (Drugs & Surgical)	1	UR-1	Pay Band -2 with Grade Pay of Rs. 4,600/-
7	Accountant	1	UR-2(W-1) ST-1	Pay Band -2 with Grade Pay of Rs. 4200/-
8	Assistant (HR & Admn.)	1	UR-1 (W-1)	Pay Band -2 with Grade Pay of Rs. 4200/-
9	Jr. Assistant (MD's Secretariat)	1	UR-1(W-1)	Pay Band -1 with Grade Pay of Rs. 1900/-

N.B. UR means unreserved. W means Women

Interested applicants should submit the online application forms which will be available in the website www.osmcl.nic.in from 27/10/2016 till 19/11/2016. Timely and correct filling up of the application forms and online submission are the sole responsibility of the candidates.

For details of the posts like scale of pay, eligibility criteria selection modalities, general instructions/ information, guideline for filling up of the online application form etc., the applicants may visit the OSMC website www.osmcl.in.

The earlier recruitment process for the posts indicated against Sl.3,4,5 and 6 floated in Advertisement No.1 OSMC/HR/2014, dated 15.12.2014 is hereby cancelled.

Sd/-
Managing Director
Odisha State Medical Corporation"

"Manager-Procurement (Drugs and Surgical).

Nos. of post: 01- Unreserved (UR)
Terms of Reference (Job Responsibility) :
S/he will be responsible for –

• Preparation of procurement plan for OSMC.

• Preparation of Standard Bidding Documents.

• Managing the tendering processes.

• Bid evaluation, award of contract and post - contract management.

• Any other work as will be assigned by appropriate authority.

Eligibility criteria: Bachelor in Pharmacy (with minimum 60% marks) with 3 years of post - qualification experience in procurement of drugs and surgical / healthcare commodities.

However relaxation of 10% marks will be given for SC/ST category candidates.

Age limit : The maximum age limit for the post is 40 years as on the last date for submission of application form i.e. 19/11/12016. However relaxation of age up to 10 years for PWD candidates, 5 years for SC/ST/SEBC/Women candidates shall be allowed. Relaxation of age in case of ex-service men will be made as per Government norm.

All other mandatory general eligibility conditions as laid down in the "General instructions / Information" shall be applicable.

Scale of Pay: Pay Band - 3 (Rs. 15600-39100) with Grade Pay of Rs.5400/-. DA and other allowances will be paid as per Corporation norms. **Recruitment to this post shall be made in the regular scale of pay."**

Extract from the letter of appointment dated 10.03.2017

"Odisha State Medical Corporation Ltd. is **pleased to offer you the post of Manager-Procurement (Drugs & Surgical) in the Corporation on the following terms and conditions**.

1. The appointment is purely temporary. You will be on probation for one year from the date of joining. **The probation period can be extended a further period of one year or more as per satisfaction of authority.** During the period of probation, your services can be terminated by the Appointing Authority on payment of one month's notice or in lieu of the same with one month's salary. **Depending on satisfactory performance and conduct during the probation period, your continuance and regularization in the post will be decided**. The probation period will be counted towards normal annual increment, leave and seniority. **On successful completion of probation, you will be confirmed in the concerned post**." (Emphasis supplied)

8. It is the admitted case of the Parties that immediately after appointment of the Petitioner, the Odisha State Medical Corporation Ltd. Employees' Service Rules, 2017 came into force w.e.f. 22.09.2017. In terms of Sub-Rule 2.1 of Rule 2 of the Service Rules, 2017, the same is applicable to the Petitioner, he being an employee of the Corporation as on the said date i.e. 22.09.2017 and not being a casual or contingent worker. Rather, he was appointed as such pursuant to an advertisement dated 26.10.2016 against posts created for the Corporation. As it is not disputed as to applicability of such Service Rules, 2017 to the Petitioner and it has not been disputed by the Corporation in its Counter Affidavit as to non-applicability of Rule 10 of the Service Rules, 2017 to the Petitioner, this Court is of the view that the said Service Rules, 2017, including Rule 10, which deals with probation and confirmation of an employee of the Corporation, is applicable to the case of present Petitioner.

9. Rule 2, Sub-Rule 3.25 of Rule 3, and Rule 10 of the Service Rules, 2017, which are germane to the present lis, are extracted below for ready reference.

"2. APPLICATION OF THIS RULE
This Rule shall apply to

2.1 **All employees recruited by the Corporation**.

2.2 Consultants, **person engaged for a limited tenure / purpose shall be governed by the terms and conditions of their appointment order.**

The Board of Director reserves the power and authority to change or amend these Rules as they may deem fit and proper.

The interpretation of these Rules by the Board of Director shall be final and binding."

"3.25' **Employee' means any person under the employment of Odisha State Medical Corporation Ltd. other than "casual or contingent"** workers and includes a person on deputation to the Corporation whose salary is chargeable to the funds of the Corporation."

"**10. PROBATION AND CONFIRMATION**

10.1 **All the employees directly recruited by the Corporation shall be on probation for one year from the date of joining.**

10.2 The appointing authority **may extend the period of probation "for a further period of one year**" at a time considering the ability, suitability and performance of the officer **and inform the employee concerned the reason for such extension**.

10.3 **The appointing authority shall regularize the employee concerned in the post on successful completion of probation period** on the basis of his ability, suitability and performances **"by a written order".**

10.4 If during the period of probation or extended period thereof, the performance, progress and conduct of the probationer is not found satisfactory or up to the standard required for the post, the probation shall be cancelled and he shall be terminated from service by giving him one month's gross salary or one month's salary in lieu thereof.

10.5 The probation period will be counted towards normal increment, leave and seniority." (Emphasis supplied)

10. It is also admitted fact from the pleadings and documents on record that neither in terms of Clause 1 of the letter of appointment dated 10.03.2017 nor in terms of Sub-Rule 10.2 in Rule 10 of the Service Rules, 2017, the period of probation of the Petitioner was extended beyond one year, i.e. after 13.03.2018, or even thereafter also. Rather, only after completion of two years, the probation period of the Petitioner was extended for a period of one year w.e.f. 14.03.2019 vide Office Order dated 12.03.2019, as at Annexure-2. No reason was also indicated vide such office order for doing so, in terms of the relevant rules, as has been extracted above.

11. It is also admitted case of the Corporation that the Service Rules, 2017 came into force w.e.f. 22.09.2017 and was made applicable to all the employees recruited by the Corporation. Sub-Rule 3.8 in Rule 3 of the Service Rules, 2017 defines "Probationer" means a person who is provisionally employed on probation for a specific period with a view to being considered for regular employment in the establishment of the Corporation subject to satisfactory performance during

probation period. Sub-Rule 10.1 in Rule 10 mandates that all the employees directly recruited by the Corporation shall be on probation for one year from the date of joining. Sub-Rule 10.2 permits the Appointing Authority to extend the period of probation for a further period of one year at a time considering the ability, suitability and performance of the employee and inform the employee concerned the reason for such extension and Sub-Rule 10.3 prescribes as to regularization of service of an employee so appointed in the concerned post on successful completion of the probation period on the basis of his ability, suitability and performance by a written order.

12. Admittedly, as revealed from the pleadings made by the Parties, so also documents appended thereto, neither the period of probation of the Petitioner was extended on completion of one year probation period w.e.f. 14.03.2018 in terms of Sub-Rule 10.2 nor even any communication was made to the Petitioner to the said effect. When it was so extended only on 12.03.2019 i.e. after two years from the date of his appointment as a probationer, no reason was intimated to the Petitioner justifying such extension in terms of Sub-Rule 10.2 in Rule 10 of the Service Rules, 2017. Law is well settled that any guideline, notification or service condition imposed by the employer, which is not in consonance with the statute, has no legal sanctity and cannot be applied. Admittedly, the terms of employment imposed vide Clause 1 of the letter of appointment dated 10.03.2017 were never stipulated in the advertisement dated 26.10.2016. Hence, this Court is of the view that the said Clause being contrary to the terms of employment as detailed vide Rule 10 of the Service Rules, 2017, which has already been reproduced above, should not have been given effect to bring an end the services of the Petitioner after Service Rules, 2017 came into force w.e.f. 22.09.2017.

13. As relied upon by the learned Counsel for the Petitioner, the apex Court, in **State of Punjab** (supra), vide Paragraphs 8 and 9 observed as follows:

> **"**8. The initial period of probation of the respondents ended on October 1, 1958. By allowing the respondents to continue in their posts thereafter without any express order of confirmation, the competent authority must be taken to have extended the period of probation up to October 1, 1960 by implication. **But under the proviso to R. 6 (3), the probationary period could not extend beyond October 1, 1960. In view of the proviso to R. 6 (3), it is not possible to presume that the competent authority extended the probationary period after October 1,1960, or that thereafter the respondents continued to hold their posts as probationers**.
>
> 9. **Immediately upon completion of the extended period of probation on October 1, 1960, the appointing authority could dispense with the services of the respondents if their work or conduct during the period of probation was in the opinion of the authority unsatisfactory. Instead of dispensing with their services on completion of the extended period of probation, the authority continued them in their posts until sometime in 1963, and allowed them to draw annual increments of salary including the increment which fell due on October 1, 1962. The rules did not require them to pass any test or to fulfill any other condition before confirmation. There was no**

compelling reason for dispensing with their services and re-employing them as temporary employees on October 1, 1960 and the High Court rightly refused to draw the inference that they were so discharged from services and reemployed. In these circumstances, the High Court rightly held that the respondents must be deemed to have been confirmed in their posts. Though the appointing authority did not pass formal orders of confirmation in writing, it should be presumed to have passed orders of confirmation by so allowing them to continue in their posts after October 1,1960. After such confirmation, the authority had no power to dispense with their services under Rule 6 (3) on the ground that their work or conduct during the period of probation was unsatisfactory. It follows that on the dates of the impugned orders, the respondents had the right to hold their posts. The impugned orders deprived them of this right and amounted to removal from service by way of punishment.**The removal from service could not be made without following the procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 and without conforming to the constitutional requirements of Article 311 of the Constitution**.As the procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 was not followed and as the constitutional protection of Article 311 was violated, the impugned orders were rightly set aside by the High Court." (Emphasis supplied)

In **Om Prakash Maurya** (supra), in Paragraph-5, the apex Court held as follows:

"5. Learned counsel appearing for the U.P. Cooperative Sugar Factories Federation urged that the U.P. Cooperative Societies Employees Service Regulations, 1975 do not apply to the appellant as he was an employee of the U.P. Cooperative Sugar Factories Federation, as the condition of service of the appellant and other employees of the U.P. Cooperative Sugar Factories Federation are regulated by the U.P. Cooperative Sugar Factories Federation Service Rules, 1976 framed by Cane Commissioner in exercise of his powers under sub-section (1) of Section 121 of the Act published in the U.P. Gazette dated September 4, 1976. Rule 3 of the U.P. Cooperative Sugar Factories Federation Service Rules, 1976 (hereinafter referred to as the Federation Service Rules) provides that these rules shall apply to all the employees of the federation. Rule 5 provides that every employee shall be appointed on probation for such period as the appointing authority may specify and the period of probation may be extended by the appointing authority from time to time; the rule does not prescribe any limit on the extension of the probationary period. Rule 6 provides that upon satisfactory completion of probationary period an employee shall be eligible for confirmation. Placing reliance on Rule 5 learned counsel for the respondents urged that since there was no order of confirmation the appellant's probationary period stood extended, therefore, he could be reverted at any time to his substantive post. It is true that Rule 5 of the Federation Service Rules does not place any restriction on the appointing authority's power to extend the probationary period, it may extend the probationary period for an unlimited period and in the absence of confirmation order the employee shall continue to be on probation for indefinite period. It is well settled that where appointment on promotion is made on probation for a specific period and the employee is allowed to continue in the post after expiry of the probationary period without any specific order of confirmation he would be deemed to continue on probation provided the rules do not provide contrary to it. If Rule 5 applies to the appellant he could not require the status of a confirmed employee in the post of Commercial Officer and he could legally be reverted to his substantive post."

(Emphasis supplied)

In **State of Gujarat** (supra), the apex Court in Paragraphs 6,7 and 8 has held as follows:

> "6. While the Probation Rules prescribed an initial period of two years of probation it did not provide any optimum period of probation. Administrative instructions were issued by the Ministry of Home Affairs, Government of India, on March 16, 1973, indicating the guidelines to be follows in the matter. The relevant portion thereof may be extracted:
>
> (ii) It is not desirable that a member of the service should be kept on probation for years as happens occasionally at present. Save for exceptional reasons, the period of probation should not, therefore, be extended by more than one year and no member of the service should, by convention, be kept on probation for more than double the normal period i.e. four years. Accordingly, a probationer, who does not complete the probationers' final examination within a period of four years, should ordinarily be discharged from the service.
>
> 7. It is not disputed that the circular of the Home Ministry was with reference to the Indian Police Service (Probation) Rules. We have not been shown that these instructions run counter to the rules. **It is well settled that within the limits of executive powers under the constitutional scheme, it is open to the appropriate government to issue instructions to cover the gap where there be any vacuum or lacuna. Since instructions do not run counter to the rules in existence, the validity of the instructions cannot be disputed.** Reliance has been placed in the courts below on the constitution Bench Judgment of this Court, and which is reported in Sant Ram Sharma v. State of Rajasthan, (1968) 1 SCR 111 : AIR 1967 SC 1910, where Ramaswami, J. speaking for the court stated thus :
>
> We are unable to accept this argument as correct. It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. **It is true 'that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed**.
>
> 8. We are of the view that the rules read with instructions create a situation as arose for consideration by this Court in the case of State of Punjab v. Dharam Single. The Constitution Bench of this Court in that case interpreted the Punjab Education Service (Provincialised Cadre) Class III Rules and found that there was a maximum limit of three years beyond which the period of probation could not be extended. When an officer appointed initially on probation was found to be continuing in service beyond three years without a written order of confirmation, this Court held that it tantamounts to confirmation. In view of what we have stated above we are in agreement with the High Court about the combined effect of the rules and instructions. We hold that the respondent stood confirmed in the cadre on the relevant date when he was discharged. For a confirmed office in the cadre, the Probation Rules did not apply and therefore, proceedings in accordance with law, were necessary to terminate service. That exactly was the ratio of the decision in Moti Ram Deka v. General Manager, N.E.F. Railways,

Maligaon, Pandu, (1964) 5 SCR 683 : AIR 1964 SC 600. On the analysis indicated above, the net result, therefore, is that respondent 1 had become a confirmed officer of the Gujarat I.P.S. cadre and under Rule 12 (bb) of the Probation Rules his services could not be brought to an end by the impugned order of discharge."

(Emphasis supplied)

In **M.K. Agarwal** (supra), the apex Court in Paragraph-8 held as follows:

"8. The first point need not detain us. The period of the probation was one year, in the first instance. The employer could extend it only for a further period of six more months. **The limitation on the power of the employer to extend the probation beyond 18 months coupled with the further requirement that at the end of it the services of the probationer should either be confirmed or discharged render the inference inescapable that if the probationer was not discharged at or before the expiry of the maximum period of probation, then there would be an implied confirmation as there was no statutory indication as to what should follow in the absence of express confirmation at the end of even the maximum permissible period of probation.** In cases where, as here, these conditions coalesce, it has been held, there would be confirmation by implication."

In **Washim Beg** (supra), in Paragraph-15, the apex Court held as follows:

"15. Whether an employee at the end of the probationary period automatically gets confirmation in the post or whether an order of confirmation or any specific act on the part of the employer confirming the employee is necessary, will depend upon the provisions in the relevant Service Rules relating to probation and confirmation. **There are broadly two sets of authorities of this Court dealing with this question. In those cases where the Rules provide for a maximum period of probation beyond which probation cannot be extended, this Court has held that at the end of the maximum probationary period there will be a deemed confirmation of the employee unless Rules provide to the contrary**. This is the line of cases starting with State of Punjab v. Dharam Singh, M.K. Agarwal v. Gurgaon Gramin Bank, Om Prakash Maurya v. U.P. Coop. Sugar Factories Federation, State of Gujarat v. Akhilesh C. Bhargav.**"**

(Emphasis supplied)

14. As cited by learned Counsel for the Opposite Party No.1-Corporation, in **G.S. Ramaswamy** (supra), in Paragraph-8, the Constitution Bench of apex Court held as follows:

"8. It has further been urged on the basis of R.486 that as the petitioners had worked for more than two years on probation, they became automatically confirmed under the said Rule, and reliance is placed on the following sentence in R. 486, namely, "promoted officers will be confirmed at the end of their probationary period if they have given satisfaction." The law on the question has been settled by this Court in Sukhbans Singh v. State of Punjab, AIR 1962 SC 1711. **It has been held in that case that a probationer cannot after the expiry of the probationary period, automatically acquire the status of a permanent member of a service, unless of course the rules under which he is appointed expressly provide for such a result. Therefore even though a probationer may have continued to act in the post to which he is appointed on probation for more than the initial period of probation, he cannot become a permanent servant merely because of efflux of time, unless the Rules of**

service which govern him specifically lay down that the probationer will be automatically confirmed after the initial period of probation is over. It is contended on behalf of the petitioners before us that the part of R. 486 (which we have set out above) expressly provides for automatic confirmation after the period of probation is over**.** We are of opinion that there is no force in this contention. It is true that the words used in the sentence set out above are not that promoted officers will be eligible or qualified for promotion at the end of their probationary period which are the words to be often found in the Rules in such cases; even so, though this part of R. 486 says that "promoted officers will be confirmed at the end of their probationary period", it is qualified by the words "if they have given satisfaction". Clearly therefore the Rule does not contemplate automatic confirmation after the probationary period of two years, for a promoted officer can only be confirmed under this Rule if he has given satisfaction. This condition of giving satisfaction must be fulfilled before a promoted officer can be confirmed under this rule and this condition obviously means that the authority competent to confirm him must pass an order to the effect that the probationary officer has given satisfaction and is, therefore, confirmed. The petitioners, therefore, cannot claim that they must be treated as confirmed circle inspectors simply because they have worked for more than two years on probation; they can only become confirmed circle inspectors if an order to that effect has been passed even under this rule by the competent authority. The first contention, therefore, that the petitioners before us have an indefeasible right to promotion once their names are put in the eligibility list and that they are entitled to continue as circle inspectors thereafter if they have once been promoted, on temporary or officiating basis, cannot be sustained."

(Emphasis supplied)

In **State of U.P.** (supra), in Paragraph-6, the apex Court held as follows:

"6. The scheme of the rules is clear : confirmation in the post which a probationer is holding does not result merely from the expiry of the period of probation, and so long as the order of confirmation is not made, the holder of the post remains a probationer. It has been held by this Court that when a first appointment or promotion is made on probation for a specified period and the employee is allowed to continue in the post, after the expiry of the said period without any specific order of confirmation he continues as a probationer only and acquires no substantive right to hold the post. If the order of appointment itself states that at the end of the period of probation the appointee will stand confirmed in the absence of any order to the contrary, the appointee will acquire a substantive right to the post even without an order of confirmation. In all other cases, in the absence of such an order or in the absence of such a service rule, an express order of confirmation is necessary to give him such a right. Where after the period of probation an appointee is allowed to continue in the post without an order of confirmation, the only possible view to take is that by implication the period of probation has been extended, and it is not a correct proposition to state that an appointee should be deemed to be confirmed from the mere fact that he is allowed to continue after the end of the period of probation. See Chief Conservator of Forests, U. P. Nainital v. D. A. Lyall, C. A. No. 259 of 1963, dated 24-2-1965 (SC); Sukhbans Singh v. State of Punjab, AIR 1962 SC 1711 and Accountant General, Madhya Pradesh, Gwalior v. Beniprasad Bhatnagar, C.A. No. 548 of 1962, dated 23-1-1964 (SC)"

In **High Court of M.P. through Registrar** (supra), the apex Court in Paragraph-11 held as follows:

> "11. The question of deemed confirmation in service jurisprudence, which is dependent upon the language of the relevant service rules, has been the subject matter of consideration before this Court, times without number in various decisions and there are three lines of cases on this point. One line of cases is where in the service rules or in the letter of appointment a period of probation is specified and power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases there is no bar against termination if any point of time after expiry of the period of probation. **The other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that the officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry the order of termination has not been passed. The last line of cases is where, though under the rules maximum period of probation is prescribed, but the same requires a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period of probation has expired and neither any order of confirmation has been passed nor has the person concerned passed the requisites test, he cannot be deemed to have been confirmed merely because the said period has expired.**" (Emphasis supplied)

In **Registrar, High Court of Gujarat** (supra), in Paragraph-26, the apex Court observed as follows:

> "26. A large number of authorities were cited before us by both the parties. However, it is not necessary to go into the details of all those cases for the simple reason that sub-rule (4) of Rule 5 of the Rules is in pari materia with the Rule which was under consideration in the case of State of Maharashtra v. Veerappa R. Saboji and we find that even if the period of two years expires and the probationer is allowed to continue after a period of two years, automatic confirmation cannot be claimed as a matter of right because in terms of the Rules, work has to be satisfactory which is a prerequisite or precondition for confirmation and, therefore, even if the probationer is allowed to continue beyond the period of two years as mentioned in the Rule, there is no question of deemed confirmation. **The language of the Rule itself excludes any chance of giving deemed or automatic confirmation because the confirmation is to be ordered if there is a vacancy and if the work is found to be satisfactory.** There is no question of confirmation and, therefore, deemed confirmation, in the light of the language of this Rule, is ruled out. We are, therefore, of the opinion that the argument advanced by learned counsel for the respondent on this aspect has no merits and no leg to stand. The learned Single Judge and the learned Judges of the Division Bench have rightly come to the conclusion that there is no automatic confirmation on the expiry of the period of two years and on the expiry of the said period of two years, the confirmation order can be passed only if there is vacancy and the work is found to be satisfactory. **The Rule also does not say that the two years' period of probation, as mentioned in the Rule, is the maximum period of probation and the probation cannot be extended beyond the period of two years**. We are, therefore, of the opinion that there is no question of automatic or deemed confirmation, as contended by the learned counsel for the respondent. We, therefore, answer this issue in the negative and against the respondent." (Emphasis supplied)

In **Kazia Mohammed Muzzammil** (supra), in Paragraphs 46, 47 and 48, the apex Court held as follows:

> "46. On a clear analysis of the above enunciated law, particularly, the seven-Judge Bench judgment of this Court in Samsher Singh and the three-Judge Bench judgments, which are certainly the larger Benches and are binding on us, the courts have taken the view with reference to the facts and relevant rules involved in those cases that the principle of "automatic" or "deemed confirmation" would not be attracted. **The pith and substance of the stated principles of law is that it will be the facts and the rules, which will have to be examined by the courts as a condition precedent to the application of the dictum stated in any of the line of cases afore noticed.**
>
> 47. There can be cases where the rules require a definite act on the part of the employer before an officer on probation can be confirmed. **In other words, there may a rule or regulation requiring the competent authority to examine the suitability of the probationer and then upon recording its satisfaction issue an order of confirmation.Where the rules are of this nature the question of automatic confirmation would not even arise. Of course, every authority is expected to act properly and expeditiously. It cannot and ought not to keep issuance of such order in abeyance without any reason or justification.** While there could be some other cases where the rules do not contemplate issuance of such a specific order in writing but merely require that there will not be any automatic confirmation or some acts, other than issuance of specific orders, are required to be performed by the parties, even in those cases it is difficult to attract the application of this doctrine.
>
> 48. However, there will be cases where not only such specific rules, as noticed above, are absent but the rules specifically prohibit extension of the period of probation or even specifically provide that upon expiry of that period he shall attain the status of a temporary or a confirmed employee. In such cases, again, two situations would rise: one, that he would attain the status of an employee being eligible for confirmation and second, that actually he will attain the status of a confirmed employee. The courts have repeatedly held that it may not be possible to prescribe a straitjacket formula of universal implementation for all cases involving such questions. It will always depend upon the facts of a case and the relevant rules applicable to that service." (Emphasis supplied)

15. From the pleadings on record so also submissions made by the learned Counsel for the Parties, this Court comes to the following irresistible conclusions.

15.1 The post of Manager-Procurement (Drugs and Surgical) is a single unreserved post and advertisement was made to fill up the said post along with other posts.

15.2. There was no such mention in the advertisement that the person who will be selected for appointment in the post of Manager-Procurement (Drugs and Surgical) shall be appointed on probation basis first and on successful completion of the probation period, the candidate will be permanently absorbed as per the offer of appointment dated 10.03.2017.

15.3 Though it was mentioned that the Petitioner will be on probation for one year from the date of his joining and the same can be extended for a further period of

one year or more as per satisfaction of the authority, there was no communication by the Authority concerned for extension of probation period further beyond one year from the date of joining. Rather, after completion of two years, a communication was made vide Office Order dated 12.03.2019 extending the probation period of the Petitioner for a further period of one year without indicating therein the reasons for doing so.

15.4. Till completion of two years or more, it was never communicated to the Petitioner till 25.07.2019 as to extension of his probation period on the ground of unsatisfactory performance.

15.5. Even in the Office Order dated 25.07.2019, which is impugned in the present Writ Petition, there is no mention as to termination of services of the Petitioner during the extended period of probation of further one year i.e. on the 3rd year on the ground of unsatisfactory performance.

15.6. After Service Rules, 2017 came into effect from 22.09.2017, the same became applicable to all the employees recruited by the Corporation, including the present Petitioner, who were already on the roll of the Corporation as on the said date in terms of Rule 2.1 read with Rule 3.25 of the said Rules,2017.

15.7. As per Rule 3.8 of the Service Rules, 2017, Probationer means a person, who is provisionally employed on probation for a specific period with a view to being considered for regular employment in the establishment of the Corporation subject to satisfactory performance during probation period.

15.8. As per Rule 10.1 of the said Rules, 2017, all the employees directly recruited by the Corporation shall be on probation for one year from the date of joining.

15.9. As per Rule 10.2 of the said Rules, 2017 the appointing authority may extend the period of probation for a further period of one year at a time considering the ability, suitability and performance of the officer and inform the employee concerned the reason for such extension.

15.10. As per Rule 10.3, the appointing authority shall regularize the employee concerned in the post on successful completion of the probation period on the basis of his ability, suitability and performance by a written order.

15.11. Though Rule 10.2 of the Rules, 2017 mandates to inform the employee concerned the reason for such extension by extending the period of probation for a further period of one year, till conclusion of two years of probation and thereafter also,till issuance of the impugned Office Order dated 25.07.2019, no communication was made to the Petitioner indicating therein the reason for such extension.

15.12. No reason was assigned in the Office Order dated 12.03.2019, while extending the period of probation of the Petitioner for a further period of one year on 12.03.2019 i.e. after completion of two years of probation period of the Petitioner.

15.13. The said Office Order for extension of probation period of the Petitioner for a further period of one year was issued after completion of two years of probation period from the date of first engagement of the Petitioner as a probationer.

15.14. The conduct of the Opposite Party No.1-Management well proves that such action to bring to end services of the Petitioner has been taken as a punitive measure in the guise of invoking the terms of engagement detailed in the offer of appointment dated 10.03.2017, though the clause in the letter of appointment became inapplicable after the Service Rules, 2017 came into effect immediately thereafter.

15.15. In the order of termination dated 25.07.2019 also, it has been indicated that same was so done because of the unsatisfactory performance of the Petitioner during his period of probation.

15.16. Though a stand has been taken in the Counter Affidavit that the performance of the Petitioner was unsatisfactory, no document has been filed before this Court to demonstrate that the performance of the Petitioner as a probationer was unsatisfactory.

15.17. The Petitioner was asked for an explanation regarding discrepancy in the experience certificate and over lapping in the period of service. In response thereto the Petitioner gave a detailed explanation on 16.04.2019 clearly explaining about the alleged discrepancy and over lapping period of service. Thereafter no disciplinary proceeding was initiated against the Petitioner for the alleged discrepancy/misconduct and thereafter also till the impugned Office Order dated 25.07.2019 was issued terminating the services of the Petitioner invoking Clause 1 of the appointment letter dated 10.03.2017, though the Petitioner was governed by Rule 3 of the Service Rules, 2017 as on the date of issuance of the said Office Order dated 25.07.2019.

16. Admittedly, vide letter of appointment dated 10.03.2017, the Petitioner was offered the post of Manager-Procurement (Drugs & Surgical) in the Corporation with an assurance that depending on satisfactory performance and conduct during the probation period, his continuance and regularization in the said post will be decided. It was further assured that on successful completion of probation period, he will be confirmed in the concerned post and the probation period will be counted towards normal annual increment, leave and seniority. The Corporation took a stand in the Counter as to unsatisfactory performance of the Petitioner during probation period but failed to demonstrate before this Court by producing any documentary evidence to substantiate the said stand. Rather, it was admitted that no such communication was made to the Petitioner in terms of Rule10 (2) of the Rules, 2017, while extending the probation period after two years from the date of his appointment. As no communication was made to the Petitioner either after completion of one year of service from the date of joining and thereafter also till

25.07.2019 i.e. the date of termination of his service and in the said letter also it has not been indicated that it was so done because of his unsatisfactory performance, his case deserves to be considered for the purpose of permanent absorption/regularization in the said post of Manager-Procurement (Drugs and Surgical) by issuing a written order to the said effect in terms of Rule 10.3 of the Service Rules, 2017.

17. In view of the above conclusions so also the Service Rules, 2017 of the Corporation and the settled position of law as detailed above, this Court is of the view that the action of the Corporation issuing the impugned Order of termination dated 25.07.2019 invoking Clause 1 of the appointment letter dated 10.03.2017 is illegal, unjustified, contrary to the Service Rules of the Corporation and deserves to be set aside. Accordingly, the Office Order dated 25.07.2019, as at Annexure-3, is hereby set aside.

18. Accordingly, the Opposite Party No.1-Corporation is directed to reinstate the Petitioner in the post of Manager-Procurement (Drugs and Surgical) and issue office order to regularize his service in terms of Rule 10.3 of the Service Rules, 2017 on notional basis with effect from the date of completion of two years of service in the post of Manager-Procurement (Drugs and Surgical), as there is no such provision under Rules, 2017 to extend the probation period beyond 2 years and before and after completion of the said probation period of two years and thereafter also no communication was made to the Petitioner as to his unsatisfactory performance, as has been detailed above.

It is further directed that on regularization of the service of the Petitioner in the Corporation, the probation period of the Petitioner shall be counted towards normal increment, leave and seniority in terms of Rule 10.5 of the said Rules, 2017 so also in terms of assurance given vide letter of appointment dated 10.03.2017. The period for which the Petitioner was forced to remain unemployed/out of employment, shall also be counted towards his seniority and increment to be paid in terms of Rule 12 of the said Rules, 2017. Petitioner's pay on permanent absorption/regularization shall be fixed and paid accordingly.

19. Because of the illegality and irregularity committed by the Corporation, as detailed above, for which the Petitioner was being compelled to venture into unnecessary litigation and harassment, a cost of Rs. 20,000/- (Rupees twenty thousand) is awarded to compensate the hardship caused to the Petitioner, to be paid by the Corporation.

20. The entire exercise, as directed above, shall be completed within a period of four weeks from the date of communication/production of certified copy of this Judgment.

21. Accordingly, the Writ Petition is allowed and stands disposed of.

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2023 (III) ILR – CUT- 924

SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 6506 OF 2012

RAJKISHOR ACHARYA .....Petitioner

-V-

CERTIFICATE OFFICER-CUM-DEPUTY COLLECTOR, JEYPORE & ANR. …….Opp. Parties

ODISHA PUBLIC DEMANDS RECOVERY ACT, 1962 – Sections 8, 9 – The certificate officer passed the order of recovery, without determining the petition denying liability filed by the petitioner – The authority have not followed the procedure as prescribed U/s. 9 of the Act before passing the impugned order – Whether the order of recovery is sustainable? – Held, No – Order set aside and matter is remanded back to Op no.1. (Paras 10-11)

For Petitioner : Mr. M. K. Mohapatra

For Opp. Parties : Mr.Y.S.P.Babu, Addl. Govt. Adv.

JUDGMENT Date of Hearing & Judgment: 16.10.2023

S.K. MISHRA, J.

1. The Writ Petition has been preferred challenging the action of the Opposite Parties in initiating OPDR proceeding against the Petitioner for recovery of Rs.26,662.50 Paise, vide Certificate Case No.16 of 1987, pending in the Court of Certificate Officer-Cum-Deputy Collector, Jeypore.

2. The 1st Division Bench, while hearing on 09.07.2012, directed the learned Government Advocate to take notice on behalf of Opposite Parties and ordered to stay operation of the impugned Order dated 18.05.2011 in Annexure-3 series till the next date. Thereafter, this matter has been listed today before this Bench. No Counter Affidavit has been filed by the State-Opposite Parties till date.

3. Learned Counsel for the Petitioner draws attention of this Court to the Petition dated 17.08.1987 filed by his client as required under Section 8 of the Odisha Public Demands Recovery Act, 1962, hereinafter referred to as "OPDR Act, 1962" for brevity and submits, after filing of the said Petition denying liability and praying therein to call for records as detailed in the said Petition, the Certificate Officer, while ordering to send copy of the said Petition (wrongly mentioned as Counter), vide Order dated 20.03.2003 directed the Certificate Holder to produce the relevant documents for further action and ordered to inform the Tahsildar, Jeypore to hold up the attachment warrant till hearing and the matter was posted to 28.04.2003. Thereafter, the Certificate Holder neither appeared nor tendered documents called for and the matter got adjourned from time to time till 18.05.2011. On the said date,

without determining the Petition denying liability filed by the Petitioner, the impugned Order was passed with an observation that the Petitioner, who is the Certificate Debtor, was absent on call and the Court was satisfied that the Certificate Debtor is avoiding to appear in the Court. Hence, the Tahsildar, Jeypore, was directed to execute the warrant by 01.06.2011.

4. Mr. Mohapatro, learned Counsel for the Petitioner submits, since the impugned Order has been passed by the Certificate Officer without determining the Petition denying liability filed by the Petitioner and the procedure prescribed under Section 9 of the OPDR Act, 1962 was not followed before passing of the impugned Order dated 18.05.2011 and the principles of natural justice was never followed by the Certificate Officer, though there is a provision of Appeal under Section 60 of the OPDR Act, 1962, his client has rightly approached the Writ Court challenging the said illegal order passed by the Certificate Officer.

5. Mr. Mohapatro, learned Counsel for the Petitioner further submits, this is a fit case to interfere and set aside the impugned Order and remand the matter back to the Certificate Officer for deciding the same in accordance with law more particularly, following the provision prescribed under Section 9 of the OPDR Act, 1962.

6. Mr. Babu, learned AGA for the State-Opposite Parties submits, though vide Order dated 20.03.2003, it was directed to the Certificate Holder to produce the relevant documents, but because of non-appearance of the present Petitioner (Certificate Debtor) on subsequent dates, even though the Certificate Holder was absent, the Certificate Officer was justified to pass the impugned Order dated 18.05.2011.

7. Heard learned Counsel for the Parties.

8. From the pleadings made and submissions of the learned Counsel for the Parties so also the certified copy of the entire order-sheet annexed to the Writ Petition as Annexure-3, it would be apt to reproduce below the Order dated 14.09.1992 so also Order dated 20.03.2003, respectively, in Certificate Case No.16 of 1987:

> *"***14.09.1992**- *This is put up today. The representative of the C.Hr is present. The Advocate for the C.Dr is present and submits that the petition filed on 23.10.1989 challenging the maintaining of the Certificate Proceeding due to absence of agreement.* ***The representative of the C.Hr is directed to produce the Works Case Record along with the agreement if any on the next date. Case posted to 27.10.1992****."*
>
> *"***20.03.2003**- ***The Case record is taken up today on receipt of advance petition filed by the C.Dr****. The learned Advocate Sri Nabin Chandra Mohanty filed Vakalatanama on behalf of the C.Dr Raj Kishore Acharya. The learned Advocate for the C.Dr has filed counter protesting the certificate dues.* ***The learned Advocate for C.Dr argues that the C.Hr has not produced the documents like agreement paper and finalization of bills on repeated request. Further the finalization of work can determine the actual amount***

advanced to CDR and work done. So that whatever the balance comes the C. Dr is agreed to recoup the liabilities with the CHR. Heard. Direct the C.Hr to produce the relevant documents on the next date and send the copy of counter to C.Hr for further action. Inform Tahsildar, Jeypore to held up the attachment warrant till hearing.

Case to 28.04.2003 for hearing."

(Emphasis Supplied)

9. The subsequent order-sheet of the case record in Certificate Case No.16 of 1987 well demonstrates that pursuant to the said Order passed by the Certificate Officer, neither the Certificate Holder appeared nor produced the records, as called for at the instance of the present Petitioner (Certificate Debtor). Till 07.03.2011, it was reflected in the order-sheet that Service Return (SR) not back and it was ordered to issue notice to both the Certificate Debtor and the Certificate Holder to appear before the said Court. Pursuant to the said notice, the present Petitioner (Certificate Debtor) appeared on 18.03.2011 and filed Hazira, whereas Certificate Holder was found absent on call. Thereafter, both the Certificate Debtor and Certificate Holder were found absent on 28.03.2011, 21.04.2011 and 29.04.2011.Finally, on 18.05.2011, the impugned Order was passed without following due procedure prescribed under Section 9 of the OPDR Act, 1962 and without determining the Petition denying liability filed by the Petitioner dated 17.08.1987, though vide order dated 14.09.1992 and 20.03.2003 the Certificate Officer directed the C.Hr to produce certain documents to determine and decide the Petition filed by the C.Dr in terms of Section-8 of the OPDR Act, 1962. Sections 8 and 9 of the OPDR Act, 1962 are extracted below for ready reference:

"8. Filing of petition denying liability *– (1) The certificate-debtor may, within thirty days from the service of the notice required by Section 6 or where the notice has not been duly served, then within thirty days from the execution of any process for enforcing the certificate, present to the Certificate Officer in whose office the certificate is filed or to the Certificate Officer who is executing the certificate, a petition, in the prescribed form, signed and verified in the prescribed manner, denying his liability only on the ground that –*

(a) the certificate dues have been fully or partly paid; or

(b) the person on whom such notice has been served is not the person named as certificate-debtor in the certificate :

Provided that a certificate-debtor in respect of dues other than those in relation to which the liability under any law for the time being in force is not open to question in a Civil Court may also deny his liability on any other ground:

Provided further that no petition under this sub-section shall be entertained by a Certificate Officer unless he is satisfied that such amount of the certificate dues as the certificate-debtor may admit to be due from him has been paid.

(2) If any such petition is presented to a Certificate Officer other than the Certificate Officer in whose office the original certificate is filed, it shall be sent to the latter officer for disposal.

> *"**9. Hearing and determining of such petition –** The Certificate Officer in whose office the original certificate is filed **may after hearing the petition and taking evidence, if necessary, confirm, set aside, modify or vary the certificate** as he deems it.*
>
> ***(Emphasis Supplied)***

10. In view of the above and the legal provision enshrined under Section-9 of the OPDR Act, 1962, as extracted above, this Court is of the view that there is a gross procedural flaw before passing of the impugned Order dated 18.05.2011 and the said Order has been passed without determining the Petition denying liability filed by the Petitioner as Annexure-2. Hence, impugned Order deserves interference.

11. Accordingly, the Order dated 18.05.2011 passed in Certificate Case No.16 of 1987 is hereby set aside and the matter is remanded back to the Opposite Party No.1 to re-hear the same following due procedure of law, as prescribed under Section 9 of the OPDR Act, 1962, by giving due opportunity of hearing to the Certificate Debtor.

12. Since the certificate proceeding is of the year 1987, the Certificate Officer would do well to conclude the proceeding within four months hence. Till conclusion of the certificate proceeding, no coercive action shall be taken against the Petitioner.

13. The Writ Petition stands disposed of. No Order as to costs.

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2023 (III) ILR – CUT- 927

G. SATAPATHY, J.

CRLMC NO. 4134 OF 2022

PUJA BAISHYA & ANR. .....Petitioners

-V-

PRASANTA SAHU & ANR. .....Opp. Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power – Exercise thereof – Cognizance of offences U/ss. 507/420/34 of IPC read with Section 67/67-A of IT Act, 2000 – Petitioners, who are from the State of Assam had a friendship with Opp. party through social media – Money transaction took place between them – Fraudulent or dishonest inducement which is an essential ingredient of the offence of cheating is absent – No material to show criminal intimidation – Allegation of "material containing sexually explicit act" is conspicuously absent either in the complaint or other materials placed on record – Complaint quashed as the Hon'ble Apex Court has time and again held that any effort to settle civil disputes and

claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged. (Paras 9-16)

Case Laws Relied on and Referred to :-

1. (2005) 10 SCC 336 : Uma Shankar Gopalika Vs. State of Bihar & Anr.
2. (2006) 6 SCC 736 : Indian Oil Corporation Vs. NEPC India Ltd. & Ors.

For Petitioners : Mr. B.K. Nayak

For Opp. Parties : Mr. S.N. Mishra-4
Mrs. S.R. Sahoo, ASC

JUDGMENT Date of Judgment : 04.10.2023

G. SATAPATHY, J.

1. This is an application under Section 482 of Cr.P.C. by the petitioners seeking to quash the impugned order passed on 11.08.2022 by the learned Nyayadhikari-Cum-J.M.F.C., Gram Nyayalaya, Junagarh, Kalahandi in 1.C.C. No.1 of 2022 and, consequently, the criminal proceeding arising therein.

2. The background facts are that the petitioners are the accused persons in the complaint in 1.C.C. No.1 of 2022 instituted by OPNo.1 stating therein that on 22.02.2021, the complainant sent a friend request through facebook which was accepted by the petitioner No.1 on 23.02.2021 and thereafter, both of them exchanged their mobile as well as WhatsApp numbers and they developed relationship through WhatsApp chats, but one day, petitioner No.1 approached OPNo.1 for monetary help for a sum of Rs.10,00,000/- (Rupees ten lakhs) to develop some business on assurance to return the money and, accordingly, OPNo.1 on good faith, provided Rs.6,97,000/- to petitioners and sister-in-law of the petitioner No.1 namely Pinki Baishya through different modes like Phone Pay, Google Pay and account transfer on different dates. However, on 02.01.2022 at about 10 PM, the petitioners threatened to kill OPNo.1 and sent obscene and sexually explicit photographs to the WhatsApp number of OPNo.1 and got some inappropriate and objectionable photographs of OPNo.1 viral to blackmail him. According to OPNo.1, the petitioners had fraudulently cheated him in this way and he accordingly served a pleader notice to the petitioners on 05.01.2022, but when they remained silent, OPNo.1 instituted the complaint with aforesaid averment.

3. On receipt of complaint, the learned Nyayadhikari-Cum-J.M.F.C., Gram Nyayalaya, Junagarh, Kalahandi registered it and recorded the initial statement of the complainant-cum-OPNo.1 as well as the statement of two witnesses in an inquiry under Section 202 of Cr.P.C. After being satisfied with the averments made in the complaint together with the initial statement and statement of witnesses in t he enquiry, the learned Nyayadhikari-Cum-J.M.F.C., Gram Nyayalaya, Junagarh, Kalahandi by the impugned order took cognizance of offences under Sections

507/420/34 of IPC read with Section 67/67-A of IT Act, 2000. Hence, this application under Section 482 of Cr.P.C. by the petitioners.

4. In the course of hearing of CRLMC, Mr. B.K. Nayak, learned counsel for the petitioners has submitted that neither the ingredients of offences under Section 507/420/34 of IPC are disclosed from a perusal of entire materials placed in the complaint nor are the petitioners responsible for any offence. He has further submitted that since OPNo.1 had threatened the petitioners as well as uploaded the objectionable photographs in the social media, petitioner No.1 lodged an FIR against OPNo.1 in her native State, which is Assam and, accordingly, FIR was registered against OP No.1 on 25.12.2021, but in order to escape from the criminal liability, OPNo.1 has manufactured this case against the petitioners after some days of lodging of FIR by petitioner No.1 in Assam and, therefore, the complaint in 1.C.C. No.1 of 2022 is liable to be quashed along with the impugned order.

5. Mr. S.N. Mishra-4, learned counsel for the O.P.No.1, however, has resisted the claim of the petitioners by submitting *inter-alia* that the materials placed on record disclose a strong prima facie case of cheating and, therefore, the present complaint cannot be quashed against the petitioners.

6. Mrs. S.R. Sahoo, learned ASC, however, prays to pass appropriate order in this matter.

7. Rival submissions have made it clear that the petitioners have questioned the legality of the impugned order and the criminal proceeding against them, whereas the OPNo.1 supports the impugned order as well as the criminal proceeding. A careful perusal of the complaint instituted by OPNo.1 against the petitioners unambiguously goes to disclose as to how the complainant had transferred a sum of Rs.6,97,000/- in favour of the petitioners and one Pinki Saikia, but there appears no dispute about the friendship developed between petitioner No.1 and OPNo.1. Further, the complaint also discloses that the petitioner No.1 had approached the complainant (OPNo.1) for help of Rs.10,00,000/- for developing her business and on good faith, the complainant had transferred the aforesaid amount of Rs.6,97,000/- to petitioners in the manner as provided in the complaint, but there appears allegation against the petitioners for threatening the complainant and transmitting obscene language and sexually explicit acts to the WhatsApp number of the complainant(OP No.1) and threatening to make it viral and thereafter blackmailing the complainant. In support of the averments made in the complaint, the complainant in his initial statement had reiterated transfer of the money to the petitioners and one Pinki Baishya, but when he(complainant) asked for money, they threatened and abused him and sent his photographs to his relatives and friends. Further, the witness No. 1 and 2 in their inquiry have stated about complainant transferring an amount of Rs.6,97,000/- to the bank account of the petitioners and petitioner No.1 getting nude photos of the complainant viral.

8. Above are the admitted allegation and facts involved in this case, but the learned Magistrate has taken cognizance of offence under Sections 294/507/420/34 of the IPC read with Section 67/67A of the IT Act. What constitute cheating has been described in Section 415 of the IPC in the following words:-

> *"415. Cheating.- Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat"."*

Thus, the essential ingredients of the offense of cheating are:

1. Deception of any person

2. (a) Fraudulently or dishonestly inducing that person so deceived-

(i) to deliver any property to any person; or

(ii) to consent that any person shall retain any property; or

(b) intentionally inducing the person so deceived to do or omit to do anything which he would not do or omit if he were no so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

9. Hence, a fraudulent or dishonest inducement is an essential ingredient of the offence. A person who dishonestly induces another person to deliver any property is liable for the offence of cheating.

10. On the other hand, section 420 IPC defines cheating and dishonestly inducing delivery of property which reads as under: -

> *"420. **Cheating and dishonestly inducing delivery of property.-** Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

11. Section 420 of IPC is a serious form of cheating that includes inducement in terms of delivery of property as well as valuable securities. This section is also applicable to matters where the destruction of the property is caused by the way of cheating or inducement. Punishment for cheating is provided under this section which may extend to 7 years and also makes the person liable to fine.

12. Besides, ***Uma Shankar Gopalika Vs. State of Bihar & Anr.; (2005) 10 SCC 336*** the Apex Court has been pleased to observe as under:-

> XXX XXX XXX
>
> *"6. every breach of contract would not give rise to an offence of cheating and only in those cases of breach of contract would amount to cheating where there was any deception played at the very inception".*

XXX XXX XXX

13. Time and again, the Apex Court has cautioned about converting purely civil disputes into criminal cases which is apparent from the observation made by Apex Court in ***Indian Oil Corporation Vrs. NEPC India Ltd. & Ors; (2006) 6 SCC 736*** wherein it has been held thus:-

> *"13. ...any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged."*

14. From a conscious and meticulous perusal of materials placed on record keeping in view the legal mandates as laid down in the cases referred to above, there appears absolutely nil material against the petitioners to have any dishonest and fraudulent intention. Neither the complaint nor the statement of complainant/witnesses discloses the basic ingredients of offence of cheating which is fraudulent or dishonest intention of the petitioners. Accepting, but not admitting the allegation of cheating at its face value, it is not understood as to how the complainant advanced different sum of money on 28 dates and how the complainant could not be able to smell the intention of the petitioners which is of course not disclosed either in the complaint or in the initial statement of complainant/statement of witnesses in an enquiry U/S.202 of Cr.P.C. In such situation and facts, the essential ingredients of offence U/S.420 of IPC being clearly absent from a bare perusal of materials placed on record, prima facie an offence U/S.420 of IPC cannot be attracted against the petitioners. However, the transfer of money to the petitioners in the peculiar facts and circumstance of the case may give rise to civil liability, but the same is of course subject to proof.

15. Reverting back to the ingredients of Section 507 of IPC, it appears that the foundation of criminal intimidation must be by an anonymous communication, but here in this case, even if the allegation made by OPNo.1-complainant is taken into consideration, it can be said that the communication was made by the petitioners, but not received from any anonymous person and therefore, Section 507 of IPC is not at all attracted nor the ingredients of Section 507 of IPC has been disclosed either in the complaint nor in the initial statement of the complainant nor in the statements of witnesses recorded in the enquiry. Besides, there being no allegation of causing annoyance to the complainant, the basic ingredients of Section 294 of IPC was also not disclosed in the complaint. It is, therefore, very clear that no ingredients of offences under Sections 420/506/294 of IPC were found out from a bare perusal of complaint/initial statement of the complainant and statement of witnesses recorded in the enquiry.

16. On coming back to offences U/S.67/67-A of the IT Act, the complaint only discloses the following allegation:-

> *"sending/transmitting obscene **language**, sexually explicit act to the Whatsapp number of the complainant and threatening for video viral and blackmailing".*

In the above context, the complainant in his initial statement has not whispered a single word on above issue except the words "sent my photos to my relatives and friends". On the other hand, the two witnesses examined in enquiry U/S.202 of Cr.P.C. stated "Pooja has made viral the complainant's nude photos". Section 67 of the IT Act provides for punishment for publishing or transmitting obscene **material** in electronic form, whereas Section 67-A of the IT Act stipulates punishment for publishing or transmitting **material containing sexually explicit act** etc. in electronic form, but such allegation of "material containing sexually explicit act" is conspicuously absent either in the complaint or other materials placed on record. Further, there is no allegation made in the complaint that the petitioners had in fact sent/transmitted any obscene materials, no matter it is alleged in the complaint about sending/transmitting of obscene language, which is not the ingredients of Section 67 of IT Act. Besides, this Court is also conscious of the fact that complaints are normally drafted by legal expert, who would not naturally omit to mention the ingredients of offence in the complaint, but mere mentioning/including the legal language used in the definition of the offence, in the complaint would not by itself attract the offence, unless the act of the accused person would fall within the four corners of the ingredient of the offence. In the ultimate analysis of facts and circumstance involved in this case, especially when the complainant and his witnesses had failed to reveal to state any obscene material/ material containing sexually explicit act being transmitted by the petitioners, it can clearly be concluded that the ingredients of offence U/Ss.67/67-A of the IT Act are not attracted from a bare perusal of complaint and supporting materials produced by the complainant.

17. The net result of the discussions made hereinabove is that the uncontroverted allegations made in the 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 petitioners.

18. In the result, the CRLMC stands allowed on contest but in circumstance, there is no order as to costs. As a logical sequitur, the impugned order passed on 11.08.2022 by the learned Nyayadhikari-Cum-J.M.F.C., Gram Nyayalaya, Junagarh, Kalahandi in 1.C.C. No.1 of 2022 and, consequently, the criminal proceeding arising therein stand quashed.

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2023 (III) ILR – CUT- 932

G. SATAPATHY, J.

CRLMC NO. 227 OF 2016

BINEET KUMAR PATEL & ANR. .....Petitioners

-V-

STATE OF ORISSA .....Opp Party

INDIAN PENAL CODE, 1860 – Sections 90, 375 & 376 – Victim herself has lodged the FIR alleging against petitioner no.1 for keeping physical relationship on the allurement of marriage – When the victim became pregnant for two months, the petitioner no.1 was not willing to keep his promise – Whether the cognizance of the offence U/s. 376 taken by the Learned Trial Court should be defeated on the ground of "consent"? – Held, No – Reason explained with reference to case laws. (Paras 6-10)

Case Laws Relied on and Referred to :-

1. Criminal Appeal No.1231 of 2022 : Sambhu Kharwar Vs. State of Uttar Pradesh & Anr.
2. (2019) 13 SCC 1 : Anurag Soni Vs. State of Chattisgarh.
3. 2019 (9) SCC 608 : Sonu @ Subash Kumar Vs. State of Uttar Pradesh.
4. 2013 (7) SCC 675 : Deepak Gulati Vs. State of Haryana.
5. 2006 (11) SCC 615: Yedla Srinivasa Rao Vs. State of A.P.

For Petitioners : Mr. H.S.Mishra

For Opp. Party : Mr. R.B.Mishra, AGA
Mr. S.Kanungo

JUDGMENT Date of Judgment: 19.10.2023

G. SATAPATHY, J.

1. The application by the petitioners U/S. 482 of Cr.P.C. impugns the order passed on 29.01.2010 by the learned J.M.F.C., Loisingha in G.R. Case No. 125 of 2009 taking cognizance of offences U/Ss. 376/417/506/34 of the IPC or alternatively for the offence U/S. 376 of the IPC.

2. The short background facts are, on 07.08.2009 at about 11.45 AM, OP No.2 lodged a FIR against the petitioners before the IIC Loisingha P.S. alleging therein that on the allurement of marriage, petitioner No.1 had been keeping physical relationship with her for since last six months and as a consequence thereof, when she became pregnant of two months, the petitioner No.1 is deceiving her and petitioner No.2 had been threatening to kill her if she disclose the incident.

On receipt of such FIR, Loisingha P.S. Case No. 125 of 2009 was registered U/Ss. 376/506/34 of the IPC which was investigated into resulting submission of charge sheet against the petitioners for offence U/Ss. 417/506/34 of the IPC, but not withstanding to the submission of charge sheet of aforesaid offences, the learned J.M.F.C., Loisingha by way of a detailed order took cognizance of offence U/Ss. 376/417/506/34 of the IPC and issued process against the petitioners which is the subject matter of challenge in the present CRLMC.

3. In the course of hearing, Mr.H.S.Mishra, learned counsel for the petitioners has submitted that the allegation on record never discloses a case of rape against the petitioner No.1 and by no stretch of imagination, the sexual act as alleged against the petitioner No.1 by the victim would vindicate the commission of offence U/Ss. 376

of IPC, but not withstanding to the submission of charge sheet against the petitioners for offence U/Ss.417/506/34 of the IPC, the learned J.M.F.C., Loisingha erroneously took cognizance of offence U/S. 376 of IPC in addition to the aforesaid offences which is not at all legally sustainable and, therefore, the proceeding against the petitioner No.1 for offence U/S. 376 of IPC having not made out, the impugned order taking cognizance of offence is liable to be set aside and thereby, the present CRLM may kindly be allowed by deleting the offence U/S. 376 of IPC. In support of his contention, Mr.H.S.Mishra relied upon the decision in ***Sambhu Kharwar Vrs. State of Uttar Pradesh and another; Criminal Appeal No. 1231 of 2022*** disposed of on 12.08.2022.

4. On the other hand, Mr.R.B.Mishra, learned AGA, however, assiduously has contended that the act of the petitioner No.1 squarely covered by the definition of Section 375 of IPC and thereby, the impugned cognizance order does not suffer from any infirmity. In echoing the submission of learned AGA, Mr.S.Kanungo, learned counsel for the informant by producing the certified copy of statement of witnesses including that of victim recorded U/S. 161 of Cr.P.C., has submitted that the allegation leveled by the victim itself justify a case against petitioner No.1 for offence U/S. 376 of IPC and, therefore, the impugned order does not suffer from any infirmity. Mr.Kanungo while praying to dismissed the CRLMC has relied upon the decision in ***Anurag Soni V. State of Chattisgarh; (2019) 13 SCC 1***.

5. Admittedly, the petitioners have approached this Court for quashing of impugned order taking cognizance of offence U/Ss.376/417/506/34 of IPC or alternatively quashing for the offence U/S.376 of IPC on the ground that the uncontroverted allegation on record do not prima facie constitute the aforesaid offences or make out a case against the petitioners. The ingredients of offence of rape is provided in Section 375 of IPC and the submission advanced for the petitioners makes it clear that the petitioners challenge the offence of rape on the ground of consensual relationship on the assurance of marriage. In such situation, the definition of rape as falling under description under second clause to Section 375 of IPC together with the definition of consent as provided in Section 90 of IPC is required to be noticed and is accordingly exposited below:

> *"**375. Rape** - A man is said to commit "rape" if he –*
>
> *Xx xx xx xx xx xx*
>
> *under the circumstances falling under any of the following seven descriptions*
>
> *Firstly: xx xx xx xx*
>
> *Secondly.- Without her consent.*
>
> *xx xx xx xx xx*
>
> *Explanation2.-Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:*

> *Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.*
> *xxx*
>
> *"90.* ***Consent known to be given under fear or misconception****- A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or…"*

A careful glance of definition of consent as noticed above discloses that if the consent is given by a person under misconception of facts and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of misconception, it is not a valid consent.

6. In ***Sonu @ Subash Kumar v. State of Uttar Pradesh; 2019 (9) SCC 608*** the Apex Court has held as follows:

> *"12. This Court has repeatedly held that consent with respect to Section 375 of the IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action... [xxx]*
>
> *14. [xxx] Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled... [xxx]*
>
> *16. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceived the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it.* ***The "consent" of a woman under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act****... [xxx]*
>
> *18. To summarize the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given.* ***The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act"****.*

7. In ***Deepak Gulati v. State of Haryana; 2013 (7) SCC 675*** the Apex Court at Paragraph-21 has observed as follows:

> *"21. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind*

weighing, as in a balance, the good and evil on each side. ***There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise****. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence.* ***There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently.*** *An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives".*

In ***Yedla Srinivasa Rao v. State of A.P.; 2006 (11) SCC 615*** in somewhat similar situation, the Apex Court after discussing the facts therein, has held as under:

"In that case, the sexual intercourse was committed with the prosecutrix by the accused. As per the prosecutrix, the accused used to come to her sister's house in between 11 a.m. and 12 noon daily and asked her for sexual intercourse with him. She refused to participate in the said act but the accused kept on persisting and persuading her. She resisted for about 3 months. On one day, the accused came to her sister's house at about 12 noon and closed the doors and had sexual intercourse forcibly, without her consent and against her will. When she asked the accused as to why he spoiled her life, he gave assurance that he would marry her and asked her not to cry, though his parents were not agreeing for the marriage. ***It was found that on the basis of the assurance given by the accused this process of sexual intercourse continued and he kept on assuring that he would marry her. When she became pregnant, she informed about the pregnancy to the accused.*** *He got certain tablets for abortion but they did not work. When she was in the third month of pregnancy, she again insisted for the marriage and the accused answered that his parents are not agreeable.* ***She deposed that had he not promised, she would not have allowed him to have sexual intercourse with her.*** *The question was raised before the panchayat of elders and the prosecutrix was present in the panchayat along with her sister and brother-in-law. The accused and his father both attended the panchayat and the accused admitted about the illegal contacts with the prosecutrix and causing pregnancy. The accused asked for two days' time for marrying the prosecutrix and the panchayat accordingly granted time. But after the panchayat meeting, the accused absconded from the village and when the accused did not fulfil his promise which was made before the panchayat, the prosecutrix lodged the complaint.* ***Considering the aforesaid facts and after considering Section 90 IPC, this Court convicted the accused for the offence under Section 376 IPC".***

In the aforesaid decision in ***Yedla Srinivasa Rao (supra)*** the Apex Court has held as under:

"9. The question in the present case is whether this conduct of the accused apparently falls under any of the six descriptions of Section 375 IPC as mentioned above. It is clear that the prosecutrix had sexual intercourse with the accused on the representation made

*by the accused that he would marry her. This was a false promise held out by the accused. Had this promise not been given perhaps, she would not have permitted the accused to have sexual intercourse. Therefore, whether this amounts to a consent or the accused obtained a consent by playing fraud on her. Section 90 of the Penal Code says that if the consent has been given under fear of injury or a misconception of fact, such consent obtained, cannot be construed to be a valid consent. x*x

10. It appears that the intention of the accused as per the testimony of PW 1 was, right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of consent obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him.

xxx xxx xxx

16. If sexual intercourse has been committed by the accused and if it is proved that it was without the consent of the prosecutrix and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent. Presumption has been introduced by the legislature in the Evidence Act looking to atrocities committed against women and in the instant case as per the statement of PW 1, she resisted and she did not give consent to the accused at the first instance and he committed the rape on her. The accused gave her assurance that he would marry her and continued to satisfy his lust till she became pregnant and it became clear that the accused did not wish to marry her."

8. Keeping in view the aforesaid principles as above, when the facts in this case are analyzed, the victim herself has lodged the FIR alleging against petitioner No.1 for keeping physical relationship on the allurement of marriage, but she became pregnant for two months and the petitioner No.1 was not willing to keep his promise. The victim has also stated about petitioner No.1 entering into her rented house by finding her alone and taking advantage of such situation, caught hold of her and manage to convince her for love and marriage with her and committed sexual intercourse, but when the victim informed about her pregnancy, petitioner No.1 insisted for not to abort pregnancy. It is further alleged that petitioner No.2, however, threatened the victim not to take the name of petitioner No.1 and he openly denied the marriage of petitioner No.1 with the victim.

9. In the backdrop of aforesaid allegations and keeping in view the principles reiterated by the Apex Court in the decisions referred to above and taking into account the definition of consent as provided in Section 90 of IPC together with presumption as available U/S.114-A of Indian Evidence Act, it cannot be said at this stage that the uncontroverted allegation made in the FIR and the evidence collected in support of the same do not disclose the ingredients of Section 375 of IPC and the commission for other offences and make out a case against the accused, so as to quash the criminal proceeding or the offence U/S.376 of IPC. Nonetheless, the petitioner No.1 can demonstrate the aforesaid plea as his defence plea in the trial, but the prosecution has to establish its case against the petitioners independent of the defence plea. The decision in ***Sambhu Kharwar (supra)*** was relied upon by the petitioners, but the same is found distinguishable from the facts of the present case

inasmuch as the allegation against the accused therein was for keeping relationship with the victim prior to her marriage, during the subsistence of marriage and after the grant of divorce by mutual consent.

10. In view of the discussions made hereinabove coupled with analysis of facts involved in this case by keeping in view the principles laid down by the Apex Court in the decisions referred to above, this Court does not find any justifiable ground to quash the impugned order taking cognizance of offence, much less for the offence U/S.376 of IPC.

In the result, the CRLMC stands dismissed on contest, but in the circumstance, there is no order as to costs.

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2023 (III) ILR – CUT- 938

CHITTARANJAN DASH, J.

R.S.A. NO. 74 AND 139 OF 2019

TUTUL KISHORE DAS …….Appellant

-V-

PAVAN KUMAR AGARWAL & ANR. …….Respondents

R.S.A. No.139 of 2019

PAVAN KUMAR AGARWAL & ANR.-V- TUTUL KISHORE DAS & ORS.

(A) TRANSFER OF PROPERTY ACT, 1882 – Section 48 – The plaintiff purchased the schedule 'A' property on 16.07.2009 from the vendor vide Ext. 1 with 25 feet wide common passage road over the plot No. 28 towards the northern side of the plot No.31 – The defendant No.1 purchased the schedule 'B' land that is plot No. 28 from the common purchaser on 10.10.2012 – Schedule 'C' property is the part of plot 28 carved out an area of 25ft x 104ft which is claimed to be a passage granted in favour of the plaintiff in his sale deed where as subsequently it was sold out in favour of def. No.1 – Whether the plaintiff have acquired right of pathway over the schedule 'C' property by virtue of RSD(Ext-1)? – Held, Yes – Since the right to access to plaintiffs and their seller was reserved in Ext 1, the vendor could not counter exclusive right to the defendant No.1.

(B) THE INDIAN EASEMENT ACT, 1882 – Sections 13 & 61 – Easement of grant and easement of necessity – The vendor of plaintiff grant the permission to use the 25ft road from the schedule 'c' property

which was depicted in RSD(Ext.1) – As per the RSD exhibted the parties are governed by the terms of grant – Whether the easement of grant can be revoked? – Held, No – The plaintiff have been granted right to use 25 ft wide common passage vide Ext-1 the same cannot be obstructed by the vendor or vendee. (Paras 35-36)

Case Laws Relied on and Referred to :-

1. AIR 1993 Kerala 91 : Ibrahimkutty Koyakutty Vs. Abdul Rahumankunju Ibrahimkutty & Ors :
2. AIR 1984 Orissa 97 : Smt. Usarani Das Vs. Bhaktahari Mohanty & Ors.
3. S.A No.824 of 2011 : Mr.D.Jeyabal Vs. Mrs.S.Chitra.
4. 2014 (I) OLR-1002 : Rama Chandra Sahu & Ors. Vs. Gopinath Panigrahi.
5. 2013 (I) OLR-584 : Sri Alekh Rajhans Vs. Joint Commissioner, Consolidation & Ors. Bharat Chandra Dash and Anr.
6. S.A.Nos. 316 & 317 of 1978 : Smt. Usarani Das Vs. Bhaktahari Mohanty & Ors.

R.S.A. NO.74 OF 2019

For Appellant : Mr. Abhijit Pal

Respondents : Ms. Pratyusha Naidu

R.S.A. NO.139 OF 2019

For Appellants : Ms. Pratyusha Naidu

For Respondents : Mr. Abhijit Pal

JUDGMENT Date of Judgment : 22.09.2023

CHITTARANJAN DASH, J

1. Heard learned counsel for the parties.

2. Challenge in this appeal is to the judgment and decree passed by the learned 2nd Additional District Judge, Cuttack who analogously disposed of the R.F.A. No.153 of 2016 and R.F.A. No.160 of 2016 vide judgment dated 13th February, 2019 and decree dated 27th February, 2019.

3. The Appellant in RFA No.153 of 2016 have preferred the Second Appeal registered vide RSA No.139 of 2019 whereas the Appellant in RFA No.160 of 2016 preferred Second Appeal vide RSA No.74 of 2019 before this Court.

4. The Appellant in RSA No.74 of 2019 is ***Tutul Kishore Das*** was the Defendant No.1 in the original Civil Suit No.90 of 2013 whereas the Appellant in RSA No.139 of 2019 was the Plaintiff ***Pavan Kumar Agarwal and another*** in the original suit No.90 of 2013.

5. For the sake of convenience the parties to both the Appeals are addressed in the manner arrayed in the original suit for the sake of convenience and to avoid confusion.

6. As depicted in the plaint, the suit property consists of A, B and C schedule. "Schedule A" i.e. Plot No.31 measuring an area of Ac.0.01 decimal under Khata No.253, Chaka No.24 under Mouza- Badakesharpur in the district of Cuttack is the purchased property of the Plaintiff whereas the "Schedule B" land i.e. Plot No.28 measuring an area of Ac.05 decimals out of Ac.0.43 decimals and 462 sqr. Links under Khata No.252 in the same mouza is the purchased property of the defendant No.1.

7. The "Schedule C" property is the part of Plot No.28 carved out measuring an area in the Western side 25ft x 104 ft. is equal to 2600 sq.ft. is the disputant area which is claimed to be a passage granted in favour of the Plaintiff in his sale deed whereas subsequently it is sold out in favour of Defendant No.1.

8. Succinctly, the factual background giving rise to the present Appeals are that Schedule 'A' land is stated to have been purchased by the Plaintiffs from their vendors Sanjib Kumar Sahu, Sanghamitra Sahu, Salila Sahoo @ Behera and Malabika Sahu through registered sale deed No.4195 dated 16.07.2009 wherein Defendant No.2 of the Original Civil Suit No.90 of 2013 was the identifier. As per the genealogy depicted in the plaint, the vendor of the Plaintiffs and the Defendant No.1 are related to each other being wife, son and daughters. The further case of the Plaintiffs is that while conveying the "Schedule A" land to the Plaintiffs the "Schedule C" land was set apart for joint usage as common road to be used and utilized by the Vendors, the father and husband of the vendors of the Plaintiffs as right of way by succession over which they shall have every right to take water, pipe line, electric line and phone line, so also to make drains for proper discharge of rain water at their respective cost to which the sellers shall have no objection whatsoever. The value of the said common passage was also fixed at Rs.50/- as carved out in green colour in the map attached to the Sale deed.

9. It is also the case of the Plaintiffs that after the purchase of the land they converted the kisam of the land purchased under "Schedule A" land to homestead vide OLR No.882 of 2011 and they constructed the culvert over the *chaka nala* to approach to their purchased land through "Schedule C" land on 23.04.2013. The Plaintiffs asserted that they have constructed two storied building over an area of 2000 sq.ft. over "Schedule A" land for the purpose of their business as well as residence. According to the Plaintiffs they have been using the "Schedule C" land in the manner declared in the sale deed as a road to approach the National Highway from their purchased land i.e. "Schedule A" land and transporting their goods through truck over the same. It is also the case of the Plaintiffs that Defendant Nos.2 and 3 have sold the "Schedule C" land along with the "Schedule B" land to the Defendant No.1 for which the Defendant No.1 is obstructing them to use the "Schedule C" land as approach to the National Highway. It is further case of the Plaintiffs that "Schedule C" land is the only way for the Plaintiffs to approach to the National Highway for all purposes and the Defendant Nos. 2 and 3 have no authority

to sell the same. According to the Plaintiffs the cause of action arose on 10.10.2012 when the Defendant Nos.2 and 3 sold the "Schedule C" land to the Defendant No.1 while selling "Schedule B" land to him and on 01.03.2013 when the Defendant No.1 obstructed the Plaintiffs to use the "Schedule C" land as passage.

10. Being aggrieved by the said action of the Defendant No.1, Defendant Nos.2 and 3, the Plaintiffs brought the Civil Suit before the learned Civil Judge, Junior Division, 1st Court, Cuttack registered as Civil Suit No.90 of 2013, *inter alia*, praying for the following reliefs:

> "1. To declare that the Plaintiffs have acquired right of path way over "Schedule C" property by virtue of registered sale deed No.4195 dated 16.7.2009.
>
> 2. To declare that the inclusion of "Schedule C" land in Registered Sale Deed No.2995 dated 10.10.2012 in favour of Defendant No.1 is illegal and void.
>
> 3. To declare that Defendant No.1 has no right, title and interest over the "Schedule C" land and interference in any manner with the possession of the Plaintiff over "Schedule C" property is illegal.
>
> 4. The Defendant No.1 to be permanently restrained from coming upon the "Schedule C" land and from interfering in any manner with the possession of the Plaintiffs over the suit "Schedule C" land."

11. The Defendant No.1 having caused his appearance in the Civil suit No.90 of 2013 filed the written statement of defence, *inter alia,* traversing the plaint averments and pleaded that the suit as laid is not maintainable in law or in fact; that the Plaintiffs have no cause of action to file the suit as against Defendants; the Plaintiffs suit is barred by law of limitation, estoppels and acquisance; the Plaintiff's suit is hit by resjudicata; the suit is barred for non-joinder and mis-joinder of necessary parties; the genealogy given in paragraph-3 of the plaint is incorrect; the allegation made in paragraph 4 of the plaint is false, baseless and concocted and that it is incorrect to say that "Schedule C" land was set apart as common road to be used and utilized by the Plaintiffs as well as the seller of the Plaintiffs and Defendant No.1, further alleging that the averments made in paragraphs 6 and 7 of the plaint are incorrect.

12. According to the Defendant No.1, the Defendant Nos. 2 and 3 while owners in possession of "Schedule B" property sold the same to him vide Sale Deed No.2955 dated 10.10.2012 with value and consideration and delivered the possession thereof and the alleged "Schedule C" land does not exists at all, as depicted in the plaint since alleged "Schedule C" land has been carved out by the Plaintiffs on their own though it forms part of "Schedule B" land. According to the Defendant No.1, the vendors of the Plaintiffs have no manner of right, title and interest over Plot No.28 i.e. "Schedule B" land and as such the recitals made by the vendors of the Plaintiffs in the Sale deed dated 16.07.2009 giving them the right to approach to their land which admittedly exists over Plot No.28 does not bind the Defendant No.1. According to the Defendant No.1, the vendors of the Plaintiffs

cannot assign and/or permit the right of way over a land in which they have no manner of right, title and interest at all. It is further case of the Defendant No.1 that Schedule A and B property have a chaka nala between them and there is no culvert over the chaka nala. It is asserted by the Defendant No.1 that there is 20 feet road of the northern side of the Schedule 'B' property which connects the Plot No.32. It is also asserted that Plot No.32 is approached by the Plaintiffs through the land of Defendant No.3 by virtue of sale deed bearing No.3865 dated 16.07.2009. The Defendant No.1 also pleaded that adjoining the chaka nala, their exist Plot No.29 which adjoins the National Highway including its ridge in its western side. The Defendant No.1 denies the averments made in paragraphs 8 and 9 of the plaint. According to them the Defendants 2 and 3 are the absolute owners in possession of the "schedule B" property and have executed the registered sale deed No.2955 dated 10.10.2012 in favour of the Defendant No.1. According to the Defendant no.1 the "Schedule B" land was the self acquired property of Defendant Nos.2 and 3 and as such the vendors could not have assigned the approach to the Plaintiffs through their land or any kind of interest in favour of the Plaintiffs and as such the recital of the alleged sale deed dated 16.07.2009 allowing the Plaintiffs to approach to their land through "Schedule C" property as their path way is not binding on the Defendant no.1 and further that the Plot No.31, the purchased land of the Plaintiffs is not adjoining Plot No.28. The Defendant No.1 further averred that as per the provision of the easement Act, one can only right of way over the land of their vendors and in the present case the vendors of the Plaintiffs being not the owners of the Plot No.28, no easement could be made on the road or for the use of the vendors of the Plaintiffs. The Defendant No.1 finally pleaded that he being the rightful owner over "Schedule B" land and "Schedule C" property being part of his purchased land, he is the rightful owner in possession and have acquired right, title and interest over the same.

13. Later, on the basis of the amendment brought to the plaint the Defendant No.1 also filed additional written statement challenging the portion allowed to be amended and the plea taken under paragraph-8(a) and (b) and (c).

14. Defendant Nos. 2 & 3 in the suit who are the vendors of Defendant No.1 and also partly the vendors of the Plaintiffs did not either filed statement of defence or contested the case.

15. The learned Civil Judge, Junior Division, 1st Court, Cuttack having gone through the divergent pleadings of the parties framed the following five issues:

> "1. Whether the suit is maintainable in its present form?
>
> 2. Whether the Plaintiffs have cause of action to file the suit?
>
> 3. Whether the Plaintiffs have acquired right of path way over the schedule 'C' property by virtue of RSD No.4145 dated 16.07.2009?

> 4. Whether the Defendants are invading or trying to invade upon the right of the plaintiffs over the suit schedule 'C' land?
>
> 5. Whether the Plaintiffs are entitled for any other relief/reliefs as prayed for?"

16. After formulating of issues, the parties adduced documentary and oral evidence where, the Plaintiffs examined two witnesses including Pavan Kumar Agarwal himself as PW-1. The Plaintiffs also proved documents vide Ext.1 to Ext.7. On the other hand, the Defendant No.1 Tutul Kishore Das examined himself as DW-1 and proved two documents vide Ext.A and Ext.B.

17. In the light of the above issues, the learned trial court at the first instance having assessed the evidence laid before it by the parties found the Plaintiffs to have proved its case partly and decreed the suit in favour of the Plaintiffs in part on contest and observed that the Plaintiffs have got the permanent right of path way mutually with the Defendant No.1 but only in respect to "10 feet wide passage" i.e. part of "Schedule C" land exist over Plot No.28 at the western side to reach the National Highway.

18. Being aggrieved at the findings recorded by the learned Civil Judge, Junior Division, 1st Court, Cuttack the Plaintiffs preferred RFA No.153 of 2016 and Defendant no.1 preferred RFA No. 160 of 2016 before the learned District Judge, Cuttack who later transferred the Appeals to the court of learned 2nd Additional District Judge, Cuttack for disposal.

19. As stated above, learned 2nd Additional District Judge heard both the above Appeals analogously and disposed of the same vide common Judgment dated 13th February, 2019, confirming the judgment and decree dated 31.08.2016 and 13.09.2016 respectively passed by the learned Trial Court in Civil Suit No.90 of 2013. The learned First Appellate Court, however, dismissed the RFA No. 160 of 2016 preferred by the Defendant No.1.

20. Being aggrieved with the findings recorded by the first Appellate Court the both parties i.e. the Defendant no.1 preferred RSA No. 74 of 2019 and the Plaintiffs preferred RSA No.139 of 2019, as stated above, which were admitted on the following substantial questions of law.

> "1. Whether the courts below in the facts and circumstances of the case have erred in law by not non-suiting the Plaintiffs in view of the provision of section 61 of the Easement Act, 1882?
>
> 2. Whether in the absence of pleadings in the plaint that the approach road under "Schedule C" was as of easement of necessity; the courts below are right in granting the benefits as provided in section 13 of the Easement Act ? and
>
> 3. Whether in the facts and circumstances of the case, the courts below have erred by not holding that the principle of estoppels has its play in the matter as there has been creation of easementary right by means of registered documents"

Submissions

21. In reference to the question No. 1, it is argued by Mr. Abhijit Pal, the learned counsel for the Defendant No.1 being Appellant in RSA 74 of 2016 that "Schedule C' Property is admittedly part of "Schedule B" property. According to him it is also admitted by the Plaintiffs that Schedule 'B' property has been legally transferred by the Defendants No. 2 and 3 vide regd. Sale deed No.2955 dated 10.10.2012 in favour of the Defendant No.1 and the claim of the Plaintiffs as such that the "Schedule C" property allowed to be used as "road" to approach "Schedule A" property by the Defendant No.3 with limited interest as an approach road construed as a license which stood revoked on sale of the "Schedule B" property to Defendant No.1 that attracts section 61 and 62(a) of the Easement Act and the license granted would stand revoked.

22. The learned Counsel further submitted that in the case in hand there is no specific averment in the plaint to the effect that the servient and dominant tenement constituted a single unit and as a result of subsequent transfer of the Schedule 'B' property to the Defendant No.1 cannot be at all use on account of its situation without enjoying a right of passage over "Schedule C" property. According to Mr. Pal the learned courts below got misdirected itself in making out a third case beyond pleadings, which is not permissible in law and hence the decree passed by both the courts below are liable to be set aside. Mr Pal also argued that the title of the Defendant No.2 and 3 to the Schedule 'B' property cannot be denied by the Plaintiffs and as such the principle of estoppels will not apply to the Defendant nos 2 & 3 while transferring Schedule 'B' property to Defendant No.1 and Defendant No.1 being the absolute owner in respect to Schedule 'B' property cannot be injuncted from utilizing his own property for the convenience of the Plaintiffs allowing 10 feet path way. In support of his submissions, learned counsel relied upon decisions in the matter of ***Ibrahimkutty Koyakutty v. Abdul Rahumankunju Ibrahimkutty and others : AIR 1993 Kerala 91 & Smt. Usarani Das v. Bhaktahari Mohanty and others : AIR 1984 Orissa 97.***

23. Ms. Naidu on the contrary while argued for the Plaintiffs contended that the Plaintiffs are the purchasers of "Schedule A" property from their vendors that includes Defendant No.3 whereas her husband, the Defendant No.2 is a signatory in the sale deed no. 4195 dated 16.07.2009 conveying the right of use of "Schedule C" property jointly by the Plaintiffs and the Defendants. She pointed that the map attached to the deed specifically carved in green colour is the area identified in respect of right granted and argued that pursuant to the purchase by the Plaintiffs they have been using the said 25 feet wide road appertaining to Plot no. 28 for approaching the National High way. According to Ms. Naidu, Malabika Sahu (D.3) is the common vendor to both the Sale Deeds and Defendant No.2 being her husband is the signatory to the deed of the Plaintiffs. Both having consciously granted right of passage in favour of the Plaintiffs with value, cannot covey it

subsequently in favour of anybody else. In this context she argued that the date of execution of the two deeds determines the priority i.e one executed earlier has priority over the other. According to her in view of the fact that Malabika Sahu being the common owner has transferred her interest for a value to the Plaintiffs as such the second sale deed in favour of the Defendant No.1 transferring 25 feet road is void-ab-initio.

24. Responding to the revocation of right accrued through the grant in the sale deed it is argued that when the conveyance grants a right in favour of the Plaintiffs by the vendor, the vendor is precluded from preventing the vendee there from and accordingly the right cannot be revoked. It is further argued that the road referred to in the deed is the only road having 25 feet width connecting plot of the Plaintiffs to the National highway and required to be used for transporting goods in trucks. According to Ms. Naidu the learned courts below have concurrently confirmed that there is no alternative passage available to the Plaintiffs to approach the National high way. She further argued that in order to find an easement of necessity, the necessity must be absolute necessity and not merely a convenient mode of enjoyment of property. Emphasizing on the same she also argued that an easement of necessity is an easement without which the property cannot be used at all and not merely reasonable and convenient enjoyment of the property. She further argued that easementary right has been granted and specifically mentioned in the sale deed and there is no evidence to show its extinguishment. She accordingly, canvassed for allowing the Appeal of the Plaintiffs. In support of her submission, the learned counsel relied upon decision of Hon'ble High Court of Madras in the matter of ***Mr.D.Jeyabal Vrs. Mrs.S.Chitra decided on 26.04.2019: S.A No.824 of 2011,*** decision of our Hon'ble Court in the matter of ***Rama Chandra Sahu and others v. Gopinath Panigrahi: 2014 (I) OLR-1002, Sri Alekh Rajhans Vs. Joint Commissioner, Consolidation and 3 others, Bharat Chandra Dash and another: 2013 (I) OLR-584 & Smt. Usarani Das V. Bhaktahari Mohanty and Ors. : S.A.Nos. 316 & 317 of 1978.***

Findings

25. In view of the rival submissions of the learned Counsels as above and the substantial questions of law framed for determination, on perusal of the materials on record, it is the admitted case of the parties that Defendant No. 2 –Suresh Chandra Sahu and Defendant No.3 Malabika Sahu are husband and wife. Plaintiffs have purchased "Schedule A land" i.e. Plot No.31 from Sanjib Kumar Sahu, Sanghamitra Sahu, Salila Sahoo @ Behera (children of Suresh Chandra Sahu D.2) and Malabika Sahu (D.3) vide R.S.D No.4195 dated 16.07.2009 (Ext.1). It is also found from Ext.1 that Defendant No.2 is a signatory to this document. The description of the property in Ext.1 is North- Chaka Nala, South- Prafulla Kumar Sahoo and others, East- Plot Nos.32 and 33 and West-Chaka Nala. It is further found from Ext.1 that on the date of execution of Ext.1,the Plaintiffs have also purchased plot Nos.32 &33

In Ext.1, it is mentioned that "*the sellers have set apart a 25 feet wide common passage (road) over the Plot No.28 towards the northern side of the plot No.31 marked in green colour to be utilized by the purchasers (Plaintiffs) as well as the seller and the father and husband of the seller as their right of way by way of succession and over which they shall have every right to take water pipe line, electric line and phone line and so also to make drains for proper discharge of rain water at their respective costs to which the present seller has no objection whatsoever. The approximate value of the said common passage is Rs.50/- (Rupees Fifty only).*"

26. It is also not in dispute that the Defendant No.1 has purchased suit schedule 'B' land i.e. plot No.28 from Defendant No.2 (Suresh Chandra Sahu) and Defendant No.3 (Malabika Sahu) vide R.S.D No. 2955 dated 10.10.2012 (Ext.5).

27. In the instant case, the dispute between the parties is in respect of 25 feet common passage over the Plot No.28 towards the northern side of the Plaintiffs' plot No.31 as shown in the sketch map annexed to Ext.1 (Sale deed) wherein Defendant No.2 and his wife Defendant No.3 have put their signatures.

28. In the instant case, as held above, both the Plaintiffs and Defendant No.1 have purchased suit schedule 'A' and suit schedule 'B' land. The Defendant No.1 claims that the alleged schedule 'C' land does not exist in their sale deed dated 10.10.2012. The vendors of the Plaintiffs have no manner of right, title, interest over plot No.28 (schedule 'B) land as such the recitals made by the vendors of the Plaintiffs in the sale deed dated. 16.07.2009 regarding road over plot no.28 does not bind the Defendant No.1 and that the Plaintiffs can approach the National High way after passing the canal through western side ridge of plot no.29. He further asserted that there is 20 feet road of the northern side of the Schedule 'B' property which connects the Plaintiffs' another Plot No.32 and that the adjoining the chaka nala, their exits Plot No.29 which adjoins the National Highway including its ridge in its western side.

29. It reveals from Ext.1 and Ext.5 that the vendor of the Defendant namely Malabika Sahu (D.3) is the common vendor to both the above sale deeds. It is also found that Ext.1 was executed prior to Ext.5. It is settled principle of law that in between two registered documents determines its priority i.e. the one executed earlier has priority over the other. In the instant case Malabika Sahu along with her children have sold suit schedule 'A' property in favour of the Plaintiffs wherein Suresh Chandra Sahu (husband of Malabika Sahu) is one of the signatory. In the sale deed Ext.1 dated 16.07.2009, right to the extent of 25 feet common passage over the Plot No.28 towards the northern side of the Plaintiffs' plot No.31 has been granted. Therefore, having regard to the recitals in Ext.1, it can be held that it is an easement by grant and conveyance of passage by the common vendor Defendant No.3 shall be binding on her as well as all who have consciously been its signatories. All that

transpired in the recital of the deed executed in favour of the Plaintiffs was absolutely within the knowledge and domain of the vendors of the Defendant No.1 and the land under "Schedule A and B" property being that of the family of which all the vendors in both the deed executed in favour of the Plaintiffs and Defendants constitutes one family has to be construed a single constituent in the peculiarity of the cicumstances. Therefore, the subsequent sale deed dated 10.10.2012 (Ext.5) executed by common vendor Malabika Sahu and her husband in favour of Defendant No.1 in respect of Schedule.'B' land cannot extinguish the grant already conveyed in the earlier sale deed vide Ext.1. Therefore, the same vendors if have subsequently divested the portion of land in favour of the Defendant No.1 that had once divested in favour of the Plaintiffs giving a special right with value much prior to the execution of the subsequent one have to come within the mischief of the principle of estoppels.

30. Further, between the two registered documents the priority has to be given to the one executed earlier in consonance with Section 48 of the transfer of Property Act 1882 which reads thus:

> **"48. Priority of rights created by transfer:- Where a person purports to create by transfer at different times in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created."**

31. In view of the provision above said the right of way to access to the property purchased by the Plaintiffs held to have been reserved granted in the sale deed No. 4195 dated 16.07.2009(Ext-1). Therefore, the vendors of the Defendant No.1 and that of the Plaintiffs could not have conveyed the entire land under "Schedule B" property including the passage conveyed under the deed executed in favour of the Plaintiffs. Such assertion by this Court is in tandem with the provision under Section 48 of the Transfer of Property Act in as much as the provision contemplates that where a person has created a right in or over the property such rights cannot be exercised to their full extent together, then each later created right shall be subject to the rights previously created. It will mean that the exclusive right conferred on the Defendant No.1 in the sale deed by way of conveyance dated 10.10.2012 will not be legal till such time the earlier transferees i.e the Plaintiffs has a special contract or reservation which binds the Defendant No.1. Since the right to access to Plaintiffs and their sellers was reserved in the sale deed No. 4195 dated 16.07.2009, therefore, the vendors could not confer exclusive right to the Defendant No.1 vide sale deed No. 2955 dated 10.10.2012. The Defendant No.1 has to maintain the 25 feet wide passage in any case in terms of the recitals in the sale deed of the Plaintiffs dated 16.07.2009(Ext-1). Therefore, if the Plaintiffs or their transferee use the passage, then such use of passage by the Plaintiffs or their transferees cannot be said to be causing any prejudice to the Defendant No.1. My above view is f ortified from the

decision of the of the Hon'ble Apex Court in the matter of ***DR. S. KUMAR & others Vrs. . RAMALINGAM decided in Civil Appeal nos. 8628-8629 of 2009.***

32. Thus it is held that the Plaintiffs have acquired easementary right over schedule 'C' property by means of registered document vide Ext.1. The learned Courts below have erred by not considering the easementary grant given in Ext.1.

33. In the case in hand, as held above, the vendors of Ext.1 set apart a 25 feet wide road to be utilized by the Plaintiffs and their sellers and successors. So the intention of the vendors/sellers is very clear as to use of 25 feet road as common passage for all to approach the National High way.

34. It is the case of the Plaintiffs that the 'C' schedule land is their only approach road to the National High way. It is also found from the evidence of PW-1 and PW-2 that the road as described in the sale deed (Ext.1) is the easement of necessity to the Plaintiffs. DW-1 (Defendant No.1) in his evidence has stated that plot no.28 and 31 are not adjoining plots and there is a chakanala in between both the plots. DW-1 in his cross examination has stated that he cannot say through which passage the Plaintiffs are coming out from their own land i.e. plot No.31.

35. So from the pleadings and evidence adduced from the side of the parties, it is proved that the suit schedule 'C' land is not only easement of necessity but also is easement acquired by grant as depicted in Ext.1. In the matter of grant, the parties are governed by the terms of the grant. The language employed in the recital under vExt.1 is irrevocable. It will not amount to an easement of necessity under section 13 of the Act even though it may also be an absolute necessity for the person in whose favour the grant is made. The observations of the learned Courts below regarding the right of path way which is limited interest of the Plaintiffs and transfer of plot no.28 vide Ext.5 in favour of defendant no.1 seems to be of absolute transfer in nature is not in consonance with law. Both the learned Trial Court and First Appellate Court holding mutual right of path way of the Plaintiffs for their enjoyment of passage over the portion of the suit schedule 'C' property to the extent of 10 feet only at the western side of plot no.28 is also wrong. Both the learned Trial Court and First Appellate Court confused themselves in distinguishing easement by grant and easement of necessity. In the instant case, the Plaintiffs claimed their right of passage as per the grant given by their vendors. They have also claimed the said passage necessary for their beneficial enjoyment to approach the National High way.

36. Hence, as stated above, under Ext.1 the Plaintiffs have been granted right to use 25 feet wide common passage over the Plot No.28, by the vendors and such right will not extinguish by execution of Regd.Sale deed vide Ext.5 in favour of the Defendant no.1 and that the same cannot be obstructed by the Defendant No.1 so also by Defendant Nos.2 and 3.

37. In the result, I find that the judgment and decree passed by both the learned Trial Court and first Appellate Court suffers from manifest error and, thus, cannot

sustain in law.Accordingly, the RSA No.74 of 2019 filed by the Appellant/defendant no.1 is dismissed and the R.S.A No. 139 of 2019 filed by the Appellants/Plaintiffs is allowed. There is no order as to cost.

38. The 25 feet common passage over the Plot No.28 towards the northern side of the Plaintiffs' plot No.31 (as per the recital in Ext.1) is reserved for the common use of the plaintiffs, his vendors and Defendant No.1.

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2023 (III) ILR – CUT- 949

CHITTARANJAN DASH, J

CRA NO.133 OF 1997

BESA NAIK (DEAD)THROUGH SUSHANTA NAIK & ORS. .....Appellant

-V-

STATE OF ODISHA (VIGILANCE) .....Respondent

INDIAN PENAL CODE, 1860 – Sections 409, 477(A) r/w Section 5(i)(c) of Prevention of Corruption Act – Essential ingredients to prove the charge – Discussed. (Paras 9-10)

For Appellant : Ms. S. Pattanaik

For Respondent : Mr. M.S.Rizvi, ASC (Vigilance Department)

JUDGMENT Date of Judgment : 22.09.2023

CHITTARANJAN DASH, J.

1. Heard learned counsel for the parties.

2. This Appeal is directed against the judgment and order dated 20th June, 1997 passed in T.R. Case No.37 of 1991 by the learned Special Judge,Vigilance, Sambalpur wherein the learned court convicted the Appellant under Section 5 (i) (c) of the Prevention of Corruption Act (hereinafter in short called the P.C.Act) and Section 5(2) of the said Act and also Section 477 (A) and U/s. 409 of the Indian Penal Code (herein after inshort called IPC) and sentenced him to undergo RI for three years and to pay fine of Rs.1,000/- in default to undergo RI for six months under Section 5(2) of the P.C.Act and R.I. for three years and to pay fine of Rs.5,000/- in default RI for one year under Section 409 of the IPC and further sentenced to undergo RI for one year under Section 477 (a) of the IPC.

3. The Prosecution case as emerged from the case record and evidence is that the Appellant, a government servant was working as Senior Clerk in the office of the Block Development Officer, Chendipada presently under District Angul. It is alleged that during his incumbency as such, he was kept in-charge of stock and store of levy cement of the said Block for the period from the year 1982 to 1987. Subsequently, the Appellant got transferred to the Tahasil office, Athamalik in pursuance whereof he handed over the charge of his seat including the store and stock of the Block to his successor namely, Sri M.N. Pradhan. It is further alleged that during his tenure at Chhendipada the Appellant misappropriated the sale proceeds against the stock of the levy cement as he did not account for the detail of the proceeds against 1415 bags of cement or the cement in stock costing in total Rs.83,435/- @ Rs.59/- per bag. It is also alleged that he made false entry as to issuance of cement to different persons and reduced the balance. On 12th November, 1987 verification was conducted by the vigilance sleuth in respect to the stock of cement in the store of BDO, Chendipada as well as the stock register maintained by the Appellant till 20th July, 1987. Pursuant to the report of the vigilance enquiry Sambalpur Vigilance P.S. Case No.47 dated 13th November, 1987 was registered against the Appellant and investigation commenced. During investigation the I.O. examined the witnesses, seized the cement stock register Vol. IV(Ext.2), maintenance register book for the year 1987-88 and cash book for the year 1987-88, other incriminating documents and on completion of the investigation, lodged the prosecution against the Appellant obtaining sanction from the competent authority.

4. The case of the Appellant is one of complete denial. In his statement under Section 313 Cr.P.C. he pleaded that the cement was disbursed to the contractors as per practice on the direction of the BDO on their application asking for supply of cement in advance for execution of the work to be adjusted in their final bill. He categorically denied any misappropriation of the sale proceeds or shortage of the levy cement.

5. The prosecution, in order to bring home the charges examined 16 witnesses in all. In his defence the Appellant examined 9 witnesses in support of its case. While the prosecution proved the documents vide Ext. 1 to 14, the defence too proved documents vide Exts. A to L. The learned trial court having analysed the evidence of the prosecution held it sufficient and found the charges proved beyond all reasonable doubt holding the Appellant thereby guilty there for.

6. Being aggrieved by the said findings the Appellant preferred the Appeal, *inter alia*, assailing the impugned judgment on the ground that the evidence of the star witnesses i.e. PW 5 (BDO) and that of PW 16 (Informant) are contradictory to each other and that there is no evidence on record to show the exact quantity of cement entrusted to the Appellant from which the alleged shortage could be found out; that the emphasis laid on Ext.2 said to be the cement issue register allegedly to have been verified on 12th November, 1987 belies by the statement of PW 4, the

successor of the Appellant who clearly stated in his cross examination that Ext.2 does not indicate that store verification was made on 12th November, 1987; that there is no evidence establish the exact quantity of cement entrusted to the Appellant while he was in charge of stock and store of cement of the Block during the period from 03.08.1977 to 26.07.1987 and the fact that cement was being issued in advance to the contractor on the order of the BDO and the cost thereof was being adjusted against the final bill found not contradicted thereby the prosecution case ought to have been held inadequate to discharge its primary obligation in proving the factum of entrustment so as to shift the burden on the Appellant to prove the contrary.

7. Further, it is assailed on the ground that there is no material on record to show that the Appellant destroyed, altered, mutilated or falsified any book, paper, valuable security or account which belonged to or was in possession of his employer and that the Appellant acted willfully to defraud and as such the charge under Section 477 A of the IPC cannot be said to have been proved.

8. According to the Appellant, the evidence laid through PWs 1, 3, 4, 11 and 14 to the effect that cement was issued in advance to the contractor on the order of the BDO pursuant to the recommendation of the Junior Engineer which is adjusted in the final bill that finds supports to the plea propounded by the Appellant raises a strong doubt as to if such thing had happened in the case of the Appellant since the investigation was never directed in that line. Further, the evidence of the prosecution witnesses is itself sufficient to raise suspicion on the prosecution case to the effect that the shortage of cement allegedly to have been found in course of verification of stock in the register is because of the fact that the same have been disbursed in favour of the contractor. Finally, it is assailed on the ground that in the case of defence the evidence does not contemplate that the accused should prove his case with the same strictness and vigour as the prosecution is required to prove the charge. It is sufficient if the accused is able to prove his case by the standard and pre-ponderence of probability inasmuch as probability of defence version throws doubt on the prosecution case.

9. Learned counsel for the Appellant, in course of the hearing advanced his argument akin to the ground propounded in assailing the impugned judgment as discussed above and relied upon the decisions reported in 1994 CLR 547, 1987 Vol.II OLR 519, 1981 (1) OLR 585, 2009 Suppl. II OLR 578, 198=78 CRLJ NOC 26 Orissa. The learned counsel for the State, Vigilance on the contrary submitted that the impugned judgment is in consonance with evidence adduced before the trial court and it being consistent with law and fact emerging in the case during trial requires no interference and insisted for its confirmation.

10. Having heard the arguments advanced by the parties, perused the evidence adduced before the learned trial court. While analyzing, at the outset in connection to the charge in the offence U/s. 409 IPC it can be said that the principal ingredient of the offence being dishonest misappropriation or conversion which may not

ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the property entrusted, if proved may in the light of other circumstances justifiably lead to an inference of dishonest misappropriation or conversion. Section 409 IPC consists of any one of the positive act mainly misappropriation, conversion,and user of disposal of property by any person belonging to one of the category of persons enumerated in the section. In Criminal misappropriation, the property comes into possession of the offender by some casualty or otherwise and he afterwards misappropriates it. In the case of criminal breach of trust the offender is lawfully entrusted with the property and he dishonestly misappropriated the same, or willfully suffers any other person so to do, instead of discharging the trust attached to it.

11. From the above annotation of law, it is inferred that in case of dishonest misappropriation it is incumbent upon the prosecution to prove two essential facts: The factum of entrustment and the factum of misappropriation. Perusal of the allegation basing on which the entire case of the prosecution rest goes to the fact that the Vigilance personnel conducted a verification of the store and stock of the Chendipada Block on 12.11.1987 and found shortage of Cement entrusted to the Appellant by 1415 bags either in the shape of cement or the sale proceeds thereof. Pursuant to such verification report was prepared by the vigilance team and submitted to the S.P., Vigilance proved under Ext.8, subsequent whereof Vigilance Case was registered and investigation commenced as discussed above. Admittedly, on the date of verification the Appellant had already been transferred and not present during verification. The evidence is crystal clear that prior to the verification or on the date of verification no such information was conveyed to the Appellant for his presence during verification. However, Ext. 8 proved as verification report submitted by the Vigilance Inspector before the Superintendent of Police, Vigilance stated by some witnesses to have been signed by the Appellant which is false as no such signature found proved. In the entire evidence except the register allegedly to have been maintained by the Appellant proved vide Ext.2 showing entry of Cement, the prosecution evidence is silent as regards the actual number of cement bags supplied to the store. Such an evidence is inevitable to establish the fact that the Appellant was required to deposit the cost against it quantified at Rs.83,435/-, as, according to the prosecution itself the stock register under Ext.2 is held to be improperly maintained by the Appellant. Therefore, an independent evidence as to the entrustment of actual quantum of cement ought to have been proved shown to have been supplied by the authority to the store which was either not entered by the Appellant or to have been misappropriated.

12. Further, it is the case of the Prosecution since inception that Ext. 2 i.e register of cement have not been maintained in accordance with the law and/or practice. Section 34 of the Evidence Act stipulates that the entry in books of account regularly kept in course of business are relevant but such statement not alone is

sufficient evidence to charge any person with liability. This enunciation of law is relevant to the present context because the evidence of the prosecution witness more particularly the P.Ws 1, 3, 4, 11 and 14 deposed regarding the practice prevalent in the Block in relation to the disbursement of cement which supports the plea of the Appellant that cement was being disbursed to the contractors on the basis of their application for the purpose and it is disbursed on the recommendation of the BDO without the cost being deposited instantly but is adjusted at the time of drawing of the final bill in favour of the contractor concerned. This part of evidence of the prosecution witness is very vital as the witnesses are not only competent to speak about the relevant practice but could bring on record that was required to be explained by the Prosecution, which, however, has not been controverted except a bald denial to the suggestion of the defence by the BDO(P.W.5) or the Junior Engineer (P.W.11) leading thereby a probability that such practice was prevalent and makes the case of the prosecution inadequate in ascribing the liability of misappropriation.

13. It is rightly referred to by the learned trial court that if the accused is able to prove his case by the standard of preponderance of probability as envisaged in Section 5 of the Evidence Act as a result of which he succeeds not because he proves his case to the hilt but because probability of the version given by him throws doubt on the prosecution case and therefore the prosecution cannot be said have established the charges beyond all reasonable doubt. In other words, the defence need not prove its case but to bring on record a reasonable doubt in the mind of the court as to the truthfulness and the gravamen of the prosecution case, which is evident in this case. The Prosecution evidence has been directed contrary to its case as one deposed to by the witnesses above stated coupled with the defence evidence laid by the Peon of the Block (D.W.9) who was declined as witness from the side of the prosecution and was examined in favour of the defence. D.W.9 candidly stated that upon the entry made in the Peon book in respect to the applications of 25 persons, who intended for supply of cement in advance, he brought the matter before the BDO/ JE who made endorsement on the face of the application in affirmative and accordingly the supply was made. A discrete investigation in this direction could have also established the factum of entrustment and misappropriation but was ignored.

14. It is clarified on several occasions that the evidence tendered by the defence witnesses cannot always be termed to be a tainted one by reason of the factum of the witnesses being examined by the defence. The defence witnesses are entitled to equal respect and treatment as that of the prosecution. There are several other infirmities, contradictions and discrepancies in the testimonies that strike to the root of the Prosecution case. One more such evidence would be that while some Prosecution witnesses rules out the presence of the Appellant at the time of verification, some deposed that the Appellant was present. As discussed above presence of the Appellant at the time of verification would have otherwise assured

the case of the Prosecution but is contrary. Absence of the Appellant gives rise to several inferences to be read against the Prosecution. This is because the Appellant had been transferred from the relevant post prior to the date of verification. He had no scope to explain with material before him to establish his claim as by then somebody else is in possession of the store and the stock as well. No report as such has been proved that the successor made any complaint showing shortage of cement. Consequently, the learned trial court though analysed the evidence misdirected itself in appreciating the important and relevant aspects in the evidence including the version of the defence witnesses, thereby arrived at an erroneous conclusion holding the Prosecution to have proved the factum of entrustment and consequent misappropriation. In essence, the Prosecution case cannot be held sufficient to establish either the factum of entrustment or misappropriation. As a necessary corollary the offence U/s 5(1) (c) of the P.C Act cannot also be held established except to the extent that the Appellant is a public servant by default of his service under the government establishment.

15. Coming to the offence U/s. 377A IPC, admittedly, there is no evidence of any kind in the prosecution case showing the Appellant to have altered, mutilated or manipulated the register so as to attract the offence under Section 477A of the IPC.

16. The allegation of the prosecution to the effect that the Appellant did not make proper entry in the register of cement (Ext.2) thereby giving rise to the suspicion that the number of cement bag allegedly entrusted to the Block has not been disbursed in favour of the person and has been in discriminately disbursed in favour of 25 person not directly connected to the work of the Block making the Appellant liable, in absence of a definite evidence said to be one of presumption which falls short of conclusive proof.

17. In view of the above discussions, it is found that the Prosecution has not been able to establish the charges for commission of any of the offences under which he stands convicted. Therefore, the impugned judgment and order are not sustainable in the eye of law and accordingly, set aside. Consequently, the Criminal Appeal is allowed.

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2023 (III) ILR – CUT- 954

SIBO SANKAR MISHRA, J.

W.P.(C) NO.15926 OF 2021

Dr. BHOLANATH MISHRA .....Petitioner

-V-

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

SERVICE LAW – The service of petitioner was down-graded without giving any opportunity of hearing – Whether such direction/order of authority is sustainable? – Held, No – The office order being hit by the doctrine of "Audi alterm partem" is liable to be set aside. (Para-18)

Case Laws Relied on and Referred to :-

1. AIR 2008 SC 336 : BCPP Mazdoor Sangh Vs. N.T.P.C.
2. 2022 SCC Online SC 1091: St. Mary's Education Society and Anr. Vs. Rajendra Prasad Bhargava & Ors.
3. (2006) 4 SCC 1 : Secretary, State of Karnataka & Ors. Vs. Uma Devi (3) & Ors.

For Petitioner : Mr. A.K.Biswal,Mr. R.K.Muduli

For Opp. Parties : Mr. P.K. Rath, Sr. Adv.
Mr. A. Behera, Mr. S.K. Behera,
Mr. P. Nayak, Mr. S. Das, Mr. S.B. Rath

JUDGMENT Date of Hearing: 27.09.2023 : Date of Judgment : 06.10.2023

SIBO SANKAR MISHRA, J.

1. By way of the present Writ Petition, the Petitioner is making two fold prayers namely restoration of his designation as General Manager (Geo Technology) & protection of his remuneration and for regularization of his service.

2. The broad contour of the facts of this case is that pursuant to the advertisement dated 16.02.2008, the Petitioner participated in the interview and got selected as Geographic Information System (GIS) Expert. The Petitioner was appointed on tenure basis on 27.02.2008 at the consolidated remuneration of Rs.14,000/-.His services have been extended from time to time and the remuneration was also increased to Rs.45,000/-.

3. On 08.03.2019, the Opposite Party No.2 in its 32nd meeting had taken the following decision:-

> **"E. Revision of monthly remuneration of GIS Expert & Env. Specialist, System Expert & MIS Specialist and Shelter Coordinator and Social Management specialist.**
>
> Three employees of OSDMA, i.e. GIS Expert & Env. Specialist, System Expert & MIS Specialist and Shelter Coordinator and Social Management Specialist have been engaged in OSDMA against the approved posts since more than 11 years. Presently, they are getting monthly consolidated remuneration of Rs.45,000/- (GIS Expert) and Rs.40,000/- (System Expert and Shelter Coordinator) as per the last revision made by the Governing Body of OSDMA on 1.2.2014 and since last 5 years no revision of their salary has been made.
>
> Three employees have given representatives for enhancement of their remuneration. Taking in to consideration their long experience in the field of disaster management and expertise in their respective fields, the enhancement of their remuneration was

considered keeping on views 7th pay commission recommendations, remunerations of other state level positions in different organizations and prevailing market conditions. Since they are working for a long period in OSDMA, their designations were sought to be changed to General Managers for independently looking after the works. The proposed remuneration would be as follows:-

Name of the Employee	Existing Remuneration	Proposed Remuneration
Dr. B. N. Mishra, GIS Expert & Env. Specialist	Rs. 45000/-	Rs. 80000/-
Sri A. Ray, System Expert & MIS Specialist	Rs. 40000/-	Rs. 75000/-
Sri K.C. Bisoi, Shelter Coordinator and Social Management Specialist	Rs. 40000/-	Rs. 75000/-

4. The Petitioner has been upgraded in the designation to be General Manager (Geo Technology) from GIS Expert. Keeping in view the 7th pay commission recommendation, the remuneration was also revised and upgraded to Rs.80,000/- from that of Rs.45,000/-. Accordingly, on 08.03.2010, an Office order was issued communicating the decision of the 32nd meeting of the Governing Body of Opposite Party held on 02.03.2019 to the Petitioner.

5. The Petitioner joined in the said position of General Manager (Geo Technology) and his services were being extended time to time up till 01.02.2021.

6. It appears, on 01.02.2021, 34th meeting of the Governing Body of Opposite Party No.2 (OSDMA) was held and in the said meeting a decision was taken to recall the earlier decision taken in 32nd meeting which was held on 02.03.2019. It was decided that the Petitioner would be re-designated as GIS Expert, his original designation and his salary would be downgraded to Rs.70,000/- from Rs.80,000/-.

7. The Petitioner's grievance is that the Opposite Party unilaterally has not only reverted him back to GIS Expert from General Manager (Geo Technology) but also downgraded his pay scale. The decision of the 34th meeting of the Governing Body downgrading the pay scale and re-designating the Petitioner was communicated to the Petitioner by the Office order dated 08.04.2021, which reads as under:-

"ODISHA STATE DISASTER MANAGEMENT AUTHORITY
(A GOVERNMENT OF ODISHA AGENCY)

No. 978/OSDMA Date:08.04.2021

FILE No.297/2008 (Estt.)

OFFICE ORDER

In pursuance of the decision of the 34th meeting of the Governing Body of OSDMA held on 01.02.2021, the following modification have been made in the official designation and monthly consolidated remuneration of Dr. Bholanath Mishra with effect from 08.04.2021.

Sl. No.	Name	Present official Designation	Reverted back to the following designation	Present consolidated monthly remuneration	Revised monthly consolidate remuneration
1	Dr. Bholanath Mishra	General Manager (Geo-technology)	GIS Expert	Rs.80,000	Rs.70,000

This order supersedes all previous orders issued to this effect.

By orders of Managing Director
Executive Director (Admn.)"

Perusal of the Office order dated 08.04.2021 indicates that the Petitioner has indeed been reverted back to his original post i.e. GIS Expert and his monthly remuneration was also revised to Rs.70,000/- from Rs.80,000/-.

8. On the basis of the aforementioned grievances, the Petitioner has filed the present Writ Petition *inter alia* making the following prayer:-

"It is, therefore, prayed that in the interest of justice, this Hon'ble Court may graciously be pleased to admit this writ application, issue Rule Nisi, calling upon the opp. parties to show cause as to why the office order dtd. 08.04.2021 (Annexure-7) issued as per direction of the Managing Director in reducing the designation of the petitioner to GIS Expert from General Manager (Geo Technology) and in reducing the monthly remuneration of the petitioner from Rs.80,000/- to Rs.70,000/- as well as the decision taken in respect of the petitioner in reducing the salary and in redesignating the petitioner in the 34th meeting of the Governing Body of Odisha State Disaster Management Authority on 01.02.2021 (Annexure-6) shall not be quashed declaring the same as illegal and arbitrary;

And as to why the Opp. Party shall not be directed to take step to regularize the service of the petitioner."

9. The second prayer made by the Petitioner need not be adjudicated at this stage as the same gives absolutely a different cause departing from the cause arising out of the Office order dated 08.04.2021 as reproduced above. Therefore, I am of the considered view that the legality and sustainability of the order dated 08.04.2021 needs to be gone into at this stage.

10. Heard Mr. A.K.Biswal, learned counsel for the Petitioner and Mr. P.K.Rath, learned Senior Counsel for the Opposite Parties.

11. Mr. Biswal, learned counsel for the Petitioner submits that the decision of the 34th meeting of the Governing Body which culminated into the Office order dated 08.04.2021 is an unilateral decision behind the back of the Petitioner. The earlier decision in the 32nd meeting of the Governing Body was a suo moto decision taken by the Governing Body bestowing the benefit of upgradation of the salary as well as designation from GIS Expert to General Manager (Geo Technology) by weighing his performance. Once he was upgraded/promoted to the post of General Manager (Geo Technology), he cannot be reverted back without assigning any reason or affording an opportunity of being heard. The down gradation of the pay and designation behind the back of the Petitioner and without affording him an opportunity is against the principle of natural justice. He has relied upon the judgment of Hon'ble apex Court in the case of ***BCPP Mazdoor Sangh Vs. N.T.P.C.*** reported in ***AIR 2008 SC 336***. Para-29 of the said judgment reads as follows:-

> **"29.** The Government or its instrumentality cannot alter the conditions of service of its employees and any such alteration causing prejudice cannot be effected without affording opportunity of pre-decisional hearing and the same would amount to arbitrary and violative of Article 14. As pointed out earlier, in the case on hand, the employees are neither party to tripartite Agreement nor they have been heard before changing their service condition. Therefore, the action of the management is violative of Article 14 of the Constitution of India. Similar view has been taken by this Court in *H.L. Trehan* vs. *Union of India* and others (1989) 1 SCC 764. In para 11 of the judgment, this Court observed as under:
>
> "……. It is now a well-established principle of law that there can be no deprivation or curtailment of any existing right, advantage or benefit enjoyed by a Government servant without complying with the rules of natural justice by giving the Government servant concerned an opportunity of being heard. Any arbitrary or whimsical exercise of power prejudicially affecting the existing conditions of service of a Government servant will offend against the provision of Article *14* of the Constitution. Admittedly, the employees of CORIL were not given an opportunity of hearing or representing their case before the impugned circular was issued by the Board of Directors. The impugned circular cannot, therefore, be sustained as it offends against the rules of natural justice."

Mr. Biswal, learned counsel for the Petitioner contended that reversion from superior post to inferior post and reduction of pay scale falls under "Major Penalty". Therefore, without following due process, the same could not have been inflicted on him.

12. Mr. Rath, learned Senior Counsel for the Opposite Parties vehemently opposes the contentions raised by Mr. Biswal, learned counsel for the Petitioner. At the outset he questions the very maintainability of the Writ Petition.

13. To buttress his argument he has relied upon the judgment of the Hon'ble apex Court in the case of ***St. Mary's Education Society and another Versus Rajendra Prasad Bhargava and others*** reported in ***2022 SCC Online SC 1091***. Relying upon paragraphs-43 & 44 of the said judgment, Mr. Rath, learned Senior Counsel submits that the services rendered by the Petitioner being not a 'Public Function' cannot be made subject matter of a writ jurisdiction. Paragraphs-43 & 44 of the said judgment reads as under:-

> **"43.** In the background of the above legal position, it can be safely concluded that power of judicial review under Article 226 of the Constitution of India can be exercised by the High Court even if the body against which an action is sought is not State or an authority or an instrumentality of the State but there must be a public element in the action complained of.
>
> **44.** A reading of the above extract shows that the decision sought to be corrected or enforced must be in the discharge of a public function. No doubt, the aims and objective of Appellant 1 herein are to impart education, which is a public function. However, the issue herein is with regard to the termination of service of Respondent 1, which is basically a service contract. A body is said to be performing a public function when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so."

14. To delve upon the issue of maintainability of the Writ Petition, I have perused the Manual of Odisha State Disaster Management Authority (OSDMA) and it's by law. Although OSDMA has been registered under the Societies Registration Act, 1860 on 29.12.1999 but the State Government has direct control over the function and management of the said society. Therefore, the society has been designated as a "Government of Odisha Society". The constitution of the society also indicates that all the senior officers of the State Government forms part of it and decisions are being taken at the highest level of the Government. The impugned 34th meeting of the Governing Body of the Society wherein the decision of reversion and down gradation of the salary of the Petitioner was taken attended by the following officials of State Government:-

Members Present

1. Shri Suresh Chandra Mahapatra, IAS, Chief Secretary & Chairman, Governing Body, OSDMA
2. Shri Pradeep Kumar Jena, IAS, Development Commissioner, Additional Chief Secretary, Rural Development Department, Special Relief Commissioner, Odisha & Managing Director, OSDMA
3. Shri Sanjeev Chopra, IAS, Additional Chief Secretary, Home Department.
4. Dr. Saurav Garg, IAS, Principal Secretary, Agriculture and Farmers' Empowerment.
5. Shri Ashok K.K. Meena, IAS, Principal Secretary, Finance Department
6. Sri Bishnupada Sethy, IAS, Principal Secretary, Revenue and DM Department
7. Shri Y.K. Jethwa, IPS, Additional DG of Police, Law and Orders
8. Sri Jagadananda, Member Secretary, CYSD
9. Representative of Panchayati Raj & Drinking Water Department
10. Representative of Department of Water Resources
11. Representative of H & UD Department
12.Representative of Works Department
13. Shri Ranjan Kumar Mohanty, Indian Red Cross Society, Odisha State Branch, Bhubaneswar."

Therefore, the Opposite Party even though being a Registered Society but definitely an instrumentality of the State. In that view of the matter, under Article 12 of the Constitution of India, the Opposite Party/Society could be treated as "State", as such amenable to the writ jurisdiction.

15. On the aforementioned background this Court entertains the Writ Petition.

16. On perusal of the impugned order and the proceeding of 34th meeting indicates that the decision of re-designation and down gradation of the remuneration has been taken by the Governing Body unilaterally without putting the Petitioner to notice.

17. It is settled principle of law that down gradation in the terms of the emoluments or down gradation of the designation is nothing but inflicting "Major Penalty" and entails stigmatization. Therefore, minimum requirement was to follow the principle of natural justice by giving opportunity to the Petitioner to be heard. Perusal of the records indicates that there is no adverse report or doubtful performance of the Petitioner came to the light during his tenure as GIS Expert or General Manager (Geo Technology). Therefore, the impugned conduct of the Opposite Party is left to speculation in absence of any reasoning. The impugned decision of the Governing Body in its 34th meeting under the heading of "Review of orders of decision regarding re-designation of persons and remuneration pertaining to the Petitioner and the Office order dated 08.04.2021 being hit by the doctrine of "*audi alterm partem*" is liable to be set aside.

18. Accordingly the Writ Petition is partly allowed. By allowing the prayer No.1 made in this Writ Petition. However, liberty is reserved for the Opposite Party to proceed in accordance with law, if so advised, to reconsider the case of the Petitioner regarding his down gradation of the pay remuneration and re-designation by following due process of law.

19. In so far as the second prayer of the Petitioner regarding regularization of service is concerned albeit this Court is not adjudicating the issue at this stage, but on the teeth of the observation of Hon'ble Supreme Court in the matter of ***Secretary, State of Karnataka and others v. Uma Devi (3) and others*** reported in ***(2006) 4 SCC 1,*** the case of the Petitioner worth consideration by Opposite Party.

20. Mr. Rath, learned Senior Counsel for the Opposite Party in this regard submits that all the employees of the society are temporary employees and under the contractual appointment. There is no regular cadre structure created in the Society. However, from the perusal of record it indicates that the Petitioner was appointed as a GIS Expert on the approved/sanction post. That being so paragraph-53 of the judgment of Hon'ble Supreme Court in ***Umadevi (3)*** (supra) may enure to the benefit of the Petitioner. Paragraph-53 of *Uma Devi (supra)* reads as under:-

> **"53.** One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V. Narayanappa* , *R.N. Nanjundappa* and *B.N. Nagarajan* and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such *irregularly* appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

In the light of the observations made by the Hon'ble apex Court in the aforesaid paragraph of Uma Devi (supra) judgment, it is expected that the Opposite Party take an appropriate decision in regard to the regularization of the service of the Petitioner.

21. The Writ Petition is accordingly partly allowed.

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2023 (III) ILR – CUT- 961

SIBO SANKAR MISHRA, J.

W.P.(C) NO.16230 OF 2021

SHANTILATA PRADHAN .....Petitioner

-V-

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

ODISHA DEVELOPMENT AUTHORITY ACT, 1982 – Section 4(3) –The petitioner challenge the order of transfer – Whether the order of transfer suffers from any illegality? – Held, No – As per the section 4(3) of the Act after completion of six years on deputation, the petitioner was rightly repatriated to her parent organization. (Para-9)

For Petitioner : Ms. S. Das, Ms. S. Devi

For Opp. Parties : Mr. H.M. Dhal, AGA, Mr. Dayananda Mohapatra

JUDGMENT Date of Hearing: 26.09.2023 : Date of Judgment: 06.10.2023

SIBO SANKAR MISHRA, J.

1. In the present Writ Petition, the Petitioner is assailing the office order dated 31.03.2021 passed by the Opposite Party No.3 thereby relieving her from Talcher-Angul-Meramandali Development Authority (TAMDA) with effect from 31.03.2021 and to join Paradeep Development Authority.

2. Heard Ms. S. Das, learned counsel for the petitioner and Mr.Dayananda Mohapatra, learned counsel for the Opposite Party Nos.2 and 3.

3. The factual conspectus of the present case germinating from the record indicates that the Petitioner had joined as an Architectural Assistant in the Office of the Special Planning Authority of Paradeep Development Authority. While she was posted there, an office order was issued on 20.12.2014 by the Additional Secretary to Government of Odisha, Housing and Urban Development Department transferring her from Paradeep Development Authority to Talcher-Angul-Meramandali Development Authority (for short 'TAMDA').The said transfer appears to be in place of one Smt. Nilima Mohapatra, Architectural Assistant who was employed in TAMDA. The office order indicates that the petitioner and Smt. Nilima Mohapatra were transferred in exchange between the two authorities.

4. After lapse of six years, the TAMDA authority by an office order dated 31.03.2021 relieved the petitioner from its office to rejoin as Architectural Assistant in M/s. Paradeep Development Authority.

5. Now the moot question raised in this writ petition is that whether the office order dated 20.12.2014 is a mere transfer on mutual basis or it is a transfer on deputation.

6. The provision operating in the field is Section 4 of the Odisha Development Authorities Act, 1982 which reads as under:

> **"4. Staff of the Authority** – (1) Subject to such control and restrictions as may be prescribed by rules, the Authority may appoint a Secretary and such number of other officers and employees (including experts for technical work) as may and employees (including experts for technical work) as may be necessary for the efficient performance of its functions and may determine their designation and grades.
>
> (2) The Secretary and other officers and employees of the Authority shall be entitled to receive from the funds of the Authority such salaries and such allowances, if any, and shall be governed by such conditions of service as may be determined by regulations made in this behalf.
>
> [(3) Notwithstanding anything contained in this Act or in the rules or regulations made thereunder, for the purpose of smooth and efficient administration of the affairs of the Authorities, the State Government may, at the instance of any Authority or otherwise, direct any Authority for transfer of any officer or employee of such Authority, by way of

> deputation, to another Authority for such period not exceeding six years at a time and on such conditions, as may be specified in the direction.
>
> (4) Whenever, any officer or employee belonging to an Authority is transferred under Sub-section (3), the Authority to which the officer or employee is so transferred shall be bound to accept the joining report forthwith, employ him in the service of the Authority and pay all amounts due to him on account of his pay, allowances and other dues from out of the fund of that Authority.]
>
> [(5) Notwithstanding anything contained in this Act or Rules or Regulations made thereunder, the State Government may, at the instance of any Local Authority or Department of the State Government or any other Authority constituted or incorporated under the provisions of any State Act or otherwise, direct any Authority for transfer of any Officer or employee of such Authority, by way of deputation, to such Local Authority or Department of the State Government or any other Authority constituted or incorporated under the provisions of the State Act for such period not exceeding six years at a time and on such terms and conditions, as may be specified in the direction and the provision of sub-section (4), shall apply to such deputation mutatis mutandis.]"

7. Bare reading of Sub-Section (3) of Section 4 indicates that for the purpose of smooth and efficient administration of the affairs of the Authorities, the State Government at the instance of any Authority can depute any officer from other Authority for a period not exceeding six years. After the expiry of six years, the officer would be reverted back to his/her parent employer.

8. The office order dated 20.12.2014 indicates that the Housing and Urban Development Department of the State of Odisha has intervened and passed the said order transferring the petitioner from M/s. Paradeep Development Authority to TAMDA. The petitioner is trying to derive advantage from the expression 'transfer' used in the said letter. But in fact the word 'transfer' loosely used in the office order dated 20.12.2014, in place of the word 'deputation'. Because there was no occasion for the State Government to pass any order transferring an employee of one Authority to the other except on deputation under the command of sub-section (3) of Section 4. Therefore, the order dated 20.12.2014 is nothing but an order of transfer of the petitioner on deputation from her parent organization, i.e., M/s. Paradeep Development Authority to Talcher-Angul-Meramandali Development Authority. Since the period of deputation expires on 30.12.2020 after completion of six years, the TAMDA have issued the impugned office order dated 31.03.2021 repatriating the petitioner to its parent organization, i.e., Paradeep Development Authority. To that extent, no fault can be found on the issuance of such direction.

9. The Opposite Party Nos.2 and 3 have filed a counter affidavit stating therein that after completion of six years in the establishment by way of transfer on deputation under Section 4 of ODA Act, 1982 and Rules framed thereunder, the Opposite Party No.3 being the competent authority has issued the order dated 31.03.2021. However, in the rejoinder, the petitioner has controverted the said stand of the Opposite Parties and stated that the transfer order of the petitioner issued on

20.12.2014 cannot be termed as deputation. Therefore, her repatriation to the parent organization is not sustainable. The Opposite Party No.1, the State Government have also filed a counter affidavit and supported the contention of both the Opposite Party Nos.2 and 3 to say that the transfer of the petitioner indeed was deputation under Section 4(3) of the ODA Act, 1982. Therefore, after completion of six years on deputation, the petitioner was rightly repatriated to her parent organization.

10. The ancillary issue raised by the petitioner is regarding the non-payment of salary to the petitioner from 31.03.2021 onwards. When the situation was confronted with the counsel for the Opposite Party Nos.2 and 3, Ms. Das submits that the financial health of the Opposite Party No.2 is precarious. Apart from that, even after repatriation of the petitioner she has not joined back in her parent organisation and Smt. Nilima Mohapatra, Architectural Assistant is continuously working in the organization in the same post. Therefore, owing to the present financial position, the organisation cannot afford to make payment to two employees working in the same position.

11. I have perused the order sheet of this Hon'ble Court which indicates that while allowing an interim application being I.A. No.7126 of 2021 this Court on 07.05.2021 has been pleased to stay the operation of the impugned order dated 31.03.2021 as an interim measure. On the strength of the said interim order, the petitioner is continuing in the said post even after the repatriation. Therefore, even though I hold that the order dated 31.03.2021 is a valid orderwhile rejecting the present Writ Petition, the petitioner is entitled to her salary during the interregnum period she worked on the strength of the interim order of this Court.

12. For the foregoing reasons, the Writ Petition is dismissed being devoid of merits and the Opposite Party No.2 is directed to relieve the petitioner forthwith by implementing the impugned order dated 31.03.2021.

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2023 (III) ILR – CUT- 964

A.C. BEHERA, J.

R.S.A. NO. 305 OF 2012

PITAMBAR GIRI & ORS. .....Appellants

-V-

BISHNUPADA DAS .....Respondent

(A) TRANSFER OF PROPERTY ACT, 1882 – Sections 122 to 126 – When the gift deed shall be treated as complete? – Explained with reference to case laws. (Paras 12-15)

(B) RES-JUDICATA – The Trial Court dismissed the suit of the plaintiff and as well as the counter claim of the defendants – The defendants have not preferred any appeal or cross objection in the 1st appeal challenging the order of dismissal of their counter claim – Whether the final finding made by the Learned Trial Court against the defendants has became res-judicata against them? – Held, Yes.

(Para 17)

Case Laws Relied on and Referred to :-

1. 2019(I) ILR-Cut-736 : Smt. Rama Deo Vs. State of Orissa & Ors.
2. 2001(II) OLR-514 : Namita Patnaik alias Mohanty Vs. Dillip Kumar Pattnaik.
3. 2019(I) ILR-(Cuttack)-736 : Smt. Rama Deo Vs. State of Orissa & Ors
4. 2017 AIR SCW 6187 : Rajni Rani and Anr. Vs. Khairati Lal & Ors.

For Appellants : Mr. N.C. Pati, Sr. Adv., M.R. Dash, B. Das, B. Pati, B.K. Swain.

For Respondent : Mr. Bhaktahari Mohanty, Sr. Adv., D.P. Mohanty, R.K. Nayak, T.K. Mohanty, P.K. Swain

JUDGMENT Date of Hearing :14.09.2023 : Date of Judgment :13.10.2023

A.C. BEHERA, J.

The defendants are the appellants against a reversing judgment in a suit for declaration of title, confirmation of possession and permanent injunction.

The case of the plaintiff, (who is the respondent in this 2nd appeal) in the suit vide T.S. No.849 of 1996/946 of 2000 before the learned trial court below as per the averments made in his plaint in nut shell against the defendants (those are the appellants in this 2nd appeal) was that, the suit property was the purchased property of one Krushna Das. While Krushna Das was the owner and in possession over the suit property, he gifted away the same to his two grand-sons, i.e., Judhistir Das and Bhima Charan Das by executing and registering a gift deed bearing No.3167 dated 29.09.1982 vide Ext.8. After receiving the suit property through the aforesaid gift deed from Krushna Das, the donees thereof, i.e., Judhistir Das and Bhima Charan Das became the joint owners over the suit property. But, subsequent thereto, as per amicable partition between Judhistir Das and Bhima Charan Das, they (Judhistir Das and Bhima Charan Das), distributed half share each from the suit property. Judhisir Das sold his half share to the plaintiff through R.S.D. No.2429 dated 06.11.1987 vide Ext.2. After purchasing above half share of Judhistir Das he (plaintiff) mutated the same to his name. Thereafter, Bhima Charan Das also sold his rest half of the suit property to the plaintiff through R.S.D. No.2700 dated 23.11.1991 vide Ext.4. Accordingly, the plaintiff purchased the entire suit property from Judhistir Das and Bhima Charan Das through the aforesaid sale deeds vide Exts.2 and 4 respectively and, he (plaintiff) became the owner of the entire suit property. But, surprisingly, on 27.10.1996, the dedendants tried to dispossess him (plaintiff) from the suit property

forcibly stating that, they (defendants) are the owners of the said property, because, they have purchased the same from the original owner Krushna Das. For which, without getting any way, the plaintiff approached the learned trial court below filing suit vide C.S. No.489 of 1996 being the plaintiff against the defendants praying for declaration of right, title, interest and confirmation of his possession over the suit property and also to injunct them (defendants) permanently from entering upon the same.

2. The defendants contested the suit of the plaintiff by filing their joint written statement taking their stand *inter alia* therein that, though Krushna Das had executed the gift deed on dated 29.08.1982 in respect of the suit property in favour of the vendors plaintiff, i.e., Judhistir Das and Bhima Charan Das, but, Krushna Das, had not delivered the possession thereof to Judhistir Das and Bhima Charan Das. For which, that gift deed was not a complete gift deed. Therefore, Krushna Das had cancelled/revoked that gift deed through a Registered Deed of cancellation /revocation on dated 22.11.1989. So, by that gift deed vide Ext.8, no interest over any portion of the suit property was created in favour of Judhistir Das and Bhima Charan Das, because the title and possession of the suit property was as usual with Krushna Das. Therefore, Krushna Das being the exclusive owner of the suit property sold away the same to the defendants through R.S.D. No.552 dated 21.03.1992 vide Ext. B and delivered possession thereof to them (defendants). Accordingly, they (defendants) are possessing the suit property as the owners thereof. The plaintiff has no right, title, interest and possession on the same. The further case of the defendants was that, as the original owner of the suit property, i.e., Krushna Das has cancelled the deed of gift vide Ext-8 through the registered deed of cancellation/revocation on dated 22.11.1989, for which, no right, title, interest and possession in respect of the suit property was created in favour of Judhistir Das and Bhima Charan Das. Because, the said gift deed vide Ext.8 in favour of Judhistir Das and Bhima Charan Das was void and in operative one. When the gift Deed vide Ext.8 in favour of Judhistir Das and Bhima Charan Das was void, then, the sale deeds executed by the said Judhistir Das and Bhima Charan Das in respect of the suit property in favour of the plaintiff vide Exts.2 and 4 are also void automatically. Therefore, the plaintiff is not entitled to get any interest on the suit property through the aforesaid void deeds vide Exts.2 and 4. So, in their written statement, the defendants filed counter claim against the plaintiff praying for declaration of their right, title, interest over the suit property and confirmation of their possession on the same and also to declare the RoR prepared in favour of the plaintiff on the strength of the sale deeds vide Exts.2 and 4 wrong and to injunct the plaintiff permanently from entering upon the suit property along with costs thereof.

3. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether seven numbers of issues were framed and the said issues are:-

1. Whether the plaintiff has got his cause of action to file this suit?

2. Whether the suit is maintainable?
3. Whether the plaintiff has got his right, title, interest and possession over the shit land?
4. Whether the defendants have got their right, title, interest and possession over the suit land?
5. Whether the counter claim is maintainable?
6. To what other reliefs, the plaintiff is entitled to?
7. To what other reliefs, the defendants are entitled to?

4. In order to substantiate the aforesaid relief(s) prayed for by the plaintiff in the suit, he had examined three witnesses from his side including himself as P.W.1 and had relied upon series of documents on his behalf vide Exts.1 to 13.

5. But, on the contrary, the defendants in support of their pleadings and counter claim examined three witness from their side including the defendant No.1 as D.W.1 and relied upon several documents on their behalf vide Ext.A to Ext.E/1 whereas only one document as Ext.A was marked as on behalf of the Court.

6. The learned trial court below answered issue No.3 against the plaintiff and also answered issue No.4 against the defendants observing that the plaintiff is not entitled for any relief in his favour against the defendants in respect of the suit property.

Because, he (plaintiff) has not proved the flow of title of the suit property, i.e., how the suit property came to the hand of Krushna Das, though it has been stated on behalf of the plaintiff that the suit property was purchased by Krushna Das. The learned trial court also further observed that the gift deed, which was executed by Krushna Das in favour of Judhistir Das and Bhima Charan Das vide Ext.8 in respect of the suit property is not a complete deed of gift. Because, that deed vide Ext.8 has not fulfilled the legal requirements of a gift deed as envisaged in Section 122 of the T.P. Act, 1882. For which, the said deed vide Ext.8, stated to be a gift deed is void. Therefore, the said deed vide Ext.8 has not created any interest in respect of the property covered therein, in favour of Judhistira Das and Bima Charan Das. So the sale of the suit property by the said Judhisthira Das and Bima Charan Das to the plaintiff through the sale deeds vide Exts.2 and 4 on the strength of the void deed vide Ext.8 cannot and shall not create any interest in favour of the plaintiff.

The leaned trial court also answered issue No.4 against the defendants by observing that, as there is no link evidence to show, how the suit property came to the hand of Krushna Das from the original Sabik recorded tenant, then, Krushna Das had no manner of right, title and interest over the suit property. Therefore, transfer of the suit property made by the said Krushna Das in favour of the defendants through sale deed bearing No.552 dated 11.03.1992 vide Ext.B also cannot create any interest over the suit property in favour of the defendants.

When no interest in respect of the suit property has been created in favour of the plaintiff or defendants, then they (parties of both the sides) are not entitled for any relief as prayed for by them in the plaint of the plaintiff as well as in the counter claim of the defendants.

On the basis of the aforesaid findings and observations made by the leaned trial court below in issue Nos.3 and 4, the learned trial court below dismissed the suit of the plaintiff and as well as the counter claim of the defendants on contest vide judgment and decree dated 17.01.2004 and 30.10.2004 respectively.

7. On being dissatisfied with the aforesaid judgment and decree passed by the learned trial court below in T.S. No.849 of 1996 in dismissing the suit of the plaintiff, he (plaintiff) challenged the same by preferring the 1st appeal vide R.F.A. No.8 of 2011 being the appellant against the defendants by arraying them (defendants) as respondents.

After hearing the said R.F.A. No.8 of 2011, the learned 1st Appellate Court allowed the appeal filed by the appellant(plaintiff) and set aside the judgment and decree of dismissal of the suit vide T.S. No.849 of 1996 passed by the learned trial court and declared the right, title, interest and possession of the plaintiff over the suit property and injucted the defendants permanently from interfering into the peaceful possession of the plaintiff over the suit land by assigning the reasons in paragraph no.9 of the judgment that, "when the parties of both the sides have admitted Krushna Das as the owner of the suit property, then, on the basis of their admission, no link document is required to show the ownership of Krushna Das over the suit property and when the contents of Ext.8 (gift deed) executed by Krushna Das are going to show that, the donees thereof, i.e., Judhistir Das and Bhima Charan Das have accepted such gift and they have taken possession of the suit property, covered under the gift deed, it cannot be held that, the said gift deed vide Ext.8 executed by Krushna Das in favour of Judhistir Das and Bhima Charan Das was an incomplete deed and when the said gift deed vide Ext.8 is not an incomplete gift deed, then, the unilateral cancellation thereof by the donor Krushna Das through registered deed of cancellation on dated 22.01.1989 cannot cancel/revoke that gift deed vide Ext.8 lawfully and as such, when the gift deed vide Ext.8 in favour of Judhistir Das and Bhima Charan Das is held as a valid gift, then alienation of the suit property covered under that gift deed in favour of the plaintiff by the donees thereof, i.e., Judhistira Das and Bhima Charan Das through sale deeds vide Exts.2 and 4 cannot be held as illegal. Therefore, Exts.2 and 4 are not void sale deeds, but, valid sale deeds. So, the plaintiff has right, title, interest and possession over the suit property as a lawful purchaser. When Krushna Das had already lost his interest over the suit property by executing and registering the deed of gift vide Ext.8 in favour of Judhistir Das and Bhima Charan Das, then he had no interest on the suit property to alienate sub sequently on dated 21.03.1992 in favour of the defendants. Therefore, the plaintiff is the owner and in possession over the suit property, but, the defendants have no interest thereon."

8. On being dissatisfied with the aforesaid judgment and decree of the 1st appellate court against the defendants, they (defendants) preferred this 2nd appeal being the appellants against the plaintiff by arraying him (plaintiff) as respondent.

9. This 2nd appeal has been admitted by formulating the substantial question of law that is, "whether the gift deed dated 29.09.1982 vide Ext.8 executed by Krushna Das in favour of Judhistir Das and Bhima Charan Das (vendors of the plaintiff) shall be called as valid gift deed even after cancellation of the same through a registered deed of cancellation by the donor thereof on dated 22.11.1989 ?

10. During the course of hearing of the appeal, the learned counsel for the appellants/defendants relied upon the decision between ***Balai Chandra Parui vrs. Smt. Durga Bala Dasi and Ors : (Culcutta) Court (decided on 30.04.2004)*** in order to upset the judgment and decree of the 1st appellate court.

11. On the contrary, learned counsel for the respondent/plaintiff has relied upon the decisions reported in ***2019(I) ILR-Cut-736 : Smt. Rama Deo vrs. State of Orissa & Ors, 2001(II) OLR-514 : Namita Patnaik alias Mohanty vrs. Dillip Kumar Pattnaik*** in support of the judgment of the 1st Appellate court.

12. The law on this aspect, i.e., when a gift deed shall be held and accepted as a complete or incomplete gift deed and when cancellation of gift deed is permissible under law and the legal sanctity of the deed of cancellation has already been clarified in the ratio of the following decisions of the Apex Court and Hon'ble Courts:-

(i) ***(1997) 2 SCC 255 : Naramadaben Maganlal Thakker vrs. Pranjivandas Maganlal Thakker and others—T.P. Act, 1882— Sections 122, 123 to 126***:-

When the gift deed shall be treated a complete gift deed—

"The execution of a registered gift deed, acceptance of the gift deed and delivery of possession together make the gift complete. Thereafter, the donor is divested of his title over the properties covered in that gift deed and the donee becomes absolute owner of the said properties of that gift deed."

(ii) ***2019 (1) Civil Court Cases-280 (S.C.)***
2018 (II) CLR (S.C.)-1245
127(2019) CLT (S.C.)-240
2018(4)CCC(S.C.)-464 :

S. Sarojini Amma vrs. Velayudhan Pillai Sreekumar (Para-15) —T.P. Act, 1882— Sections 122 and 123 to 126:-Gift—cancellation—

"A conditional gift with no recital of acceptance and no evidence in proof of acceptance, where possession remains with the donor as long as he is alive, does not become complete during lifetime of donor—when a gift is incomplete and title remains with donor, the deed of gift might be cancelled."

(iii) 2018(3) CCC-150(Orissa) Rankanidhi Das(dead) thr. His L.Rs vrs. Kartika Charan Das(dead) through his L.Rs. and another***—T.P. Act, 1882— Section 122 (paras 9 and 10)—***"Gift deed once acted upon, the same cannot be cancelled."

(iv) 2016(1) OJR-246 Smt. Basanti Paikray vrs. Dr. Prananath Paikray—T.P. Act, 1882, Section 126—Cancellation of gift—

"A gift once accepted cannot be cancelled unilaterally by the donor without written consent of donee—Registered deed of cancellation executed by donor does not disclose the consent or agreement of the donee nor-bear her signature—Deed of cancellation is invalid."

13. Here, in this suit at hand, there is no material in the record on behalf of the defendants to show that, the gift deed vide Ext.8 in respect of the suit property executed by the undisputed/admitted owner thereof, i.e., Krushna Das has not been accepted by the donees thereof, i.e., Judhistir Das and Bhima Charan Das. There is also no material in the record to show that, the possession of the properties covered in that gift deed has not been delivered to the donees therefore, i.e. to Judhisir Das and Bhima Charan Das. Rather the recitals of that gift deed vide Ext.8 itself are going to show that, the said gift has been accepted by the above donees from the donor Krushna Das and they (donees) have taken possession of the suit property covered under that gift deed.

14. There is also no material in the record on behalf of the defendants to show that, the so-called deed of revocation/cancellation of gift deed was executed by the written consent of the donees, i.e., Judhistir Das and Bhima Charan Das. The signatures of Judhistir Das and Bhima Charan Das are not available in the said registered deed of cancellation of gift dated 22.11.1989. So, the so-called registered deed of cancellation of gift dated 22.11.1989 was executed and registered unilaterally by the donor Krushna Das himself without the written consent of the donees thereof.

15. When, it is forthcoming from the materials on record that, the gift deed vide Ext.8 is a registered gift deed and there is proof of acceptance of that gift by the donees and the donees have taken possession of the gifted properties covered therein, i.e., suit properties and the cancellation/revocation deed has been executed unilaterally by the donor without the written consent of the donees, then, at this juncture, by applying the principles of law enunciated in the ratio of the aforesaid decisions to the above factual aspects of the suit at hand, it cannot be held that, the registered gift deed vide Ext.8 is an incomplete gift deed and the donor of that Ext.8 has right to cancel/revoke that Ext.8 unilaterally. For which, in other words, it is held that, the registered deed of gift vide Ext.8 executed by the owner of the suit property, i.e., Krushna Das in favour of the donees(vendors of the plaintiffs) is a complete gift deed and the donor thereof, i.e., Krushna Das was not authorized under law to cancel/revoke that gift deed and unilateral cancellation of that gift deed on 22.11.1989 by the donor Krushna Das is not lawful one.

16. That apart, though the defendants had prayed for declaration of their right, title, interest and confirmation of their possession over the suit property and permanent injunction against the plaintiff in their counter claim, but their above prayers made in their counter claim were nagatived/discarded by the leaned trial court dismissing their counter claim on contest, still then, they(defendants) have not challenged the same either preferring an appeal or any cross objection in the 1st appeal. So the defendants have accepted the findings of the learned trial court regarding the dismissal of their counter claim.

17. As the defendants have not preferred any appeal or cross objection in the 1st appeal challenging the order of dismissal of their counter claim, then, as per law, the final findings made by the learned trial court below against the defendants refusing their prayers for declaration of title, confirmation of possession and permanent injunction have already been reached in its finality and the order of said dismissal of the counter claim of the defendants has become *res judicata* against them (defendants) as per the ratio of the decision of the Hon'ble Courts relied upon by the plaintiff reported in ***2019(I) ILR-(Cuttack)-736 : Smt. Rama Deo vrs. State of Orissa & Ors,*** on the basis of the decision of the Apex Court reported in ***2017 AIR SCW 6187 : Rajni Rani and another vrs. Khairati Lal ad others.***

18. As per the discussions and observations made above, when it is held that, the registered gift deed vide Ext.8 executed by Krushna Das in favour of the vendors of the plaintiff is a valid gift deed and the unilateral cancellation thereof through a deed of cancellation/revocation dated 22.11.1989 by the donor without the written consent of the donees has no legal sanctity and when the dismissal of the counter claim of the defendants by the learned trial court disregarding their prayer for declaration of their right, title, interest and possession over the suit property and permanent injunction has become *res judicata* as per law against the defendants, then, at this juncture, it cannot at all be held that, the decisions/findings made by the 1st appellate court setting aside the judgment and decree of the dismissal of the suit of the plaintiff vide T.S. No.849 of 1996 passed by the trial court and decreeing that suit of the plaintiff on contest against the defendants is erroneous in any manner. For which, the question of interfering with the same through this 2nd appeal filed by the defendants does not arise at all.

19. Therefore, there is no merit in this 2nd appeal filed by the appellants (defendants).

In the result, the 2nd appeal filed by the appellants is dismissed on contest, but without cost. The judgment and decree dated 27.01.2012 and 10.02.2012 respectively passed by the 1st appellate court in R.F.A. No.8 of 2011 are hereby confirmed.

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2023 (III) ILR – CUT- 972

A.C. BEHERA, J.

R.S.A. NO.107 OF 2011

BIRANCHI BANCHHOR .....Appellant

-V-

ISWARI PRADHAN & ORS. .....Respondents

ADVERSE POSSESSION – Whether a person paying fine in the encroachment proceeding initiated by state government can claim title by adverse possession? – Held, No – The same is admission of title of the state & possession of plaintiff is of a rank of trespasser.

(Paras 13-18)

Case Laws Relied on and Referred to :-

1. 2015(II) CLR 645 : Smt. Tribeni Biswal Vs. State of Orissa & Ors.
2. 2017(II) CLR 84 : Sambhuram Mandal Vs. Collector, Kendrapara & Ors.
3. 2017(II) CLR-87 : State of Orissa & Ors.Vs. Sibasankar Ray and Anr
4. 2021(4) CCC-222 (Raj.) : Subhash Sindhi Co-Operative Housing Society Limited Through Yogesh Bhatnagar Vs. Dr. A.K. Verma and Anr.
5. 2018(3) Civil Court Cases 558 (Rajasthan):Mangilal Vs. Gram Panchayat Gotan
6. 2001(I) Civil Court Cases 297 (P&H) : Jagir Singh Vs. Guru Nanak College & Ors.
7. 2018(2) Civil Court Cases-112 (P&H) : Smt. Urmila Gupta Vs. Commissioner & Ors.
8. 1995(I) Civil Court Cases 1 (S.C.) Premji Ratan Sey @ Shah & Ors.Vs. Union of India & Ors.
9. 2005(4)CCC-418(Ori): Smt. Laxmipriya Sahoo & Ors.Vs. State of Orissa & Ors.
10. 2000 (I) Civil Court Cases 291 (Bombay) Vasudev Nene Vs. Dattatraya Raghunath Jog.
11. 2019(I) Civil Court Cases-654 (Guj) : Hasmukhbhai Kantibhai Bharvad Vs. Chanduhi Gabhaji Thakor.
12. 1993 (I) OLR-505:Raghunath Prusty & Ors.Vs. Raghunath Baliarsingh.
13. 2001(3) Civil Court Cases-82(P&H) : Rajinder Kumar Sainivrs. Municipal Committee, Hissar.
14. AIR 1981(S.C.)-2198 : Gulam Abbas & Ors.Vs. State of U.P. & Ors.
15. 1991(II) OLR-71 : Rabindranath Sahu Vs. Dayanidhi Sahu & Ors.

For Appellant : Mr. N.C. Pati, Sr. Adv., A.K. Das, B. Das, M.R. Dash & B. Das

For Respondents : Mr. S. Pattnaik, Addl. Govt. Adv.

JUDGMENT Date of Hearing : 14.09.2023: Date of Judgment :13.10.2023

A.C. BEHERA, J.

This 2nd appeal has been preferred by the plaintiff in C.S. No.18 of 2008 against the confirming judgment passed in R.F.A. No.07 of 2009.

The appellant and the respondents of this appeal were the plaintiff and defendants in C.S. No.18 of 2008 and they were the appellant and the respondents respectively in the 1st appeal vide R.F.A. No.07 of 2009.

2. The case of the plaintiff in short was that, the suit land described in schedule-A being the Government land was lying vacant, to which, he(plaintiff) possessed in the year 1975 and made the same fit for cultivation and cultivated the same. He(plaintiff) has been possessing the suit land continuously since the year 1975. But, the State (defendant No.3) through its Tahasildar initiated a land Encroachment case against him (plaintiff) in the year 1997 alleging his illegal and unauthorized possession of the suit land. In that land encroachment case, fine was imposed against him (plaintiff), to which, he (plaintiff) paid, but still then, he (plaintiff) continued his possession on the suit land as before. Subsequent thereto, in the year 2003, the State Government (defendant no.3) through its Tahasildar initiated an another Land Encroachment Case vide L.E. Case No.383 of 2003 against him (plaintiff) alleging illegal possession of the plaintiff over the suit land, wherein fine was also imposed and the plaintiff paid that fine to the Government and continued his possession on the suit land as before. But, when in the year 2007, the defendant Nos.1 and 2 created disturbances in his possession over the suit land, a proceeding vide M.C. No.613 of 2007 under Section 144 of the Cr.P.C. was initiated between them before the local Executive Magistrate, Jharsuguda. In that proceeding under Section 144, Cr.P.C., 1973, the learned Executive Magistrate passed on order restraining the defendant Nos.1 and 2 from entering into the suit land for a period of two months. Then again in the year 2008, the defendant Nos.1 and 2 tried to dispossess the plaintiff from the suit land forcibly. So, he (plaintiff) filed the suit vide C.S. No.18 of 2008 against the defendants including the State of Orissa (defendant No.3) praying for injuncting the defendants permanently from entering into the suit land and from creating any sort of disturbance in his possession over the suit land. Because, he (plaintiff) has been possessing the suit land for more than 30 years continuously and his possession has been recognized by the Tahasildar in L.E. Case Nos. 54 of 1996-1997 and 383 of 2003 and as well as in the order passed in a proceeding under Section 144, Cr.P.C. against the defendant Nos.1 and 2 by the Executive Magistrate in the year 2007, for which, he (plaintiff) has become the owner of the suit land by possessioning the same exclusively and continuously for more than 30 years.

The defendant Nos.1 and 2 filed their written statement jointly denying the averments of the plaintiff made in his plaint and stated that, they (defendant nos.1 and 2) are in possession over the suit land since 1999 and they are providing a portion of products thereof to the villagers for the benefit of the village. For which, the plaintiff has no interest on the suit land. Therefore, the suit of the plaintiff is liable to be dismissed.

The defendant No.3(State) filed written statement denying the averments made by the plaintiff in his plaint by taking its stand that, the KISAM of the suit land is “NALA” and absolutely the same belongs to the Government. The RoR of the suit land is in the name of the Government. Eviction orders have already been passed in L.E. Cases against the plaintiff for his illegal and unauthorized possession

of the suit land with imposition of penalty against him. The plaintiff has paid such penalty imposed against him in L.E. Cases. So, the plaintiff has no interest in the suit land. Therefore, the suit of the plaintiff is liable to be dismissed with costs.

3. Basing upon 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 and the said issues are:-

(i) Whether the suit is maintainable ?

(ii) Whether the plaintiff has got any cause of action to file the present suit?

(iii) Whether the suit is not properly valued and proper Court fees has not been paid?

(iv) Whether the plaintiff is in possession over the suit land?

(v) Whether the plaintiff is entitled to get a decree of permanent injunction against the defendants restraining them from entering into the suit land or any portion thereof?

(vi) What other relief(s) the plaintiff is entitled for?

4. In that suit, the plaintiff examined two witnesses from his side including him as P.W.1 and proved six documents on his behalf vide Exts. 2 to 6 including the certified copies of the orders passed in L.E. Cases against him, fine receipts paid by him and the order of the 144, Cr.P.C. proceeding.

The defendant Nos.1 and 2 examined two witnesses from their side including defendant No.1 as D.W.1 and relied upon several documents vide Exts.B to E.

The defendant No.3(State) examined one witness from its side and proved documents vide Exts. H to L.

5. After taking into account the pleadings and evidence of the parties, the learned trial court passed the judgment and decree of the suit vide C.S. No.18 of 2008 on 19.02.2009 and 04.03.2009 respectively dismissing the suit of the plaintiff on contest against the defendants with cost by answering all the issues except issue No.3 against the plaintiff giving observations in the judgment while answering issue Nos.4 and 5 that, the suit land is Government land and the Government/State (defendant no.3) is the owner of the same and he (plaintiff) is not in lawful possession over the suit land according to his own admissions. For which, he (plaintiff) is not entitled to get the decree of permanent injunction in respect of the suit land against its true owner, i.e., Government/State.

6. On being dissatisfied with the above judgment and decree of the dismissal of suit vide T.S. No.8 of 2018 of the plaintiff passed by the learned trial court, he (plaintiff) challenged the same by preferring 1st appeal vide R.F.A. No.7 of 2009 being the appellant against the defendants by arraying them (defendants) as respondents.

The learned 1st appellate court dismissed the R.F.A. No.7 of 2009 of the plaintiff on contest concurring with the findings of the trial court.

Then the plaintiff preferred this 2nd appeal challenging the judgment and decree of the learned courts below passed in C.S. No18 of 2008 and R.F.A. No.07 of 2009 respectively.

7. This 2nd appeal has been admitted formulating the substantial question of law, i.e., "whether the findings of the learned courts below negating the plaintiff's claim to be in possession of the suit land as a result of non-consideration of evidence of P.Ws.1 and 2 and the contents of Exts.2, 3 (series) 4 and 5 are sustainable under law?.

8. I have already heard from the learned counsel for the appellant and learned Additional Government Advocate for the State (respondent no.3) and also have perused the materials and evidence available in the record.

9. Ext.2 is the certified copy of the R.I. report in L.E. Case No.54 of 1996-1997. Exts.3 (series) are the fine receipts in respect of the fine paid by the plaintiff as per the order passed in L.E. Case No.54 of 1996-1997. Exts.4 is the fine receipt in respect of the fine paid by the plaintiff as per the order passed in L.E. Case No.383 of 2003. Ext.5 is the xerox copy of the order passed in CMC No.613 of 2007 under Section 144, Cr.P.C. by the Executive Magistrate, Jharsuguda.

10. P.Ws.1 and 2 have adduced evidence about the ownership and possession of the plaintiff (P.W.1) over the suit land on the basis of eviction order passed against him (P.W.1) in the Land Encroachment (L.E.) Cases and as well as the order passed under Section 144, Cr.P.C. in CMC No.613 of 2007 in his favour and against defendant nos.1 and 2.

11. There is no material in the record on behalf of the plaintiff to show that, he (plaintiff) has challenged the eviction orders regarding his eviction from the suit land passed against him in L.E. Case No.54 of 1996-1997 and 383 of 2003 before appropriate forums. Accordingly, the eviction orders passed against him (plaintiff) in L.E. Cases for his eviction from the suit land have remained unchallenged.

12. It is the clarified propositions of law that, a person, who is paying fine imposed in encroachment proceedings initiated by Government, the said person cannot claim adverse possession on that land in respect of which fine has been imposed against him for his illegal and unauthorized encroachment to the same. Because, he paid the fine admitting his status as that of a rank trespasser of the said land in question. So, the Act of payment of fine itself shows the admission of title and lawful possession of the true owner, i.e, Government on the suit land instead of objecting to the intimation/result of the encroachment case. When a person will have admitted to him as an encroacher of the Government land on payment of fine as per the order passed against him in land encroachment case, he would have no *locus standi* to continue in possession thereof and seek interim or final protection from the court.

13. In this suit at hand, the plaintiff has sought for the relief, i.e., permanent injunction against the defendants.

As per law, the relief of injunction is an equitable relief. Equitable relief of injuction is not available to an encroacher. Even after passing of an eviction order against a person in respect of any land, if, he possesses that land, then he is to be treated as a trespasser of that land and his possession thereon shall be treated as unlawful and wrongful.

14. A wrong doer is not entitled to take advantage of his own wrong. When possession of a person is not valid or lawful, he is to be considered as a trespasser. A person who demands an equitable relief, he must do or show equity.

Injunction cannot be issued in favour of a trespasser, who gained unlawful possession against true owner. That too, equitable relief of injunction is not available to an encroacher.

15. An order passed in a proceeding under Section 144 of the Cr.P.C., 1973 is purely administrative in nature. The same is not a judicial or quasi-judicial order. The object of passing such order is to preserve public peace and tranquility, because, the same is intended to meet the above object. That order cannot be permanent or semi permanent. Order under Section 144 of the Cr.P.C. should not be treated as evidence of possession in a subsequent proceeding.

16. The position of law on the above aspects has already been clarified in the ratio of the following decisions of the Apex Court and Hon'ble Courts.

(i) ***2015(II) CLR—645 : Smt. Tribeni Biswal vrs. State of Orissa and others.***

"Whether a person paying fine in the encroachment proceeding initiated by State Government, can claim adverse possession?—No—He paid fine admitting his status as that of a rank trespasser. The act of payment of fine shows the admission of title of the true owner instead of objecting the initiation of encroachment case."

(ii) ***2017(II) CLR—84:Sambhuram Mandal vrs. Collector, Kendrapara and others. (para-10)***

"***Claim of Title—Payment of penalty in Encroachment Case***—The same is admission of title of the State—Possession of plaintiff is of a rank trespasser."

(iii) ***2017(II) CLR-87 : State of Orissa and others vrs. Sibasankar Ray and another (Para-12)***

"Title—Admission of title of Government by payment of rent in encroachment case—In encroachment case, the plaintiffs have paid rent and penalty. Thus the inescapable **conclusion** is that, the plaintiffs admit the title of the Government."

(iv) ***2021(4) CCC-222 (Raj.) : Subhash Sindhi Co-Operative Housing Society Limited Through Yogesh Bhatnagar vrs. Dr. A.K. Verma and another (Para-6 and 7).***

"Injunction—Relief of injunction is an equitable relief."

(v) ***2018(3) Civil Court Cases—558 (Rajasthan):Mangilal vrs.Gram Panchayat Gotan.***

"***Specific Relief Act, 1963—Section-38—Injunction—Encroachment***—Equitable relief of injunction is not available to an encroacher."

(vi) ***2001(I) Civil Court Cases—297 (P&H) : Jagir Singh vrs. Guru Nanak College and others.***

"***Specific Relief Act, 1963-Sections-37 and 38—Trespasseer—Suit for injunction***—If possession of plaintiff is of a trespasser, he cannot get an injuction against the true owner in order to perpetuate his own wrong."

(vii) ***2018(2) Civil Court Cases-112 (P&H) : Smt. Urmila Gupta vrs. Commissioner and 1995(I) Civil Court Cases 1 (S.C.) Premji Ratan Sey @ Shah and others vrs. Union of India and others***.

"***Specific Relief Act, 1963—Section 38***—Injunction cannot be issued in favour of a Trespasser or a person, who gained unlawful possession, as against the owner."

(viii) ***2005(4)CCC-418(Ori): Smt. Laxmipriya Sahoo and others vrs. State of Orissa and others(Para-10 and 11)***.

"***Specific Relief Act, 1963—Section-41***—Where plaintiff petitioner was ***encroacher*** on Government land, he would not have *locus standi* to continue in possession thereof and seek interim protection from court."

(ix) ***2000 (I) Civil Court Cases—291 (Bombay) Vasudev Nene vrs. Dattatraya Raghunath Jog***.

"Specific Relief Act 1963—Section—37 and 38—To obtain relief from the court to protect possession of the party, such possession has to be lawful possession."

(x) ***2019(I) Civil Court Cases-654 (Guj) : Hasmukhbhai Kantibhai Bharvad vrs. Chanduhi Gabhaji Thakor.***

"Specific Relief Act, 1963—Section-37 and 38—Suit for injunction—Wrongful ***Possession—***A person in wrongful possession is not entitled to an injunction against rightful owner."

(xi) ***1993 (I) OLR-505:Raghunath Prusty and others vrs.Raghunath Baliarsingh***.

"Specific ***Relief*** Act, 1963—Sections 36 and 38—A trespasser cannot injuct a rightful owner."

(xii) ***2001(3) Civil Court Cases-82(P&H) : Rajinder Kumar Sainivrs. Municipal Committee, Hissar.***

"Specific Relief Act, 1963—Sections—37 and 38—Trespasseer—Public Property—possession of a trespasser, howsoever long may be, cannot be allowed to be protected."

(xiii) ***AIR 1981(S.C.)-2198 : Gulam Abbas and others vrs. State of U.P. and others (Para-32)***

"***Cr.P.C., 1973—Section-***144—Order under Section 144 Cr.P.C. is administrative in nature and not judicial or quasi-judicial. The object is to preserve public peace and tranquility."

(xiv) ***1991(II) OLR-71 : Rabindranath Sahu vrs. Dayanidhi Sahu and others***

"Cr.P.C., 1973—Section-144—Order of Magistrate under Section 144 Cr.P.C. is only a temporary measure in case of emergency. Such order cannot be taken as evidence of possession in a subsequent proceeding."

17. Here in this suit at hand, when, the plaintiff has not challenged the order of eviction from the suit land passed against him in L.E. Case No.54 of 1996-1997 and L.E. Case No.383 of 2003 in any forum and when he (plaintiff) has admitted his status as that of a rank trespasser on the suit land on payment of fine to the Government as per the fine receipts vide Exts.2, 3(series) and 4 admitting the Government's title and lawful possession over the suit land and when equitable relief of injunction is not available to an encroacher of the suit land like plaintiff and when as per law, a person who remains in wrongful possession over the suit land is not entitled to injunction against the rightful manner and when the order assed in a proceeding under Section 144, Cr.P.C. like Ext.5 is neither a judicial nor a quasi-judicial order, and when an order passed under Section 144, Cr.P.C. like Ext.5 cannot be treated as evidence of possession in any subsequent proceedings, then at this juncture, by applying the principles of law enunciated in the ratio of the decisions referred to supra in para no-16 of this judgment, it cannot be held that, the findings and observations made by the learned courts below refusing the prayer of permanent injunction of the plaintiff were erroneous. For which, in other words, it is held that, the findings and observations made by the learned courts below in the judgment and decree of the suit and as well as in 1st appeal dismissing the suit of the plaintiff are not illegal in any manner.

18. When, as per the discussions and observations made above, the impugned judgments and decrees of the leaned courts below are not illegal or erroneous in any manner, then at this juncture, the question of interfering with the same through his 2nd appeal filed by the appellant does not arise. Therefore, the appeal filed by the appellant must fail.

In the result, the 2nd appeal filed by the appellant is dismissed on contest, but without cost.

The impugned judgment and decree passed in C.S. No.18 of 2008 and as well as in R.F.A. No.07 of 2009 by the leaned courts below are hereby confirmed.

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