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2024 (I) ILR-CUT-1

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

W.P.(C) NO. 32454 OF 2023

RABI NARAYAN SAHOO .....Petitioner

-V-

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

(A) TENDER MATTER – Petitioner's technical bid has been rejected due to insufficient experience in similar nature of work – Petitioner was one of the Partner and Managing Director of M/s. BRS construction, a partnership firm – He has submitted work experience certificate of similar nature of work in the name of M/s. BRS construction – Whether rejection of bid on the ground of insufficient experience is sustainable under law? – Held, No – Where a person, having past experience has entered into partnership and the tender has been submitted in the name of partnership firm, which may not have any past experience, that does not mean, earlier experiance of one of the partners of the firm, cannot be taken into consideration. (Para 14)

(B) WORDS & PHRASES – "Experience" – Meaning explained with referenced to case law. (Paras 9 -13)

Case Laws Relied on and Referred to :-

1. (2009) 1 SCC 589 : Ganpati RV-Talleres Alegria Track (P) Ltd V. Union of India & Anr.
2. (2015) SCC OnLine SC 1933 : Maa Nabadurga Construction V. Saroj Ku.Jena & Ors.
3. (1995) 1 SCC 478 : New Horizons Limited V. Union of India.

For Petitioner : Mr.P.K.Rath (Sr. Adv.), M/s. S.Rath, A.Behera, S.K.Behera, S. Das, P.K. Basantia, C. Purohit, R. Panigrahi & A. Rout.

For Opp.Parties: Mr. P.P. Mohanty, AGA

JUDGMENT Date of Hearing : 06.12.2023 : Date of Judgment :12.12.2023

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

1. The petitioner, who is a 'B' class contractor and subsequently upgraded to 'A' class on 04.12.2009, has filed this writ petition seeking to quash the letter no.3376 dated 15.09.2023 under Annexure-1, whereby his technical bid has been rejected by the Chief Construction Engineer, Rural Works Circle, Kendrapara-Jajpur on the ground "disqualified due to insufficient similar nature of work", and to issue direction to the opposite parties to treat the petitioner's technical bid as valid and open the financial bid of the petitioner and consider the same along with others.

2. The factual matrix of the case, in brief, is that the petitioner, being upgraded from 'B' class to 'A' class contractor on 04.12.2009, constituted a partnership firm in the name and style as "M/s BRS Construction" on 18.10.2013. During 2014-15,

vide order dated 21.08.2014, the license of the petitioner was upgraded from 'A' class to 'Special' class contractor. Subsequent to such up-gradation, the partnership firm, of which the petitioner was a partner, wanted to be a part of the petitioner's special class license. For the said purpose, the petitioner, as Managing Partner, submitted an application to substitute the name of M/s BRS Construction, in place of the petitioner, as a special class contractor and to issue the license. Accordingly, M/s BRS Construction was issued with special class license with effect from 19.04.2021. Thereafter, the petitioner undertook several construction projects under the license of M/s BRS Construction, in which he is the Managing Partner.

2.1 Partnership is not a justice person unlike a company incorporated under the Companies Act. On the other hand, a partnership is identified through its partners like any other individuals. On account of dispute among the partnership, on 10.04.2022, the petitioner applied for cancellation of license in the name of partnership firm, i.e., M/s BRS Construction. Consequent upon such application, the Engineer-in-Chief (Civil), Works Department, vide order dated 12.05.2022, cancelled the special class license in favour of the partnership firm. After cancellation of license, the petitioner applied for issuance of a 'B' class license in his favour, which was issued on 25.11.2022.

2.2 The Chief Construction Engineer, Rural Works Circle, Kendrapara-Jajpur issued e-procurement notice dated 09.08.2023 under Annexure-8 inviting tenders for construction of several projects under it. The said tender call notice was followed by two corrigenda dated 17.08.2023 and 25.08.2023 under Annexures-9 and 10 respectively. Pursuant thereto, the petitioner submitted his bid for the work "Construction and Maintenance of NH-16 to Kantabania via Sabar Sahi Neulpur Road under MMSYTRIP" under R.W. Division-II, Jajpur at Jaraka. As per the conditions stipulated in the Detailed Tender Call Notice (DTCN), under the checklist to be filled up by the bidder at sl.no.6 it was provided that "Works Experience & Annual Turn Over" was to be furnished with reference to clause-14 of the DTCN. The petitioner submitted experience certificate in respect of the work, which was executed during his continuance as the special class contractor, as a partner of M/s BRS Construction, a partnership firm. But, the Chief Construction Engineer, Rural Works Circle, Kendrapara-Jajpur, without assigning any reason and without applying its mind, rejected the bid of the petitioner vide Annexure-1 dated 15.09.2023 on the ground "disqualified due to insufficient similar nature of work". Hence, this writ petition.

3. Mr. P.K. Rath, learned Senior Counsel, appearing along with Ms. Aroma Rout, learned counsel for the petitioner, vehemently contended that though the petitioner furnished all information with regard to execution of similar nature of work worth 75% of the estimated cost put to tender during any three financial years taken together of the last preceding five years excluding the current financial year, the Chief Construction Engineer, Rural Works Circle, Kendrapara-Jajpur did not

take the same into consideration and rejected the technical bid of the petitioner without applying his mind in proper perspective. It is further contended that technical bid of the petitioner has been rejected on the plea that the petitioner has got work experience from a partnership firm of a special class contractor, which cannot be considered as a 'B' class contractor, subsequently upgraded to 'A' class contractor. Thereby, the Chief Construction Engineer, Rural Works Circle, Kendrapara-Jajpur has committed gross error in evaluating the technical bid, so far it relates to the petitioner and, as such, the same is arbitrary, unreasonable and contrary to the provisions of law. To substantiate his contention, he has relied upon the judgments of the apex Court in the cases of ***Ganpati RV-Talleres Alegria Track Private Limited v. Union of India and another***, (2009) 1 SCC 589; and ***Maa Nabadurga Construction v. Saroj Kumar Jena and others***, 2015 SCC OnLine SC 1933.

4. Mr. P.P. Mohanty, learned Addl. Government Advocate appearing for the State-opposite parties although admitted the factum of issuance of tender call notice and participation of the petitioner in the tender process, so far as the work in question is concerned, but contended that during evaluation the petitioner did not submit work experience certificate of similar nature of work in his own name. Rather, he has submitted work experience certificate of similar nature of work in the name of M/s BRS Construction, which is a 'Special Class' contractor, whereas the tenders were invited from 'A & B' class contractors only. It is thus contended that since the petitioner did not submit any experience certificate with regard to execution of similar nature of work in his name, the tender committee decided to disqualify his bid "due to insufficient similar nature of work". Consequentially, no illegality or irregularity has been committed by the authority in rejecting the technical bid of the petitioner assigning specific reason "disqualified due to insufficient similar nature of work". It is further contended that after uploading of the list of qualified bidders, the financial bids of the said tender notice were opened on 21.09.2023 at 4.30 P.M. After opening of financial bids, it was found that Satyabrata Jena and Sudam Charan Sethy were qualified as first lowest tenderers in respect of two works, including the work in question and, therefore, the tender committee decided to award the work in favour of them. As such, the tender for the above two works has been ascertained vide office letter no.3735 dated 06.10.2023 and letter no.4335 dated 04.11.2023 respectively and forwarded to the same to the Superintending Engineer, R.W. Division No.2, Jajpur at Jarka for drawal of agreement. But due to pendency of this case, no further progress has been made. Consequentially, he sought for dismissal of the writ petition.

5. This Court heard Mr. P.K. Rath, learned Senior Counsel appearing along with Ms. Aroma Rout, learned counsel for the petitioner and Mr. P.P. Mohanty, learned Addl. Government Advocate appearing for the State-opposite parties. Since pleadings have been exchanged between the parties, with the consent of learned counsel for the parties this writ petition is being disposed of finally at the stage of admission.

6. For just and proper adjudication of the case, relevant provisions of the Detailed Tender Call Notice are extracted hereunder:-

> *"**14. Qualification Criteria on general experience.***
>
> ***The Applicant shall meet the following minimum criteria failing which the bid shall be summarily rejected:***
>
> ***<u>Eligibility Criteria</u>:***
> *The eligibility criteria for participation in this tender are given below. The tenderer (s) should go through these eligibility criteria before purchasing the tender documents. Tenderer (s) not fulfilling the eligibility criteria and submit the tender, can do so at their own risk, as the tendere will summarily rejected.*
>
> *(a) The intending tenderer (s) should have to submit an affidavit regarding correctness of information in schedule. F. Non furnishing of the scanned copy of required affidavit, the bid document will be summarily rejected. The intending tenderer (s) should also have not abandoned any work of similar nature nor should their contract have been rescinded during the last five years and affidavit to that effect is also to been closed as Schedule E.*
>
> ***(b) An Undertaking for installation of Hot Mix Plant within 60 km.An undertaking in shape of declaration by the bidder should be uploaded with the bid documents mentioning there in that, he will procure the material mix from the Hot Mix Plant established within 63km from the work site before execution of the work, failing which the bid will be summarily rejected.***
>
> *(c) The intending tenderer(s) should have the valid Registration Certificate as on date, of the required class as mentioned in Col-5 of the Annexure in NIT.*
>
> *(d) The intending tenderer (s) should have up to date, GSTIN Certificate & process PAN CARD, Labour License. No undertaking forwards GSTIN & PAN Card is acceptable.*
>
> *i. The intending tenderer (s) should have executed **similar nature of work worth** 75% of the estimated cost put to tender during any three financial years taken together of the last preceding five years excluding the current financial year. **In case of Contract spanning for more than one financial year, the breakup of execution of work in each of financial year should be furnished** A certificate to this effect must been closed from the officer not below the rank of Executive Engineer to be enclosed as Schedule –D.*
>
> *ii. The intending tenderer(s) should have the total financial turn over in respect of Civil Engineering works of an amount not less than the amount put to tender during any 3 (three) financial years taken together of the last preceding five financial years (excluding the current financial year). The financial turn over certificate for Civil Engineering works should be submitted from the Charted Accountant showing clearly the financial turn over financial year wise with UDIN as per schedule – H."*

7. On perusal of the aforementioned provisions, it is made clear that the intending tenderer (s) should have executed similar nature of work worth 75% of the estimated cost put to tender during any three financial years taken together of the last preceding five years excluding the current financial year. But in the said provisions it is nowhere stated that the experience certificate should be in the name of the bidder or in the name of individual. On the other hand, the petitioner has all through been contending that he has got experience of a partnership firm, of which

he is the Managing Partner, which fully satisfied the requirement of the tender conditions. More so, the conditions stipulated in the tender documents, do not indicate that the experience of the partnership firm will be excluded from consideration. Rather, the status of the partnership is that of an individual and partnership firm is not a juristic person, so as to have an independent status. Therefore, the experience certificate submitted by the petitioner of a partnership firm, of which he was the Managing Partner, will be counted towards his experience for all practical purposes. The question raised by the opposite parties is that whether the experience certificate of a special class contractor will be considered valid for the tender invited for 'A' and 'B' class contractor. On perusal of the conditions stipulated in the DTCN, it is revealed that there is no such condition that experience certificate of any particular class of contractor is to be filed. In absence of any such stipulation in the tender notice, the experience of the petitioner, while he was a special class contractor, cannot be rejected on the ground that the experience certificate was not of the similar class of contractor, for which the tender was invited. As such, in absence of any such stipulation in the tender notice, the authority cannot act on the basis of conjectures and surmises, which would amount to re-writing the tender conditions, which is not permissible under law.

8. Though it is admitted fact that there was dispute between the partners, for which the petitioner, on 10.04.2022, applied for cancellation of special class license issued on the name of M/s BRS construction, but on perusal of document, which has been annexed as Annexure-5 to the writ petition, it is made clear that the petitioner applied for cancellation of the special class license and there is nothing available on record to show that the experience gained by the petitioner as Managing Partner of the partnership firm shall not be counted for participating in the bid. Thereby, the petitioner, who furnished the experience certificate, relying upon the experience gained as a special class contractor, for the purpose of participation in the bid, having 'B' class license and upgraded to 'A' class, that ipso facto cannot deprive the petitioner of the benefit of participating in the bid.

9. In **Maa Nabadurga Construction** (supra), the apex Court, in paragraph-11 of the judgment, held as under:-

> *"11. This court was of the view that the experience of a joint venture is akin to the experience of a partnership and further observed as under: "The expression "Joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the Joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risk. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses."*

10. In ***New Horizons Limited v. Union of India***, (1995) 1 SCC 478, the apex Court held as under:-

> *"While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company. While keeping in view the past experience he would also take note of the present state of affairs and the equipment and resources at the disposal of the company."*

11. In view of the above, there is no iota of doubt that 'experience' is something which cannot be an asset of the firm and, therefore, not capable of being attributed to a firm is not correct. It is settled law that a partnership has been held to be a compendious name for its partners and that experience is a human attribute which does not form part of the assets or property of the firm in the usual sense.

12. In ***Black's Law Dictionary***, the meaning of 'experience' has been defined to the following effect:-

> *"Experience- A state, extent, or duration of being engaged in a particular study or work; the real life as contrasted with the ideal or imaginary. A word implying skill, facility, or practical wisdom gained by personal knowledge, feeling and action, and also the course or process by which one attains knowledge or wisdom."*

13. In ***Ganapati RV-Talleres Alegria Track Private Limited*** (supra), the apex Court, in paragraph-23 of the judgment, held as under:-

> *"23. Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22-4-1993 inviting tenders is a condition about eligibility for consideration of the tenders, though we find no basis for the same, the said requirement regarding experience cannot his name only. It is possible to visualize a situation where a person having past experience has entered into a partnership and the tenderer has been submitted in the name if the partnership firm which may not have any past experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration. Similarly, a company incorporated under the Companies Act having past experience may undergo reorganization as a result of merger or amalgamation with another company which may have no such past experience and the tender is submitted in the name of the reorganized company. It could not be the purport of the requirement about experience that the experience of the company which has merged into the reorganized company cannot be taken into consideration because the tender has not been submitted in its name and has been submitted in the name of the reorganized company which does not have experience in its name. Conversely there may be a split in a company and persons looking after a particular field of the business of the company form a new company after leaving it. The new company, though having persons with experience in the field, has no experience in its name while the original company having experience in its name lacks persons with*

experience. The requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name thought it has persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the stand point of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute work. He would go not by the name of the company but by the persons behind the company. While keeping in view the past experience he would also take note of the present state of affairs and the equipment and resources at the disposal of the company. ....."

14. In view of the law, as discussed above, it is made clear that where a person, having past experience, has entered into partnership and the tender has been submitted in the name of partnership, which may not have any past experience, that does not mean, earlier experience of one of the partners of the firm, cannot be taken into consideration. From the ratio decided by the apex Court, as mentioned supra, it is made clear that the experience gained by the petitioner from the erstwhile special class contractor-M/s BRS Construction, a partnership firm, being remained as Managing Partner, cannot be brushed aside to declare him disqualified from the technical bid. Thereby, the technical evaluation committee has committed gross error apparent on the face of record in rejecting the bid of the petitioner on the ground "disqualified due to insufficient similar nature of work". If the work undertaken by the petitioner as Managing Partner of the erstwhile special class contractor-M/s BRS Construction had been taken into account for the purpose of determination of his work experience, that would have been more than 75% of the estimated cost of the tender in question, and his bid could not have been declared as "disqualified due to insufficient similar nature of work".

15. In the above view of the matter, the inevitable conclusion is that the view taken by the technical evaluation committee, that the petitioner is disqualified due to insufficient similar nature of work and, therefore, not fulfilled the eligibility criteria, is not correct. Thereby, this Court directs the technical evaluation committee to consider the technical bid of the petitioner and allow him to participate in the financial bid, along with two others who have been selected, and take a final decision thereon.

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

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2024 (I) ILR-CUT-08

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

W.P(C) NO. 21267 OF 2016

BIBHUTI CHARAN MOHANTY .....Petitioner

-V-

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

(A) CONSTITUTION OF INDIA, 1950 – Article 21 – Right to life – Meaning and duty of the state and its instrumentalities for the safeguard of the same – Indicated with reference to case laws. (Paras 11-19)

(B) WORDS & PHRASES – "Negligence" – Meaning explain with reference to external aid and case laws. (Paras 21-28)

(C) COMPENSATION – The only child of the parent died due to bites of stray dogs – The municipal authority tried to compensate in the light of the Judgement of the Apex Court in Sarala Verma under the Motor Vehicle Act – Whether such view acceptable? – Held, No – Such mathematical calculation has no application to the present case – Because the schedule which has been referred to in the aforesaid Judgement is only meant for the death caused in motor vehicle accident not in the case where the authorities are negligent in their conduct and not discharging their statutory duty assigned to them – The Basic principles of compensation indicated with reference to case law. (Paras 32-46)

Case Laws Relied on and Referred to :-

1. AIR Online 2018 CHH 1051:Shobha Ram Rajwa Ram Sahu V. State of Chhattisgarh
2. AIR Online 2022 KAR 399:Yusub V. State of Karnatak
3. (2009) 6 SCC 121:Sarla Verma (Smt.) & Ors. V. Delhi Transport Corporation & Anr.
4. AIR 1983 SC 803:State of Maharashtra V. Chandrabhan
5. AIR 1986 SC 180:Olga Tellis V. Bombay Corporation
6. AIR 1991 SC 101:D.T.C. V. Mazdoor Congress Union D.T.C.
7. AIR 1981 SC 746 : (1981) 1 SCC 608:Francis Coralie Mullin V. Union Territory Delhi, Administrator
8. AIR 1978 SC 597: 1978 1 SCC 248:Maneka Gandhi V. Union of India
9. (1996) 2 SCC 549 : AIR 1996 SC 1051:Chameli Singh V. State of U.P.
10. (1993) 1 SCC 645 : AIR 1993 SC 2178:Unni Krishnan, J.P. V. State of Andhra Pradesh
11. 1995 Supp (3) SCC 546:U.P. Avas Evam Vikas Parishad V. Friends Coop. Housing Society Limited
12. (2011) 8 SCC 568 : Delhi Jal Board V. National Campaign for Dignity and Rights to Sewerage and Allied Workers
13. (1994) 4 SCC 1 : Jay Laxmi Salt Works (P) Ltd. V. State of Gujurat
14. (1996) 4 SCC 332 : Poonam Verma V. Ashwin Patel
15. (2001) 8 SCC 151 = 2001 SCC (Cri) 1426 : M.S.Grewal V. Deep Chand Sood
16. AIR 2005 SC 3180 : Jacob Mathew V. State of Punjab

17. (2009) 9 SCC 221= AIR 2010 SC 1162 : Malay Kumar Ganguly V. Dr.Sukumar Mukherjee
18. (1995) 2 SCC 150 : Consumer Unity & Trust Society V. Chairman & Managing Director.
19. 1995 ACJ 443 : Ramesh Kumar Nayak V. Union of India
20. 1998(1) Civ.LJ 670 : Chatra and another V. Imrat Lal & Ors.
21. (2009) 6 SCC 121 : Sarla Verma (Smt.) & Ors. V. Delhi Transport Corporation & Anr.
22. (1869) 21 LT 326 : Fair V. London and North Western Rly. Co.
23. (1874) 4 QBD 406 : Phillips V. South Western Railway Co.
24. (1880) 5 AC 25 : Livingstone V. Rawyards Coal Co.
25. 1958-65 ACJ 504 (HL, England) : H.West & Son Ltd. V. Shephard.
26. (1965) 1 AII ER 563 : Wards V. James
27. 1969 ACJ 363 (HL, England) : Perry V. Cleaver
28. (1922) 2 AC 242 : Admiralty Comrs V. S.S. Valeria
29. 1987 ACJ 1022 (Karnataka) : Basavaraj V. Shekhar
30. 2004 ACJ 1109 : K.Narasimha Murthy V. Manager, Oriental Insurance Co. Ltd.
31. (1922) 2 AC 242 : Admiralty Comrs. V. S.S. Valeria
32. (1880) 5 AC 25 : Livingstone V. Rawyards Coal Co.
33. 1958-65 ACJ 504 (HL, England) : H.West & Son Ltd. V. Shephard
34. (1965) 1 AII ER 563 : Ward V. James
35. 1987 ACJ 1022 (Karnataka) : Basavaraj V. Shekhar
36. 1969 ACJ 363 (HL, England) : Perry V. Cleaver
37. (1874) 4 QBD 406 : Phgillips V. South Western Railway Co.
38. (1970) 114 Sol Jo 193 : Fowler V. Grace
39. (1956) 3 All ER 300 : Houghton Main Colliery Co. Ltd.
40. AIR 1969 SC 634 : State of Gujarat V. Shantilal Mangaldas
41. AIR 1994 SC 787 : Lucknow Development Authroity V. M.K. Gupta
42. AIR 1998 Ori 159 : Kiranabala Dandapat V. Secy. Grid Corporation of Orissa Ltd.
43. (1997) 1 SCC 416 : (AIR 1997 SC 610):D.K. Basu V. State of WB
44. (1993) 2 SCC 746 : (AIR 1993 SC 1960:Nilabati Behera (Smt.) Alias Lalita Behera (Through the Supreme Court Legal Aid Committee) V. State of Orissa and others)

For Petitioner : M/s. R. Swain, B. Nayak, P.K. Mohanty & D. Sahu.

For Opp.Parties: Mr. D. Mohanty, AGA, Mr. P.K. Mohanty, Sr. Adv, M/s. P.K. Pasayat, D.N. Mohapatra, J. Mohanty, P.K. Nayak, S.N. Dash & P. Mohanty

JUDGMENT Date of Hearing : 06.12.2023 : Date of Judgment :13.12.2023

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

1. The petitioner, an advocate by profession, has filed this writ petition by way of public interest litigation, seeking direction to the opposite parties to control and check the roaming dogs within the human inhabitants and also take necessary, appropriate or adequate action for the protection of the human lives and to pay compensation of Rs.10.00 lakhs to the family of the deceased child.

2. The factual matrix of the case, in brief, is that one male child, namely, Satyabrata Rout, son of Hrudananda Rout at Jagannath Colony under Kumbharpada

Police Station, Puri, while playing by the side of his house adjacent to the public road, on 01.12.2016, one after another four roving dogs furiously attacked him in the hunting manner. Hearing his cry, his mother and nearby neighbours came to the spot immediately, but the attack of the street dogs was so furious that within 2 to 3 minutes the child breathed his last. Neither his mother nor the other inmates could rescue the child from the clutches of the hunting dogs. The said child (Satyabrata Rout) was the only son of his parents and his death caused havoc in the lives of the parents so also the relatives.

2.1. The said incident was published on 01.12.2016 in Odia daily newspapers, namely, "The Samaj" and "The Amrutadunia" and others. The petitioner also came to know the fact from the reporter/ editor concerned of the aforesaid newspapers. Therefore, he approached this Court by filing this writ petition seeking direction to the opposite parties to control and check the roaming dogs within the human inhabitants and also take necessary, appropriate or adequate action for the protection of the human lives and to pay compensation of Rs.10.00 lakhs to the family of the deceased child.

3. Mr. R. Swain, learned counsel appearing for the petitioner contended that due to frequent roaming and moving of dogs and other animals in the city serious incidents and road accidents are being caused, for which many people and children are losing their lives. Therefore, the roaming of dogs and other animals in the city should be checked. It is further contended that the frightful incident has happened due to negligence on the part of the State Administration. It is the duty of the State to save and protect the lives of the people as per Article 21 of the Constitution. It is further contended that the father of the deceased child has lost his only son due to attack of the street dogs. Therefore, for the mental agony and sufferings incurred, he should be granted compensation of Rs.10.00 lakhs. But, the Municipal Authorities have washed their hands by giving a lump sum of Rs.50,000/- towards compensation. To substantiate his contentions, learned counsel for the petitioner has relied upon the judgment of the Chhattisgarh High Court in ***Shobha Ram Rajwa Ram Sahu v. State of Chhattisgarh***, AIR Online 2018 CHH 1051 and ***Yusub v. State of Karnatak***, AIR Online 2022 KAR 399.

4. Mr. P.K. Mohanty, learned Senior Counsel along with Mr. P. Mohanty, learned counsel appearing for opposite party no.4-Puri Municipal Corporation, referring to the counter affidavit, contended that after reported occurrence of the tragic incident, opposite party no.4-Puri Municipality undertook suitable measures ABC (Animal Birth Control) programme. A total of 1620 (sixteen hundred twenty) numbers of stray dogs have been brought under sterilization operation and the said process is continuing. So far as compensation to the family of the deceased child is concerned, he contended that there is no provision under the Odisha Municipal Act, 1950 and/or any other statute for payment of any compensation in case of such unfortunate incident. Therefore, no liability arises for Puri Municipality in case of

any death that may have occurred because of attack by stray dogs. But however, considering the gravity of the matter and dealing with the instant case sympathetically as well as giving due regard to the order of this Court, the Executive Officer, Puri Municipality contacted over telephone with the father of the deceased, who is now residing in Athagarh, Cuttack to submit the details of his bank account to transfer the compensation as admissible. In order to alleviate the grievance of Hrudananda Rout, the parents of ill-fated child died due to stray dog bites in the year 2016, the Collector and District Magistrate, Puri was appraised of the matter, vide office letter no.7091 dated 24.01.2023, to grant financial assistance as admissible. Thereafter, the Collector and District Magistrate, Puri sanctioned an amount of Rs.30,000/- (rupees thirty thousand) out of Chief Minister Relief Fund, vide order no.394/Emer dated 22.02.2023, and Rs.20,000/- (rupees twenty thousand) from Red Cross Fund, vide order no.48/R.C. dated 22.02.2023, in favour of Hrudananda Rout, S/o- Nath Rout, At- Jagannath Colony with a direction to the Tahasildar, Puri to intimate the facts to the father of the deceased. Thus, in total Rs.50,000/- (rupees fifty thousand) has been paid to the father of the deceased child. It is also contended that after the said tragic incident, Puri Municipality has undertaken suitable steps, as a result of which no such untoward incident has taken place within its jurisdiction. To substantiate his contentions, he has relied upon ***Sarla Verma (Smt.) And Ors. v. Delhi Transport Corporation & Anr.***, (2009) 6 SCC 121.

5. Mr. D. Mohanty, learned Addl. Government Advocate appearing for the State-opposite parties relied upon the arguments advanced by Mr. P.K. Mohanty, learned Senior Counsel appearing for opposite party no.4-Puri Municipal Corporation and, as such, the State has not filed any counter affidavit in this writ petition.

6. This Court heard Mr. R. Swain, learned counsel appearing for the petitioner; Mr. D. Mohanty, learned Addl. Government Advocate appearing for the State-opposite parties and Mr. P. K. Mohanty, learned Senior Counsel along with Mr. P. Mohanty, learned counsel appearing for opposite party no.4-Puri Municipality in hybrid mode. The 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. There is no dispute in the instant case that the father of the deceased child has lost his only child due to attack by street dogs and, as such, the parents could not be able to find out time to save his life by carrying him to the hospital, as death occurred instantly within 2 to 3 minutes of the attack by street dogs. To compensate the mental agony and sufferings of the parents of the deceased child, the Municipal Authority has granted a sum of Rs. 50,000/- as compensation.

8. In Hamlet, IV, v, in the words of Shakespeare *when sorrows come, they come not single species, but in battalions*. Due to such frightful event, the parents lost their only child because of victimization of the street dogs. As such nobody

saved the life of Satyabrata, who breathed his life within 2 or 3 minutes of the bites of the dogs.

In "The Borderers", William Butler Yeats told that "suffering is permanent, obscure, and dark, and shares the nature of infinity"

9. As such, suffering is permanent, obscure, and dark, and shares the nature of infinity. The death of the only child has caused mental agony to the parents and from that they have not well recouped and it will continue throughout their lives. Apart from the same, the mother of the child, who was the witness to the situation for a while, imprinted the incident in her brain and has been shading tears from her eyes which have not dried till date. Feelings of the parents for losing their only child because of attack by the street dogs cannot be measured in terms of money. The Municipal Administration, by handing over Rs.50,000/- to the parents of the deceased child, have washed their hands and are sitting tight without taking any remedial measure, which is very painful. Payment of compensation for the incident occurred on 01.12.2016 is not a matter of showing sympathy or obligation or compassion. Rather, it is to be seen whether the parents, who have lost their only child, are adequately compensated for the irreparable loss or damages caused to them due to negligence and callous attitude of the Municipal Administration.

10. For just and proper adjudication of the case, it is worthwhile to note that Article 21 mandates that no person shall be deprived of his life and personal liberty except according to the procedure established by law. Personal liberty has an important role to play in the life of every citizen. Life or personal liberty includes a right to live with human dignity. Life and personal liberty are inalienable to human existence, and existed even before the advent of the Constitution. Hence, the Constitution cannot be said to be the sole repository of these natural law rights. Enjoyment of a quality life by the people is the essence of the guaranteed right under Article 21 of the Constitution. The protection of the Article extends to all 'person', not merely citizens, including even persons under imprisonment (as regards restrictions imposed in jail).

10.1. Apart from the above, it is also note worthy to refer to the relevant provisions of the Odisha Municipal Act, 1950, which are extracted hereunder:-

> *"**Sec.287-Prohibition against keeping animal so as to be a nuisance or dangerous**- No person shall keep any animal on his premises so as to be a nuisance or so as to be dangerous.*
>
> ***Sec.288-Power to destroy stray pigs or dogs-**(1) The council may, and, if so directed by the District Magistrate, shall give public notice that unlicensed pigs or dogs straying within specified limits will be destroyed.*
>
> *(2) When such notice has been give, the Executive Officer may cause to be destroyed in any manner not inconsistent with the terms of the notice any unlicensed pig or dog, as the case may be, found straying within such limits."*

11. May it be noted that basically Article 21 States the Protection of Lives and personal liberty. That means, Article 21 mandates that no person shall be deprived of his life and personal liberty except according to the procedure established by law.

12. In ***State of Maharashtra V. Chandrabhan***, AIR 1983 SC 803, the apex Court held that Right to Life, enshrined in Article 21 means something more than survival or animal existence.

The same view has also been taken in ***Olga Tellis v. Bombay Corporation***, AIR 1986 SC 180, ***D.T.C. v. Mazdoor Congress Union D.T.C.***, AIR 1991 SC 101, ***Re Noise Pollution (V)***, (2005) 5 SCC 733 and ***Re Noise Pollution (VI),*** (2005) 8 SCC 794.

13. In ***Francis Coralie Mullin v. Union Territory Delhi, Administrator***, AIR 1981 SC 746 : (1981) 1 SCC 608, the apex Court held that the right to life would include the right to live with human dignity.

14. In ***Maneka Gandhi v. Union of India***, AIR 1978 SC 597: 1978 1 SCC 248, the Apex Court held that the right to life would include all those aspects of life which go to make a man's life meaningful, complete and worth living.

15. In ***Chameli Singh v. State of U.P***., (1996) 2 SCC 549 : AIR 1996 SC 1051, the apex Court held that the Right to Life guaranteed under Article 21 of the Constitution embraces within its sweep not only physical existence but the quality of life. Right to live guaranteed in any civilised society implies the right to food, water, decent environment, education, medical care and shelter.

16. In ***Unni Krishnan, J.P. v. State of Andhra Pradesh***, (1993) 1 SCC 645 : AIR 1993 SC 2178, the apex Court held that several unenumerated rights fall within Article 21, since the expression 'personal liberty' is of the widest amplitude.

17. In ***U.P. Avas Evam Vikas Parishad v. Friends Coop. Housing Society Limited***, 1995 Supp (3) SCC 546, the apex Court held that Right to shelter has been held to be a fundamental right which springs from right to residence under Article 19(1)(e) and right to life under Article 21.

18. In ***Delhi Jal Board v. National Campaign for Dignity and Rights to Sewerage and Allied Workers***, (2011) 8 SCC 568, the apex Court held that the State and its agencies/instrumentalities or the contractors engaged by them are under a constitutional obligation to ensure the safety of the persons who are asked to undertake hazardous jobs.

19. Therefore, if the provisions contained in Article 21 of the Constitution, as mentioned above, are taken into consideration, right to life with human dignity is the prime consideration and the State should ensure such right of its citizens by providing adequate protection. In absence of the same, it can be inevitably concluded that the State and its instrumentalities have lacked in shouldering their

responsibility and utterly failed in due discharge of their duty as enshrined in the Constitution of India.

20. The facts and circumstances available on record lead to an irresistible conclusion that the death of the child was caused due to negligence and, as such, admitting such factum the Puri Municipality has paid compensation of Rs.50,000/- to the parents of the deceased child.

21. In Advanced Law Lexicon of 3rd Edition 2009, 'negligence' has been defined as follows:-

> *"Negligence" is not an affirmative word, it is a negative word; it is the absence of such care, skill and diligence as it was the duty of the person to bring to the performance of the work, which he is said not to have performed."*
>
> *Negligence may consist as well in not doing the thing which ought not to be done as in doing that which ought not to be done when in either case it has caused loss and damage to another.*
>
> *Negligence is "the absence of proper care, caution and diligence; of such care, caution and diligence, as under the circumstances reasonable and ordinary prudence would require to be exercised".*

22. In ***Jay Laxmi Salt Works (P) Ltd. v. State of Gujurat***, (1994) 4 SCC 1, the apex Court held that negligence in performance of duty is only a step to determine if action of Government resulting in loss or injury to common man should not go uncompensated.

23. In ***Poonam Verma v. Ashwin Patel***, (1996) 4 SCC 332, 'negligence' has been dealt with by the apex Court in the manner stated herein below:-

> *"Negligence as a tort is the breach of a duty caused by omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do. The definition involves the following constituents:*
>
> *(1) a legal duty to exercise due care;*
>
> *(2) breach of the duty; and*
>
> *(3) consequential damages."*

24. In ***M.S.Grewal v. Deep Chand Sood***, (2001) 8 SCC 151 = 2001 SCC (Cri) 1426, the apex Court in para 14 stated as follows:-

> *"Negligence in common parlance means and implies "failure to exercise due care, expected of a reasonable prudent person". It is a breach of duty and negligence in law ranging from inadvertence to shameful disregard of the safety of others. In most instances, it is caused by heedlessness or inadvertence, by which th negligent party is unaware of the results which may follow from his act. Negligence is thus a breach of duty or lack of proper care in doing something, in short, it is want of attention and doing of something which a prudent and a reasonable man would not do. Though sometimes the word "inadvertence" stands and is used as a synonym to negligence, but in effect negligence represents a state of the mind which, is much more serious in nature than mere inadvertence. There is thus existing a differentiation between the two*

expressions - whereas inadvertence is a milder form of negligence, "negligence" by itself means and implies a state of mind where there is no regard for duty or the supposed care and attention which one ought to bestow."

25. In ***Jacob Mathew v. State of Punjab***, AIR 2005 SC 3180, the apex Court considering the meaning of "negligence", held as follows:-

"The jurisprudential concept of negligence defies any precise definition. In current forensic speech, negligence has three meanings. They are : (i) a state of mind, in which it is opposed to intention; (ii)careless conduct; and (iii) the breach of a duty to take care that is imposed by either common or statute law. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings."

26. In ***Malay Kumar Ganguly v. Dr.Sukumar Mukherjee***, (2009) 9 SCC 221= AIR 2010 SC 1162, the apex Court considering the meaning of "negligence", held as follows:

"Negligence is breach of duty caused by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Negligence means either subjectively a careless state of mind, or objectively careless conduct. It is not an absolute term but is a relative one; it is rather a comparative term. In determining whether negligence exists in a particular case, all the attending and surrounding facts and circumstances have to be taken into account. Negligence is strictly nonfeasance and not malfeasance. It is omission to do what the law requires, or failure to do anything in a manner prescribed by law. It is the act which can be treated as negligence without any proof as to the surrounding circumstances, because it is in violation of statute or ordinance or is contrary to dictates of ordinary prudence."

27. "Negligence" has also been considered in various judgments of this Court as well as the apex Court. In ***Consumer Unity and Trust Society v. Chairman and Managing Director***, (1995) 2 SCC 150, the apex Court has held that "negligence" is absence of reasonable or prudent care which a reasonable person is expected to observe in a given set of circumstances. But the negligence for which a consumer can claim to be compensated under this sub-section must cause some loss or injury to him. In ***Prafulla Kumar Rout v. State of Orissa***, 1995 Cri LJ 1277, the apex Court has held that negligence is an omission to do something which a reasonable man guided upon these considerations which ordinarily regulates conduct of human affairs would do or the doing of something which a prudent and reasonable man would not do. In ***Ramesh Kumar Nayak v. Union of India***, 1995 ACJ 443, the apex Court, considering the meaning of "negligence", held that negligence means failure to exercise the required degree of care and caution expected of a prudent driver. In ***Chatra and another v. Imrat Lal and others***, 1998(1) Civ.LJ 670, the apex Court, while defining the meaning of "negligence", has stated that negligence means the breach of the provisions of law as also the breach of the duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs, would do or the doing of something

which a prudent and reasonable man would not do. The negligence or the rashness would depend upon the facts of each case.

28. In view of meaning attached to 'negligence', as illustrated above, and applying the same to the present case, it is made clear that adequate precautions have not been taken by the Puri Municipality for maintenance of the street dogs. There is no dispute before this Court that the death of the child has been caused due to attack of the street dogs. Thereby, the Municipal Authorities have failed in their due discharge of statutory duties enshrined in the Orissa Municipal Act, 1950. Therefore, the negligence caused by the Municipal Authorities in due discharge of their statutory responsibilities cannot be absolved its liability to pay compensation contending that there is no provision under the Orissa Municipal Act, 1950 to pay compensation. Therefore, in the present facts and circumstances, the State and its instrumentalities are liable to pay compensation.

29. Under Sections 287 & 288 of the Orissa Municipal Act, 1950, as quoted above, it is specifically provided that no person shall keep any animal on his premises so as to be a nuisance or so as to be dangerous and the council may, and, if so directed by the District Magistrate, shall give public notice that unlicensed pigs or dogs straying within specified limits will be destroyed. When such notice is given, the Executive Officer shall cause destruction of any unlicensed pig or dog, as the case may be, found straying within such limits, in any manner not inconsistent with the terms of the notice.

30. In course of hearing, Mr. P.K. Mohanty, learned Senior Counsel appearing for opposite party no.4-Puri Municipality contended that the death of the child has been occurred due to bites of the street dogs and, as such, compensation can be considered in the light of the judgment of the apex Court in ***Sarla Verma (Smt.) and others v. Delhi Transport Corporation & Anr.***, (2009) 6 SCC 121, as per the schedule referred to in paragraph-40 of the said judgment. It is contended that since the age of the child falls within the first category, i.e., up to 15 years, the parents of the deceased child are entitled to get compensation of Rs.60,000/- and excluding compensation amount of Rs.50,000/- the balance can be paid by the Municipality Authority.

31. This Court is of the considered view that such mathematical calculation has no application to the present case. Because the Schedule, which has been referred to in the aforesaid judgment, is only meant for the death caused in motor vehicle accident but not in the case where the authorities are negligent of their conduct and not discharging their statutory duty assigned to them.

32 In ***Fair v. London and North Western Rly. Co.***, (1869) 21 LT 326, the Court of Queen's Bench held that the necessity that the damages should be full and adequate. In ***Ruston v. National Coal Board***, (1953) 1 AII ER 314, Singleton, L.J. said;

> *"Every member of this court is anxious to do all he can to ensure that the damages are adequate for the injury suffered, so far as there can be compensation for an injury, and to help the parties and others to arrive at a fair and just figure."*

33. In ***Phillips v. South Western Railway Co***., (1874) 4 QBD 406, Field, J. held as follows:

> *"You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. The plaintiff can never sue again for it. You have, therefore, now to give him compensation, once and for all. He has done no wrong; he has suffered a wrong at the hands of the defendants and you must take care to give him full fair compensation for that which he has suffered."*

34. In ***Livingstone v. Rawyards Coal Co.***, (1880) 5 AC 25, Lord Blackburn has observed as follow:

> *"Where any injury is to be compensated by damages, in settling the sum of money to be given ... you should as nearly as possible get at that sum of money which will put the person who has been injured…in the same position as he would have been in if he had not sustained the wrong."*

35. In ***H. West & Son Ltd. v. Shephard***, 1958-65 ACJ 504 (HL, England), Lord Morris in his memorable speech pointed out this aspect in the following words:

> *"Money may be awarded so that something tangible may be procured to replace something else of like nature which has been destroyed or lost. But the money cannot renew a physical frame that has been battered and shattered. All the Judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards."*

36. In ***Wards v. James***, (1965) 1 AII ER 563, speaking for the Court of Appeal in England, Lord Denning, while dealing with the question of awarding compensation for personal injury, laid down the following three basic principles:-

> *"Firstly, assessability: In cases of grave injury, where the body is wrecked or brain destroyed, it is very difficult to assess a fair compensation in money, so difficult that the award must basically be a conventional figure, derived from experience or from awards in comparable cases. Secondly, uniformity: There should be some measure of uniformity in awards so that similar decisions may be given in similar cases, otherwise, there will be great dissatisfaction in the community and much criticism of the administration of justice. Thirdly, predictability: Parties should be able to predict with some measure of accuracy the sum which is likely to be awarded in a particular case, for by this means cases can be settled peaceably and not brought to court, a thing very much to the pubic good."*

37. In ***Perry v. Cleaver***, 1969 ACJ 363 (HL, England), ***Lord Morris of Borth-y-Gest*** said:-

> *"To compensate in money for pain and for physical consequences is invariably difficult but ... no other process can be devised than that of making a monetary assessment."*

38. In ***Admiralty Comrs v. S.S. Valeria***, (1922) 2 AC 242, Viscount Dunedin has observed thus:

> *"The true method of expression, I think, is that in calculating damages you are to consider what is the pecuniary consideration which will make good to the sufferer, as far as money can do so, the loss which he has suffered as the natural result of the wrong done to him."*

39. In ***Basavaraj v. Shekhar***, 1987 ACJ 1022 (Karnataka), a Division Bench of this Court held as follows:

> *"If the original position cannot be restored-as indeed in personal injury or fatal accident cases it cannot obviously be-the law must endeavour to give a fair equivalent in money, so far as money can be an equivalent and so 'make good' the damage."*

40. In K. Narasimha Murthy v. Manager, Oriental Insurance Co. Ltd., 2004 ACJ 1109 (Karnataka), the Division Bench of the Karnataka High Court in its judgment rendered in an appeal preferred by the claimant under Section 173 of Motor Vehicles Act, 1988 succinctly laid down the legal principles, after extracting the relevant paras from the decisions of the cases in ***Admiralty Comrs. V. S.S. Valeria***, (1922) 2 AC 242; ***Livingstone v. Rawyards Coal Co.***, (1880) 5 AC 25; ***H. West & Son Ltd. V. Shephard***, 1958-65 ACJ 504 (HL, England); ***Ward v. James***, (1965) 1 AII ER 563; ***Basavaraj v. Shekhar***, 1987 ACJ 1022 (Karnataka); ***Perry v. Cleaver***, 1969 ACJ 363 (HL, England); ***Phgillips v. South Western Railway Co***., (1874) 4 QBD 406; ***Fowler v. Grace***, (1970) 114 Sol Jo 193; and (1969) 3 AII ER 1528; and referring to McGregor on Damages, 14th Edn. in support of the conclusion for determination of the compensation for personal injury both for pecuniary and non-pecuniary losses in favour of the injured petitioners.

41. In ***Houghton Main Colliery Co. Ltd. In Re***, (1956) 3 All ER 300, the apex Court held that the word "compensation" signifies that which is given in recompense an equivalent rendered-damages, on the other hand, constitute the sum of money claimed, or adjudged to be paid as compensation for loss or injury sustained, the value estimated in money of something lost or withheld. The term "compensation" etymologically suggests the image of balancing one thing against another; as, where there is loss of pension rights, allowance for income-tax respectively payable in respect of pension has to be deducted.

42. In ***State of Gujarat v. Shantilal Mangaldas***, AIR 1969 SC 634, the apex court held that the expression "compensation" is not defined in the Constitution. In ordinary parlance, the expression "compensation" means anything given to make things equivalent; a thing given to or to make amends for loss recompense, remuneration or pay, it need not therefore necessarily be in terms of money. The phraseology of the constitutional provision also indicates that compensation need not necessarily be in terms of money, because it expressly provides that the law may specify the principles on which, and the manner in which, compensation is to be determined and "given". If it were to be in terms of money along, the expression "paid" would have been more appropriate.

43. In ***Lucknow Development Authority v. M.K. Gupta***, AIR 1994 SC 787, the apex Court held that according to dictionary it means, "compensating or being compensated; thing given as recompense". In legal sense, it may constitute actual loss or expected loss and may extend to physical, mental or even emotional suffering, insult or injury or loss.

44. In ***Kiranabala Dandapat v. Secy. Grid Corporation of Orissa Ltd***. AIR 1998 Ori 159, this Court held as follows:-

> *"Compensation' means anything given to make things equivalent, a thing given or to make amends for loss, recompense, remuneration or pay; it need not, therefore, necessarily be in terms of money, because law may specify principles on which and manner in which compensation is to be determined as given. Compensation is an act which a Court orders to be done, or money which a Court orders to be paid, by a person whose acts or omissions have caused loss or injury to another in order that thereby the person damified may receive equal value for his loss or be made whole in respect of his injury; something given or obtained as equivalent; rendering of equivalent in value or amount an equivalent given for property taken or for an injury done to another; a recompense in value; a recompense given for a thing received recompense for whole injury suffered, remuneration or satisfaction for injury or damage or every description. The expression 'compensation' is not ordinarily used as an equivalent to 'damage' although compensation may often have to be measured by the same rule as damages in an action for a breach."*

45. Therefore, the compensation has to be awarded as per the principle decided above by the apex Court. As such, in ***Shobha Ram Rajwa Ram Sahu*** (supra), the learned Single Judge of the Chhattisgarh High Court has formulated question in paragraph-7 to the effect as to whether the petitioner therein is entitled to get compensation due to death of his wife for rabid dog bite or not. Paragraphs 8 to 10 of the said judgment read thus:-

> *"8. In **Anupam Tripathi v. Union of India and others** (2016) 13 SCC 492 and other connected matters the Supreme Court was considering conflicting issues brought before it by way of several petitions. On the one hand petitions have been filed for direction to the concerned State to control stray dogs; the other raised the issue of indiscriminating killing of stray dogs amounting to cruelty to animals. The Supreme Court referred to the provisions of the Prevention of Cruelty to Animals, Act, 1960 (for short 'the PCA Act') and Animal Birth Control (Dogs) Rules, 2001 (for short 'the Rules, 2001'). The Supreme Court eventually constituted a committee to maintain complaints regarding injuries sustained by the persons in the dog bite, the nature and gravity of the injury, availability of medicines and the treatment administered to them, the failure of treatment and its cure and in case of unfortunate death, the particulars of the deceased and the reasons behind the same. The Supreme Court observed that on the basis of the report of the committee, subject to adjudication of the responsibility of the State, it would be in a position to think of granting of compensation.*
>
> *9. In **Shakuntala v. Govt of NCT of Delhi and Anr**., W.P. (C) No.13771 of 2006 decided on 1-7- 2009 (Reported in AIR 2009 (NOC) 2791 (Del)) the High Court of Delhi was considering death of a roadside Redi/Thela (hand-cart) operator, a fruit vendor, as he was mauled by two fighting bulls. After referring to the provisions contained in*

Section 298 of the Delhi Municipal Corporation Act, 1957 and Section 202 of the New Delhi Municipal Council Act, 1994 and various decisions of the Supreme Court and other High Courts, it was held by the High Court of Delhi that the respondents are liable to compensate the petitioner in that case as the respondents were either negligent or indifferent towards their statutory duties. The High Court of Delhi awarded a sum of Rs.10.00 lass towards compensation.

10. In Sanjay Phophaliya v. State of Rajasthan and Ors., AIR 1998 Raj 96 relying on L.K. Koolwal v. State of Rajasthan and OPrs., AIR 1988 Raj 2 it was observed thus:

"it is primary, mandatory and obligatory duly (sic duty) of Municipality to keep city clean and to remove insanitation, nuisance etc. The Municipality cannot take plea whether funds or staff is available or not."

46. In ***D.K. Basu v. State of WB***, (1997) 1 SCC 416 : (AIR 1997 SC 610), it has been laid down by the Supreme Court that grant of compensation in proceedings under Articles 32 and 226 of the Constitution of India for the established violation of fundamental rights guaranteed under Article 21, is an exercise of the Courts under the public law jurisdiction for penalising the wrong doer and fixing the liability for the public wrong on the State which failed in the discharge of its public duty to protect the fundamental rights of the citizen. The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much, as the protector and custodian of the indefeasible rights of the citizens. The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations. A Court of law cannot close its consciousness and aliveness to stark realities. Mere punishment of the offender cannot give much solace to the family of the victim-civil action for damages is a long drawn and cumbersome judicial process. Monetary compensation for redressal by the Court finding the infringement of the indefeasible right to life of the citizen is, therefore, a useful and at times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim, who may have been the bread winner of the family.

47. In ***Nilabati Behera (Smt.) Alias Lalita Behera (Through the Supreme Court Legal Aid Committee) v. State of Orissa and others***, (1993) 2 SCC 746 : (AIR 1993 SC 1960), it was held that the primary source of the public law proceedings stems from the prerogative writs and the Courts have, therefore, to evolve new tools to give relief in public law by moulding it according to the situation with a view to preserve and protect the rule of law.

48. In ***Nilabati Behera*** (supra), the Supreme Court quoted the first Hamlyn Lecture in 1949 under the title 'Freedom under the Law' where Lord Denning had said as under:-

"No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do: and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power is not. Just as the

> *pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorary, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up-to date machinery, by declarations, injunctions and actions for negligence… This is not the task for parliament…. The courts must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfare state; but abused they lead to a totalitarian state. None such must ever be allowed in this country."*

49. In the present case, the street dogs attack within the Puri Municipality area can be regulated by the provisions of the Odisha Municipal Act, 1950. As such, the cleanliness of the town and maintenance of the stray dogs and pigs are the statutory responsibility of the Municipal Authorities. In the judgment rendered by the Chhattisgarh High Court in ***Shobha Ram Rajwa Ram Sahu*** (supra), a reference has been made to the judgment and order dated 22.08.2017 of the said High Court passed in W.P. PIL No.24 of 2017 (Regarding death of Kumari Divya Verma, D/o-Shri Ashok Verma due to Rabies v. State of Chhattisgarh and another), reported in ILR 2017 Chh 1042, wherein while entertaining the suo motu PIL, the High Court of Chhattisgarh awarded compensation of Rs.10,00,000/- to the mother of the deceased, who died on account of attack by street dog.

50. Similarly, in ***Yusub*** (supra), wherein the petitioner sought for compensation of Rs.25,00,000/- on account of death of his son Master Abbasali Yusub Sanadi, the Karnataka High Court, referring to the judgments of the various High Courts and taking note of ***Nilabati Behera (Smt.) alias Lalita Behera*** (supra), directed to make payment of Rs.10,00,000/- as compensation to the petitioner along with interest @ 6% per annum calculated from 29.11.2018, being the date of death of the minor son, within a period of four weeks from the date of receipt of a copy of the order.

51. Taking into consideration the aforementioned judgments and applying the same to the present case, this Court is of the considered view that the father of the deceased child is entitled to get compensation of Rs.10,00,000/- (Rupees Ten Lakhs) due to death caused by the street dogs bite. Accordingly, this Court directs opposite party no.4 to pay Rs.10,00,000/- (Rupees Ten Lakhs) as compensation to the father of the deceased within a period of four weeks from the date of receipt of the copy of this judgment, failing which the amount will carry interest @ 6% per annum from the date of passing of the judgment till such payment is made.

52. In the result, therefore, the writ petition is allowed, but, however, there shall be no order as to costs.

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2024 (I) ILR-CUT-22

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

W.P.(C) NO. 20221 OF 2023

SANJIB KUMAR MOHANTY & ORS. .....Petitioners

-V-

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

(A) PUBLIC INTEREST LITIGATION – The petitioner seeks direction by filling the application to take action for relocating/shifting of Saw Mills to a radial distance beyond the restrictive area of Similipal Reserve Forest (National Park), Hatikat Reserve Forest, Mancha Bandha Reserve Forest and Village Forest – Whether the grievance is maintainable as public interest litigation? – Held, Yes – The petitioner seeks to protect and save the human lives and environment, by bringing to the notice of the court that such an irregularity has been caused, which is to be rectified by relocating the Saw Mills.

(B) INTERPRETATION OF STATUTE – "Provisio" – Purpose of the inclusion of the proviso discussed with reference to case law.

Case Laws Relied on and Referred to :-

1. 1995 (1) OLR 1 : Laxminarayan Saw Mill V. State of Odisha
2. (1995) 79 CLT 61 : Saraswati Saw Mill V. State of Odisha
3. (1995) 5 SCC 615 : Sushila Saw Mill V. State of Odisha
4. (1997) 2 SCC 267 : T.N. Godavarman Thirumulpad V. Union of India
5. AIR 1997 SC 3297 : Samatha V. State of Andhra Pradesh.
6. (1999) 6 SCC 552 : Malik Bros V. Narendra Dadhich
7. 2003 (9) Scale 741 : Ashok Kumar Pandey V. State of West Bengal
8. (2006) 5 SCC 28 : T.N. Godavarman Thirumulpad V. Union of India
9. AIR 1982 SC 149 : 1981 Supp. SCC 87 : S.P.Gupta V. President of India
10. AIR 1993 SC 892 : Janata Dal V. H.S. Chowdhary
11. AIR 1993 SC 852 : Ramjas Foundation V. Union of India
12. (1994) 6 SCC 620 : K.R. Srinivas V. R.M. Premchand
13. (1995) 1 SCC 242 : Noorduddin V. K.L. Anand
14. AIR 1996 SC 2687 : Dr. Buddhi Kota Subbarao V. K. Parasaran
15. AIR 1997 SC 1236 : Ramniklal N. Bhutta V. State of Maharashtra
16. (2013) 2 SCC 398 : Kishore Samrite V. State of U.P.
17. (2008) 12 SCC 481 : K.D. Sharma V. Steel Authority of India Ltd.
18. (2010) 3 SCC 402 : State of Uttaranchal V. Balwant Singh Chaufal
19. 122 (2016) CLT 609 : Chhabindra Mukhi V. State of Odisha
20. 1897 A.C. 647 : West Derby Union V. Metropolitan Life Assurance Society
21. 1940 A.C. 2006 : (1939) 4 All E.R. 464 : Jennings V. Kelly
22. AIR 1963 SC 1083 : (1963) 2 SCR 56 : Hindustan Ideal Insurance Co. V. L.I.C.
23. (1964) 4 SCR 680 : AIR 1964 SC 179 : Devadsan T. V. Union of India
24. OJC No.11164 of 1996 (08.11.0996) : Maa Mangala Saw Mill V. State of Orissa
25. AIR 1995 ORISSA 114 : 79 (1995) CLT 189 (FB) : Laxminarayan Saw Mill V. State of Orissa & Ors.
26. AIR 1977 SC 1228 : T.N.Godavarman Thirumulpad V. Union of India
27. (1991) 2 SCC 463 : Bhavani Tea and Produce Co. Ltd. V. State of Kerala

28. (1999) 6 SCC 99 : State of Kerala V. Pullangode Rubber and Proudce Co. Ltd.
29. (1999) 6 SCC 99 : Indian Airlines Ltd. V. Samaresh Bhownick
30. (2004) 12 SCC 118 : AIR 2004 SC 4016 : M.C. Meheta V. Union of India
31. (2002) 9 SCC 108 : AIR 2002 SC 1913:B.L. Wadhera V. Union of India
32. AIR 1986 SC 622 : (1986) 2 SCC 138:Collector of 24 Parganas V. Lalit Mohan Mullick
33. (2011) 7 SCC 639 : AIR 2011 SC 1989 :State of M.P. V. Narmada Bachao Andolan

For Petitioners : M/s. B. Bhuyan, S. Sahoo & S.S. Bhuyan.

For Opp.Parties : Mr. D.K. Mohanty, AGA [O.P. Nos. 1 to 5]
Mr. Abhishekh Dash, A.K. Dash, A. Khandelwal
& A. Mishra [O.P. Nos. 6 to 8].

JUDGMENT Date of Hearing : 06.12.2023 : Date of Judgment:15.12.2023

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

1. The petitioners, in this writ petition filed by way of public interest litigation, seek direction to the opposite parties to cause an enquiry with regard to involvement of two Saw Mills, namely, "M/s Behera Saw Mill" and "M/s Jalaram Saw Mill", of which opposite parties no.6 and 7 are respectively the proprietors, in illegal wood logging and wood laundering and take appropriate action. They further seek direction to the opposite party-authorities to take action for relocating/shifting of those Saw Mills to a radial distance beyond the restrictive area of Similipal Reserve Forest (National Park), Hatikote Reserve Forest, Mancha Bandha Reserve Forest and Village Forest.

2. The factual matrix of the case, in brief, is that the petitioners, claiming to be public spirited persons having no personal interest, individual gain, private motive or oblique reasons, have filed this public interest litigation, stating inter alia that the private opposite parties no.6 and 7 are the proprietors and owners of M/s Behera Saw Mill and M/s Jalaram Saw Mill situated in Chancha Industrial Estate, Baripada. M/s Behera Saw Mill is located over IDCO-Plot Nos.85 (P), 86(P), 87 and 88 measuring Ac.0.300 for 2500 cft per month, whereas M/s Jalaram Saw Mill is located on IDCO Plot Nos.8284, 860 (P), measuring Ac.0.344 for 2900 cft. per month. Validity of the licenses of both the Saw Mills were from 15.11.2021 up to 24.11.2023. The conditions attached to the licenses were as follows:-

a) License is not transferable.

b) The licenses shall maintain the registers in Forms D, E, F, and post them up to date at i.e end of each day 8 p.m. of the day.

c) The registers shall be produced for inspection and check when demanded by any Forest Officer of and above the rank of Forester. Any such Forest officer shall have the power to enter into the premises of this Saw Mill or Saw Pit. For the purpose of inspection and securing compliance with the condition of the license and any obstruction given in coming out, the said inspection and non-production of registers shall be deemed to be violation on the conditions of the license.

d) Monthly consolidated account shall be submitted to the Divisional Forest Officer before the 10th of the succeeding month.

e) The Saw Mill or Saw Pit as well as the timber shall be open for inspection by the Officer mentioned in condition (3) whenever required.

f) The Saar Mill or Saw Pit shall be closed at the end of the period prescribed in the license and the license shall be returned to the Divisional Forest Officer.

g) The license shall not undertake sawing of timber belonging to other persons or job work, unless he is satisfied about the bonafides of such limber by examining the connected permits and the marks on the timber.

h) If the bonafides of the timber is suspected, he shall detain it and immediately report the fact to the nearest.

i) Forest Officer or Police Officer for taking further action.

j) The timber received from other persons for saving on job work shall be stacked separately both before and after sawing.

k) For breach of any of the above condition, the license is liable to punishment as provided under Section 14 of the Act."

2.1. The above two Saw Mills are situated within 1 KM radial distance of Mancha Bandha Reserve Forest, 5 KM radial distance from Hatikote Reserve Forest and 10 KM radial distance from Similipal Reserve Forest (National Park). Though opposite parties no.6 and 7 are the owners and proprietors of two Saw Mills, in fact they are not operating the said Saw Mills and those two Saw Mills are operated by opposite party no.8, who is a wood mafia and involved in illegal felling of trees and wood laundering by utilizing these two Saw Mills which are situated within close proximity of Mancha Bandha, Hatikote and Similipal Reserve Forest (National Park). As such, every day a large number of trees are illegally cut and removed without any valid permit and in violation of Forest Act and Rules in force and brought to these Saw Mills for sawing and, thereby, making raw materials for production of different wood items in cheaper rate. To justify the same, it is pleaded that though these two Saw Mills belonged to two different persons, namely, opposite parties no.6 and 7, but the mobile number, which was given by both the Saw Mills, belonged to opposite party no.8. Thereby, those two Saw Mills are controlled and operated by opposite party no.8. It is further alleged that though the normal rate for sawing wood is Rs.50/- to Rs.100/- per cft., but opposite party no.8 is charging Rs.300/- per cft. from the local people as per his desire.

2.2. Section 4 of the Odisha Saw Mills and Saw Pits (Control), Act 1991 prohibits establishment or operation of Saw Mills within reserve forest, protected forest or any forest area or within 10 KM from the boundary of any forest or forest area. No Saw Mills are to be allowed to be operated within such restricted area. For the purpose of granting license to the Saw Mills, the Odisha Saw Mills and Saw Pits (Control) Rules, 1993 were formulated by the Govt. of Odisha. Rule-4 of the Odisha Saw Mills and Saw Pits (Control) Rules, 1993 governs the field in the matter of granting license to the Saw Mill. Though it is the duty of the Saw Mill owner, whenever there are reasons to believe that wood brought to his Saw Mill is illegal/ unauthorized, to immediately inform the Forest Authorities regarding such illegal/

unauthorized wood, opposite party no.8, who is a wood mafia, is not carrying out the purpose of the Rules, rather causing harassment to the public at large. Though grievances are made by the petitioners to the authorities, namely, forest officials and police, no action is being taken.

2.3. Earlier, one Bholanath Behera, for the selfsame allegations, had approached this Court by filing W.P.(C) PIL No.13051 of 2023, which was disposed of by this Court, vide order dated 27.04.2023, directing the petitioner to file fresh representation to the appropriate authority. The forest authorities are not enquiring into the matter nor taking any legal action on the grievance made by the petitioners along with other inhabitants. It is further pleaded that since Similipal Reserve Forest (National Park) is situated at a distance of 10 KM radial, the Saw Mill owners should not be allowed to operate their Saw Mills within the restricted zone and the same should be either stopped or relocated/shifted to a radial distance beyond the restrictive area of the Similipal Reserve Forest (National Park), Hatikote Reserve Forest, Manchabandha Forest and Village Forest. Hence, this writ petition.

3. Mr. S.S. Bhuyan, learned counsel appearing for the petitioners contended that opposite parties no.6 and 7, contrary to the terms and condition no.16(a) of the license, have transferred the control of the Saw Mills in the name of opposite party no.8, who is a wood mafia and is involved in illegal felling of trees, which was admitted by opposite party no.4 in the counter affidavit. But opposite party no. 4, having hands in gloves with the private opposite parties no.6, 7 and 8, is not taking any action. To fortify his argument, it is contended that the mobile number provided by opposite party nos.6 and 7 in the Govt. website belonged to opposite party no.8 and, therefore, there is nexus between opposite parties no.6 and 7 with opposite party no.8 for illegal using of Saw Mills for illegal gain. It is further contended that the Saw Mills are being operated within the prohibitory zone and the forest officials are not regularly monitoring the activities of the Saw Mills by installing CCTV and taking any real time data, because of which they are heavily involved in illegal felling of trees in the reserve forest. Thereby, the action of the authority is illegal, arbitrary and contrary to the provisions of law. It is further contended that the Saw Mills have also not taken consent to establish and operate from the State Pollution Control Board, whereas other Saw Mills are operating after obtaining the said permission. It is further contended that the Saw Mills even though are engaged in felling of trees from the reserve forest, but they have not obtained any license, as is mandated by the Forest Conservation Act, 1980. It is further contended that Baripada City in the year 2023 has been recorded as the hottest place, which warrants an immediate action to prevent the work being carried out by the Saw Mills directly affecting the environment. It is further contended that even if the Saw Mills have rehabilitated as per the orders of the Supreme Court, but the said orders never intended for the rehabilitation of the Saw Mills inside the prohibitory zone by establishing industrial estate. It is contended that the legislative intent behind the Act was to regulate the Saw Mill operation throughout the State and to control

deforestation. Before enactment of the Act, the license was required by private individuals to operate within forests and in the surrounding. Subsequently, the 1991 Act was introduced incorporating the absolute ban in the prohibitory zone. It is further contended that the 3rd proviso introduced after amendment has to be read constructively with the first proviso and not destructively and if done the latter would defeat the legislative intent of the Act so also the force of the Act would be stripped away and would result in the whole Act being reduced to mere pieces of paper.

To substantiate his contention, learned counsel appearing for the petitioners has relied upon the judgments of this Court, as well as apex Court in the cases of ***Laxminarayan Saw Mill v. State of Odisha***, 1995 (1) OLR 1; Saraswati Saw Mill v. State of Odisha, (1995) 79 CLT 61, ***Sushila Saw Mill v. State of Odisha***, (1995) 5 SCC 615; ***T.N. Godavarman Thirumulpad v. Union of India***, (1997) 2 SCC 267; and ***Samatha v. State of Andhra Pradesh***, AIR 1997 SC 3297.

4. Mr. D.K. Mohanty, learned Addl. Government Advocate appearing for the State-opposite parties no.1 to 5 vehemently contended that action has been taken in compliance of the orders passed by the apex Court, but that itself cannot enure to the benefit of the petitioners. Rather, the present writ petition, in the nature of public interest litigation, is not maintainable either in facts or in law. As such, the nature of allegations, which have been made by the petitioners against opposite parties no.6, 7 and 8 is purely of "personal interest" but not of "public interest". It is further contended that the apex Court in W.P.(C) No. 356 of 2007 and in different IAs passed orders on 16.08.2010 that the State of Odisha to implement the directions of the apex Court contained in orders dated 10.07.2009 and 07.05.2010 and carry out necessary amendments to the provisions of the Act and Rules framed thereunder in order to give effect to the rehabilitation plan and that the industrial estates have to be identified so that the Saw Mills are appropriately rehabilitated in terms of the directions issued by the apex Court. It is further contended that the allegations made by the petitioners that the two Saw Mills of opposite parties no.6 and 7 are operated and controlled by opposite party no.8 involving rampant illegal felling of trees and wood laundering and these two Saw Mills are situated within 10 KM radial distance of reserve forest is not correct. It is contended that opposite parties no.6 and 7, being the proprietors of the above named Saw Mills, submitted the documents like monthly returns, show cause notices, etc. and, as such, opposite party no.8 is being authorized by the proprietors of the Saw Mills to receive any type of letters, documents from all sources and execute documents as well as verification on behalf of them. As such, if the allegations made by the petitioners are taken into consideration, then opposite party no.8 has not involved in any forest offence nor any case is pending against him for illegal felling of trees and removal of the same. It is further contended that the representation dated 17.04.2023 has not been received by the authority and after receipt of the representation dated 15.05.2023, the ACF (Enforcement), Baripada Forest Division was directed to conduct an

enquiry with regard to the allegations made in the representation, who in turn conducted the enquiry and submitted his report vide letter dated 04.07.2023 indicating that the allegations regarding illegal establishment of two Saw Mills are not correct. Similarly, the allegation of furtive sawing of timbers by the smugglers with the help of illegal Saw Mills is also not correct. As such, the allegations made in the representation are incorrect and the same have been denied by the ACF (Environment). Furthermore, the functioning of the Saw Mills is recorded in the CCTV cameras. To ensure working of all the cameras, continuous power supply along with provision for power back up was there. The CCTV footages were submitted on weekly basis to the Division Forest Office for smooth monitoring as well as functioning of their Saw Mills. Thereby, the allegations so made by the petitioners are not correct and, as such, the writ petition filed by the petitioners in the nature of "personal interest litigation" should be dismissed with cost.

5. Mr. Abhishekh Dash, learned counsel appearing for opposite parties no.6, 7 and 8 vehemently contended that the allegations made by the petitioners, that the establishment and operation of the Saw Mills by opposite parties no.6 and 7 within 1 KM radial distance of Mancha Bandha Reserve Forest, 5 KM radial distance of Hatikote Reserve Forest and 10 KM radial distance of Similipal (National Park) is in violation of Section 4 (1) of the Odisha Saw Mills and Saw Pits (Control) Act, 1991; and that the delegation of control with respect to Saw Mills by the licensee-opposite parties no.6 and 7 in favour of opposite party no.8 is impermissible under the terms of the license; and that there are reasons to believe that woods brought to the Saw Mills are illegal and unauthorized and, as such, the Mills are involved in wood laundering, have no legs to stand. It is contended that establishment of Saw Mills inside the identified industrial estate (Chancha Industrial Estate) is not violative of Section 4 (1) of the Odisha Saw Mills and Saw Pits (Control) Act, 1991, as those Saw Mills, which were closed down, were established again in obedience to the direction of the apex Court, referred to above, for rehabilitation of the Saw Mills in the State, and in pursuance of the amendment made to Section 4(1) of the Act by inserting third proviso thereto. It is further contended that there is no transfer or delegation of control over Saw Mills by the proprietors-opposite parties no.6 and 7 in favour of opposite party no.8. As such, the Saw Mills are not involved in any kind of illegal timber business, as is evident from their track record, and they have no criminal antecedent till date. Therefore, in absence of any materials, the writ petition, which has been filed by way of public interest litigation by making bald allegations, is not maintainable. Consequentially, dismissal of the writ petition is sought for with heavy cost.

6. This Court heard Mr. S.S.Bhuyan, learned counsel appearing for the petitioner; Mr. D.K. Mohanty, learned Addl. Government Advocate appearing for opposite parties no.1 to 5; and Mr. Abhishekh Dash, learned counsel appearing for opposite parties no. 6, 7 and 8 and perused the record. Since pleadings have been

exchanged, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

7. To resolve the dispute, this Court framed the following issues:

(i) Whether the public interest litigation is maintainable on the basis of the allegations made in the writ petition?

(ii) Whether the authorities are empowered to establish/rehabilitate the Saw Mills of opposite parties no.6 and 7 in the locations, where they are established in terms of the provisions of the Act and the Rules framed thereunder and in compliance of the direction given by the apex Court?

(iii) Whether the opposite parties no.6 and 7 have transferred the control of their Saw Mills to opposite party no.8? and

(iv) Whether the Saw Mills of opposite parties no.6 and 7 are involved in any kind of illegal timber business so as to direct for their closure?

Issue No.(i) :

8. Now, it is to be seen whether the present writ petition filed in the guise of public interest litigation is for the betterment of the society at large or for benefiting any individual.

8.1. In ***Malik Bros v. Narendra Dadhich***, (1999) 6 SCC 552, the apex Court held as follows:-

> *"... a public interest litigation is usually entertained by a Court for the purpose of redressing public injury enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effect access to justice to the economically weaker class and meaningful realization of the fundamental rights. The direction and commands issued by the courts of law in a public interest are for the betterment of the society at large and not for benefiting any individual. But if the Court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be the bounden-duty of the Court not to entertain such petitions as otherwise a very purpose of innovation of public interest litigation will be frustrated. It is in fact a litigation in which a person is not aggrieved personally but brings an action on behalf of the downtrodden mass for the redressal of their grievance."*

In view of the law laid down by the apex Court, in our considered opinion, on Public Interest Litigation (PIL), redressal of public injury, enforcement of public duty, protection of social rights and vindication of public interest must be the parameters for entertaining a PIL. The Court has a bounden duty to see whether any legal injury is caused to a person or a cluster of persons or an indeterminate class of persons by way of infringement of any constitutional or other legal rights while delving into a PIL. The existence of any public interest as well as bona fide are the other vital areas to come under the Court's scrutiny. In absence of any legal injury or public interest or bona fide, a PIL is liable to be dismissed at the threshold. It is to be borne in mind that ultimately it is the rule of law that is to be vindicated. As such, there is a

need for restrain on the part of the public interest litigants when they move Courts. The Courts should also be cautious and selective in accepting PIL as well.

8.2. Public Interest Litigation which has now come to occupy an important field in the administration of law should not be 'publicity interest litigation' or 'private interest litigation'. If not properly regulated and abuse averted, it becomes also a tool in unscrupulous hands to release vendetta and wreck vengeance, as well. There must be real and genuine public interest involved in the litigation and not merely an adventure of knight errant or poke ones nose into for a probe. It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction. A person acting bona fide and having sufficient interest in the proceeding of public interest litigation will alone have locus standi and can approach the Court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration.

8.3. In ***Ashok Kumar Pandey v. State of West Bengal***, 2003 (9) Scale 741, the apex Court held as follows:

> *"Public Interest Litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil and public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. Court must be careful to see that a body of persons or member of public, who approaches the Court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique consideration. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserves to be thrown out by rejection at the threshold and in appropriate cases with exemplary costs."*

Laying down certain conditions on which the Court has to satisfy itself it was observed :

> *"The Court has to be satisfied about-*
>
> *(a) the credentials of the applicant;*
>
> *(b) the prime facie correctness or nature of the information given by him;*
>
> *(c) the information being not vague and indefinite;*
>
> *The information should show gravity and seriousness involved. Court has to strike a balance between two conflicting interest;*
>
> *(i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and*

(ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive action. In such case, however, the Court cannot afford to be liberal."

The apex Court, on the point of exercising restraint, held that it has to be very careful that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the executive and the legislature. The Court hardening its stand said:-

"The court has to act ruthlessly while dealing with imposters and busy-bodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of pro bono public, though they have no interest of the public or even of their own to protect."

8.4. In ***T.N. Godavarman Thirumulpad v. Union of India***, (2006) 5 SCC 28, the apex Court, relying upon the judgments of S***.P. Gupta v. President of India***, AIR 1982 SC 149 : 1981 Supp. SCC 87, ***Janata Dal v. H.S. Chowdhary***, AIR 1993 SC 892, after noticing that lakhs of rupees had been spent by the petitioner to prosecute the case, held as under:-

"it has been repeatedly held by the Court that none has a right to approach the Court as a public interest litigant and that Court must be careful to see that the member of the public who approaches the Court in public interest, is acting bona fide and not for any personal gain or private profit or political motivation or other oblique consideration.

…….. while the Court has laid down a chain of notable decisions with all emphasis at their command about the importance and significance of this newly developed doctrine of PIL, it has also hastened to sound a red alert and a note of severe warning that courts should not allow their process to be abused by a mere busybody, or a meddlesome interloper or wayfarer of officious intervener without any interest or concern except for personal gain or private profit or other oblique consideration."

8.5. Undisputedly, the petitioners have approached this Court of equity invoking jurisdiction under Articles 226 and 227 of Constitution of India.

In ***Ramjas Foundation v. Union of India***, AIR 1993 SC 852, the apex Court held that who seeks equity must do equity. The legal maxim "Jure Naturae Aequum Est Neminem cum Alterius Detrimento Et Injuria Fieri Locupletiorem", means that it is a law of nature that one should not be enriched by the loss or injury to another.

Similar view has also been taken in ***K.R. Srinivas v. R.M. Premchand***, (1994) 6 SCC 620, where the apex Court held that when a person approaches a Court of Equity in exercise of its extraordinary jurisdiction under article 226/227 of the Constitution, he should approach the Court not only with clean hands but also with clean mind, clean heart and clean objective.

In ***Noorduddin v. K.L. Anand*** (1995) 1 SCC 242, the apex Court held that Judicial process should not become an instrument of oppression or abuse of means in the process of the Court to subvert justice for the reason that the interest of justice and public interest coalesce. The Courts have to weigh the public interest vis-à-vis

private interest while exercising their discretionary powers. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions.

Similar view has also been taken in ***Dr. Buddhi Kota Subbarao v. K. Parasaran***, AIR 1996 SC 2687, and Ramniklal N. Bhutta v. State of Maharashtra, AIR 1997 SC 1236.

8.6. In Kishore Samrite v. State of U.P., (2013) 2 SCC 398, the apex Court laid down guidelines to the Court, in the matter of entertaining the PIL, to the following effect:-

> *"(1) The obligation to approach the Court with clean hands is an absolute obligation.*
>
> *(2) Quests for personal gains haver become so intense that those involved in litigation do not hesitate to take shelter of falsehood and misrepresent and suppress facts in the court proceedings. Materialism, opportunism and malicious intent have over-shadowed the old ethos of litigative values for small gains.*
>
> *(3) A litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands is not settled to any relief, interim or final.*
>
> *(4) The Court must ensure that its process is not abused and in order to prevent abuse of the process the Court, it would be justified even in insisting on furnishing of security and in cases of serious abuse, the Court would duty bound to impose heavy costs.*
>
> *(5) Wherever a public interest is invoked, the Court must examine the petition carefully to ensure that there is genuine public interest involved. The stream of justice should not be allowed to be polluted by unscrupulous litigants.*
>
> *(6) It is the bounden duty of the Court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the Court must ensure that there is no wrongful, unauthorised or unjust gain to anyone as a result of abuse of the process of the Court. One way to curb this tendency is to impose realistic or punitive costs"*

Similarly, in ***K.D. Sharma v. Steel Authority of India Ltd***., (2008) 12 SCC 481, the apex Court held that no litigant can play 'hide and seek' with the Courts or adopt 'pick and choose'. True facts ought to be disclosed as the Court knows law, but not facts. One, who does not come with candid facts and clean breast cannot hold a writ of the court with soiled hands. Suppression or concealment of material facts is impermissible to a litigant or even as a technique of advocacy. In such cases, the Court is duty bound to discharge rule nisi and such applicant is required to be dealt with for contempt of court for abusing the process of the Court.

8.7. In ***State of Uttaranchal v. Balwant Singh Chaufal***, (2010) 3 SCC 402, the apex Court in paragraphs-143 and 181 of the judgment held as follows:-

> *"143. Unfortunately, of late, it has been noticed that such an important jurisdiction which has been carefully carved out, created and nurtured with great care and caution by the courts, is being blatantly abused by filing some petitions with oblique motives. We think time has come when genuine and bona fide public interest litigation must be encouraged whereas frivolous public interest litigation should be discouraged. In our considered opinion, we have to protect and preserve this important jurisdiction in the larger interest of the people of this country but we must take effective steps to prevent and cure its abuse on the basis of monetary and non-monetary directions by the courts.*

181. In order to preserve the purity and sanctity of the PIL, it has become imperative to issue the following directions:

(1) The Courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.

(2) Instead of every individual Judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request that the High Courts who have not yet framed the rules, should frame the rules within three months. The Registrar General of each High Court is directed to ensure that a copy of the rules prepared by the High Court is sent to the Secretary General of this Court immediately thereafter.

(3) The Courts should prima facie verify the credentials of the petitioner before entertaining a PIL.

(4) The Courts should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.

(5) The Courts should be fully satisfied that substantial public interest is involved before entertaining the petition.

(6) The Courts should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.

(7) The Courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The Court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.

(8) The Courts should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations".

Similar view has also been taken by this Court in ***Chhabindra Mukhi v. State of Odisha***, 122 (2016) CLT 609.

8.8. Taking into consideration the above principles of law laid down by the apex Court and applying the same to the present context, the contention raised by learned counsel appearing for the opposite parties, that the petitioners have filed "personal interest litigation" in the nature of "public interest litigation" to vindicate their grievance against opposite parties no.6, 7 and 8, is not tenable in the eye of law. But fact remains, the Saw Mills of opposite parties no.6 and 7, which have been rehabilitated by virtue of the direction given by the apex Court, are being managed by opposite party no.8. More so, Baripada City in the year 2023 was recorded as the hottest city and this has happened due to deforestation affecting the environment greatly. Therefore, to protect and save the human lives and environment, if such a petition is filed, it cannot be said that it is a "personal interest litigation" and is liable to be dismissed. Rather, this is a public interest litigation, by which the petitioners otherwise seek to protect the environment, by bringing to the notice of the Court that such an irregularity has been caused, which is to be rectified by relocating the Saw

Mills in conformity with the provisions of law. Thereby, issue no.(i) is answered in affirmative in favour of the petitioners.

Issue No.(ii):-

9. Before delving into this issue, the provisions of Section 4 of the Odisha Saw Mills and Saw Pits (Control) Act, 1991, which are relevant for the purpose of the case, are to be referred to:-

> *"4. Establishment and Operation of Saw Mill and Saw Pit—(1) On and after the appointed day, no person shall establish or operate a saw mill or saw pit except under the authority and subject to the conditions of a license granted under this Act:*
>
> *Provided that no person shall establish or operate any saw mill or saw pit within a reserved forest, protected forest or any forest area or within ten kilometers from the boundary or any such forest or forest area.*
>
> *Provided further that the Government shall for reasons to be recorded in writing disallow a saw mill or saw pit other than those referred to in Clause (i) of Sub-section (2) established and operating prior to the appointed day within the area mentioned in the first proviso to continue such operation and may, In order to meet the needs of saw facilities for local population, allow a saw mill or saw pit referred to in Clause (i) of Sub- section (2), established and operating prior to the appointed day in such area, to continue such operation or may allow further establishment of saw mill or saw pit in such area either through the Department of Forest or through a State Public Sector Undertaking fully owned by it.*
>
> ****
>
> *[Provided also that the State Government may identify industrial estates within such area not exceeding two in one district and shall subject to compliance of the guidelines issued from time to time allow the Saw mills or Saw Pits for their establishment relocation and functioning in such Industrial estates.*
>
> *Explanation- For the purpose of this sub-section, the expression "industrial estate" shall have the same meaning assigned to it under clause (i) of Section 2 of the Orissa Industrial Infrastructure Development Corporation Act, 1980.]*
>
> *(2) Notwithstanding anything contained in Sub-section (1):*
>
> *(i) a saw mill or saw pit, established by the Orissa Forest Development Corporation Limited or by any other agency of the Government prior to the appointed day, may continue to be operated by such Corporation agency; as the case may be, and in such a case, the Corporation or agency, as the case may be, shall be deemed to be a licensee for the purposes of this Act;*
>
> *(ii) a saw mill or saw pit other than one referred to in clause (i) and established prior to the appointed day, may continue to be operated, and shall be deemed to be a saw mill or saw pit, as the case may be, licensed under this Act;*
>
> *(a) for a period of three months from the appointed day; or*
>
> *(b) in an application made in accordance with Section 6 for a licence is pending on the expiry of the period specified in clause (a) till the disposal of such application under sub-section (2) of Section 7."*
>
> **1. Inserted vide O.A. 2 of 2007, Orissa Gazette Ext. No. 273 dated 22.02.2007*
> ***2 Inserted vide O.A. No. 2 of 2011 Orissa Gazette Ext. No. 208 dated 25.01.2011*

9.1. Section 4(1) of the Act, 1991 puts a mandate that on and after the appointed day, no person shall establish or operate a saw mill or saw pit except under the authority and subject to the conditions of a license granted under the Act. The first proviso attached to this Sub-section (1) of Section 4 also gives clarification that no person shall establish or operate any saw mill or saw pit within a reserved forest, protected forest or any forest area or within ten kilometers from the boundary of any such forest or forest area. By virtue of the provisions of Section 4(1), the saw mills, established within the prohibited zone, as mentioned in the proviso, have stopped operating overnight by virtue of enactment of the Act.

9.2. Purpose of the proviso attached to the main provision is very clear that if the enacting portion of the Section is not clear, a proviso appended to it may give an indication as to its true meaning.

9.3. In ***West Derby Union v. Metropolitan Life Assurance Society***, 1897 A.C. 647, Lord Herschell stated as under:-

> *"Of course a proviso may be used to guide you in the selection of one or other of two possible constructions of the words to be found in the enactment, and show when there is doubt about its scope, when it may reasonably admit of doubt as to having this scope or that, which is the proper view to take of it."*

Lord Watson in the same case stated as under:-

> *"There is no doubt that where the main provision is clear, its effect cannot be cut down by the proviso. But where it is not clear, the proviso, which cannot be presumed to be a suplusage, can properly be looked into to ascertain the meaning and scope of the main provision."*

The aforesaid view has also been referred to in ***Jennings v. Kelly***, 1940 A.C. 2006 : (1939) 4 All E.R. 464.

9.4. In ***Hindustan Ideal Insurance Co. v. Life Insurance Corporation***, AIR 1963 SC 1083 : (1963) 2 SCR 56, the apex Court held that there is no doubt that where the main provision is clear, its effect cannot be cut down by the proviso, but where it is not clear, the proviso, which cannot be presumed to be a surplusage, can properly be looked into to ascertain the meaning and scope of the main provision.

9.5. The words of a proviso must be given their full and natural meaning and cannot be restricted by an artificial construction unless the intention of the legislature is clearly expressed to show that they were intended to apply only to a limited number of cases.

9.6. In ***Devadsan T. v. Union of India***, (1964) 4 SCR 680 : AIR 1964 SC 179, the apex Court held that a proviso should receive a strict construction. It cannot be so interpreted as to nullify or destroy the main provision. It is not open to add words to a proviso with a view to enlarge the scope of the provision. It must be restricted to the scope reasonably conveyed by the words used therein. The rule is applied with

such strictness that it is not permissible even to draw any implication from the specification of any particular case in a proviso by the application of the maxim expression unius est exclusion alterius so as to affect the interpretation of the enacting clause. A proviso unlike an exception should be taken in connection with the general language of the previous portion of the clause to which it is attached.

9.7. In view of the aforementioned interpretation attached to the meaning of the proviso, if Section 4(1) of the Act is read as a whole, it would be evident that the first proviso creates a bar to establish or operate any saw mill or saw pit within a reserved forest, protected forest or any forest area or within ten kelometres from the boundary of any such forest or forest area. The issue relating to distance criteria for establishment of saw mills and saw pits contained in the first proviso, which is clarified to be radial distance (as crow flies), has been considered by this Court in the case of ***Maa Mangala Saw Mill v. State of Orissa***, OJC No.11164 of 1996 decided on 08.11.1996.

9.8. In ***Laxminarayan Saw Mill v. State of Orissa and others***, AIR 1995 ORISSA 114 : 79 (1995) CLT 189 (FB), this Court, taking into consideration Section 4 (1), held that Section 4 (1) imposes an absolute bar which falls under the criteria of reasonable restriction and has been introduced for the welfare of the general public and the whole section has to be read completely and not in isolation. Section 4 (1) is the spirit of the Act and if allowed to be circumvented, the whole act loses its force. Paragraphs 7, 8, 10, 12, 15, 16, 18 and 21 of the said judgment, being relevant, are extracted hereunder:-

> *"7. The language employed in the proviso is simply clear. It creates a total ban against establishing a new saw mill/pit or operating the existing saw mill/ pit in the areas specified which can be described as, prohibited zone. Sub-section (1) of Section 4 mandates against establishing or operating a saw mill/pit except under the authority and subject to the conditions of a licence granted under the Act. In view of Section 24, all old licences come to an end. Clause (i) of sub-section (2) of Section 4 carves out an exception in respect of existing saw mill/ pit established by the Orissa Forest Development Corporation Limited or by any other agency of the Government prior to the appointed day. As a result, that saw mill/pit, even though within the prohibited zone, can continue to operate. Exception is only about existing saw mill/ pit, and even that class of operator cannot establish a new saw mill/ pit within the prohibited area. Clause (ii) (a) of Section 4(2) provides for continuation of the existing saw mill/pit as a deemed licensee under the Act for a period of three months from the appointed day. This was clearly necessary as a transitory measure to avoid hardship to the operator and also to gain time to apply fresh mind by the authorities. Section 6(2) provides for an application to be made at least one month before the expiry of the period of three months from the appointed day. Clause (ii)(b) of Section 4(2) provides that if such application is pending, the period of deemed licence shall be extended till the disposal of the application under Section 7(2). Section 7(2) provides for disposal of the application under Section 6(1) within a period of three months from the date of its receipt.*
>
> *8. Before the Act was brought into force, the saw mill/pit belonged to two categories - one established beyond the prohibited zone and the other established within the*

prohibited zone. The former did not require any licence, but the latter did. Section 4 created two classes of saw mills/pits, one situated within the prohibited zone and the other beyond that zone, Former class was banned and the latter was regulated. Thus, under the Act, even those saw mills/pits which did not require licence were brought in the net of the licensing provision. A transitory provision was made for all varieties of saw mills/pits for a period of three months in the first instance and thereafter till the disposal of the application for licence under Section 6 in accordance with Section 7(2). The assumption that clause (ii)(b) of Section 4(2) applies even to the mills/pits situated within the newly created prohibited zone appears to be erroneous. It will have to be borne in mind that the non-obstante clause contained in sub-section (2) was meant not only to apply to the proviso to Section 4(1) but also to the substantive provision. Clause (ii)(b) of Section 4(2) was not meant for mills which are undisputedly in the prohibited area. One of the points to be considered while granting licence is whether or not the saw mill/pit is situated within the prohibited zone. On that question, there may be a dispute and if there is a dispute the matter has to be adjudicated upon. Such contingency was also required to be provided for. Under the circumstances, there is no scope for an interpretation that Section 4(2)(ii)(b) provides for a discretion in the officer to grant or refuse a licence to a saw mill/pit even within a prohibited zone. A discretion to grant or refuse licence in accordance with the law very much exists, but not in respect of cases governed by total ban. If discretion even in cases covered by the proviso is read to exist, the proviso is rendered otiose. Normally, interpretation leading to such result has to be avoided. Moreover, the provision as a whole will have to be read together and no part of it can be read in isolation.

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10. The language employed in the proviso to Section 4(1) is plain and clear. It is capable of only one interpretation. It also is quite in consonance with the very object of the new Act. In this context, taking aid of any other principle of interpretation is unnecessary. Section 4 will have to be read as a whole and each part thereof will have to be reconciled to the other. Hence clause (ii)(b) to sub-section (2) or any other clause cannot be read in isolation. Even if the language of the statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment or to absurdity presumably not intended, construction may be put upon it which modifies the meaning of the word and even the structure of the sentence. All this is permissible only when two constructions are reasonably possible and not when only one construction is possible. In that case, the opinion of the Court, howsoever strong, must yield to the language and it is Court's duty to give effect to the inevitable result and leave it to the legislature to amend or alter the law.

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12. The basic approach to the interpretation of a statute has' been pithily put in the case of Utkal Contractors and Joinery Pvt. Ltd. v. State of Orissa, AIR 1987 SC 1454 thus (para 9):-

"..... .A statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation. The words of a statute take their colour from the reason for it. How do we discover the reason for a statute? There are external and internal aids. The external aids are Statement of Objects and Reasons when the Bill is presented to Parliament, the reports of Committees which preceded the Bill and the reports of Parliamentary Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the preamble, the scheme and the provisions of the Act. Having discovered the reason for the statute and so having set the sail to the

wind, the interpreter may proceed ahead. No provision in the statute and no word of the statute may be construed in isolation. Every provision and every word must be looked at generally before any provision or word is attempted to be construed. The setting and the pattern are important. It is again important to remember that Parliament does not waste its breath unnecessarily. Just as Parliament is not expected to use unnecessary expressions. Parliament is also not expected to express itself unnecessarily. Even as Parliament does not use any word without meaning something, Parliament does not legislate where no legislation is called for. Parliament cannot be assumed to legislate for the sake of legislation; nor can it be assumed to make pointless legislation."

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15. It is true that non-obstante clause is usually used to indicate the overriding effect, but it is not the rule of thumb. Sometimes, proviso can be treated as a substantive provision and a non-obstante clause as another provision. But assuming for a moment that Sub-section (2) has an overriding effect, is on the whole sub-section (I) and not merely on the proviso. Moreover, the overriding effect can be only to the extent of inconsistency and cannot travel beyond that limit. We are unable to notice any such inconsistency that would obliterate the substantive provision of total ban designedly created by the proviso to Section 4(1).

16. This takes us to the question No. 2. Fundamental right to practise any profession or to carry on as occupation, trade or business is specified under Article 19(1)(g) of the Constitution. But this right is subject to limitations provided for in Sub-article (6), which permits the State to make a law imposing, in the interest of general public, Reasonable restrictions on the exercise of that right. The key words are "reasonable restrictions" and "in the interest of general public". What is reasonable restriction and what is in the interest of general public cannot be put in any strait jacket formula. All depends upon the object of the Act and its scheme. But the very words "reasonable restrictions" connote that they should not be arbitrary or of an excessive nature beyond what is required in the interest of public. Though there is a presumption in favour of constitutionality of a statute, determination of reasonableness by legislature is not conclusive. It is subject to judicial review. These are the broad features and touchstones on the basis of which the validity of an enactment has to be tested. Considering the object sought to be achieved and the legislative background of the Act, it cannot be said that the total prohibition of saw mill/pit in the prohibited zone is not a reasonable restriction and is not in public interest. On the face of it, it is in public interest. No law can claim to be perfect for all times to come. Passage of time, new experiences etc. necessitate changes. The extent of the changes depends upon many factors. Forest is a national wealth. It is being denuded by illegal cutting. Considering the vast area involved and their situation in the far off places from the habitat area, it is becoming increasingly difficult to control the illegal activities. Earlier after experiment of imposing condition of licence within 80 Kms. did not serve the purpose. More drastic measure to achieve the same result was thought of. The saw mills/pits in or around the forest and forest area can be and has been the recipients of the illegal forest produce. They have great potentiality of destroying the evidence of unauthorised denuding of the forest. Physical control, though possible theoretically is not always practicable. If in this context a total ban has been put on the establishment and operation of the saw mills/pits within the forest and a radius of 10. Kms. therefrom, there is no legal justification to make a grievance. There has to be a balance between an individual and public interest, and in case of conflict, individual interest must yield to public interest. In the whole context, it cannot be said that this restrictions, which is obviously in general public

interest, is unreasonable or excessive. The measure is essentially regulatory in nature and is neither unguided, nor unreasonable, nor discriminatory.

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18. It was substituted that the right to regulate does not include the right to destroy. The business of saw mill and raw pit has not been completely destroyed. Beyond the prohibited zone, the business can be carried on. There is no right to carry on business at a particular spot.

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21. Next submission is that permitting continuation of the saw mills/pits established only by the Orissa Forest Development Corporation or other agencies of the Government is discriminatory. Now, private persons on one hand and Government or public bodies on the other belong to two distinct classes. Giving special facilities to the Government, its agents and statutory corporations has been recognised as valid and reasonable. In this case, classification has clear nexus to the object. Hence, the provisions cannot be faulted even on that ground."

9.9. In ***Saraswati Saw Mills*** (supra), this Court held that proviso to Section 4 (1) of the Act is not ultra vires and, thereby, is not violative of Article 14 of the Constitution of India.

9.10. In ***Sushila Saw Mill*** (supra), the apex Court held that Article 19(1)(g) and 301 of the Constitution of India is subjected to statutory regulation and Section 4 (1) puts a total embargo on the right to carry out saw mill operation within the prohibitory zone. The preservation of forest is a matter of great public interest and demanded for the total ban by legislation via the Act. The size and contiguity of the district does not matter, if all the area of the district falls under the prohibitory zone then no saw mill be permitted to function in the said district and it does not affect Articles 14 and 301 of the Constitution.

9.11. In ***T.N. Godavarman Thirumulpad*** (supra), the apex Court issued detailed directions for the sustainable use of forests and created its own monitoring and implementation system through regional and State level communities, regulating the felling, use and movement of timber across the country in hope of preserving the nation's forest. The apex Court examined in detail all the aspects of the National Forest Policy, the Forest Conservation Act, 1980, which was enacted with a view to check further deforestation. It emphasized that the word "forest" must be understood according to its dictionary meaning of the term irrespective of the nature of ownership and classification thereof. According to this new broader definition, any forest thus defined, regardless of ownership, would be subject to Section 2 of the Act. Under new interpretation of forest land under Section 2 of the Act, States could no longer de-reserve protected forests for commercial or industrial (non-forestry) use without permission.

9.12. A "Forest" having not been defined, the meaning attached to forest has been considered by various judgment of the Apex Court, and some of which has been taken up for adjudication of the present case.

9.13. In ***T.N. Godavarman v. Union of India***, AIR 1977 SC 1228, the apex Court, while considering Section 1 of Forest Conservation Act, held that the word "forest" covers all statutory recognized forests, whether designated as reserved, protected or otherwise for the purpose of Sec.2(i) of the Forest Conservation Act.

9.14. In ***Bhavani Tea and Produce Co. Ltd. v. State of Kerala***, (1991) 2 SCC 463, the apex Court held that forest means a parcel of land on which trees have been grown. Similar view has also been taken by the apex Court in ***State of Kerala v. Pullangode Rubber and Proudce Co. Ltd***. (1999) 6 SCC 99.

9.15. In ***Indian Airlines Ltd. v. Samaresh Bhownick***, (1999) 6 SCC 99, the apex Court held that meaning of forest must be understood according to its dictionary meaning. It would, thus, appear that the rubber plantation containing rubber trees, would be regarded as a private forest the destruction of which was sought to be prohibited by the 1949 Act.

9.16. In ***M.C. Meheta v. Union of India***, (2004) 12 SCC 118 : AIR 2004 SC 4016, while considering Article 21 of the Constitution of India, the apex Court held that the term 'forest' is to be understood in the dictionary sense and also that any area regarded as a forest in government accords, irrespective of ownership, would be a forest.

9.17. In ***B.L. Wadhera v. Union of India***, (2002) 9 SCC 108 : AIR 2002 SC 1913, the apex Court held as follows:

> *"Forest has not been defined under the Act but the Supreme Court in T.N. Godavarman Thirumulpad v. Union of India (1997) 2 SCC 267 has held that the word "forest" must be understood according to its dictionary meaning. It would cover all statutorily recognized forests whether designatred as reserved, protected or otherwise for the purposes of Section 2(i) of the Forest Conservation Act. The term "forest land" occurring in Section 2 will include not only the forest as understood in the dictionary sense but also any area regarded as forest in the government record irrespective of the ownership. The gifting of land, in the instate case, cannot in any way, be termed to be for a forest purpose as postulated by Section 2 of the Forest Conservation Act."*

9.18. In view of the meaning attached to the word 'forest', it would cover all statutorily recognized forests whether designated as reserved, protected or otherwise for the purposes of Section 2(i) of the Forest Conservation Act. Therefore, it is the pivotal duty and responsibility of the State to protect the same through their forest officials and for growing consciousness among the citizens.

9.19. Therefore, to save the forest, by enacting the provisions contained in Section 4 (1) of the Act along with the proviso, there is a full restriction with regard to operation of the Saw Mills in the State of Odisha within prohibited zone of 10 KM radial distance from the preserved forest. The aforesaid view of the Court, in the case of ***T.N. Godavarman*** (supra), has been implemented by the State Government, vide order dated 10.07.2009, stating that there should be no Saw Mills within 10

kms radial distance from the boundary of the forest area. The relevant extracts of the orders passed by the apex Court in ***T.N. Godavarman*** (supra) are quoted hereunder:-

> ***Order dated 10.07.2009 :***
> *"I.A. No.941 IN I.A. No. 754-755 WITH I.ANo.777, 1131-1133, 1138-1146, 1148, 1184, 1272, 1361, 1579-1580 in* ***W.P.(C) No. 202/1995 with W.P.(C) No. 356 /2007.***
>
> *These matters relate to saw mills in the State of Orissa. This Court had earlier directed that there should be no saw mills within 10kilometers from the boundary of the forest area. Many of the saw mills in the State of Orissa were closed down. The applicants in I.A. Nos. 1579 and 1580 also closed down their saw mills. We are told that some of the saw mills had obtained interim orders from the High Court but as those are contrary to the direction given by this Court, all those saw mills must also be closed down immediately.*
>
> *We are told that the Orissa Forest Corporation has its own saw mills and these mills are given on lease to private parties. Such practices shall be stopped forthwith.*
>
> *The State of Orissa to file a fresh affidavit to this effect within a period of four weeks.*
>
> *The State shall arrange to have an industrial estate and take urgent steps to this effect and shall also take steps to see that there shall be appropriate amendment to the Saw Mills Rules of 1991. It shall file an affidavit to this effect."*
>
> *"I.A. No.941 IN I.A. No. 754-755 WITH I.ANo.777, 1131-1133, 1138-1146, 1148, 1184, 1272, 1361,1579-1580 in W.P.(C) No. 202/1995 with* ***W.P.(C) No. 356/2007****.*
>
> *After this Court passed Order dated 10.07.2009 regarding closing of the mills in the State of Orissa, a large number of saw mills were closed. The State is of the view that for the saw mills were closed. The State is of the view that for the saw mills appropriate location could not be found as many of the areas are covered by the definition of forest. Now the State has proposed and want to set-up Industrial Estate(s) for establishment of saw mills for which they require amendment of the Orissa Saw Mills and Saw Pits (Control) Act, 1991.*
>
> *In view of the statement made by the learned counsel for the State of Orissa, we direct that urgent steps may be taken in this direction at the earliest.*
>
> *Post on 20.11.2009."*

9.20. The above direction given by the apex Court resulted in closing down of majority of Saw Mills in the State of Odisha. Consequentially, the affected Saw Mill owners of the State approached the apex Court by filing various interim applications seeking clarifications/modifications/relaxation of the aforesaid directions.Evaluating the contentions raised, the apex Court, vide order dated 16.08.2010, directed for rehabilitation of those closed down Saw Mills and thereby directed the State of Odisha to make necessary arrangements to have industrial estates and take appropriate steps in that regard, if necessary, by making amendments to the provisions of the Saw Mills Act and the Rules framed thereunder. The relevant extract of the order dated 16.08.2010 passed by the apex Court is quoted below:-

> *"****ORISSA SAW MILL MATTERS****:*
>
> *We have learned counsel for the parties as well as Mr. P.S. Narasimha, learned Amicus Curiae.*

These applications relate to the saw mills in the State of Orissa. This Court has earlier directed that no saw mills should be established within a radius of 10 kms. from the boundary of the forest area.

Pursuant to the directions of the Court many of the saw mills in the State of Orissa were closed down. At the same time, this Court having realised that those saw mills which were closed down are required to be rehabilitated, passed the orders on 10.7.2009 directing the State of Orissa to make necessary arrangements to have industrial estates and take appropriate steps in that regard, if necessary, by making amendments to the provisions of Orissa Saw Mills and Saw Pit (Control) Act, 1991 (hereinafter referred to as 'the Act) and the rules framed thereunder.

The Court vide its order dated 10.7.2009 accordingly, directed the State of Orissa to take urgent steps in that regard and ensure appropriate amendments to the said provisions of the Act and the Rules made there under so that the eligible amongst the closed saw mills could be appropriately rehabilitated in due course. By another order dated 7.5.2010 based on the instructions submitted before the Court, a direction was issued requiring the State to take appropriate decision concerning amendments to the provisions of the said Act and Rules within a period of six weeks there from already taken appropriate decision in the matter and complied with the directions of this Court. The necessary amendments to the provisions of the Act are required to be made by the Legislature.

In the circumstances, it would be appropriate to direct the State of Orissa to directions of this Court dated 10.7.2009 and 7.5.2010 and accordingly make and carry implement the out necessary amendments to the provisions of the Act and Rules framed there under in order to give effect rehabilitation plan. The industrial estates have to be indentified so that these applicants are appropriately rehabilitated in terms of the directions issued by this Court from time to time. The exercise in this regard shall be completed within a period of six months from today.

In such view of the matter, no adjudication is required in these applications and they are accordingly disposed of."

9.21. Now, in the name of rehabilitation, closed Saw Mills are being permitted to be opened at industrial estate area. The word "rehabilitation", as has been defined in Vocabulary.com, reads thus:-

*"**Rehabilitation** is the act of restoring something to its original state, like the rehabilitation of the forest that had once been cleared for use as an amusement park. The noun rehabilitation comes from the Latin prefix re-, meaning "again" and habitare, meaning "make fit." When something falls in to disrepair and needs to be restored to a better condition, it needs rehabilitation."*

Primary Meanings of rehabilitation

1.n. the treatment of physical disabilities by massage and electrotherapy and exercises.

2.n. the restoration of someone to a useful place in society.

3.n. the conversion of wasteland into land suitable for use of habitation or cultivation."

9.22. In ***Collector of 24 Parganas v. Lalit Mohan Mullick***, AIR 1986 SC 622 : (1986) 2 SCC 138, the apex Court held that by rehabilitation what is meant is not to provide shelter alone. The real purpose of rehabilitation can be achieved only if those who are sought to be rehabilitated are provided with shelter, food and other

necessary amenities of life. Providing medical facilities would come, within the concept of the word 'rehabilitation'.

9.23. In ***State of M.P. V. Narmada Bachao Andolan***, (2011) 7 SCC 639: AIR 2011 SC 1989, the apex Court, keeping in view Sections 3 and 20 of the Land Acquisition Act, 1894 and Article 300-A of the Constitution of India, considered the"**Rehabilitation"** in paragraphs-26, 27, 28 to 31, 52, 94, 96 and 93, 75, 88, 101 and 183 to the following effect:-

> *"It is desirable for the authority concerned to ensure that as far as practicable persons who had been living and carrying on business or other activity on the land acquired, if they so desire, and are willing to purchase and comply with any requirement of the authority or the local body, be given a piece of land on the terms settled with due regard to the price at which the land has been acquired from them. However, the State Government cannot be compelled to provide alternate accommodation to the oustees and it is for the authority concerned to consider the desirability and feasibility of providing alternative land considering the facts and circumstances of each case. (Para 26)*
>
> *In certain cases, the oustees are entitled to rehabilitation. Rehabilitation is meant only for those persons who have been rendered destitute because of a loss of residence or livelihood as a consequence of land acquisition. The authorities must explore the avenues of rehabilitation by way of employment, housing, investment opportunities, and identification of alternative lands. For people whose lives and livelihoods are intrinsically connected to the land, the economic and cultural shift to a market economy can be traumatic. The fundamental right of the farmer to cultivation is a part of right to livelihood. "Agricultural land is the foundation for a sense of security and freedom from fear. Assured possession is a lasting source for peace and prosperity." India being a predominantly agricultural society, there is a "strong linkage between the land and the person's status in [the] social system".(Para 27)*
>
> *However, in case of land acquisition, "the plea of deprivation of right to livelihood under Article 21 is unsustainable". Article 300-A is not only a constitutional right but also a human right, but acquisition of land does not violate any constitutional/ fundamental right of the displaced persons. However, they are entitled to resettlement and rehabilitation as per the policy framed for the oustees of the project concerned. (Paras 28 to 31)*
>
> *In the process of development, the State cannot be permitted to displace tribal people, a vulnerable section of our society, suffering from poverty and ignorance, without taking appropriate remedial measures of rehabilitation. The Court is not oblivious of the fact that social and economic reasons had caused disaffection, and thus, the tribal areas are today in the grip of extremism, as the tribal youths have become easy prey to the extremists' propaganda. (Para 52)*
>
> *Rehabilitation on the other hand, is restoration of the status of something lost, displaced or even otherwise a grant to secure a dignified mode of life to a person who has nothing to sustain himself. This concept, as against compensation and property under Article 300-A, brings within its fold the presence of the elements of Article 21 of the Constitution of India. Those who have been rendered destitute, have to be assured a permanent source of basic livelihood to sustain themselves. This becomes necessary for the State when it relates to the rehabilitation of the already depressed classes like*

Scheduled Castes, Scheduled Tribes and marginal farmers in order to meet the requirements of social justice.(Para-94)

The rehabilitation has to be done to the extent of the displacement. The rehabilitation is compensatory in nature with a view to ensure that the oustee and his family are at least restored to the status that was existing on the date of the commencement of the proceedings under the 1894 Act. Each State has a right to frame the rehabilitation policy considering the extent of its resources and other priorities. One State is not bound if in a similar situation, another State has accorded additional facilities even over and above the policy. (Para-96)

Compensation has to be understood in relation to the right to property. The right of the oustee is protected only to a limited extent as enunciated in Article 300-A. The tenure-holder is deprived of the property only to the extent of land actually owned and possessed by him. This is, therefore, limited to the physical area of the property and this area cannot get explained or reduced by any fictional definition of the word "family" when it comes to awarding compensation. Compensation is awarded by the authority of law under Article 300-A read with the relevant statutory law of compensation under any law made by the legislature and for the time being in force, only for the area acquired. Hence, major sons could not have been made allotments of land as separate family units. (Paras 93 and 75, 88 to 101 and 183"

Thereby, in compliance of the order passed by the apex Court, the closed Saw Mills are to be opened at the industrial estate area by way of rehabilitation.

9.24. In compliance to the direction given by the apex Court, the State Government implemented the provisions contained in Section 4 of the Act, 1991 and added 3rd proviso, which has been inserted vide O.A. No. 2 of 2011 published in the Gazette Notification No.208 dated 25.01.2011, where power has been vested on the State Government that the State Government may identify industrial estates within such area not exceeding two in one district and shall, subject to compliance of the guidelines issued from time to time, allow the saw mills or saw pits for their establishment, relocation and functioning in such industrial estate.

9.25. Therefore, in the case at hand, the Saw Mills, which were closed by virtue of the preliminary orders of the apex Court issued in ***T.N.Godavarman case*** (supra), have been rehabilitated and established inside the identified industrial estate, in terms of the third proviso to Section 4 (1) of the Saw Mills Act leading to establishment of the two saw mills (two being the maximum mills permissible in one district).

9.26. Guidelines have also been issued by the Government for establishment, relocation and functioning of Saw Mills, which have been published on 30.07.2011 to the following effect:-

*"**Guidelines for Establishment, Relocation and functioning of Saw Mills***
(The 30th July 2011)

No.-13891_ 10F-legal -3/2011-F& E Guidelines for establishment relocation and functioning of Saw Mills in the identified industrial estates of the State is indicated

below as per the provisions contained in Orissa Saw Mills and Saw Pits (Control) Act, 1991 and Orissa Saw Mills and Saw Pits (Control) Amendment Act, 2010.

Background

Prior to 1980, the control of timber in transit or possession was regulated by the provision of Section 45 of the Orissa Forest Act, 1972. Under the said section of the Act, the Orissa Forest Saw Pits and Saw mills (Control) Rules, 1980 was brought in during 1980 which prohibited establishment of Saw Mills inside the forest land within 80kms. From it's boundary without a valid license. In 1991, the Orissa Saw Mill and Saw Pits (Control) Act, 1991 was rought in for regulation of Saw Mill and Saw Pits in the State. The Act came into force on the 13th December 1991 after its publication in the Orissa Gazette. To facilitate implementation of the Act, Orissa Saw Mills and Saw Pits (Control) Rules, 1993 were framed which came into effect from the 18th November 1993. As per the Orissa Saw Pits and Saw Mills (Control) Rules, 1980, 427 Saw Mills existed in the State till 1991. After promulgation of the Saw Mills Act, 1991 and Rules, 1993 a further 132 number of Saw Mills were given licence based on the criteria of "more than 10 kms. distance" by road from the forest boundary. Thus the total number of licence holding Saw Mills in the State became 559 till 2002. Hon'ble High Court of Orissa in OJC No.11164/1996 (Maa Mangala Saw Mill vrs. State & others) clarified that 10 kms. Distance from boundary of the nearest forest is to be the radial distance (as crow-flies). As per this clarification of the Hon'ble High Court, radial distance criteria was followed in implementation of the Saw Mills and Saw Pits (Control) Act, 1991 and most of the Saw Mills were closed. On the 2nd July 2008 only 24 Saw Mills existed in the State. After amendment in the Saw Mill Act during 2007, Orissa Forest Development Corporation started operating Saw Mills on contract basis and the total number of Saw Mills increased to 41. However, after the order of Hon'ble Supreme Court dated the 10th July 2009, 34 Saw Mills were closed and only 7 Saw Mills are functioning at present. As per the orders of Hon'ble Supreme Court, Orissa Saw Mills & Saw Pits, Amendment Act, 2010 has been enacted which allows establishment, relocation and functioning of Saw Mills in two identified industrial estates (maximum two in one district) subject to compliance of the guidelines issued by the State Government from time to time. Hence, it has become necessary to formulate the guidelines for establishment, relocation and functioning of Saw Mills closed due to enforcement Of the Saw Mills & Saw Pits (Control) Act, 1991 and subsequent orders of the Supreme Court.

THE GUIDELINES

Identification of Industrial Estate

1. The Industries Department shall identify industrial estates (maximum two in each district) for the purpose of establishment, relocation and functioning of Saw Mills in those industrial estates, the Department shall also indicate the sheds/ area available for establishment, relocation and functioning of Saw Mills.

2. Preference may be given to the industrial estate which is closer to the office of D.F.O /Forest Ranger/ Forester.

Eligibility for establishment, relocation and functioning of Saw Mills in identified industrial estate.

3. The eligibility of Saw Mills to be rehabilitated in the identified industrial estate will be determined by the following criteria:-

a) Priority will be given to Saw Mills in the State functioning for a longer period on the strength of valid license.

b) Saw Mills which were functioning with no-offence record, will only be rehabilitated. In case the Saw Mills have been booked for committing offences, first the offences need

to be condoned by the Government seeing their gravity for considering them for rehabilitation in the identified industrial estate.

c) A list of Saw Mills having no record of offence against them will be prepared as per their seniority basing on duration of functioning on the strength of valid license. Such a list will be prepared by the P.C.C.D., Orissa.

d) Saw Mills having modern technology and equipment will be preferred.

4. The eligibility list of Saw Mills as per criteria narrated at Point 4 above will be put on the Notice board of the office of the P.C.C.F., Orissa and the Website of Forest & Environment Department. The eligible Saw Mills owners will be required to furnish their willingness for rehabilitation in the Industrial Estate giving three choices of industrial estates, to the P.C.C.F., Orissa by a specified date in sealed cover. The option exercised will be final.

5. The shed/land allotted to Saw Mills for establishment or relocation should be able to accommodate at least one horizontal bandsaw, one vertical bandsaw, one cross-cut-saw and other accessories.

6. Basing on the option exercised within the stipulated period, the decision regarding rehabilitation of the eligible Saw Mills will be taken up by a Committee headed by P.C.C.F., Orissa. The decision of the Committee will be final. The decision of the Committee will be communicated to the eligible Saw Mills owners and forest field functionaries concerned. A copy of the decision will also be submitted to the Forest & Environment Department and Industries Department for necessary action at their end.

7. On receipt of the decision of the Committee headed by the P.C.C.F., Orissa, Industries Department will take steps for allotment of shed/land in different industrial estates by the authority competent to make such allotment.

8. On allotment of shed/land in the industrial estate, the Saw Mills owners will have to apply for license to the concerned D.F.O., under Saw Mills Act, enclosing a sketch of shed/land allotted, equipment to be installed etc. within 15(Fifteen) days.

9. The Cone The concerned D.F.O. shall forward the said applications with his recommendation to the P.C.C.F Orissa within 15(Fifteen) days of its receipt. The P.C.C.F, Orissa, after examining the content will allow rehabilitation of Saw Mills. Then the D.F.O concerned will issue license to the applicant for the Saw Mills.

10. The day-to-day functioning (operation) and control of Saw Mills would be done as per the existing provisions of Orissa Saw Mills & Saw Pits (Control) Act, 1991 and rules framed thereunder in 1993."

9.27. In terms of the provisions contained under Section 4(1) of the Act, 1991 read with the guidelines for establishment, relocation and functioning of saw mills, the above named two Saw Mills were established within Chancha industrial estate by the Industries Department vide gazette notification dated 04.08.2009. As such, it qualifies the parameters laid under the guidelines for establishment, relocation and functioning of saw mills, vide notification no.13891-10F-Legal/3/2011 dated 30.07.2011. The factors for identification are two folds, i.e., (i) having requisite sheds/area for relocation for two saw mills (i.e., the maximum no. permissible); and (ii) the estate being closer to the office of DFO/Forest Ranger/Forester.

In view of the discussions made above, issue no.(ii) is answered in affirmative.

Issue No.(iii)

10. So far as this issue is concerned, it has been vehemently contended that opposite parties no.6 and 7 have transferred the management of their Saw Mills to opposite party no.8 and such contention has been raised as because opposite parties no.6 and 7 have relied upon the mobile number, which is stated to have been used by opposite party no.8. But, as it appears, opposite parties no.6 and 7, who are proprietors of the Saw Mills, are in charge of all the affairs and business, as is evident from the statutory forms, i.e., Form-D, E and F, which are stock register, sawing and sawn timber account filed every day and month wise extract of receipt and disposal of logs and sawn wood respectively. Furthermore, pursuant to a petition dated 17.04.2023, the Asst. Conservator of Forest (Enforcement, Baripada, Division), on causing an enquiry, found that opposite party no.8 has been authorized by the proprietors of the Saw Mills to receive any type of letters, documents and give verification on their behalf in their absence as well as represent them before the respective authorities. Thereby, opposite parties no.6 and 7, who are proprietors of the Saw Mills, have been regularly filing returns under the statutory forms and have at no point of time violated the provisions of law and the terms of the license. The DFO, Baripada, vide letter dated 26.06.2023, also caused inquiry for effective monitoring and functioning of the Saw Mills in consonance with the statutory provisions and rules. As such, the proprietors have also taken all measures and stood in strict compliance with the said instructions. Therefore, the allegation made that opposite parties no.6 and 7, being the proprietors of the respective Saw Mills, have authorized opposite party no.8 to manage the said Saw Mills, has no legs to stand. The contention to that extent cannot be sustained in the eye of law and issue no.(iii) is answered accordingly.

Issue No.(iv)

11. The petitioners have not produced any materials before this Court to indicate that opposite parties no. 6 and 7 are involved in any kind of illegal activities of timber business. On the other hand, as it reveals from the materials available on record, on receipt of the representation dated 15.05.2023, the Asst. Conservator Forest (Enforcement) conducted a full-fledged enquiry and reported on 04.07.2023 that the allegations regarding illegal sawing of timbers is without any basis. Furthermore, on causing enquiry to the said petition, the Asst. Conservator Forest (Enforcement) conducted a surprise visit by personally inspecting the premises on 11.07.2023 and undertook verification of the stock registers and monthly returns and consequentially found that the Saw Mills were running within monthly capacity as per the license. Therefore, in absence of any materials before this Court, no conclusion can be drawn that the Saw Mills are involved in illegal timber business. The issue no.(iv) is answered accordingly.

12. Before parting with the case, this Court deems it apposite to make a mention that in the name of rehabilitation of closed saw mills, the State authorities including

the forest officers, cannot and should not act detrimental to the interest of the public at large, which affects the public policy and very well come in realm of judicial review. Therefore, the forest department has to ensure that in the name of rehabilitation of closed saw mills, the forest resources made available should not be destroyed. In the event of any destruction thereof, the authorities, who are in the helm of affairs, should be put to task, because the human habitation are now facing severe crisis for their survival in a healthy environment, which should not be jeopardized further in any manner. In the interest of justice, equity and fair-play, both the human habitation and the forest growth simultaneously should have a healthy atmosphere and environment, as because any damage caused to the forest resources would definitely jeopardize human habitation.

13. This Court hopes and trusts, the committee which has been constituted should take care of the above mentioned aspects, when we are facing acute pollution of air and water. The burning example before this Court is New Delhi, capital of India, suffers from acute air pollution. Had there been enough growth of forest, this air pollution could have been averted. Similarly, the State of Orissa, mainly its capital, Bhubaneswar is heading towards similar problem which is faced in New Delhi, may be within a short span of time. Therefore, now time has come for all the stake holders to act strictly in consonance with the provisions of law to give better environment for survival of human habitation, and that to allow human beings to live with dignity in consonance with Article 21 of the Constitution of India. The primary objective is survival of human habitation, which should not be lost sight of, while considering the rehabilitation of the closed saw mills and also notification issued for consideration of the State Level Committee for taking decision regarding grant of license/ permission to the wood based industries subject to compliance of the prescribed guidelines and procedures issued by Ministry of Environment, Forest and Climate Change, Government of India, New Delhi.

14. This Court, before closing the case, would like to endorse its appreciation regarding the assistance rendered by the two young counsels of this Bar, namely, Mr. S.S. Bhuyan, learned counsel appearing for the petitioners and Mr. Abhishekh Dash, learned counsel appearing for opposite parties no. 6, 7 and 8.

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

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2024 (I) ILR-CUT-47

ARINDAM SINHA, J. & SIBO SANKAR MISHRA, J.

W.P.(C) NO.39063 OF 2021

KORAPUT CENTRAL COOPERATIVE BANK LTD. ….Petitioner

-V-

UMAKANTA RATH & ANR. …. Opp.Parties

INDUSTRIAL DISPUTE ACT, 1947 – Section 33(C)(2) – The workman after retirement filed an application before Labour Court for computation of his benefit of leave encashment – Whether a retired workman can maintain a claim U/s. 33(c)(2) of the Act? – Held, Yes – The computed leave encashment amount remains due to the workman & it is part of his terminal dues. (Paras 12-15)

Case Laws Relied on and Referred to :-

1. 2015 (1) OLR 1064 : The Executive Engineer V. Aswini
2. 2020 (II) OLR 977 : Divisional Manager V. Umamani
3. (2006)10 SCC 211 : U.P. State Road Transport Corporation V. Shri Birendra Bhandari
4. AIR 1958 SC 353 : Workmen of Dimakuchi Tea Estate V. Management of Dimakuchi Tea Estate

For Petitioner : Mr. Baidhar Sahoo

For Opp.Parties: Mr. Shakti Datta Tripathy

JUDGMENT Date of Hearing & Judgment : 05.12.2023

ARINDAM SINHA, J.

1. Petitioner-management has challenged order dated 9th September, 2021 passed by the labour Court on application made under section 33-C(2) of Industrial Disputes Act, 1947. The application was made by opposite party no.1, who when making the application had retired. His claim before the labour Court was for computation of his benefit of leave encashment, the leave accrued to him during subsistence of his suspension. Petitioner-management contended before us, a retired workman cannot maintain a claim under section 33-C(2). Without prejudice secondly, the workman stood suspended for a period during his service. Punishment order was made and upon his retirement, pursuant to the order of punishment there was calculation made of his retirement benefits and disbursed. The workman got leave encashment. No leave accrued to him during his period of suspension. Hence, the claim was disputed. The dispute being undetermined, the labour Court committed illegality in making impugned order directing payment of 80 days leave encashment.

2. Mr. Sahoo, learned advocate appears on behalf of petitioner and relies on two judgments of this Court respectively in support of each of his contentions.

(i) **The Executive Engineer v. Aswini**, reported **in 2015 (1) OLR-1064**, by which a learned single Judge took view as would appear from a passage from paragraph 8, reproduced below.

"8. Present is a suit where the plaintiff has sought for the back pensions when admittedly he is no more the employee and as such as already discussed is not coming as a 'workman' on the date of the institution of the suit and thus his dispute cannot be termed to be an industrial dispute. ……"

(ii) **Divisional Manager v. Umamani**, reported in **2020 (II) OLR 977**, wherein a division Bench of this Court was of view that the labour Court has no jurisdiction to

adjudicate an undetermined claim made by the workman by application under section 33-C(2), until such adjudication is made by the appropriate forum.

3. Mr. Tripathy, learned advocate appears on behalf of opposite party no.1 (workman). He relies on **judgment dated 14th August, 2013** of the Supreme Court reported in **(2013) 12 SCC 210 (State of Jharkhand v. Jitendra Kumar Srivastava)**. Paragraph 16 is reproduced below.

> *"16. The fact remains that there is an imprimatur to the legal principle that the right to receive pension is recognised as a right in "property". Article 300-A of the Constitution of India reads as under:*
>
> *"**300-A. Persons not to be deprived of property save by authority of law**. – No person shall be deprived of his property save by authority of law."*
>
> *Once we proceed on that premise, the answer to the question posed by us in the beginning of this judgment becomes too obvious. A person cannot be deprived of this pension without the authority of law, which is the constitutional mandate enshrined in Article 300-A of the Constitution. **It follows that attempt of the appellant to take away a part of pension or gratuity or even leave encashment without any statutory provision and under the umbrage of administrative instruction cannot be countenanced**."*
>
> *(Emphasis supplied)*

He submits, inter alia, leave encashment is a part of retiral benefits. It is property of the beneficiary having constitutional guarantee under article 300 A to not be deprived therefrom except by authority of law.

4. Mr. Sharma, learned advocate, Additional Government Advocate appears on behalf of opposite party no.2.

5. We put query to Mr. Sahoo on whether leave encashment can be claimed during period of service. He submits, leave encashment can only be claimed after retirement.

6. We have perused punishment order dated 11th January, 2005. Entire order in respect of opposite party no.1 is reproduced below.

> *"Sri Umakanta Rath, Grade-VIA and Ex-Cadre MIC of Kundura LAMPS appeared before the Committee for personal hearing on the show cause notice issued to him. After going through the charges framed against the delinquent and provisional punishment was inflicted by the Appointment sub-committee held on dtd.15.5.04 it is decided to award the final punishment to the delinquent as follows:*
>
> *1. **The misappropriation amount of Rs.30688/- alongwith interest 14% from the date of occurrence i.e. from August-2001 is to be deposited** within one month from the date of issue of the decision.*
>
> *2. One increment be stopped with cumulative effect.*
>
> *3. **The suspension period from dated 16.9.97 to 3.8.2000 be treated as such**.*
>
> *4. **Failure to deposit the above misappropriation amount with interest within the scheduled time, he will be dismissed from service of the Bank."***
>
> *(Emphasis supplied)*

On query from Court we were not shown anything to give us illumination on what otherwise was meant by direction that 'the suspension period from dated 16th September, 1997 to 3rd August, 2000 be treated as such', except that it would be treated as period of suspension. We are clear in our mind that the punishment was direction for stopping one increment with cumulative effect. The other direction was regarding depositing the misappropriated amount, failing which dismissal. The workman continued in service thereafter and retired in year, 2019.

7. Petitioner has said that the claim was undetermined. We have already seen the punishment order and the punishment awarded to the workman. We do not find anything to suggest that there was impliedly a direction for disallowing leave during the period of suspension. The punishment order did not say period of suspension would be treated as 'dies non'. It is well-settled that suspension happens when disciplinary proceeding is contemplated or is pending. As such it cannot be seen as discontinuance of service or as a break for purposes of calculating the terminal benefits, particularly when the punishment order was for stoppage of one increment with cumulative effect and for the period of suspension to be as such. Said period to be anything more than suspension, as a period when no terminal benefit would accrue, was not said. This was found and said in impugned order as will appear from a passage extracted and reproduced below.

> *"7. xx xx xx* ***Further Ext.B, the punishment order does not reveal*** *that the period of suspension is treated as dismiss and further it also does not* ***reveal if the applicant is not entitled for any future allowance. From the above discussion it is established that the applicant*** *is engaged as a workman under the O.P. and he has retired from his service* ***on his superannuation and the suspension period is treated as he was in service during the said period and also he is entitled to get his full earned salary leave on his retirement****. xx xx xx"* (Emphasis supplied)

8. The Supreme Court in **U.P. State Road Transport Corporation v. Shri Birendra Bhandari, had by judgment dated 28th September, 2006**, reported in **(2006) 10 SCC 211** considered legality of judgment rendered by the High Court dismissing the writ petition with prayer to quash order of the labour Court made under section 33-C(2), for payment of arrears relating to difference of, inter alia, leave encashment arising out of implementation of recommendations made by the 5th Pay Commission. By the judgment the Supreme Court while setting aside order of the High Court and the labour Court said that benefit sought to be enforced under section 33-C(2) is necessarily a pre-existing benefit or one flowing from pre-existing right. The difference between a pre-existing right or benefit on one hand and the right or benefit, which is considered just and fair on the other hand, is vital. Case before the Supreme Court was claim of the retired workman for arrears based on recommendations by the 5th Pay Commission. Hence, there was interference by the Supreme Court because during his service the right had not to accrued to him. It accrued thereafter on recommendations made by the 5th Pay Commission. This, the Supreme Court said, could not be adjudicated under section 33-C(2). Our understanding

of the judgment is, it was not for the labour Court to adjudicate under section 33-C(2) on whether it would be just and fair to confer upon the retired workman, the claimed benefit, based on the recommendations subsequently made. Nothing was said by the Supreme Court regarding maintainability of the application.

9. Clause (k) in section 2 gives meaning of industrial dispute. Involvement of persons for there being an industrial dispute, are the employers and workmen. There is no other, who can raise an issue for it to be termed an industrial dispute. However, dispute regarding non-employment or the terms of employment or with the conditions of labour of 'any person' is also included in the meaning. Thus, apart from employers and workmen stands included 'any person' in the definition. Why Parliament thought fit to include 'any person' has been explained by the Supreme Court in **Workmen of Dimakuchi Tea Estate v. Management of Dimakuchi Tea Estate**, reported in **AIR 1958 SC 353**, paragraph 14. Three passages from the paragraph are reproduced below.

> *"14. xxx xxx xxx The reason for the use of the expression "any person" in the definition clause is, however, not far to seek. The word 'workman' as defined in the Act (before the amendments of 1956) included, for the purposes of any proceedings under the Act in relation to an industrial dispute, a workman discharged during the dispute.*
>
> *xxx xxx xxx*
>
> *If the expression "any person" in the third part of the definition clause were to be strictly equated with 'any workman', then there could be no industrial dispute, prior to 1956, with regard to a workman who had been discharged earlier than the dispute, even though the discharge itself had led to the dispute. That seems to be the reason why the legislature used the expression 'any person' in the third part of the definition clause so as to put it beyond any doubt that the non-employment of such a dismissed workman was also within the ambit of an industrial dispute.*
>
> *xxx xxx xxx*
>
> ***The Act avowedly gives a restricted meaning to the word 'workman' and almost all the provisions of the Act are intended to confer benefits on that class of persons who generally answer to the description of workmen**. xxx xxx xxx"* (Emphasis supplied)

So far as this case is concerned, claim by opposite party no.1 made before the labour Court is for computing his benefit of leave encashment. It is a claim for computation in terms of money, a benefit that could be had only after the workman achieved age of superannuation.

10. In our view sub-section (2) in section 33-C does not bar claim for benefits accrued to the retired workman during his service. Power of the labour Court to compute such benefit in terms of money is a relief available to a retired workman. Such an interpretation is consistent with provision in sub-section (1) of the section. In case of any money due to a workman, section 33-C(1) enables the workman and after him his assignee or heirs to obtain recovery as provided in the Act. Sub-section (2) deals with, inter alia, answer to be given by the labour Court on a question raised regarding the amount of money or, the amount at which the benefit is to be computed. To restrict this relief to a person, who has been a workman and is entitled

to the benefit thereby, as cannot be availed because he has retired is, in our view, an unacceptable interpretation of the provision for recovery of money due from an employer. In taking this view we rely on **Dimakuchi** (supra), where the Supreme Court said, the Act avowedly gives a restricted meaning to the word 'workman' and almost all the provisions of the Act are intended to confer benefits on that class of persons who generally answer to the description of workmen. It follows that later on in **U.P. State Road Transport Corporation** (supra) said Court in setting aside, inter alia, order made by the labour Court, did not do so on the ground of maintainability of the claim as made by a retired workman.

11. In this case, claim of the workman related to his right of having leave encashment accrued to him during his period of service, when he did not avail his leave. It was a claim from a pre-existing right or benefit. It could correctly be looked into by the labour Court for purpose of computation of the benefit in terms of money. There could not have been any issue for determination, on whether or not the workman was entitled to the leave encashment since, as aforesaid, the punishment order did not make any otherwise direction. It was a case where the labour Court was called upon to compute the benefit of the superannuated worker, who had not availed 80 days leave in the period of suspension that was for three years.

12. On query from Court Mr. Tripathy submits, the management never took any step to enforce the direction for depositing alleged misappropriated amount. As there was no step taken by the management for recovery of alleged misappropriated amount, his client did not also take steps to challenge the punishment order. Claim of the management regarding deposit of the amount stood abandoned. They did not resort to any due process of recovery, while his client was in service. On the contrary, they contended that his client is not entitled for period of leave accrued during subsistence of his suspension. There was no claim for set off. On query from Court Mr. Sahoo submits, opposite party continued in service after passing of the punishment order but recovery was not made from his salary, nor steps taken to dismiss him from service.

13. In **Aswini** (supra) the learned single Judge expressed view that where the plaintiff had sought back pensions, when admittedly he is no more the employee on the date of institution of the suit, having retired, his dispute cannot be termed to be an industrial dispute. The view was taken in adjudicating a second appeal, where defendant management had unsuccessfully preferred appeal against the ex-parte decree and was appellant before the High Court. The substantial question of law framed for answer in the appeal is reproduced below.

> *"5. xx xx xx*
>
> *(a) Whether the civil Court has jurisdiction to decide the present suit in view of the provision of Section 33(c)(2) of the I.D. Act; Section 24 of the Minimum Wages Act and Section 22 of the Payment of Wages Act?"*

The learned single Judge found, on date of institution of the suit the workman had retired. In that context sub-section (2) in section 33-C was considered and view taken that benefit of the provision would be available only for those who were considered as workmen. In other words, it would not be available to those who are ex-employees and had availed all the benefits and full payments under the voluntary retirement scheme. Plaintiff had received his retiral benefits, subsequent to which by letter dated 3rd May, 2010 he was asked to refund the revised amount allegedly paid in excess while simultaneously intimating recovery of the same from his dues, in event of failure to refund. Plaintiff had moved the writ Court, whereby order passed by the respective employers cancelling revision of computed value of pension to the employees, to treat the difference amount as excess payment, was quashed. Subsequent thereto the retired workman filed suit claiming amounts, inter alia, as per pay revision of the wage board. View taken, therefore, was on a different set of facts and does not come in aid of petitioner.

14. **Umamani** (supra) also has no application. It is trite the labour Court under section 33-C(2) cannot determine on an industrial dispute. It can only decide the question arisen on a workman's entitlement to receive from the employer, inter alia, any benefit which is capable of being computed in terms of money. Here, petitioner-management had raised the question on the amount of money saying, no money was payable. The question was answered by impugned order of the labour Court in favour of opposite party no.1.

15. We make no observation regarding recovery on the direction for deposit made in the punishment order. However, we also do not find any reason to interfere with impugned order. The computed amount remains due to the workman. It is part of his terminal dues. A retired employee depends for sustenance on his retirement benefits. Deprivation from receiving such dues in time must be suitably compensated. We direct petitioner to pay the computed benefit alongwith simple interest thereon at 6% per annum from date of retirement till the date directed by impugned order, i.e., 10th January, 2021 (4 months from date of the order) and thereafter at 10% per annum simple interest, till date of payment.

16. The writ petition is accordingly disposed of.

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2024 (I) ILR-CUT-53

ARINDAM SINHA, J. & SIBO SANKAR MISHRA, J.

MATA NO. 156 OF 2023

RAJASHREE SAHOO ….Appellant

-V-

RAGHUNATH BARAL ….Respondent

HINDU MARRIAGE ACT, 1955 – Section 13(1), Clause (i)(a) – Cruelty – Whether absence of physical relationship between husband and wife can be considered as cruelty while claiming divorce? – Held, Yes.

Case Laws Relied on and Referred to :-

1. AIR 1961 Cal, 359 : A.E.G. Carapiet V. A.Y.Derderian
2. (2007) 4 SCC 511 : Samar Ghosh V. Jaya Ghosh

For Appellant : Mr. R. Behera
For Respondent : None

JUDGMENT Date of Hearing & Judgment : 12.12.2023

ARINDAM SINHA, J.

1. Appellant-wife, aggrieved by judgment dated 6th April, 2023 of the family Court, has preferred the appeal. She had filed for divorce but by impugned judgment, the civil proceeding was dismissed.

2. Mr. Behera, learned advocate appears for appellant-wife. He submits, the marriage was not consummated. This was on omission of respondent-husband. As such, his client having brought the civil proceeding beyond one year from the date of marriage, the omission amounted to cruelty and was good ground made out under clause (i-a) of section 13(1) in Hindu Marriage Act, 1955, for there to be decree for dissolution of the marriage. Impugned judgment be set aside in appeal and the marriage dissolved.

3. Mr. Behera submits, the family Court failed to appreciate the law of evidence regarding case of a party to be made out as well as suggested to the other party at trial. On behalf of his client, a Division Bench judgment of the Calcutta High Court on case of a party required to be put to the other party at trial as in **A.E.G. Carapiet vs A.Y. Derderian**, reported in **AIR 1961 Cal, 359** was cited.

4. The only ground urged before us is of cruelty on omission to consummate the marriage. There was no physical relation. On perusal of impugned judgment, it appears that the Court below looked at the facts in context of section 12 and found that appellant-wife could not prove that her husband was impotent. Impotency is not relevant here because the civil proceeding was brought by appellant-wife after the period prescribed in section 12 and, therefore, the omission to consummate the marriage urged as a ground of cruelty.

5. We reproduce below paragraphs 3, 5, 6, 8 and 12 from the petition.

> *"3. That on the 4th day of marriage the Respondent and his elder brother namely Jagannath Baral told the Petitioner to ask her father to bring another cash of Rs.5,00,000/- (Rupees five lakhs) only and only after payment of such demand the 4th day rituals can be done.*
>
> xxx xxx xxx xxx

> *5.* ***That on the day of Chaturthi night the Petitioner when entered into the room of the Respondent where he was sleeping alone the Respondent said to the Petitioner that he is in love with another girl*** *and as such he had no intention to marry the Petitioner, but as per the compulsion of his brother and sister-in-law he married the Petitioner and saying so he drove the Petitioner from the room,* ***but as the Petitioner showed her unwillingness to come out from the room the Respondent gave hard push for which the Petitioner fell down on the ground after which the brother-in-law and his wife drag the Petitioner from the room and the respondent and his ଭାଉଜ Sabitri Baral slept in the room closing the door*** *and as such the Petitioner sat in the courtyard in the whole night and was weeping.*
>
> *6. That thereafter whenever the Petitioner was trying to mix with the Respondent, his brother-in-law and his wife did not allow to mix with the Respondent.*
>
> *xxx xxx xxx xxx*
>
> *8. That after said date the respondent along with his brother and Bhauja started torturing the Petitioner and even kept the petitioner without food continuously for 3 days, for which the Petitioner apprehending life risk called her father and accordingly her brother and brother-in-law came to the Respondent's house on 12.7.2019 and took back her to her parental house at Gengutia.*
>
> *xxx xxx xxx xxx*
>
> *12.* ***That due to torture and without physical relationship between the parties is a cruelty which is sufficient for granting a relief of divorce****."* (Emphasis supplied)

Above allegations in the petition point to there being absence of physical relation between appellant-wife and respondent-husband. This was the case made out.

6. We have on perusal of the record found that after appellant-wife was cross-examined, the written statement of respondent-husband was accepted. This weighed with the trial Court in overlooking the scant cross-examination of appellant-wife. There was no attempt at recalling her subsequent to the written statement filed. Here, we must note that allegations made in the petition were repeated by the wife in her examination-in-chief on affidavit. We reproduce her depositions in cross-examination dated 17th January, 2023 and 6th February, 2023.

> *"****Cross-examination****:-*
> *2. It is a fact that I have mentioned in my evidence-in-chief that concerning the occurrence Dt.12.05.2019, I have filed this case.*
> ***Further Cross-examination on 06.02.2023:-***
>
> *3. After marriage, I stayed in my matrimonial house for about two months. Then I called my brother and brother-in-law (Bhinoi) and came back to my father's house. After fifteen to twenty days, I came back from my matrimonial home, my father and uncle (mamu) had gone there to pacify the matter between me and Raghunath. The family members of my husband did not talk with my father or uncle. So no solution could be reached.*
>
> *4. Even during my stay in the matrimonial home, there was dissention between me and Raghunath and my father had attempted to talk to his family members. From the fourth day itself after marriage, torture started on me. I cannot specify the day or dates on*

which I was tortured, thereafter. After seven months of coming back from my matrimonial home, I lodged the F.I.R. It is not a fact that I have lodged false and concocted F.I.R. against Raghunath and his family members. It is not a fact that I am residing in my father's house suo moto and on my own wish. It is not a fact that I am deposing falsehood."

No suggestion was put to appellant-wife that the marriage was consummated and there was physical relation thereafter. This omission has nothing to do with absence of written statement filed because, it appears from impugned judgment, respondent-husband was represented by advocate. His advocate having conducted the cross-examination is presumed to have done it on instructions. No suggestion was also put regarding she having affair previous to the marriage, case made out in the written statement subsequently filed.

7. Respondent-husband filed written statement dated 19th February, 2023. We reproduce paragraphs 7 to 10 from the written statement.

"7. That, the allegations made in para-5, 6, 7 and 8 against the respondent are not admitted by the respondent.

8. That the respondent has never committed any type of torture and cruelty towards the petitioner at any point of time.

9. That it is humbly submitted here that on the day of 4th night the respondent asked the petitioner as to whether she had any relationship/love affair with any other person prior to the marriage, she admitted in the same night that she had love affair with a boy of Kamakhyanagar area and further she admitted that she had married the respondent as he is a Govt. servant and in future there will be no monetary problem for her to maintain a levis life.

10. ***That after disclosure of the love affair of the petitioner with a boy of Kamakhyanagar the respondent became suffered mental agony and failed to perform his day to day life in a proper manner****."* *(Emphasis supplied)*

There is no assertion in the written statement that the marriage was consummated.

8. In context of above pleadings and examination of appellant-wife, we reproduce below paragraph-2 from deposition dated 13th March, 2023 of respondent-husband in cross-examination.

"2. I joined my service in 2014 and I am working at Parjang Block as Jr. Clerk since last three years. It is a fact that since 12.07.2019 my wife Rajashree has been residing in her father's house. It is a fact that I have never taken care of Rajashree or never paid any money to her for her sustenance during that period. ***It is a fact that I have no personal or physical contact with her for that period****."* (Emphasis supplied)

We appreciate oral evidence of respondent-husband from his deposition in cross-examination reproduced above to be that he admitted no physical contact with appellant-wife. This is because though respondent-husband mentioned period referring to it commencing from 12th July, 2019, when appellant-wife left the matrimonial home

but having said she was away from that date, the admission of no physical contact could only relate to the time she was with him.

9. Our analysis of pleadings and oral evidence clearly show that there was no physical contact between appellant-wife and respondent-husband. Respondent-husband has attributed this to a counter allegation of discovery that appellant-wife had a boyfriend/lover prior to the marriage and she had only married him for security. This was asserted pursuant to examination of the wife concluded on cross-examination. It is appellant-wife who asserted and deposed on absence of physical contact as a ground of cruelty in claiming divorce.

10. In **A.E.G. Carapiet** (supra) the Division Bench took a view that still hold the field as, inter alia, in paragraph 10, reproduced below.

> *"10. The law is clear on the subject.* ***Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all****. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses.* ***It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated****."* (Emphasis supplied)

11. **A.E.G. Carapiet** (supra) was and is a celebrated view regarding case to be put to the other side. It is founded on principles of essential justice, to enable a party facing an allegation, to be able to answer without being taken by surprise. Object of examination of witnesses is for truth to come out on best evidence and, to achieve the purpose, case made out on one side must be put at the box to the other by way of suggestion. This view has stood the test of time. If the husband's case was consummation but not pleaded, at least the case ought to have been put by suggestion. Subsequently made allegation in the written statement of respondent-husband was never put to appellant-wife in cross-examination. She had no chance to meet the new case made out! Omission to do so can only mean he accepted the testimony of his wife that there was no physical relation between them. The Court below accepted the view but got around it on reason given that appellant-wife had made a fantastic claim. Reliance was on her allegation in the petition that when on the fourth night she was thrown out, her sister-in-law slept with her husband. On close scrutiny of paragraph-5 in the petition it cannot be said with certainty from the allegation alone that it could be a fact. The allegation was, brother-in-law and his

wife dragged out appellant-wife from the room and in the same sentence was also stated that the sister-in-law closed the door and slept in the room with her husband. There is nothing in the evidence to give illumination on this allegation, which weighed with the trial Court in disbelieving appellant-wife.

12. Fact emerging in the case is absence of physical relationship going as far as the marriage not having been consummated. The fact brings it within illustration by clause (xii) under paragraph-101 in judgment of the Supreme Court in **Samar Ghosh vs. Jaya Ghosh,** reported in **(2007) 4 SCC 511**. The illustration is reproduced below.

> *"(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty."*

13. Impugned judgment is reversed. We dissolve the marriage by decree of divorce on the ground that after solemnization of it, appellant-wife was treated by respondent-husband with cruelty. Considering that the family Court in not granting divorce, did not go into the claim for permanent alimony, we direct appellant-wife to apply for permanent alimony to said Court under section 25.

14. The appeal is allowed and disposed of.

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2024 (I) ILR-CUT-58

D. DASH, J. & G. SATAPATHY, J.

W.P.(C) NO.26192 OF 2022

POWER GRID CO. OF INDIA LTD., BALANGIR .....Petitioner

-V-

THE COLLECTOR-CUM-LAO, BALANGIR & ORS. .....Opp.Parties

LAND ACQUISITION ACT, 1894 – Section 18(2)(b) – Whether the referral court has the jurisdiction to condone the delay and entertain the reference filed after the stipulated period as prescribed by the Act? – Held, No – The Collector act as a statutory authority, If the application is not made within the time the collector will not have the power to make reference – Case law discussed.

Case Laws Relied on and Referred to :-

1. (2005) 7 SCC 440 : Mahadeo Bajirao Patil V. State of Maharashtra.
2. (2005) 8 SCC 709 : State of Karnataka V. Laxuman.
3. (1997) 11 SCC 412: Addl. Spl. Land Acquisition Officer, Bangalore V. Thakoredas, Major & Ors.
4. 2009 (16) SCC 1: Steel Authority of India Limited V. SUTNI Sangam & Ors.
5. (1979) 2 SCC 572 : Officer on Special Duty (Land Acquisition) & Anr. V. Shah Manilal Chandulal & Ors.

6. (2010) 3 SCC 545: Nayantara Gupta & Ors. V. State of Uttar Pradesh & Ors.
7. AIR 1961 SC 1500: Raja Harish Chandra Raj Singh V. Dy. Land Acquisition Officer.
8. AIR 1963 SC 1604: State of Punjab V. Mst. Qaisar Jehan Begum & Anr.
9. 2005(7) SCC 431: Parsottambhai Maganbhai Patel & Ors. V. State of Gujarat through Dy. Collector Modasa & Anr.
10. (2013) SCC 765 : Popat Bahiru Govardhane V. Land Acquistiion Officer.
11. AIR 1966 SC 529: The Martin Burn Ltd. V. The Corporation of Calcutta
12. AIR 2013 SC 30: Rohitas Kumar & Ors. V. Om Prakash Sharma & Ors.
13. 1979 (2) SCC 572 : Mohd. Hasnuddin V. State of Maharashtra.
14. 1995 (3)SCC 330: State of Punjab & Anr. V. Satinder Bir Singh

For Petitioner : Mr. Aditya Narayan Das
For Opp.Parties : Mr.G.N. Rout (ASC), Mr. M.K. Mohapatra

JUDGMENT Date of Hearing : 21.11.2023 : Date of Judgment : 04.12.2023

D.DASH, J.

The Petitioner by filing this Petition has invoked the jurisdiction of this Court under Article-226 and 227 of the Constitution of India in impeaching an order dated 23.08.2022 passed by the learned Senior Civil Judge, Balangir (as then was) arising out a reference under section-18 of the Land Acquisition Act, 1894 (for short, the L.A. Act) standing numbered as L.A. Case No.01 of 2012. The Petitioner has accordingly prayed for quashing the said reference made under section 18 of the L.A. Act' by the Collector-cum-Land Acquisition Officer, Balangir, the Opposite Party No.1.

2. The Facts necessary for the purpose are stated as under:-

(A) The Petitioner is a Public Sector Undertaking of the Government of India, incorporated under the Companies Act, 1956, having its registered office at B-9, Qutab Institutional Area, Katwaria Sarai, New Delhi-110016 and its Corporate Office at "Saudamini", Plot No.02, Sector-29, Gurgaon-122001. Its Regional Headquarter for the Odisha Projects is at Plot No.4 Unit-41, Niladri Vihar, Chandrasekharpur, Bhubaneswar-751021. The Petitioner indulges in the activities which are in Public Interest and sub serve the National Interest being engaged in Power Transmission business.

(B) Land in mouza/village Madhiapali under Khata No.28, Plot Nos.385 & 380 of kisam Atamamuli and Bahalmamuli, measuring an area of Ac.0.71 and Ac.0.84 decimals respectively belonging to the Opposite Party Nos.2 to 5 with other lands owned and possessed by others were acquired by the State by notification under section 6 of the L.A. Act dated 16.07.2010 published in the Gazette of the State on 19.07.2010 for construction of Power Grid Sub-Station by the present Petitioner. The Land Acquisition Officer (Opposite Party No.1) made the award under section 11 of the L.A. Act on 12.10.2010. The Opposite Party Nos.2 to 5, thereafter, was served with notice under sub-section (2) of section 12 of the L.A.Act on 23.10.2010.

Upon receipt of the said notice, the Opposite Party Nos.2 to 5 received the payment of this awarded amount of Rs.1,42,241/- as compensation for the said acquisition of his land. Thereafter, the Opposite Party Nos.2 to 5 filed an application signed and verified before the Land Acquisition Officer (Opposite Party No.1) advancing a prayer for referring the matter to the Civil Court for determination of proper compensation for the

acquired land and the standing trees under Section 18 of the L.A. Act. The application under Annexure-4 came to be received on 29.01.2011 by the Opposite Party No.1 as it finds reflected on the top left corner from the initial put thereon acknowledging its receipt.

The Opposite Party No.1 by letter dated 09.09.2011 made the reference as per section 18 of the L.A. Act for determination of proper compensation, keeping in view the provision contained in section 23 of the said Act after giving opportunities of hearing to the Petitioner who had borne burden of payment of compensation and may be so required to shoulder the liability on that count as per the decision of the Referral Court as well as the Opposite Party Nos. 2 to 5 (Claimants).

(C) When the reference proceeding was in progress, the Petitioner filed a petition nomenclaturing the same as one under Order-7 Rule-11 (d) read with section 151 of the Code of Civil Procedure (for short 'the CPC') stating therein that the Opposite Party No.1 has made reference when at the time, when he had no such power and authority as the right to have a reference resting with the Opposite Party Nos. 2 to 5 (Claimants) by then stood extinguished due to efflux of time. We may state here that the nomenclature of the petition as one under Order-7 Rule-11(d) read with section-151 of the Code is not correct. Be that as it may, reading the petition in entirety, we find that the prayer advanced therein is essentially for discharge of the reference without being answered as sought for by the Opposite Party No.1.

(D) The Opposite Party Nos.2 to 5 filed their objection in stating that the petition filed by the Petitioner is devoid of merit.

(E) The Referral Court upon hearing the parties before it and on going through the record found on facts that the Opposite Party Nos.2 to 5 had presented the application before the Opposite Party No.1, 54 days beyond statutory period of six weeks from the date of receipt notice under sub-section 2 of section 12 of the L.A. Act.

The Referral Court has held as under:-

"The aforesaid provision enumerated U/s.18(2)(b) makes it clear that every application for reference shall be made within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2) or within six months from the date of the Collector's award, whichever period shall first expire. In the case in hand, the documents of reference submitted by the L.A.O., Balangir clearly indicates that award U/s.11 of the Act has been passed by the Collector on 12.10.2010, notice U/s.12(2) has been received on 23.10.2010 but the petitioners have moved the present application for reference on 27.01.2011 i.e. 54 days beyond the statutory period of six weeks from the date of receipt of notice U/s.12(2). The aforesaid facts have not been denied or disputed by the petitioners in any manner."

(F) Having said as above, the Referral Court proceeded to consider the question as to whether it can hear the reference filed beyond the period of limitation as prescribed under section 18 of the L.A. Act. Finally, the Referral Court has gone to condone the delay of 54 days in filing the application by the Opposite Party Nos. 2 to 5 for making the reference. The said order passed by the Referral Court on 23.08.2022 has been called in question in the present writ petition.

3. From the facts narrated above, it stands undisputed that award had been passed by the Opposite Party No.1 under Section 11 of the L.A. Act on 12.10.2010.

Notice as required under sub-section 2 of section 12 of the said Act was sent and received by the Opposite Party Nos.2 to 5 on 23.10.2010 and pursuant to the said notice, the Opposite Party Nos.2 to 5 thereafter filed an application on 27.01.2011 which was received by the Opposite Party No.1 on 29.01.2011 as it reveals from the initial put on the top left of the application. On receiving the said application, the Opposite Party No.1 has made the reference under section 18 of the L.A. Act to the Civil Court for determining the proper compensation for the acquired land etc. vide its letter dated 12.09.2011.

4. In view of the point raised for consideration, for proper appreciation, at the outset, it is felt apposite to place the provision contained under Section 18 of the L.A. Act. The same reads as under:-

> "18. Reference to Court.-(1) Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the person to whom it is payable, or the apportionment of the compensation among the person interested.
>
> (2) The application shall state the grounds on which objection to the award taken: Provided that every such application shall made-
>
> (a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;
>
> (b) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2) or within six months from the date of the Collector's award, whichever period shall first expire."
>
> *(3) Any order made by the Collector on an application under this section shall be subject to revision by the High Court, as if the Collector were a Court subordinate to the High Court, as if the meaning of Section 115 of the Code of Civil Procedure 1908 (5 of 1908) : Orissa Act No.19 of 1948, Section 2.*

A close reading of the aforesaid provision, posits three situations for which the period of limitation had been provided for making an application for reference. Firstly, if the person making application was present or represented before the Collector at the time when he made his award, the application must be filed within six weeks from the date of the Collector's award. In the given case, it is not disputed that the Opposite Party Nos.2 to 5 were not present when the award was made. Therefore, section 18(2)(a) has no applicability to the facts of this case.

The second and third situations are envisaged by Section 18(2)(b) of the L.A. Act. The second situation envisaged is where a notice is received under section 12(2) of the L.A. Act. In such a case, the period of limitation prescribed is six weeks from the date of receipt of the notice or within six months from the date of award of the Collector whichever period shall first expire.

In the case at hand, the Opposite Party Nos.2 to 5 were served within the notice under section 12(2) of the L.A Act on 23.10.2010. The Opposite Party No.1 received the compensation on 30.10.2010. The Opposite Party No. 2 to 5 had made

the application for reference to the Opposite Party No.1 on 29.01.2011. In any case, the period of six weeks from the date of receipt of the notice or even from the date of receipt of the compensation which was on 30.10.2010 even by the time, the Opposite Party No.2 signed and Opposite Party Nos.3 to 5 put their LTIs on the application had already expired. The Referral Court having taken the date of service of notice under section 12(2) of the Act upon the Opposite Party Nos.2 to 5 and the date when the Opposite Party No.2 signed and Opposite Party Nos.3 to 5 had put their LTIs on the application made before the Opposite Party No.1 has found the delay of 54 days to have occurred in making such application.

The Referral Court has therefore, proceeded to find out as to if that delay is condonable in ascertaining as to if the Opposite Party Nos.2 to 5 were prevented by sufficient reason for not presenting the application before the Opposite Party No.1 within the period of limitation as prescribed under section 18(2)(b) of the L.A. Act. It has finally ruled in favour of the Opposite Party Nos.2 to 5 in condoning the delay. The delay appears to have been condoned by pressing into service, the provision of section 5 of the Limitation Act and in that analogy.

5. We have heard Mr. Aditya Narayan Das, learned Counsel for the Petitioner and Mr. G.N. Rout, learned Additional Standing Counsel at length. None appeared on behalf of the Opposite Party Nos.2 to 5 despite opportunity.

Mr. Das, with vehemence argued that the Reference being bad in law as by the time, the application was filed by the Opposite Party Nos.2 to 5. The Opposite Party No.1 had no power to make the Reference as by then the time period for the Opposite Party Nos.2 to 5 exercise said right had expired; the Referral Court had no valid Reference to proceed as per law. He further submitted that there being no provision under the Scheme of section-18 of the L.A. Act for condonation of delay in applying for making the Reference by the Opposite Party No.1 beyond the time stipulated and that power when the Opposite Party No.1 was not having the Referral Court could not have assumed such power by reading that provision of condonation and power into that section. He cited several decisions in support of his submission which would be referred to in our discussion to follow.

Mr. G.N. rout, learned Additional Standing Counsel however submitted that as per the provision under section 18 of the L.A. Act, neither the Opposite Party No.1 nor the Referral Court has the power to condone the delay in filing the application by the Claimant after the award for making a reference under section 18 of the L.A.Act.

6. The short questions which arises for being answered by us for disposal of the present writ petition are as under:-

> "Whether the Referral Court which assumed the jurisdiction of a reference being made by the Land Acquisition Officer under section 18 of the L.A.Act for answering the reference in determining the proper compensation since the claimant is not satisfied to the compensation as has been awarded by the Land Acquisition Officer, can rule upon

> the validity of the reference made by the Land Acquisition Officer in saying that the reference being made on a application filed beyond the period of limitation prescribed under section 18(2)(b) of the L.A. Act, and as such being not in accordance with law, in saying that it has no jurisdiction to answer the reference and therefore discharge the reference? And;
>
> Whether Referral Court can assume the jurisdiction even finding the reference to have been made on the basis of an application filed by the person interested beyond the period of limitation prescribed under section 18 of the L.A. Act by condoning the delay in making the application for reference before the Land Acquisition Officer?"

7. It is to be remembered that the Land Acquisition (Amendment) Act (68 of 1984) was enacted prescribing the limitation to exercise the power under section 4, 6 and 11 and also excluded the time occupied due to stay so granted by the Court. Taking cognizance of the limitation prescribed in proviso to sub-section-(2) of section 18 of the L.A. Act, the provisions of the Limitation Act were not expressly extended. Though provision contained in section 29(2) of the Limitation Act is available and the limitation in the proviso to the sub-section (2) of section 18 of the L.A.Act may be treated to be a special law, in the absence of such an application by Land Acquisition (Amendment) Act (68 of 1984), it is seen that the L.A.Act specifically maintains a distinction between the Collector and the Court and the Collector/ L.A.O. performs only the statutory duties under the Act, including one while making reference under section 18 of the L.A. Act. It would be thus difficult to construe that the Collector/L.A.O. while making reference under section 18, as statutory authority still acts as a Court for the purpose of section 5 of the Limitation Act being pressed into service.

In view of the specific limitation provided under proviso to section 18(2) of the L.A.Act, whether the provision contained in sub-section (2) of section 29 can be applied to the proviso to sub-section (2) of section 18 of the L.A. Act is before us for consideration. Therefore, section 5 of the Limitation Act if can be applied for extension of the period of limitation prescribed under proviso to sub-section (2) of section 18 of the L.A. Act is precisely the field of our examination.

8. In case of *Mahadeo Bajirao Patil vrs. State of Maharashtra*; (2005) 7 SCC 440, the Appeal was before the Apex Court at the behest of the State. The sole question before the Court was whether the application filed by the claimant was barred by limitation and therefore, there was no power with the Land Acquisition Officer or the Court to condone the delay in filing an application under section 18 of the L.A. Act. The answer has been returned in the affirmative and accordingly, the order of the High Court of Judicature of Bombay, in setting aside the award passed by the Referral Court as a time barred reference has been upheld.

9. Before the Apex Court in *State of Karnataka Vrs. Laxuman*; (2005) 8 SCC 709, the challenge was to the order of the learned Single Judge of Karnataka High Court by which the revision of the State challenging the order of the Referral Court,

purporting to the condone delay in filing an application under section 18(3)(b) of the L.A. Act as amended in Karnataka. The Referral Court had condoned the delay and the High Court had refused to interfere with the same. It has been held therein by the Apex Court that provision of section 5 of the Limitation Act would not be available in such matter since the consequence flowing from the claimant not seeking to enforce his right under section 18(3)(b) of the LA Act in a case where the reference was not made within the time mandated by the statute was got over by the theory that there was no provision for extinguishment of the right and that a party cannot be penalized for the failure of the Deputy Commissioner to make the reference.

The Apex Court said that under the scheme of the section 18 of the LA Act as in Karnataka, thus the claimant looses his right to move the Court for reference on the expiry of three years and 90 days from the date of his making an application to the Deputy Commissioner under section 18 (1) of the Act within the period fixed by section 18(2) of the Act. This position is now settled by the decision of this Court in The Addl. Spl. Land Acquisition Officer, Bangalore vs. Thakoredas, Major and others; (1997) 11 SCC 412. This loss of right to move the court precludes him from seeking a remedy from the court in terms of section 18 of the Act. This loss of right in the claimant puts an end to the right of the claimant to seek an enhancement of compensation. To say that the Deputy Commissioner can make a reference even after the right in that behalf is lost to the claimant would be incongruous. Once the right of the claimant to enforce his claim itself is lost on the scheme of section 18 of the Act, there is no question of the Deputy Commissioner who had violated the mandate of sub-section 3(a) of section 18 of the Act, reviving the right of the claimant by making a reference at his sweet- will and pleasure, whatever be the inducement or occasion for doing so. On a harmonious understanding of the scheme of the Act in the light of the general principle that even though a right may not be extinguished, the remedy may become barred, it would be appropriate to hold that on the expiry of three years and 90 days from the date of an application for reference made within time under section 18(1) of the Act, the remedy of the claimant to have a reference gets extinguished and the right to have an enhancement becomes unenforceable. The Deputy Commissioner would not be entitled to revive a claim which has thus become unenforceable due to lapse of time or non-diligence on the part of the claimant.

10. At paragraph 26 of the Judgment, the Apex Court's view is as follows:-

> *"Then the question is, whether in the context of Section 18 of the Karnataka amendment, the decision of this Court in Thakoredas (supra) and our discussion as above, Section 5 of the Limitation Act could be invoked or would apply to an application under section 18(3)(b) of the Act. This Court has held that section 5 of the Limitation Act has no application to proceedings before the Collector or Deputy Commissioner here, while entertaining an application for reference. We see no reason not to accept that position. Then arises the question whether section 5 could be invoked before the Land Acquisition Court while making an application under Section 18(3)(b) of the Act. We have held in agreement with the earlier Division Bench of the Karnataka High Court, that the right to*

have a reference enforced through court or through the Deputy Commissioner becomes extinguished on the expiry of three years and 90 days from the date of the application for reference made in time. Consistent with this position it has necessarily to be held that section 5 of the Limitation Act would not be available since the consequence of not enforcing the right to have a reference made on the scheme of Section 18 of the Act as obtaining in Karnataka, is to put an end to the right to have a reference at all. Since in that sense it is an extinguishment of the right, the right cannot be revived by resorting to section 5 of the Limitation Act. We may incidentally notice that in Thakoredas (supra) this Court rejected the application under section 18(3)(b) of the Act which was beyond time, though, of course, there was no specific discussion on this aspect."

11. In case of Steel Authority of India Limited Vrs. SUTNI Sangam and Others; 2009 (16) SCC 1, it has been held as under:-

"45. When the statute provides for a law of limitation, compliance thereof is mandatory. For the purpose of applying the statute of limitation, the courts should, however, be liberal in their approach. section 18(2)(b) of the Act provides for the maximum period of six months from the date of the Collector's award. It was, therefore, impermissible to direct references to be made after a long period particularly when the provisions of section 5 of the Limitation Act, 1963 cannot be said to have any application.

46. In Officer on Special Duty (Land Acquisition) & Anr. v. Shah Manilal Chandulal & ors., (1979) 2 SCC 572 the Hon'ble Court has held:-:

"8. The right to make application in writing is provided under section 18(1). The proviso to sub- section (2) prescribes the limitation within which the said right would be exercised by the claimant or dissatisfied owner. In Mohd. Hasnuddin v. State of Maharashtra, this Court was called upon to decide in a reference under section 18 made by the Collector to the court beyond the period of limitation, whether the court can go behind the reference and determine the compensation, though the application for reference under Section 18 was barred by limitation? This Court had held that the Collector is required under section 18 to make a reference on the fulfillment of certain conditions, namely, (i) written application by interested person who has not accepted the award; (ii) nature of the objections taken for not accepting the award; and (iii) time within which the application shall be made. In paragraph 22 after elaborating those conditions as conditions precedent to be fulfilled, it held that the power to make a reference under section 18 is circumscribed by the conditions laid down therein and one such condition is a condition regarding limitation to be found in the proviso. The Collector acts as a statutory authority. If the application is not made within time, the Collector will not have the power to make reference. In order to determine the limitation on his own power, the Collector will have to decide whether the application presented by the claimant is or is not within time and specify the conditions laid down under section 18. Even if the reference is wrongly made by the Collector, the court will have to determine the validity of the reference because the very jurisdiction of the court to hear a reference depends upon a proper reference being made under section 18. If the reference is not proper there is no jurisdiction in the court to hear the reference. It was, therefore, held that it is the duty of the court to see that the statutory conditions laid down in section 18 including the one relating to limitation, have been complied with and the application is not time-barred. It is not debarred from satisfying itself that the reference which it is called upon to hear is a valid reference. It has to proceed to determine compensation and if it is time-barred, it is not called upon to hear the same. It

is only a valid reference which gives jurisdiction to the court. Therefore, the court has to ask itself the question whether it has jurisdiction to entertain the reference. If the reference is beyond the prescribed period by the proviso to sub-section (2) of section 18 of the Act and if it finds that it was not so made, the court would decline to answer the reference. Accordingly, it was held that since the reference was made beyond the limitation, the court was justified in refusing to answer the reference.

9. It would thus be clear that one of the conditions precedent to make a valid reference to the court is that the application under section 18(1) shall be in writing and made within six weeks from the date of the award when the applicant was present either in person or through counsel, at the time of making of the award by the Collector under clause (a) of proviso to sub-section (2). The Collector, when he makes the reference, acts as a statutory authority.

50. We will, however, proceed on the assumption that most of the awardees were poor and illiterate and they were not aware of their rights. It is one thing to say that an Association, like the first respondent, takes up its cause but it would be another thing to say that only due to the said reason the mandatory provisions of the statutes would not be necessary to be complied with.

12. The Hon'ble Apex Court in case of *Bhagaban Das & Others Vrs. State of Utter Pradesh & Others* and *Nayantara Gupta and others -vrs- State of Uttar Pradesh and others* (2010) 3 SCC 545, considered the following questions:-

(a) Whether an appeal would lie under Section 54 of the Act against the order of the Collector refusing to make a reference?

(b) Whether the Collector can condone the delay in filing an application seeking reference, if sufficient cause is shown?

(c) Whether the period of six months under clause (b) of the proviso to Section 18 of the Act should be reckoned from the date of knowledge of the award of the Collector or from the date of award itself?

(d) Whether the appellants were entitled to relief?

13. Question Nos.(b) and (c) with which we are concerned in so far as the case before us, have been answered as under:-

"14. The proviso to section 18 requires that an application by a person interested, to the Collector, seeking reference of his claim for higher compensation for determination by the Court, shall be made within six weeks from the date of the Collector's award, if such person was present or represented before the Collector, at the time when the award was made. If not, the application for reference shall have to be made within six weeks of the receipt of the notice of the Collector under section 12(2) or within six months from the date of the Collector's award, whichever period shall first expire.

15. In Officer on Special Duty (Land Acquisition) & Anr. v. Shah Manilal Chandulal & Ors.;1996 (9) SCC 414, the Hon'ble Apex Court held that in view of the special limitation provided under the proviso to section 18 of the Act, section 29(2) of the Limitation Act, cannot be applied to the proviso to section 18 of the Act; and therefore, the benefit of sections 4 to 24 of Limitation Act 1963, will not be available in regard to applications under section 18(1) of the Act. It was also held that as the Collector is not a court when he discharges his functions as a statutory authority under section 18(1) of

the Act, section 5 of the Limitation Act 1963 cannot be invoked for extension of the period of limitation prescribed under the proviso to section 18(2) of the Act.

16. As the Collector is not a civil court and as the provisions of Section 5 of the Limitation Act, 1963 have not been made applicable to proceedings before the Collector under the Act, and as there is no provision in the Act enabling the Land Acquisition Collector to extend the time for making an application for reference, the Collector cannot entertain any application for extension, nor extend the time for seeking reference, even if there are genuine and bonafide grounds for condoning delay. This view was reiterated in Steel Authority of India Ltd. vs. S.U.T.N.I. Sangam and others; 2009 (16) SCC 1. Therefore, the observation of the High Court that an application for condonation of delay could have been made by the person interested, is incorrect.

The question No.c has been answered as follows:-

18. Clause (b) of the proviso to section 18 requires a person interested who has not accepted the award, to make an application to the Collector requiring him to refer the matter for determination of the court, within six weeks of the receipt of the notice from the Collector under section 12(2) or within six months from the date of the Collector's award whichever period first expires, if he or his representative was not present before the Collector at the time of making of the award.

19. The reason for providing six months from the date of the award for making an application seeking reference, where the applicant did not receive a notice under section 12(2) of the Act, while providing only six weeks from the date of receipt of notice under section 12(2) of the Act for making an application for reference where the applicant has received a notice under section 12(2) of the Act is obvious. When a notice under section 12(2) of the Act is received, the land owner or person interested is made aware of all relevant particulars of the award which enables him to decide whether he should seek reference or not. On the other hand, if he only comes to know that an award has been made, he would require further time to make enquiries or secure copies so that he can ascertain the relevant particulars of the award.

20. The term 'date of the Collector's award' occurring in clause (b) of the proviso, has been interpreted by this Court in several cases. We may refer to a few of them.

21. In Raja Harish Chandra Raj Singh v. Dy. Land Acquisition Officer; AIR 1961 SC 1500, the Hon'ble Apex Court held:

"5…….Therefore, if the award made by the Collector is in law no more than an offer made on behalf of the Government to the owner of the property then the making of the award as properly understood must involve the communication of the offer to the party concerned. That is the normal requirement under the contract law and its applicability to cases of award made under the Act cannot be reasonably excluded. Thus considered the date of the award cannot be determined solely by reference to the time when the award is signed by the Collector or delivered by him in his office; it must involve the consideration of the question as to when it was known to the party concerned either actually or constructively. If that be the true position then the literal and mechanical construction of the words 'the date of the award' occurring in the relevant section would not be appropriate.

There is yet another point which leads to the same conclusion. If the award is treated as an administrative decision taken by the Collector in the matter of the valuation of the property sought to be acquired it is clear that the said decision ultimately affects the

rights of the owner of the property and in that sense, like all decisions which affect persons, it is essentially fair and just that the said decision should be communicated to the said party. The knowledge of the party affected by such a decision, either actual or constructive, is an essential element which must be satisfied before the decision can be brought into force. Thus considered the making of the award cannot consist merely in the physical act of writing the award or signing it or even filing it in the office of the Collector; it must involve the communication of the said award to the party concerned either actually or constructively. If the award is pronounced in the presence of the party whose rights are affected by it, it can be said to be made when pronounced. If the date for the pronouncement of the award is communicated to the party and it is accordingly pronounced on the date previously announced the award is said to be communicated to the said party even if the said party is not actually present on the date of its pronouncement. Similarly if without notice of the date of its pronouncement an award is pronounced and a party is not present, the award can be said to be made when it is communicated to the party later. The knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fair play and natural justice the expression 'the date of the award' used in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively. In our opinion, therefore, it would be unreasonable to construe the words 'from the date of the Collector's award' used in the proviso to Section 18 in a literal or mechanical way."

21. In *State of Punjab v. Mst. Qaisar Jehan Begum & Anr.*; AIR 1963 SC 1604, this Court reiterated the principles stated in Raja Harish Chandra Raj Singh (supra) and further held as follows:-

"5…….It seems clear to us that the ratio of the decision in Harish Chandra's case (supra) is that the party affected by the award must know it, actually or constructively, and the period of six months will run from the date of that knowledge. Now, knowledge of the award does not mean a mere knowledge of the fact that an award has been made. The knowledge must relate to the essential contents of the award. These contents may be known either actually or constructively. If the award is communicated to a party under S. 12(2) of the Act, the party must be obviously fixed with knowledge of the contents of the award whether he reads it or not. Similarly when a party is present in court either personally or through his representative when the award is made by the Collector, it must be presumed that he knows the contents of the award. Having regard to the scheme of the Act we think that knowledge of the award must mean knowledge of the essential contents of the award."

23. In Parsottambhai Maganbhai Patel & Ors. vs. State of Gujarat through Dy. Collector Modasa & Anr.; 2005(7) SCC 431 and in Steel Authority of India Ltd. vs. S.U.T.N.I Sangam; 2009(16) SCC 1, the aforesaid principles were followed and reiterated by this Court.

24. When a land is acquired and an award is made under section 11 of the Act, the Collector becomes entitled to take possession of the acquired land. The award being only an offer on behalf of the Government, there is always a tendency on the part of the Collector to be conservative in making the award, which results in less than the market value being offered.

25. Invariably the land loser is required to make an application under section 18 of the Act to get the market value as compensation. The land loser does not get a right to seek reference to the civil court unless the award is made. This means that he can make an application seeking reference only when he knows that an award has been made.

26. If the words six months from the `date of the Collector's award' should be literally interpreted as referring to the date of the award and not the date of knowledge of the award, it will lead to unjust and absurd results. For example, the Collector may choose to make an award but not to issue any notice under section 12(2) of the Act, either due to negligence or oversight or due to any ulterior reasons. Or he may send a notice but may not bother to ensure that it is served on the land owner as required under section 45 of the Act. If the words `date of the Collector's award' are literally interpreted, the effect would be that on the expiry of six months from the date of award, even though the claimant had no notice of the award, he would lose the right to seek a reference. That will lead to arbitrary and unreasonable discrimination between those who are notified of the award and those who are not notified of the award.

27.Unless the procedure under the Act is fair, reasonable and non-discriminatory, it will run the risk of being branded as being violative of Article 14 as also Article 300A of the Constitution of India. To avoid such consequences, the words `date of the Collector's award' occurring in proviso (b) to section 18 requires to be read as referring to the date of knowledge of the essential contents of the award, and not the actual date of the Collector's award.

14. In summing up at paragraph 28, the following positions have emerged from the interpretation of the proviso to section 18 of the L.A. Act as made by the Hon'ble Apex Court:

"28.xxxx xxxx xxxx xxxx

(i) If the award is made in the presence of the person interested (or his authorised representative), he has to make the application within six weeks from the date of the Collector's award itself.

(ii) If the award is not made in the presence of the person interested (or his authorised representative), he has to make the application seeking reference within six weeks of the receipt of the notice from the Collector under section 12(2).

(iii) If the person interested (or his representative) was not present when the award is made, and if he does not receive the notice under Section 12(2) from the Collector, he has to make the application within six months of the date on which he actually or constructively came to know about the contents of the award.

(iv) If a person interested receives a notice under section 12(2) of the Act, after the expiry of six weeks from the date of receipt of such notice, he cannot claim the benefit of the provision for six months for making the application on the ground that the date of receipt of notice under section 12(2) of the Act was the date of knowledge of the contents of the award.

29. A person who fails to make an application for reference within the time prescribed is not without remedy. It is open to him to make an application under section 28A of the Act, on the basis of an award of the court in respect of the other lands covered by the same acquisition notification, if there is an increase. Be that as it may."

15. In case of Popat Bahiru Govardhane Vrs. Land Acquistiion Officer; (2013) SCC 765; although the Apex Court was considering the question of limitation in filing the application under section 28(A) of the LA Act, the observations made at para-16, according to us has bearing on the present case and that run as under:-

> *"It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The Court has no power to extend the period of limitation on equitable grounds. The statutory provision may cause hardship or inconvenience to a particular party but the Court has no choice but to enforce it giving full effect to the same. The legal maxim "dura lex sed lex" which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute. "A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation." (See: The Martin Burn Ltd. v. The Corporation of Calcutta; AIR 1966 SC 529; and Rohitas Kumar & Ors. v. Om Prakash Sharma & Ors., AIR 2013 SC 30)"*

16. In case of *Mohd. Hasnuddin v. State of Maharashtra*; 1979 (2) SCC 572, the Apex Court was called upon to decide in a reference under section 18 made by the Collector to the court beyond the period of limitation, whether the court can go behind the reference and determine the compensation, though the application for reference under section 18 was barred by limitation?

The Court held that the Collector is required under section 18 to make a reference on the fulfillment of certain conditions, namely, (i) written application by interested person who has not accepted the award; (ii) nature of the objections taken for not accepting the award; and (iii) time within which the application shall be made. In paragraph 22 after elaborating those conditions as conditions precedent to be fulfilled, it held that the power to make a reference under section 18 is circumscribed by the conditions laid down therein and one such condition is a condition regarding limitation to be found in the proviso. The Collector acts as a statutory authority. If the application is not made within time, the Collector will not have the power to make reference. In order to determine the limitation on his own power, the Collector will have to decide whether the application presented by the claimant is or is not within time and specify the conditions laid down under section 18. Even if the reference is wrongly made by the Collector, the court will have to determine the validity of the reference because the very jurisdiction of the court to hear a reference depends upon a proper reference being made under section 18. If the reference is not proper there is no jurisdiction in the court to hear the reference. It was, therefore, held that it is the duty of the court to see that the statutory conditions laid down in section 18 including the one relating to limitation, have been complied with and the application is not time-barred. It is not debarred from satisfying itself that the reference which it is called upon to hear is a valid reference. It has to proceed to determine compensation and if it is time-barred, it is not called upon to hear the same. It is only a valid reference which gives jurisdiction to the court. Therefore, the court had to ask itself the question whether it has jurisdiction to entertain the reference. If the reference is beyond the prescribed period by the proviso to sub-section (2) of Section 18 of the Act and if it finds that it was not so made, the court would decline to answer the reference. Accordingly, it was held that

since the reference was made beyond the limitation, the Court was justified in refusing to answer the reference.

It would thus be clear that one of the conditions precedent to make a valid reference to the court is that the application under section 18(1) shall be in writing and made within six weeks from the date of the award when the applicant was present either in person or through counsel, at the time of making of the award by the Collector under clause (a) of proviso to sub-section (2). The Collector, when he makes the reference, acts as a statutory authority.

17. In *State of Punjab & Anr.v. Satinder Bir Singh*; 1995 (3)SCC 330, a Bench of two Judges, was called upon to consider whether the application for reference under section 18 was barred by limitation and the direction issued by the court for making reference was valid in law. The Collector made the award on August 1, 1970. The notice under section 12(2) was received by the respondent on September 22, 1970 and he received the compensation under protest on September 29, 1970. The application for reference under section 18 was made on January 21, 1971. The Collector rejected the application as being barred by limitation. The High Court in revision under section 115, CPC, similar to Gujarat Amendment, allowed the revision holding that since the notice did not contain all the details of the award, notice under section 12(2) was not valid. Therefore, there was no limitation. The Court reversing the view had held in paragraph 7 that the form of notice was not material since the respondent appeared and received the notice on September 22, 1970 and received the compensation under protest on September 29, 1970. The limitation began to run from the date of the receipt of the notice and by operation of clause (b) of the proviso to sub- section (2) of section 18 since the application was not made within six weeks from the date of the receipt of the notice, the application was barred by limitation prescribed in section 18(2). It does not depend on the ministerial act of communication of notice in any particular form which the Act or Rules have not prescribed. The limitation began to operate from the moment the notice under section 12(2) was received as is envisaged by section 18(2). Accordingly the order of the High Court was set aside.

18. Coming to the undisputed facts and circumstances as obtained in the given case on the anvil of the legal principle which have been noted in the foregoing paragraphs, we find that the Referral Court assumed the jurisdiction basing upon a reference made to it under section 18 of the Land Acquisition Act by the (Opposite Party No.1) Land Acquisition Collector. So, the jurisdiction of the Referral Court whether is exercisable as per the provision contained in the L.A. Act depends upon a valid reference being made by the Opposite Party No.1 (Land Acquisition Officer) substantially following the provision of the LA Act. When it has been authoritatively said that if the reference is wrongly made by the Collector, the Court will have to determine the validity of the reference case, and thus the very jurisdiction of the Court to hear the reference depends upon the proper reference being made under

section 18 of the LA Act and if the reference is not proper, there is no jurisdiction in the Court to hear the reference. In the wake of as aforesaid, we are of the considered view that in the present case, the Referral Court having found the Opposite Party No.1 to have made the reference upon an application being made beyond the period of limitation as prescribed under section 18 of the L.A. Act; it has gone to accept that as such that it has no jurisdiction to proceed with the reference in finally answering the same as requested by the Opposite Party No.1 in determining the proper compensation.

The Referral Court in the present case has then condoned the delay occasioned in filing the application before the Opposite Party No.1 by the Opposite Party Nos.2 to 5 and thus have assumed the jurisdiction in attaching the seal of validity, post-facto the reference which was invalid or not a valid one at its inception and receipt by the Referral Court. As provided in law, the course adopted by the Referral Court in the present case is wholly erroneous and improper for the simple reason that when the Opposite Party No.1 had no power to condone the delay and therefore, the reference made by him to the Referral Court is invalid, the Referral Court is equally powerless to condone the delay in thus converting an invalid reference as valid. Putting it with clarity, it be said that when after expiry of the period of limitation for making application for reference, the Opposite Party no.1 had no power at all to make a reference and that having been done in contravention of the provision of law in that regard; the Referral Court was having no jurisdiction to proceed with the reference. It has completely erred in law by assuming the jurisdiction to answer the reference in condoning the delay occasioned at the level of the Opposite Party No.1 in reading such a power to be resting with it as if an inherent one and thereby, clothing the Opposite Party No.1 with the jurisdiction to so refer the matter to the Referral Court is not at all permissible under the scheme of section 18 of the LA Act. Such a course adopted by the Referral Court in our considered view is wholly not in consonance with law and therefore, the impugned order cannot be sustained and the reference made since has no base to stand upon and is bad in law, it cannot proceed for being answered for determination of proper compensation by the Referral Court.

19. For the aforesaid discussions and reasons, we are of the considered view that the impugned order cannot be sustained in the eye of law and accordingly, we quash the reference made by the Opposite Party No.1 in giving rise to the L.A. Case No.01 of 2012 in the Court of learned Civil Judge (Senior Division), Balangir.

Consequent upon the same, the proceeding vide L.A. No.01 of 2012 pending in the Court of learned Senior Civil Judge, Balangir is hereby quashed.There shall however be no order as to cost.

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2024 (I) ILR-CUT-73

D. DASH, J. & G. SATAPATHY, J.

CRLA NOS. 180 & 181 OF 2016

MATHU MAJHI & ORS. ….Appellants

-V-

STATE OF ODISHA ….Respondent

CRLA NO.181 OF 2016

SOMANATH @ SINDRISA PATAMAJHI & ORS. -V- STATE OF ODISHA

INDIAN PENAL CODE, 1860 – Sections 147/148/201/149 – The Learned Trial Court while acquitting the appellants for offences U/ss. 147/148 of IPC proceeded to convict all the appellants (except one) for offences punishable U/ss. 201/149 IPC – There appears scanty evidence against the appellants, whether the offence U/ss. 201/149 of IPC is maintainable? – Held, No. (Paras 13-14)

For Appellants : Ms. D. Mohapatra
For Respondent : Mr. S.K. Nayak, AGA

JUDGMENT Date of Hearing : 02.11.2023 : Date of Judgment : 04.12.2023

G. SATAPATHY,J.

1. These two appeals are directed against one common judgment passed on 16.02.2016 by the learned Sessions Judge, Phulbani in two trials in ST No.60 of 2012 and ST No.187 of 2013 arising out of one transaction convicting the appellant Mathu Majhi for offences punishable U/Ss.302/201 of IPC and rest 34 appellants for offences punishable U/Ss.201/149 of IPC.

The learned trial Court by the impugned judgment has, accordingly, sentenced the appellant Mathu Majhi to undergo imprisonment for life and to pay a fine of Rs.500/-, in default whereof, to undergo Simple Imprisonment (SI) for further two months for offence U/S.302 of IPC with no separate sentence against him for offence U/S.201 of IPC and each of the rest of the appellants, to undergo Rigorous Imprisonment (RI) for three years and to pay a fine of Rs.500/-, in default whereof, to undergo RI for further period of two months for offence U/Ss. 201/149 of IPC.

2. Since these two appeals arise out of one common judgment in two trials for one transaction, the same are heard together and disposed of by this common order with consent of the learned counsel for the parties.

An overview of prosecution case:

3. On the basis of some information, an inquiry was conducted by Sub-Inspector of police, Bamunigaon namely Anudhatta Parichha in reference to Station Diary Entry (SDE) No. 143 dated 08.04.2010 and in the course of such inquiry, it

was unraveled that one organization name and styled as "Lok Sangram Manch Sangathan" asserted its presence in bordering area of Gajapati District and the members were professing the ideals of Maoist. It was further learnt in such inquiry that around 3 to 4 years back, one Gudrisa Majhi, Liasa Majhi, Tohali Mallick and Gaya Gandasa Majhi of village Gadama had died out of some unknown disease, but the local people blamed Tupi Patamajhi (hereinafter referred to as the "deceased") for the death of above four persons by practicing witchcraft and accordingly, on 07.04.2010, a meeting was called on this issue, where the deceased and his family members as well as 400 to 500 peoples of different villages such as Gudrisahi, Mundasahi, Badasahi, Srakigudi, Badaripi, Indra Colony and Baghapada attended the meeting. In the meeting, some of the accused persons including appellants Johan Muthamajhi and Kalisa @ Binod Kandha had forced the deceased and his family members to pay a sum of Rs.2 lakhs to the village committee and threatened to kill the deceased, if the amount is not paid, but the deceased by pleading his innocence, expressed his inability to pay such a hefty amount. On this reply of the deceased, the accused persons became infuriated and killed the deceased by cutting his throat and immediately cremated the dead body at the spot and took oath not to disclose the matter anywhere and warned the family members not to report the matter before police.

On the basis of outcome of this inquiry, on 09.04.2010 at about 5 PM, the SI police, Anudhatta Parichha lodged an FIR before the IIC, Bamunigaon against 15 named accused and 40 unknown accused including appellants Johan Muthamajhi and Kalisa @ Binod Kandha of village Gadamaha. On the basis of FIR, Bamunigaon PS Case No.14 of 2010 was registered and the IIC, Bamunigaon PS took up the investigation of the case, in the course of which, he examined the witnesses, visited the spot, prepared the spot map under Ext.2, seized the bone pieces and ashes under Ext.3 and dispatched the seized articles to SFSL, Rasulgarh for chemical examination through Ext.4 and received the CE report vide Ext.5 and subsequently, handover the charge of investigation which was completed by the SI of police, Dayanidhi Das, who submitted charge-sheet against the accused persons for offences punishable U/Ss.147/ 148/ 302/ 201/ 506/ 387/ 149 of IPC.

4. Finding prima facie material, the learned JMFC, Daringbadi took cognizance of offences and committed the case to the Court of Sessions after duly following committal procedure. Finding sufficient materials and grounds for presuming the accused persons to have committed the offences, the learned Sessions Judge, framed charged against the accused persons including the appellants and the trial commenced after the accused persons denied to the charge. However, the case of the appellants being committed to the Court of Sessions on two different dates, two trials accordingly, commenced, but on conclusion of both the trials, one common judgment was passed.

5. For sake of convenience and in order to avoid confusion, some of the common witnesses examined in the two trials are referred to in these appeals as they

were referred in the original case with same witness number by putting the witness number in ST No.60 of 2012 preceding to the number of the witness in later case in ST No.187 of 2013 (For example the witness Tambasa Pattamajhi examined as PW2 in ST No. 60/2012 & PW 1 in ST No. 187/2013 would be referred commonly as PW2/PW1 in this appeal).

In support of the charge, the prosecution examined altogether 8 witnesses and relied upon 5 documents under Exts.1 to 5 in ST No.60 of 2012, whereas it examined 6 witnesses vide PWs.1 to 6 and 5 documents vide Exts.1 to 5 in ST No.187 of 2013 as against no evidence whatsoever by the defence in ST No.60 of 2012, but sole documentary evidence was exhibited under Ext.A by the defence in ST No.187 of 2013. Of the witnesses examined, PW2/PW1 Tambasa Pattamajhi, PW4/PW2 Akash Pattamajhi and PW5/PW3 Ribika Pattamajhi were the eye witnesses to the occurrence, whereas PW7/PW5 Ajay Kumar Barik and PW8/PW6 Dayanidhi Das were the two investigating officers and PW6/PW4 Anudhatta Parichha was the informant police officer. However, PW1 Benansios Baliarsingh and PW3 Sudhira Sahani were the two independent additional witnesses examined in ST No.60 of 2012.

6. The plea of the appellants in the course of trial was denial simplicitor and false implication.

7. After appreciating the evidence on record upon hearing the parties, the learned trial Court convicted the appellant Mathu Majhi for offences punishable U/Ss.302/201 of IPC and rest of the appellants for offences punishable U/Ss.201/149 of IPC by mainly relying upon the evidence of eye witnesses to the occurrence.

Rival Submissions:

8. In assailing the impugned judgment of conviction and order of sentence, Ms. D. Mohapatra, learned counsel for the appellants in both the appeals while not seriously challenging the conviction of the appellant Mathu Majhi, has vehemently interalia argued by taking this Court through the evidence of eye witnesses that none of the eye witnesses had ever stated against any of the appellants except the appellant Mathu Majhi either for cremating the dead body of the deceased or even for their presence at the spot which was in fact doubtful, but the learned trial Court has convicted the aforesaid appellants for offences U/Ss.201/149 of IPC. It is further submitted by her that PW2/PW1 Tambasa Pattamajhi who is the brother of the deceased, although claimed to be an eye witness, but his evidence clearly suggests that he had never seen the occurrence as had been admitted by him in the cross examination that he had not seen the appellants assaulting the deceased by means of stone and as to how the dead body of his deceased brother was burnt. Ms. Mohapatra, has also submitted that since there were 500 persons present at the time of occurrence as per the prosecution story, but the learned trial Court having acquitted all the appellants except Mathu Majhi for committing the offence of murder,

it would be highly unsafe to convict the rest of the appellants for offences U/Ss.201/149 of IPC when there is absolutely nil evidence to infer for the prosecution of common object of the appellants. Ms. Mohapatra has, however, submitted that although there appears some evidence against the appellant Mathu Majhi, but in the circumstance, such evidence being highly unsafe to rely upon, the appellant Mathu Majhi may kindly be acquitted of the charge. In summing up her argument, Ms. Mohapatra, learned counsel for the appellant has prayed to allow both the appeals.

9. On the other hand, Mr. S.K. Nayak, learned AGA has, however, strongly submitted that each of the circumstance so established against the convicts by the prosecution clearly and unerringly points towards the guilt of the convicts and the circumstances so established form a chain so complete that it is incapable of any explanation consistent with the hypothesis of innocence of the convicts and the circumstances taken cumulatively prove the only hypothesis of the guilt of the convicts and, therefore, the impugned judgment of conviction and order of sentence require no interference by this Court. Further, Mr. S.K. Nayak, learned AGA has, however, submitted by taking this Court through the evidence of eye witnesses that the prosecution has proved the guilt of the Mathu Majhi beyond all reasonable doubt for offences U/Ss. 302/201 of IPC since all the eye witnesses have categorically stated before the Court that Mathu Majhi slitted the throat of the deceased with a knife and such evidence having not been demolished by the defence, the guilt of the appellant Mathu Majhi is squarely established by the prosecution beyond all reasonable doubt. Further, Mr. Nayak, learned AGA has submitted that the evidence on record clearly reveals that the other appellants had cremated the dead body in order to screen themselves from the legal punishment and, thereby, their conviction for offences U/Ss.201/149 of IPC cannot be faulted with. Mr. Nayak, learned AGA has accordingly, prayed to dismiss both the appeals.

Analysis of law and evidence

10. After having extensively gone through the evidence on record and meticulously examining the impugned judgment of conviction in the light of rival submissions, this Court considers it apposite to examine the sustainability of the conviction of the appellants for the respective offences by scrutinizing and re-appreciating the evidence on record. On adverting to the evidence on record, it appears that PW2/PW1 Tambasa Pattamajhi had clearly stated in his evidence that on 07.04.2010, a meeting was held on the cultivable land at a distance of 100 meters from Anganwadi building in which he and his other family members, accused persons and other villagers were present and in the said meeting, at first, accused Alo Majhi told not to leave his deceased brother and kill him, but the appellant Mathu Majhi having cut the neck of his deceased brother by a knife also stabbed on the belly of the deceased by the said knife. It was also the specific evidence of PW2/PW1 that after his (deceased) death, they went away and the said persons had

taken away the dead body of his deceased brother and burnt the same. The above evidence of PW2/PW1 is corroborated by the evidence of PW4/PW2 Akash Pattamajhi, whose specific evidence was that the accused Mathu Majhi slitted his father's throat with a knife and his father died there. The evidence of above two witnesses is further invigorated by the evidence of PW5/PW3 Ribika Pattamajhi who in her evidence had specifically stated that accused Mathu Majhi slitted the throat of his husband Tupi Patamajhi by a knife as a result of which, her husband Tupi Patamajhi died there with bleeding injury. The evidence of these three witnesses could not be demolished by the defence in their cross examination since nothing fruitful benefiting the defence of Mathu Majhi was elicited from their mouth nor their evidence was found suffering from any infirmity and inconsistency with respect to Mathu Majhi slitting the throat of the deceased which the prosecution in the circumstance of evidence appears to have established the guilt of Mathu Majhi for murder of the deceased beyond all reasonable doubt. Thus, the strenuous effort of the learned counsel for the appellants to challenge the conviction of Mathu Majhi for offence U/S.302 of IPC is found to be feeble and merits no consideration.

11. Albeit, the learned trial Court on analysis of evidence has found all the appellants except Mathu Majhi to have committed the offences U/Ss.201/149 of IPC, but in the course of such appreciation of evidence on record, it has found them not guilty to the charge for other offences U/Ss.147/148/387/506/149 of IPC. It is quite strange that after finding the appellants not guilty of offences U/Ss.147/148 of IPC, the learned trial Court has convicted them for offences U/Ss. 201 with aid of Sec. 149 of IPC, but after holding the appellants not guilty of offences U/Ss.147/148 of IPC, whether the appellants can still be convicted with aid of Section 149 of IPC. In order to answer the same, the crucial questions required to be determined in this case to attract the liability U/S.149 of IPC is whether there was an unlawful assembly consisting of 5 or more persons including the appellants and whether such unlawful assembly had a common object to cremate the dead body for causing disappearance of evidence to screen themselves from legal punishment. It is no doubt true that the presence of the appellants in the unlawful assembly having common objection would attract their liability for offence U/S.149 of IPC, but when the appellants were charged for offences U/Ss.147/148 of IPC and they having found not guilty of such offences which basically speaks for rioting being armed with deadly weapons, but before a person can be held guilty for offences U/Ss.147/148 of IPC, the prosecution is obliged to establish that the offender was a member of an unlawful assembly consisting of 5 or more persons and he or any member of such unlawful assembly had used force or violence in prosecution of the common object of such assembly and such person must be armed with deadly weapons or with anything used as a weapon of offence, is likely to cause death. It is true that the learned trial Court while acquitting the appellants for offences U/Ss.147/148 of IPC has observed in the judgment as under:

"In this case prosecution has failed to prove the accused persons either to have shared their common object or were the supporters of "Lok Sangram Manch Sangathan". There is no concrete evidence on record that whether the accused persons were present in earlier meeting that was conducted in their village in connection of this case. The evidence is very much silent regarding carrying any deadly weapon by the accused persons to kill the victim. There is no evidence on record to suggest that the other accused persons applied any force or violence to complete their common object. It seems from the material on record that the killing of the victim is an individual act. In such circumstance, it cannot be said that all the accused had a common object to kill the deceased. Mere presence in unlawful assembly could not render a person liable unless there was a common object which was shared by that person. As per the evidence on record, the other accused persons are not found to have shared their common object with the accused Mathu. Therefore they cannot be held liable U/Ss.147/148 IPC".

12. After having observed as above, the learned trial Court has proceeded to convict all the appellants except Mathu Majhi for offences punishable U/Ss.201/149 of IPC without having any analysis of evidence on record as to how these appellants had cremated the dead body in prosecution of their common object which is the essence of charge U/S.149 of IPC. Even on merits, if we revert back to the evidence of PW2/PW1, it appears that he had not seen these appellants cremating the dead body in view of his own evidence that after the death, they went away, which is further consolidated by his own admission in cross-examination in following words "I did not see how the dead body of my deceased brother was burnt". Additionally, it is also not found from his evidence as to who others cremated the dead body and even his uncontroverted evidence is considered, only one thing emanates that "they took away" the dead body which means omnibus allegation and it is also not in dispute that there were 500 persons present in the meeting. It is not the case that PW2/PW1 had stated in the evidence that the appellants cremated the dead body of the deceased by attributing any overt act to them. On coming back to the evidence of other eye witness PW4/PW2, more or less it appears the same because PW4/PW2 had made an omnibus statement in his evidence that they took the dead body of his father towards one ditch situated near a date palm tree and burnt the dead body of his father.

13. Similarly, on coming to the evidence of the other eye witness PW5/PW3, it transpires that all the accused persons carried the dead body towards down the field of Dadumaha and burnt the dead body of Tupi Pattamajhi and, therefore, her evidence also appears to be omnibus in nature with regard to cremating the dead body. In the aforesaid situation, when there appears scanty evidence against the appellants for offences U/Ss. 201/149 of IPC, it cannot be said that the guilt of the appellants was established beyond reasonable doubt for the offences U/Ss. 201/149 of IPC inasmuch as there is absolutely no evidence to indicate that the appellants were members of any unlawful assembly nor had they any common object to cremate the dead body of the deceased by use/show of criminal force to any person.

14. On a careful conspectus of evidence on record, especially when the learned trial Court having already acquitted the appellants of the charge for offences U/Ss.147/148 of IPC which contains the foundational ingredients of non-substantive offence U/S.149 of IPC and there being very scanty omnibus evidence as deposed to by the eye witnesses not taking specific name of any of the appellants or attributing any specific role to them in cremating the dead body of the deceased, the impugned judgment of conviction of the appellants except the appellant Mathu Majhi for the offence U/S.201 of IPC either individually or with aid of Sec. 149 of IPC is made out in the eye of law and, thereby, the conviction of the above appellants except appellant Mathu Majhi being unsustainable is required to be set aside.

15. In the result, both the appeals are allowed in part. Accordingly, the conviction and sentence of all the appellants except appellant Mathu Majhi being unsustainable in the eye of law are hereby set aside, but the judgment of conviction and order of sentence passed on 16.02.2016 by the learned Sessions Judge, Phulbani in **ST No.60 of 2012 and ST No.187 of 2013** are confirmed in respect of appellant Mathu Majhi for offences U/Ss.302/201 of IPC.

16. All the appellants except the appellant Mathu Majhi being acquitted of the charge are discharged of their bail bonds upon appeal.

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2024 (I) ILR-CUT-79

S.K. SAHOO, J.

CRA NO.30 OF 2001

PADABENDRA SENAPATI & ORS. .....Appellants

-V-

STATE OF ODISHA .....Respondent

INDIAN PENAL CODE, 1860 – Sections 201 & 302 – Whether conviction of the appellants can be sustained U/s. 201 of the IPC when they have already been acquitted U/s. 302 of IPC? – Held, Yes – The charge U/s. 201 of the IPC is not a corollary of the charge U/s. 302 of IPC and both the charges can exist without one another.

Case Laws Relied on and Referred to :-

1. (2007) 7 SCC 502 : Sukhram V. State of Maharashatra
2. AIR 1953 SC 131 : Kalawati V. State of Himachal Pradesh.
3. (1999) 9 SCC 486 : Ram Saran Mahto and Anr. V. State of Bihar.
4. (2003) 8 SCC 296 : Sou Vijaya @ Baby V. State of Maharashtra.
5. (1994) 2 Supp SCC 39 : Hanuman and Ors. V. State of Rajasthan

For Appellants : Mr. Sidharth Shankar Lenka
For Respondent : Mr. Rajesh Tripathy, ASC

JUDGMENT Date of Hearing & Judgment : 07.12.2023

S.K. SAHOO, J.

The three appellants, namely, Padabendra Senapati, Kausalay Senapati and Saroj Senapati faced trial in the Court of learned Sessions Judge, Balasore-Bhadrak in S.T. Case No.53 of 1999 for offences punishable under sections 302, 201 read with section 34 of the Indian Penal Code (hereinafter 'I.P.C.') on the accusation that on 26.02.1997 at Belbaria, they committed murder of Manoj Senapati @ Sambhu Senapati (hereinafter 'the deceased') in furtherance of their common intention and knowing that certain offences have been committed which is punishable with death or imprisonment for life, they caused certain evidence of the said offences to disappear by throwing away the dead body with an intention to screen themselves from legal punishment.

The learned trial Court vide impugned judgment and order dated 16.12.2000 acquitted the appellants of the charge under section 302 of the I.P.C., however, found them guilty under section 201 of the I.P.C. and sentenced each of them to undergo R.I. for a period of one year.

Prosecution Case:

2. The prosecution case, in short, is that dead body of the deceased was recovered from the paddy field called 'Mahabila Nala' and Jaleswar P.S. U.D. Case No.5 of 1997 was registered by O.I.C., Jaleswar Police Station on 02.03.1997 on the written report presented by Gourahari Das (P.W.4), the father-in-law of the deceased. P.W.8 Surendra Kumar Behuria, S.I. of Police, Jaleswar Police Station was directed to take up enquiry of the said U.D. case. During the course of enquiry, P.W.8 examined the witnesses, visited the spot, conducted inquest over the dead body of the deceased, seized one check lungi, sent the dead body for post mortem examination and received the post examination report (Ext.3). Subsequently, on 16.03.1997, P.W.1 Smt. Swapnarani Senapati, the widow of the deceased lodged the F.I.R. before Jaleswar police station on the basis of which Jaleswar P.S. Case No.26 dated 16.03.1997 was registered under sections 302/201/34 of the I.P.C. against the appellants wherein it is stated that the deceased was an un-employed and jobless person for which the appellants being the father, mother and brother of the deceased were assaulting him and on the date of occurrence, the deceased was present in the house and when he felt hungry, he came to the kitchen, but found it locked and accordingly, he broke open the lock, entered inside the kitchen and took the food for which his mother Kausalaya Senapati (appellant no.2) threatened him with dire consequences. The above incident took place at 9.00 a.m. whereafter the informant (P.W.1) went to cultivate the land and returned in the evening and found the deceased was absent in the house and the room of the deceased was also locked. When the informant asked her mother-in-law (appellant no.2) about the whereabouts of the deceased, she told that the deceased had gone to the village. After taking food, P.W.1 went to sleep and the appellant no. 2 slept guarding the entrance of the

bedroom of P.W.1. In the night, P.W.1 got up and found her father-in-law (appellant no.1) and brother-in-law (appellant no.3) were removing the dead body of the deceased and when the informant started crying, she was threatened by the appellants with dire consequences and was also warned not to disclose the same before anyone. Out of fear, P.W.1 did not disclose the incident before anyone. Subsequently, when the dead body of the deceased was found, she identified the same, but remained silent and did not complain before others on account of fear. When she came to reside at her father's place after the incident, after getting assurance from the paternal side family members so also the villagers, she lodged the F.I.R.

P.W.7, the Circle Inspector of Jaleswar Police Station took charge of the investigation from P.W.6, who had registered the F.I.R. and started investigation of the case. P.W.7 made a query to the doctor (P.W.5), who conducted post mortem examination over the dead body of the deceased, received the query report (Ext.4/1) so also the post mortem examination report (Ext.3) and on completion of investigation, charge sheet was submitted on 08.03.1998 against the appellants under sections 302/201/34 of the I.P.C.

Prosecution Witnesses & Exhibits:

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

P.W.1 Swapnarani Senapati is the widow of the deceased and the informant in this case. She elaborately explained the incidents that unfolded on the date of occurrence and implicated the appellants for the murder of the deceased.

P.W.2 Rabindranath Das is the uncle of P.W.1 who scribed the F.I.R. He stated that P.W.1 narrated the entire incident before him which he later reduced to writing as F.I.R. He is also a witness to the preparation of the inquest report vide Ext.2.

P.W.3 Banamali Das stated that on 02.03.1997, he was informed by P.W.4 about discovery of the dead body of the deceased from Mahabila. He also stated that the appellants used to assault the deceased and they had separated him and his wife (P.W.1) for which they came to live in the house of P.W.4, but later on, the first appellant came and took the couple back to his house. He further stated that P.W.1 lost her mental balance for 15 days after the death of the deceased.

P.W.4 Gourahari Das is the father of P.W.1 and father-in-law of the deceased. He stated that upon learning the discovery of the dead body, he went to the spot and identified the same to be that of the deceased. He inquired from his daughter (P.W.1) as to how the deceased died but she could not tell anything as she had lost her mental balance after seeing the dead body of the deceased. He further stated that after 15-16 days, P.W.1 informed him that she would file a case against the appellants as they killed the deceased.

P.W.5 Dr. Bishnu Prasad Samantaray was working as the Medical Officer (Assistant Surgeon) at the District Headquarters Hospital, Balasore. He conducted post-mortem examination over the dead body of the deceased upon police requisition and proved his report vide Ext.3. He further stated that P.W.8 made a query vide Ext.4, regarding the injury marked on the dead body of the deceased and he answered the same vide Ext.4/1.

P.W.6 Mayadhar Swain was posted as the Officer-in-Charge of Jaleswar Police Station who received the written report from P.W.1 and registered the case against the appellants and took up the investigation. Subsequently, he handed over the charge of investigation to the Circle Inspector of Police, Jaleswar (P.W.7).

P.W.7 Kshetra Mohan Mohapatra was the Circle Inspector of Police, Jaleswar who took over the charge of investigation of this case from P.W.6 and finding prima facie case against the appellants, submitted charge sheet against them.

P.W.8 Surendra Kumar Behuria was the Sub-Inspector of Police, Jaleswar Police Station. After receiving written report from P.W.4, P.W.6 directed him to take up enquiry of the case.

The prosecution exhibited six numbers of documents. Ext.1 is the F.I.R., Ext.2. is the inquest report, Ext.3 is the post-mortem examination report, Ext.4 is the query made by P.W.8 to P.W.5 and Exts.5 & 6 are the seizure lists.

Defence Plea, Defence Witness & Exhibit:

4. The defence plea of the appellants was one of complete denial. The defence, in order to disprove the prosecution case, examined one witness.

D.W.1 Sk. Farid Ahamed was an Advocate practising at Jaleswar who stated that one Advocate's clerk Ananta Rout had scribed an affidavit when he was not present, which was sworn in by P.W.1 on 16.01.1999. He, however, stated that he attested the L.T.I. of P.W.1 on that affidavit and read over and explained the contents of the affidavit to P.W.1. He further denied to have filed the said affidavit before the Court.

The defence exhibited one document. Ext.A/2 is the affidavit sworn in by P.W.1 on 16.01.1999.

Findings of the Trial Court:

5. The learned trial Court, after assessing the oral as well as the documentary evidence on record, came to hold that the prosecution has not been able to prove that the death of the deceased was homicidal through the evidence of the doctor (P.W.5) or through any other piece of evidence and the informant (P.W.1) although has stated to have seen the dead body of her husband (the deceased) being carried by the appellants, she has not seen the alleged killing of the deceased. Therefore, it cannot be concluded that the death of the deceased was homicidal. However, the learned trial Court taking into account the evidence on record regarding the conduct of the

appellants on the night of occurrence came to hold that the appellants tried their best for causing disappearance of evidence with regard to the suspicious and unnatural death of the deceased intending to screen them from legal punishment. Accordingly, the appellants were found guilty under section 201 of the I.P.C.

Contentions of the Parties:

6. Mr. Sidharth Shankar Lenka, learned counsel for the appellant contended that the appellants have been acquitted of the charge under section 302 of the I.P.C. and the finding of the learned trial Court is that the prosecution has failed to establish that the deceased met with a homicidal death and merely because P.W.1 stated that the dead body of the deceased was removed by the appellants from their house in the dead hour of the night, the ingredients as provided under section 201 of the I.P.C. are not attracted. Learned counsel further argued that the occurrence in question stated to have taken place on 22.06.1997 and four to five days thereafter the dead body was recovered and thereafter the U.D. case was registered and the police was investigating the matter and from the evidence, it further appears that P.W.1 went to stay at her father's place and in such a situation, had P.W.1 been aware of the fact that the appellants had committed murder of the deceased, she would have immediately disclosed the same before her family members, villagers and also to the police and in view of the belated lodging of F.I.R., it can be said that the case has been concocted to falsely implicate the appellants and since there is no other cogent evidence on record, it is a fit case where benefit of doubt should be extended in favour of the appellants.

Mr. Rajesh Tripathy, learned Additional Standing Counsel on the other hand submitted that even though the appellants have been acquitted of the charge under section 302 of the I.P.C., there is no bar in convicting the appellants under section 201 of the I.P.C., particularly when in view of the evidence of P.W.1, it is apparent that in the dead hour of the night, the appellants were seen removing the dead body of the deceased from the house and they also did not lodge any missing report before the police station and there was ill-feeling between the appellants and the deceased as the deceased was sitting idle in the house and moreover the appellants absconded and all these circumstances substantiate that on the night of occurrence, they removed the dead body of the deceased from their house for causing disappearance of the evidence and therefore, the learned trial Court has rightly found the appellants guilty under section 201 of the I.P.C.

Can conviction be recorded U/S 201 I.P.C. when appellants are acquitted U/S 302, I.P.C.?:

7. The brief and precise question that falls for consideration is whether conviction of the appellants can be sustained under section 201 of the I.P.C. when they have already been acquitted under section 302 of the I.P.C.

In the case of **Sukhram -Vrs.- State of Maharashatra reported in (2007) 7 Supreme Court Cases 502**, relying on the Constitution Bench decision in the case

of **Kalawati -Vrs.- State of Himachal Pradesh reported in AIR 1953 Supreme Court 131**, the Hon'ble Supreme Court held that it is well settled that notwithstanding acquittal of the accused of the offence under section 302 of the I.P.C., his conviction under section 201 of the I.P.C. is still permissible.

In the case of **Ram Saran Mahto and Anr.-Vrs.- State of Bihar: (1999) 9 Supreme Court Cases 486**, the Hon'ble Supreme Court held that conviction under the main offence is not necessary to convict the offender under section 201 of the I.P.C. To quote:

> "13. It is not necessary that the offender himself should have been found guilty of the main offence for the purpose of convicting him of offence under section 201. Nor is it absolutely necessary that somebody else should have been found guilty of the main offence."

In **Sou Vijaya @ Baby -Vrs.- State of Maharashtra reported in (2003) 8 Supreme Court Cases 296**, the Hon'ble Supreme Court reiterated that "there is no quarrel with the legal principle that notwithstanding acquittal with reference to the offence under section 302 Indian Penal Code, conviction under section 201 is permissible, in a given case."

Therefore, a charge under section 201 of the Indian Penal Code can be independently laid and conviction can be maintained, if the requirements as provided under the said provision are met. In other words, the charge under section 201 of the I.P.C. is not a corollary of the charge under 302 of the I.P.C. and both the charges can exist without one another.

Analysis of evidence on record for the charge under section 201 of I.P.C.:

8. To bring home an offence under section 201 of the I.P.C., the prosecution is required to establish the following ingredients:

> (i) an offence has been committed;
>
> (ii) person charged with the offence under section 201 of the I.P.C. must have the knowledge or reason to believe that an offence has been committed;
>
> (iii) person charged with the said offence should have caused disappearance of evidence; and
>
> (iv) the act should have been done with the intention of screening the offender from legal punishment or with that intention he should have given information respecting the offence, which he knew or believed to be false.

It is plain that the intent to screen the offender committing an offence must be the primary and sole aim of the accused. It hardly needs any emphasis that in order to bring home the charge under section 201 of the I.P.C., a mere suspicion is not sufficient. There must be on record cogent evidence to prove that the accused knew or had information sufficient to lead him to believe that the offence had been committed and that the accused has caused the evidence to disappear in order to screen the offender, known or unknown.

In the case of **Hanuman and Ors. -Vrs.- State of Rajasthan reported in (1994) 2 Supp Supreme Court Cases 39**, the Hon'ble Supreme Court held that the mere fact that the deceased allegedly died an unnatural death could not be sufficient to bring home a charge under section 201 of the Indian Penal Code. Unless the prosecution was able to establish that the caused person knew or had reason to believe that an offence has been committed and had done something causing the offence of commission of evidence to disappear, he cannot be convicted.

I shall now revert to the factual matrix and see whether the conviction in the facts and circumstances of the case under section 201 of the Indian Penal Code could be sustained.

In the case in hand, the doctor (P.W.5), who conducted post-mortem examination over the dead body of the deceased, has stated that the dead body was at the advance stage of decomposition, face and limbs were mutilated and partly eaten away by wild animals, bones, teeth, limbs were exposed, the body was full of maggots and abdomen distended, both the legs were eaten away up to the ankle, left palm was absent up to the wrist. On dissection, he found the intestine was distended, stomach was filled with undigested food and since the body was highly decomposed, no external injury could be marked and with regard to the cause of death, the opinion was reserved pending chemical analysis of viscera. It appears that no viscera report was obtained and produced before P.W.5 to obtain the final opinion regarding cause of the death of the deceased. Therefore, there is no evidence on record that the deceased met with a homicidal death or any unnatural death and that is how the learned trial Court has arrived at the finding that it cannot be certainly said that the death of the deceased was homicidal.

No doubt from the evidence of P.W.1, it appears that she had seen the removal of the dead body of her husband (deceased) from the house by her father-in-law (appellant no.1) and brother-in-law (appellant no.3) and she was also threatened, but unless there is evidence that it was a case of homicidal death or an offence has been committed in relation to the death of the deceased and the appellants having knowledge or reason to believe that an offence has been committed, removed the dead body from their house for causing disappearance of the evidence with regard to that offence, the ingredients of the offence under section 201 of the I.P.C. would not be attracted. Mere removal of the corpse would not be sufficient to find the appellants guilty of such charge. Mere suspicion is not sufficient, it must be proved that the appellants knew or had a reason to believe that the offence has been committed and yet they caused the evidence to disappear so as to screen them from legal punishment. Therefore, I am of the view that there is no material before this Court to come to the conclusion that the appellants had the knowledge that an offence has been committed or at least they had reasons to believe it and knowingly or having reason to believe the same, they caused disappearance of evidence of commission of that offence.

No doubt the learned counsel for the appellants argued regarding delay in lodging the F.I.R. and it appears in this case that the F.I.R. was lodged almost eighteen days after the date of commission of the offence, however, the state of mind of P.W.1 and the threat stated to have given by the appellants to P.W.1 cannot be lost sight of while adjudging the circumstances which led to the delay in lodging the F.I.R. More particularly, the evidence of P.W.1 indicates that she was shocked for which she lost the balance of her mind and P.W.2 (uncle of the informant) has stated that P.W.1 was always crying in her parents' house and was also becoming senseless at times. Similarly, P.W.4 (father of the informant) has stated that for fifteen to sixteen days, P.W.1 was unable to tell anything out of shock as she lost her balance of mind subsequent to the death of the deceased. Therefore, in my humble view, delay cannot be the sole factor to disbelieve the evidence of P.W.1.

The submissions of learned counsel for the State that there was ill-feeling between the parties as the deceased was not doing anything is no doubt apparent from the evidence of P.W.1, but it is very difficult to believe that the parents and brother of the deceased would go to the extent of killing him for this reason. Therefore, motive behind the commission of crime is also absent in this case. Absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused.

Though the appellants were found absconding, but the law is well settled that absconding itself cannot be a factor to prove culpability of the accused persons.

Conclusion:

9. In view of the foregoing discussions, when the prosecution has not satisfactorily proved the death of the deceased to be homicidal in nature and has also failed to prove that the appellants had the knowledge or reasons to believe that an offence has been committed in relation to the death of the deceased, merely because they were found removing the dead body from the house in question in the dead hour of night as deposed to by P.W.1, it cannot be said that the ingredients of the offence under section 201 of the I.P.C. are satisfied. Therefore, the appellants are acquitted of the charge under section 201 of the I.P.C.

Resultantly, the Criminal Appeal is allowed.

Before parting with the case, I would like to put on record my appreciation to Mr. Sidharth Shankar Lenka, learned counsel for the appellant for rendering his valuable assistance towards arriving at the decision above mentioned. This Court also appreciates Mr. Rajesh Tripathy, learned Additional Standing Counsel for ably and meticulously presenting the case on behalf of the State.

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2024 (I) ILR-CUT-87

S.K. SAHOO, J.

I.A. NO.1398 OF 2023
(ARISING OUT OF CRLA NO. 252 OF 2023)

SUSANT KUMAR SAHU ……Appellant/Petitioner

-V-

STATE OF ODISHA (VIG.) ……Respondent/Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 389(1) – Ambit and scope of Section 389(1) of Cr.P.C relating to stay of judgment and order of conviction by the Appellate Court – Discussed with reference to case laws.

Case Laws Relied on and Referred to :-

1. 2023 SC OnLine SC 280: Neeraj Dutta V. State (Govt. of N.C.T. Delhi)
2. (2001) 6 SCC 584: K.C. Sareen V. C.B.I., Chandigarh.
3. (2012) 53 OCR (SC) 1233: State of Maharastra through C.B.I. V. Balakrishna Dattatrya Kumbhar.
4. A.I.R. 2008 SC 35: State of Punjab V. Deepak Mattu.
5. (2022) 85 OCR 667: Pruthwiraj Lenka V. State of Odisha (Vig.).
6. (2023) 91 OCR (SC) 84 : Om Prakash Sahani V. Jai Shankar Chaudhary & Anr.
7. A.I.R. 2011 SC 3845: A.B.Bhaskara Rao V. Inspector of Police, CBI, Visakhapatnam.

For Petitioner : Mr. Devashis Panda

For Opp.Party : Mr. Sanjaya Kumar Das, Standing Counsel (Vig.)

ORDER Date of Order : 12.12.2023

S.K. SAHOO, J.

The appellant/petitioner Susant Kumar Sahu who was the V.L.W. in Gania Block in Nayagarh District has filed this interim application under section 389 of Cr.P.C. for stay of his conviction passed by the learned Special Judge, Vigilance, Bhubaneswar in T.R. Case No.01 of 2011 vide impugned judgment and order dated 20th February 2023 in convicting him under section 7 and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereafter '1988 Act') and sentencing him to undergo R.I. for a period of one year and to pay a fine of Rs.2,000/-(Rupees two thousand), in default, to undergo R.I. for a further period of two months for the offence under section 7 of the 1988 Act and to undergo R.I. for a period of two years and to pay a fine of Rs.2,000/- (Rupees two thousand), in default, to undergo R.I. for a further period of two months for the offence under section 13(2) read with section 13(1)(d) of the 1988 Act and both the sentences were directed to run concurrently.

2. The prosecution case, in short, is that on 21.12.2009, one Milu Rai lodged a written report before the Deputy Superintendent of Police, Vigilance, Nayagarh Unit, Nayagarh addressing to the Superintendent of Police, Vigilance, Bhubaneswar stating therein that he was an inhabitant of village Dhobabarai under Gania Block

and a sum of Rs.20,000/-(Rupees twenty thousand) was sanctioned for construction of the platform of his village well and he was selected as V.L.L. in Palli Sabha of his village to construct the platform of the said well and in his name, the work order was issued which was signed by the Sarpanch seven to eight days prior to the lodging of F.I.R. Thereafter, the informant approached the petitioner four days prior to the lodging of F.I.R. who was supposed to issue the work order but the petitioner demanded a sum of Rs.2,000/- (rupees two thousand) as bribe to issue the work order. On 21.12.2009 at about 2.00 p.m., when the informant again approached the petitioner and expressed his inability to pay the demanded amount, the petitioner refused to issue the work order, however he reduced the demanded bribe amount from Rs.2,000/- (rupees two thousand) to Rs.1,800/-(rupees one thousand eight hundred) and asked the informant to pay the amount by 22.12.2009 to get the work order.

The written report being received by the D.S.P. (Vigilance), Nayagarh Unit, Nayagarh was sent to the Superintendent of Police, Vigilance, Bhubaneswar Division, Bhubaneswar, who directed the Officer in-charge of Vigilance Police Station, Bhubaneswar Division, Bhubaneswar to register the case and Shri Srinibasa Padhy (P.W.5), Inspector, Nayagarh Vigilance Unit was directed to lay a trap and further directed the Inspector of Police (Vigilance) Ms. Harapriya Naik (P.W.7) to take up investigation of the case. Accordingly, Bhubaneswar Vigilance P.S. Case No.52 dated 21.12.2009 was registered under section 7 of the 1988 Act against the petitioner.

P.W.5 made a preparation to lay the trap on 22.12.2009, issued necessary instruction to the informant to come ready with the bribe money of Rs.1,800/- (rupees one thousand eight hundred) on that day and basing upon the requisition of D.S.P., Vigilance, the witnesses, namely, Naran Murmu (P.W.2), Asst. Engineer and Jagdish Prasad Majhi(P.W.3), Junior Engineer reported before him and thereafter he along with the other witnesses assembled in the office room of D.S.P., Vigilance, Nayagarh where the informant was introduced by P.W.5 to the team members. The informant produced a sum of Rs.1,800/- (rupees one thousand eight hundred) having three numbers of 500 rupees denominations and three numbers of 100 rupees denominations before P.W.5. The constable P.K. Acharya showed a demonstration during which he prepared sodium carbonate solution and dipped his fingers inside the solution, but the colour of the solution remains unchanged. He thereafter, treated the currency notes with phenolphthalein powder and handed over the same to the informant inside a four-fold paper with instruction to pay the same to the petitioner only on demand. The constable thereafter dipped his fingers inside the prepared solution and the colour of the solution turned pink. The solution was preserved in a glass bottle duly labeled and sealed. P.W.2 was selected to accompany the informant to the office of the petitioner, to overhear the conversation between the informant and the petitioner and to relay the signal by rubbing his forehead after the transaction of passing the bribe money. A preparation report was duly drafted by

P.W.5 marked as Ext.2. On the same day at about 4.25 p.m., they reached at Gania Block and the informant and the accompanying witness (P.W.2) went inside the Gania Block office by walking and other team members followed them and took positions inside the campus of the Block. At about 5.00 p.m., P.W.5 received the signal from P.W.2 and immediately, they proceeded to the computer room of I.C.D.S. building and found the informant and the petitioner available in room. The informant identified the petitioner to P.W.5 and clarified that he had paid the bribe amount to the petitioner on demand. Thereafter, P.W.5 collected the hand wash of the petitioner in sodium carbonate solution which turned pink in two separate glass bottles being duly labeled and sealed. On instruction, the petitioner handed over the tainted money to P.W.3 by brining it from his right side pant pocket and then P.W.3 compared the number and denomination of the currency notes with that mentioned in the copy of preparation report and found it tallied. Both hand wash of P.W.3 which turned pink taken in prepared solution was collected and the solution was preserved in separate glass bottles duly labeled and sealed. The right pant packet wash of the petitioner which also turned pink was also collected and the solution was preserved in separate glass bottles duly labeled and sealed. P.W.5 also sealed the collected wash, tainted money, four fold paper, copy of the preparation report with necessary endorsement by P.W.3 and the connected file regarding issuance of work order in respect of platform of a well. Then P.W.5 collected the impression of seal on a paper and left the seal on zima of P.W.3 and prepared the spot map marked as Ext.16 and also the detection report (Ext.10) at the spot and arrested the petitioner and subsequently, handed over the seized materials, connected documents and the petitioner to P.W.7 for further investigation.

The Investigating Officer (P.W.7) took charge of investigation of the case from P.W.5 as per the direction of S.P., Vigilance, Bhubaneswar, Division, examined the witnesses and forwarded the petitioner to the Court. On 11.01.2010, she forwarded the seized exhibits to the Director, S.F.S.L., Rasulgarh, Bhubaneswar for its chemical examination. On her prayer before the Court, the statements of the informant and overhearing witness were recorded under section 164 Cr.P.C. On 17.03.2010, she sent the requisition to Sarpanch, Chhamundia G.P. of Gania Block to produce the proceeding of the Palli Sabha of village Dhobabarai in which it was decided that the village well platform would be done by the informant. She received the chemical examination report from S.F.S.L., Rasulgarh on 22.03.2010 in which it was opined by the examiner that phenolphthalein was detected in sodium carbonate solution contained in the glass bottle marked as Ext. R, L, P, W and D. On 18.06.2010, she seized the Palli Sabha book of village Dhobabarai and the resolution book of Chhamundi G.P. from one Nalini Jani marked as Ext.18 and the Palli Sabha khata marked as Ext.19. On 08.07.2010, she seized the personal original file of the petitioner along with its certified copy, original posting order of the petitioner and duty assignment order of the B.D.O on the strength of seizure list marked as Ext.14. On 19.10.2010, she received the sanction order of Collector, Nayagarh vide letter

dated 05.10.2010 marked as Ext.20 (with objection). On completion of investigation, she submitted the charge sheet against the petitioner under section 7 and section 13(2) read with section 13(1)(d) of the 1988 Act to stand his trial in the court of law.

3. On assessing the oral as well as documentary evidence available on record, the learned trial Court came to hold that the defence has failed to rebut the presumption under section 20 of the P.C. Act, even at the touch stone of preponderance of probability. It was further held that the prosecution has also proved the original sanction order against the petitioner vide Ext.20 and the same further fortifies that all the material documents were produced before the sanctioning authority and that after going through all the documents, the sanction order has been passed by the then Collector, Nayagarh. It was further held that when the sanction order has been proved and it gives detailed account of discussion with the I.O. (P.W.7) which is corroborated by the ocular testimony of the I.O. and when no infirmity has been brought out on record by the defence in the process of the grant of sanction, mere non-examination of the sanctioning authority cannot vitiate the prosecution against the petitioner. It was held that the prosecution has successfully proved the sanction order against the petitioner as per true norms and spirit of section 19(1) of the P.C. Act, 1988, aaccordingly, the learned trial Court came to the conclusion that the offences under section 7 and section 13(2) read with section 13(1)(d) of the 1988 Act has been committed by the petitioner and the petitioner was found guilty of such charges.

4. Mr. Devashis Panda, learned counsel appearing for the petitioner contended that the learned trial Court has illegally convicted the petitioner under section 7 and section 13(2) read with section 13(1)(d) of the 1988 Act. He further argued that the learned trial Court in the impugned judgment has picked and chosen only the portion of evidence of the prosecution to be utilized against the petitioner and discarded the rest evidence in favour of the petitioner without any justifiable reason. It was further asserted that the deposition of the witnesses of the prosecution during the cross-examination was not taken into account. He further argued that the informant died for which he could not be examined during trial and the overhearing witness (P.W.2) had deposed falsely that he could see the transaction and heard the conversation as it was not possible on his part either to see or to overhear the alleged demand from where he was standing. A spot map was prepared by the trap laying officer at the spot itself, where the position of the witness (P.W.2) was near the store room in an open field and the said store room was in between the position of the witness and the place of occurrence. He further asserted that despite being conscious of the fact that P.W.2 neither could see nor could hear while the transaction was done still it presented a false set of facts before the Court to criminally implicate the appellant. He further argued that had the learned trial Court considered the evidence available in favour of the petitioner and not ignored the same, the impugned order of conviction would not have come into existence. The finding recorded by the learned

trial Court is out and out perverse and without any application of its judicial mind and therefore, the impugned judgment is bad in the eye of law. He further submitted that the apprehension of losing the job may not be the sole criteria for granting stay of conviction, but the exceptional and special circumstances which exist in the facts of the case sufficiently indicate that the present litigation is luxury litigation on the part of the prosecution at the cost of the petitioner. Therefore, when the prosecution has not proved the guilt of the petitioner to the hilt, this Court may be pleased to pass an order of stay of conviction. To substantiate his stand, learned counsel has relied upon in the case of **Neeraj Dutta -Vrs- State (Govt. of N.C.T. Delhi) reported in 2023 Supreme Court OnLine SC 280** wherein it is held as follows:

> "12. The referred question was answered in paragraph 76 of the aforesaid judgment, which reads thus:
>
> 76. Accordingly, the question referred for consideration of this Constitution Bench is answered as under:
>
> In the absence of evidence of the informant (direct/primary, oral/documentary evidence), it is permissible to draw an inferential deduction of culpability/guilt of a public servant Under Section 7 and Section 13(1)(d) read with Section 13(2) of the Act based on other evidence adduced by the prosecution."
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> Xxx Xxx Xxx Xxx
>
> 16. Thus, the demand for gratification and its acceptance must be proved beyond a reasonable doubt.
>
> 17. Section 7, as existed prior to 26th July 2018, was different from the present Section 7. The unamended Section 7 which is applicable in the present case, specifically refers to "any gratification". The substituted Section 7 does not use the word "gratification", but it uses a wider term "undue advantage". When the allegation is of demand of gratification and acceptance thereof by the Accused, it must be as a motive or reward for doing or forbearing to do any official act. The fact that the demand and acceptance of gratification were for motive or reward as provided in Section 7 can be proved by invoking the presumption Under Section 20 provided the basic allegations of the demand and acceptance are proved. In this case, we are also concerned with the offence punishable Under Clauses (i) and (ii) Section 13(1)(d) which is punishable Under Section 13(2) of the PC Act. Clause (d) of Sub-section (1) of Section 13, which existed on the statute book prior to the amendment of 26th July 2018, has been quoted earlier. On a plain reading of Clauses (i) and (ii) of Section 13(1)(d), it is apparent that proof of acceptance of illegal gratification will be necessary to prove the offences Under Clauses (i) and (ii) of Section 13(1)(d). In view of what is laid down by the Constitution Bench, in a given case, the demand and acceptance of illegal gratification by a public servant can be proved by circumstantial evidence in the absence of direct oral or documentary evidence. While answering the referred question, the Constitution Bench has observed that it is permissible to draw an inferential deduction of culpability and/or guilt of the public servant for the offences punishable under section 7 and 13(1)(d) read with section 13(2) of the PC Act. The conclusion is that in absence of direct evidence, the demand and/or acceptance can always be proved by other evidence such as circumstantial evidence."

Mr. Sanjaya Kumar Das, learned Standing Counsel for the Vigilance Department appearing for the opposite party vehemently opposed the prayer for stay

of conviction and also filed his objection to such petition. It is contended that the learned trial Court after going though the evidence on record in detail has rightly found the petitioner guilty and since stay of conviction should be exercised only in exceptional circumstances and in rare cases where failure to stay conviction would lead to injustice and irreversible consequences, nothing having been pointed out by the learned counsel for the petitioner in that respect, no favourable order should be passed in his favour. It is further contended that besides getting legal remuneration, demanding and accepting bribe has come a 'MANTRA' in the public institutions by the public servants. It has become a contagious disease in the society, which needs social reforms and judicial inference to get rid of the same. He further submitted that so far as the contentions of suspension/stay of conviction and sentence of the petitioner is concerned, the interim application is liable to be dismissed because of his conviction and sentence for committing the offence under the Prevention of Corruption Act and being held to be a corrupt public servant by accepting illegal gratification as a 'motive'. He further submitted that as the law is equal to all and to be judged impartially, the petitioner does not stand in a different footing to be considered in any special circumstances, when he has been found guilty for adopting corruption by thinking it to be his official act. He further contended that the petitioner ought to have thought of the consequences regarding demand and acceptance of bribe money against discharging the official duties. He also contended that in the event, the petitioner succeeds in the criminal appeal preferred by him before this Court, he would be at liberty to claim all of his consequential benefits from the Government and in view of the above, the I.A. should be dismissed.

5. First, let me deal with the ambit and scope of section 389(1) of Cr.P.C. relating to stay of judgment and order of conviction by the appellate Court as were placed by the learned Standing Counsel for the vigilance department.

In the case of **K.C. Sareen -Vrs.- C.B.I., Chandigarh reported in (2001) 6 Supreme Court Cases 584**, it is held as follows:-

> "11. The legal position, therefore, is this: though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code, its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal in challenge of the conviction, the Court should not suspend the operation of the order of conviction. The Court has a duty to look at tall aspects including the ramifications of keeping such conviction in abeyance. It is in the light of the above legal position that we have to examine the question as to what should be the position when a public servant is convicted of an offence under the PC Act. No doubt when the appellate Court admits the appeal filed in challenge of the conviction and sentence for the offence under the PC Act, the superior Court should normally suspend the sentence of imprisonment until disposal of the appeal, because refusal thereof would render the very appeal otiose unless such appeal could be heard soon after the filing of the appeal. But suspension of conviction of the offence under the PC Act, dehors the sentence of imprisonment as a sequel thereto, is different matter.
>
> 12. Corruption by public servants has now reached a monstrous dimension in India. Its tentacles have started grappling even the institutions created for the protection of the

republic. Unless those tentacles are intercepted and impeded from gripping the normal and orderly functions of the public offices, through strong legislative, executive as well as judicial exercises, the corrupt public servants could even paralyse the functioning of such institutions and thereby hinder the democratic policy. Proliferation of corrupt public servants could garner momentum to cripple the social order if such men are allowed to continue to manage and operate public institutions. When a public servant was found guilty of corruption after a judicial adjudicatory process conducted by a Court of law, judiciousness demands that he should be treated as corrupt until he is exonerated by a superior Court. The mere fact that an appellate Court or revisional forum has decided to entertain his challenge and to go into the issues and findings made against such public servants once again should not even temporarily absolve him from such findings. If such a public servant becomes entitled to hold public office and to continue to do official acts until he is judicially absolved from such findings by reason of suspension of the order of conviction, it is public interest which suffers and sometimes even irreparably. When a public servant who is convicted of corruption is allowed to continue to hold public office, it would impair the morale of the other persons manning such office, and consequently that would erode the already shrunk confidence of the people in such public institutions besides demoralising the other honest public servants who would either be the colleagues or subordinates of the convicted person. If honest public servants are compelled to take orders from proclaimed corrupt officers on account of the suspension of the conviction, the fall out would be one of shaking the system itself. Hence, it is necessary that the Court should not aid the public servant who stands convicted for corruption charges to hold only public office until he is exonerated after conducting a judicial adjudication at the appellate or revisional level. It is a different matter if a corrupt public officer could continue to hold such public office even without the help of a Court order suspending the conviction."

In the case of **State of Maharastra through C.B.I. -Vrs.- Balakrishna Dattatrya Kumbhar reported in (2012) 53 Orissa Criminal Reports (SC) 1233**, it is held as follows:-

"12. Thus, in view of the aforesaid discussion, a clear picture emerges to the effect that, the Appellate Court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which, the applicant must satisfy the Court as regards the evil that is likely to befall him, if the said conviction is not suspended. The Court has to consider all the facts as are pleaded by the applicant, in a judicious manner and examined whether the facts and circumstances involved in the case are such, that they warrant such a course of action by it. The court additionally, must record in writing, its reasons for granting such relief. Relief of staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done.

xx xx xx xx xx

14. The aforesaid order is therefore, certainly not sustainable in law if examined in light of the aforementioned judgments of this Court. Corruption is not only a punishable offence but also undermines human rights, indirectly violating them, and systematic corruption, is a human rights' violation in itself, as it leads to systematic economic crimes. Thus, in the aforesaid backdrop, the High Court should not have passed the said order of suspension of sentence in a case involving corruption. It was certainly not the case where damage if done, could not be undone as the employee/Respondent if

ultimately succeeds, could claim all consequential benefits. The submission made on behalf of the Respondent, that this Court should not interfere with the impugned order at such a belated stage, has no merit for the reason that this Court, vide order dated 9.7.2009 has already stayed the operation of the said impugned order."

In the case of **State of Punjab -Vrs.- Deepak Mattu reported in A.I.R. 2008 Supreme Court 35**, it is held as follows:-

"7. While passing the said Order, the High Court did not assign any special reasons. Possible delay in disposal of the appeal and there are arguable points by itself may not be sufficient to grant suspension of a sentence. The High Court while passing the said Order merely noticed some points which could be raised in the appeal. The grounds so taken do not suggest that the Respondent was proceeded against by the State, mala fide or any bad faith…."

In the case of **Pruthwiraj Lenka -Vrs.- State of Odisha (Vigilance) reported in (2022) 85 Orissa Criminal Reports 667**, it is held that law is well settled that possible delay in disposal of the appeal and/or presence of arguable points in the appeal by itself may not be sufficient in staying the order of conviction of the trial Court without assigning any special reasons. An order granting stay of conviction is not the Rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. As order of stay, of course, does not render the conviction non-existent, but only non-operative.

In the case of **Om Prakash Sahani -Vrs.- Jai Shankar Chaudhary and another etc. reported in (2023) 91 Orissa Criminal Reports (SC) 84**, it is held as follows:-

"33. The Appellate Court should not reappreciate the evidence at the stage of section 389 of the Cr.P.C. and try to pick up few lacunas or loopholes here or there in the case of the prosecution. Such would not be a correct approach.

34. In the case on hand, what the High Court has done is something impermissible. High Court has gone into the issues like political rivalry, delay in lodging the F.I.R., some over-writings in the First Information Report etc. All these aspect, will have to be looked into at the time of the final hearing of the appeals filed by the convicts. Upon cursory scanning of the evidence on record, we are unable to agree with the contentions coming from the learned Senior Counsel for the convicts that, either there is absolutely no case against the convicts or that the evidence against them is so weak and feeble in nature, that, ultimately in all probabilities the proceedings would terminate in their favour….."

In the case of **A.B. Bhaskara Rao -Vrs.- Inspector of Police, CBI, Visakhapatnam reported in A.I.R. 2011 Supreme Court 3845**, it is held as follows:-

"19. From the analysis of the above decisions and the concerned provisions with which we are concerned, the following principles emerge:

a) When the Court issues notice confining to particular aspect/sentence, arguments will be heard only to that extent unless some extraordinary circumstance/material is shown to the Court for arguing the matter on all aspects.

> b) Long delay in disposal of appeal or any other factor may not be a ground for reduction of sentence, particularly, when the statute prescribes minimum sentence. In other cases where no such minimum sentence is prescribed, it is open to the Court to consider the delay and its effect and the ultimate decision.
>
> c) In a case of corruption by public servant, quantum of amount is immaterial. Ultimately it depends upon the conduct of the delinquent and the proof regarding demand and acceptance established by the prosecution.
>
> d) Merely because the delinquent lost his job due to conviction under the Act may not be a mitigating circumstance for reduction of sentence, particularly, when the Statute prescribes minimum sentence."

The appreciation of evidence in detail at the final stage of hearing of criminal appeal is not to be adopted at the stage of dealing with interim application for stay of judgment and order of conviction inasmuch any finding on the merits of the case by way of appreciation of evidence at the stage of consideration of interim application for stay of conviction is likely to prejudice either of the parties.

There is no doubt that in view of settled position of law, the appellant has to make out a rare and exceptional case for the grant of stay against conviction under section 389 of Cr.P.C. There must be special and compelling circumstances in justification for the grant of such stay against conviction. There should be irreversible consequences leading to injustice and irretrievable damages in the event of non-grant of stay against conviction. The impugned judgment of conviction should be based on no evidence or against the weight of evidence, which must prima facie appear on the face of it without conducting a detailed analysis into the merit of the case. Possible delay in disposal of the appeal and that there are arguable points by itself may not be sufficient to grant stay of conviction.

6. In view of the ratio laid down in the aforesaid decisions and keeping in view the submissions raised by the learned counsel for the respective parties, it is to be seen whether the petitioner has made out a very rare and exceptional case for grant of stay of order of conviction. What the evil that is likely to befall on the petitioner, if the order of conviction is not stayed? Whether failure to stay the order of conviction would lead to injustice and irreversible consequences?

There is no dispute that the informant Milu Rai could not be examined as he died during trial. Therefore, there is no evidence relating to the demand stated to have been made to the informant four days prior to the lodging of F.I.R. and even on the date of lodging F.I.R. as stated in the F.I.R., which is not a substantive piece of evidence and its utility in evidence is very much restricted by law and it can only be used corroborate the statement of the maker under section 157 of Evidence Act, or to contradict it under section 145 of the Evidence Act.

The most important witness to prove the demand and acceptable of the bribe money is none else than P.W.2. P.W.2 has not only stated about the preparation proceeding in the office of D.S.P., Vigilance Unit, Nayagarh but also stated that he

accompanied the informant to the Block Office, Gania where he noticed about the demand of money by the petitioner to the informant, the informant handing over the tainted money to the petitioner which was counted by the petitioner and then keeping it in his pant pocket. He also stated about the recovery of the money from the possession of the petitioner, comparison of the denomination of notes and hand washes of the petitioner being taken in sodium carbonate solution changing colour to pink. Whether in view of the position of P.W.2 as shown in the spot map (Ext.16) prepared by P.W.5, he could notice the demand and acceptance of bribe money by the petitioner from the informant is to be adjudicated at the final stage of hearing of the criminal appeal. The evidence of P.W.2, P.W.3 and P.W.5 proves the stand of the prosecution that the petitioner had demanded and accepted the bribe money of Rs.1,800/- (rupees one thousand eight hundred) from the deceased-informant and the evidence of Scientific Officer (P.W.1) with Ext.1 (C.E. report) fortified the same as held by the learned trial Court. The stand taken by the petitioner that the informant have Rs.1,800/- (rupees one thousand eight hundred) to him which he had taken as hand loan from him in the year 2009 has not been accepted by the learned trial Court and the evidence of D.W.1 was found to be not credible. The sanction order against the petitioner was found to be as per true norms and spirit of section 19(1) of the 1988 Act.

7. After carefully and meticulously analyzing the finding of the learned trial Court, the submissions made by the learned counsel for the respective parties and the evidence on record, I am of the humble view that at this stage, it cannot be said that it is a case of no evidence against the petitioner. Whether the evidence available on record would be sufficient to uphold the impugned judgment and order of conviction of the petitioner or on the basis of points raised by the learned counsel for the petitioner, benefit of doubt is to be extended to the petitioner is to be adjudicated at the final stage when the appeal would be heard on merit. Giving any finding on the merits of the case is likely to cause prejudice to either of the parties. This Court will certainly have a duty to make deeper scrutiny of the evidence and decide the acceptability or creditworthiness of the evidence of witnesses at the final stage of hearing of the appeal on merit. At this stage, reappreciation of evidence by conducting detailed analysis and trying to pick up lacunas or loopholes in the case of the prosecution is not permissible. No extraordinary circumstance/material is shown to this Court for granting the desired relief to the petitioner. The fact that the petitioner has been dismissed from the government service by the order of the Collector & Disciplinary Authority, Nayagarh and that he is likely to face financial hardship and there is no chance of early hearing of the appeal are not the grounds for granting the reliefs sought for.

Therefore, I am of the humble view that for the limited purpose of ascertaining whether stay of order of conviction be granted or not, I find that the petitioner has failed to make out a very exceptional case or special reasons for keeping the conviction in abeyance and as such, in the facts and circumstances of the

case, the relief sought for by the petitioner for staying the order of conviction cannot be granted.

8. Accordingly, the interim application being devoid of merits, stands dismissed.

By way of abundant caution, I would like to place it on record that whatever has been stated hereinabove in this order has been so said only for the purpose of disposing of the prayer for staying the order of conviction of the petitioner. Nothing contained in this order shall be construed as expression of a final opinion on any of the issues of fact or law arising for decision in the case which shall naturally have to be done at the final stage of the hearing of the criminal appeal on merit.

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2024 (I) ILR-CUT-97

S.K. SAHOO, J.

CRLREV NO. 21 & 17 OF 2003

HRUDANANDA SETHI .....Petitioner

-V-

REPUBLIC OF INDIA (C.B.I.) .....Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 397 – Scope of interference in revisional jurisdiction – Discussed with reference to case law. (Para 7)

Case Laws Relied on and Referred to :-

1. (2022) SCC Online Ori. 861: Sudarsan Sahani Vrs. State of Odisha (Vig.).
2. (2022) 8 SCC 204: Malkeet Singh Gill Vrs. State of Chhattisgarh.
3. (1980) 1 SCC 704: Murari Lal Vrs. State of Madhya Pradesh.
4. (1999) 2 SCC 452: State of Kerala Vrs. Putthumana Illath Jathavedan Namboodiri.
5. (2015)3 SCC 123: Sanjaysinh Ramrao Chavan Vrs. Dattatray Gulabrao Phalke & Ors.
6. 1992 Criminal Law Journal 3454: State of Maharashtra Vrs. Sukhdev Singh.
7. A.I.R. 1996 SC 1140 : O. Bharatan Vrs.K. Sudhakaran
8. A.I.R. 1979 SC 14 : The State (Delhi Administration) Vrs. Pali Ram.
9. (2021) 3 SCC 751 : Archana Rana Vrs. State of U.P.

For Petitioner : Mrs. Madhumita Panda & Mr. Ashok Ku. Sarangi

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

JUDGMENT Date of Judgment : 18.12.2023

S.K. SAHOO, J.

The petitioner Hrudananda Sethi in CRLREV No.21 of 2003 and the petitioner Achyutananda Panda in CRLREV No.17 of 2003 faced trial for offences punishable under sections 420, 468, 471 read with section 120-B of the Indian Penal

Code (in short, 'I.P.C.') in the Court of learned Addl. C.J.M. -cum- Special C.J.M. (C.B.I.), Bhubaneswar in S.P.E. Case No.43 of 1994 for committing criminal conspiracy, cheating, forgery for the purpose of cheating and dishonestly and fraudulently using the forged document as genuine one.

The learned trial Court vide impugned judgment and order dated 05.03.2002 found both the petitioners guilty of the offences charged and sentenced each of them to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.3,000/- (rupees three thousand) each, in default of payment of fine, to undergo rigorous imprisonment for six months more on each count for the offences under sections 120-B/420/468 of I.P.C. and to undergo rigorous imprisonment for a period of one year each for the offence under section 471 of the I.P.C. The substantive sentences were directed to run concurrently.

The petitioner Hrudananda Sethi preferred Criminal Appeal No.16/24 of 2002 and the petitioner Achyutananda Panda preferred Criminal Appeal No.12/23 of 2002 and both the appeals were heard analogously by the learned Additional Sessions Judge, Fast Track Court No.II, Bhubaneswar and vide common impugned judgment and order dated 21.12.2002, the learned Appellate Court upheld the impugned judgment and order of the learned trial Court and sentence passed thereunder and dismissed both the criminal appeals.

Since both the revision petitions arise out of the same case, with the consent of the parties, those were heard analogously and are being disposed of by this common judgment and order.

Prosecution Case:

2. The prosecution case, in short, is that on the basis of source information, first information report (Ext.56) was registered on 08.02.1994 initially against the petitioner Hrudananda Sethi, Postal Assistant and one Kartika Chandra Mohanty, authorized postal agent of Jajpur Road Railway Station Sub-post office on the accusation that they conspired with each other and in pursuance of such conspiracy, the postal department was cheated to the tune of Rs.32,831/- during the period from 14.06.1993 to 20.10.1993 by forging the signatures of the depositors and they took payment of withdrawals in respect of depositors Arjuna Sethi (P.W.1), Janaki Ballav Pradhan (P.W.2), Ramakanta Sahu (P.W.3) and Gangadhara Nayak (P.W.4).

P.W.9 Gopabandhu Pati, Inspector of Police, C.B.I., Bhubaneswar during investigation of the case found that there was a withdrawal of Rs.8,500/- (rupees eight thousand five hundred) on 20.10.1993 from S.B. A/c. No.132441 standing in the name of P.W.1 who deposited his pass book on 08.06.1993 with the petitioner Hrudananda Sethi under proper acknowledgement, but the petitioners made payment to one Aruna Chandra Sethi through messenger P.K. Sethi after verifying the specimen signature. The A/c. holder P.W.1 denied to have received the payment and as such it was concluded that the petitioners are liable under sections 120-B/420/467

/468/471 of the I.P.C. It was also found that the petitioners who verified the specimen signature, have fraudulently taken a withdrawal of Rs.5,000/- (rupees five thousand) on 14.06.1993 from R.D. A/c. No.11508 standing in the name of P.W.4. It was also revealed that the petitioners made a fraudulent withdrawal of Rs.2,500/- (rupees two thousand five hundred) on 26.06.1993 from R.D. A/c. No.11569 without the knowledge of P.W.3, the A/c. holder. The petitioners in pursuance of the conspiracy between them also fraudulently withdrawn Rs.6,000/- (rupees six thousand) on 03.07.1993 from R.D. A/c. No.11663 without the knowledge of P.W.2, the A/c. holder. The I.O. came to the conclusion that in all the above instances, the petitioners cheated the postal department by causing a wrongful loss by way of forgery and using forged documents as genuine. The petitioner Hrudananda Sethi, however deposited a sum of Rs.13,000/- (rupees thirteen thousand) towards the defrauded amount vide ACC-67 receipts dated 04.04.1994 for Rs.12,000/- (rupees twelve thousand) and dated 18.04.1994 for Rs.1,000/- (rupees one thousand). The petitioner Hrudananda Sethi also deposited Rs.2,762.50 (rupees two thousand seven hundred sixty two and fifty paise) towards principal and interest on 06.01.1994 in respect of R.D. A/c. No.11569. The documents were seized and witnesses were examined and on completion of investigation, the I.O. found prima facie evidence against the petitioners under sections 120-B/420/467/468/471 of the I.P.C. and accordingly, charge sheet was filed on 31.08.1994 against them.

Prosecution Witnesses And Documents Exhibited By Prosecution:

3. During course of trial, the prosecution examined nine witnesses.

P.W.1 Arjuna Sethi is one of the depositors who stated about withdrawal of a sum of Rs.8,500/- from his S.B. account by forging his signature on the withdrawal slip (Ext.5).

P.W.2 Janakiballav Pradhan is a depositor who stated about withdrawal of a sum of Rs.6,000/- from his R.D. account by forging his signature on the withdrawal slip (Ext.8).

P.W.3 Ramakanta Sahu is a depositor who stated that he himself withdrew of a sum of Rs.2,500/- from his R.D. account and further stated that nobody had forged his signature for withdrawal of the said amount and he proved his signatures in the withdrawal form and further stated that he had not submitted any written report (Ext.16) to the Asst. Superintendent of Post Office.

P.W.4 Gangadhara Nayak is a depositor who stated about withdrawal of a sum of Rs.5,000/- from his R.D. account by forging his signature.

P.W.5 Narayan Chandra Behera was working as Complaint Inspector, Cuttack North Division, Cuttack, who proved the entries in different pass books of the depositors and the statements made by them before P.W.8.

P.W.6 Ashok Kumar Nayak was working as Postal Assistant in Head Post Office, Bhadrak and he is a witness to the seizure of documents marked Ext.23. He

stated that the petitioner Hrudananda Sethi has deposited the misappropriated amount of Rs.12,000/- from R.D. A/c. No.132441 and also deposited Rs.6,000/- in R.D. A/c. No.11663 standing in Jajpur Road Railway Station Sub-post office on 04.04.1994. He further stated that he also received Rs.1,000/- from the petitioner Hrudananda Sethi, which was fraudulently withdrawn from R.D. A/c. No.11663 standing in Jajpur Road Railway Station Sub-post office.

P.W.7 Muralidhar Satpathy, who was working as U.D.C. in Jajpur Road Electrical Division, stated about filling up of the withdrawal slip on behalf of P.W.3 as the latter approached him for such purpose.

P.W.8 Satyabrata Satpathy, who was working as Asst. Superintendent of Post Offices, Cuttack North Division conducted enquiry into the allegations made by some depositors being directed by the Superintendent of Post Offices, Cuttack North Division, Cuttack and submitted the Enquiry Report to the Chief Post Master General, Odisha vide Ext.53.

P.W.9 Gopabandhu Pati is the Investigating Officer of the case.

The prosecution exhibited fifty seven documents. Ext.1 is the receipt of pass book, Ext.2 is the application of P.W.1, Ext.3 is the specimen signature of P.W.1, Ext.4 is the deposit slip, Ext.5 is the withdrawal slip dt.20.10.1993, Ext.6 is the statement of P.W.1, Ext.7 is the specimen signature of P.W.2, Ext.8 is the withdrawal slip dt. 03.07.1993, Ext.9 is the statement in two sheets of P.W.2, Ext.10 is the specimen signature in a sheet of P.W.2, Ext.11 is the application of P.W.3 for opening the account, Ext.12 is the specimen signature slip of P.W.3, Ext.13 is the R.D. pass book of P.W.3, Ext.14 is the authorization of cashier to P.W.3, P.W.15 is the withdrawal slip dated 26.06.1993, P.W.16 is the written report given to A.S.P. by P.W.3, P.W.17 is the specimen signature of P.W.3, P.W.18 is the signature of P.W.3 on back of S/R., Ext.19 is the application form for opening the account by P.W.4, Ext.20 is the specimen signature slip of P.W.4, Ext.21 is the statement given by P.W.4 to A.S.P., Ext.22 is the specimen signature of P.W.4, Ext.23 is the seizure list dated 16.08.1994, Ext.24 is the A.C.G. receipt book, Ext.25 is the seizure list dt.02.08.1994, Ext.26 is the seizure list dated 10.08.1994, Ext.27 is the seizure list dated 22.08.1994, Ext.28 is the seizure list dated 25.10.1994, Ext.29 to Ext.29/4 are the specimen signatures of the petitioner Hrudananda Sethi in five sheets, Ext.30 is the withdrawal form, Ext.31 is the ledger card of P.W.4, Ext.32 is the ledger card of P.W.3, Ext.33 is the ledger card of P.W.2, Ext.34 is the ledger card of P.W.1, Exts.35 to 40 are the daily lists of transactions dated 14.06.1993, 23.12.1993, 26.06.1993, 03.07.1993, 03.07.1993, 06.01.1993 and 20.10.1993, Ext.41 is the pay in-slip form of Rs.2762.50 p., Exts.42 to 47 are the sub-office daily account, Ext.48 is the statement of L.D. Kar, Ext.49 is the statement of S. Mohanty, Ext.50 is the statement of K.C. Mohanty, Ext.51 is the statement of the petitioner Hrudananda Sethi, Ext.52 is the statement of the petitioner Achyutananda Panda, Ext.53 is the enquiry report, Ext.54 is the letter sent to S.E.Q.D., Ext.55 is the report of G.E.Q.D., Ext.56 is the F.I.R. and Ext.57 is the seizure list dt.10.08.1994.

Defence Plea and Defence Witness:

4. The defence plea of the petitioners is one of denial and they pleaded that it is out and out a false case foisted against them.

D.W.1 Narayan Sethi who was the Sub-Postmaster from Jajpur Road Railway Station post office during the relevant time has been examined on behalf of the defence who stated about the works assigned to the petitioners in their respective capacity and further stated that P.Ws.1 to 4 never complained before him against the petitioners.

Finding of Trial Court and Appellate Court:

5. The learned trial Court in the impugned judgment has been pleased to hold that both the petitioners made an agreement to commit criminal conspiracy and in pursuance of such conspiracy, they forged the signatures of P.Ws.1 to 4 in the withdrawal slips, manufactured forged documents and on the basis of the forged documents, they withdrew the money to the tune of Rs.22,000/- from the accounts of P.Ws.1 to 4 and cheated the postal department to the tune of the said amount intentionally and for the purpose of cheating, they dishonestly and fraudulently utilized forged withdrawal slips as genuine documents. The learned trial Court further held that the evidence of the prosecution witnesses stand unassailable and unimpeachable and thus the prosecution has proved all the charges against both the petitioners beyond the shadow of reasonable doubt and accordingly, held both the petitioners guilty of the offences charged and convicted them as aforesaid.

The learned Appellate Court scanned the oral evidence as well as documentary evidence and has been pleased to uphold the impugned judgment and order of conviction passed by the learned trial Court and dismissed the appeal.

6. Mrs. Madhumita Panda, learned counsel appearing for the petitioner Hrudananda Sethi in CRLREV No. 21 of 2003 emphatically contended that as per the charge sheet, the petitioner Hrudananda Sethi was entrusted with the work of deposit/withdrawal in respect of S.B., R.D., CTD etc. and as per the evidence of P.W.8, the duty to verify and scrutinize the genuineness of the signatures of the depositors was not assigned to the petitioner Hrudananda Sethi, rather it was the duty of the Head Clerk. Learned counsel further argued that the prosecution has failed to establish that final withdrawal was not permissible through a bearer and no document to that effect has been filed by the prosecution. She further submitted that the withdrawal slip in case of R.D. deposit is used to be sent to the Head Post Office for clearance and after necessary verification, the Head Office gives permission for withdrawal. She further submitted that the petitioner Achyutananda Panda was the signature verifying officer and thus, fixing liability on the petitioner Hrudananda Sethi is erroneous. Learned counsel further submitted that from the evidence of the depositors i.e. P.Ws.1 to 4, it reveals that no one has stated about giving any signature in any blank paper and utilization of the same for cheating and none of the

Depositors have also stated that the petitioner Hrudananda Sethi made fake signatures of the depositors to withdraw the money and used it for his own purposes. She further argued that as per the evidence of the Investigating Officer, it could not be established who had forged the signatures of the depositors and thus, if there is no evidence that either the petitioner had forged the signatures of the depositors or at his instance, somebody else had forged the signatures of the depositors. The basic accusation against the petitioner Hrudananda Sethi is that he had asked one K.C. Mohanty (who was originally the accused and not charge sheeted) to expedite the process of withdrawal of money and when the petitioner Achyutananda Panda was there, who was authorized to verify the signature and another superior officer was there to verify and to correct the same, therefore, the ingredients of the offences under sections 468 and 471 of the Indian Penal Code are not attracted against the petitioner. Learned counsel further submitted that the account holders have received their entire money and the prosecution has failed miserably in proving that the petitioner Hrudananda Sethi had misappropriated the amount and utilized the same for his own benefit. With regard to the charge under section 120-B of the Indian Penal Code, learned counsel argued that the essence of criminal conspiracy is the unlawful combination and in the present case, the prosecution has not proved any unlawful combination of the petitioner with anyone and that the appellant was entrusted with the work of withdrawal and deposit in respect of Savings Bank, recurring deposit etc. Learned counsel further submitted that though the act of the petitioner Hrudananda Sethi was breach of codal provisions, instructions and procedural safeguard as prescribed under the service code, the same cannot be given a colour of criminal offence and the learned trial Court appears to have drawn inference by placing burden of proving innocence on the petitioner Hrudananda Sethi, which is not permissible under law. With regard to the charge under section 420 of the Indian Penal Code, Mrs. Panda submitted that the petitioner Hrudananda Sethi has not cheated any person or fraudulently used the documents in his favour and he did not deceive the post office nor received the amount dishonestly. In support of such submissions, learned counsel placed reliance on the decision of this Court in the case of **Sudarsan Sahani -Vrs.- State of Odisha (Vig.) reported in (2022) SCC Online Ori. 861**.

Mr. A.K. Sarangi, learned counsel appearing for the petitioner Achyutananda Panda in CRLREV No. 17 of 2003 adopted the arguments advanced by Mrs. Madhumita Panda, Advocate and submitted that out of the nine witnesses examined on behalf of the prosecution, none has whispered a single word against the petitioner Achyutananda Panda about criminal conspiracy and that the finding of the learned trial Court is not justified regarding the agreement made by both the petitioners to commit criminal conspiracy. He further submitted that P.W.1 to P.W.4 are the depositors whose money was alleged to have been misappropriated and they have not uttered a single word against the petitioner in their evidence and there is no evidence on record to show that the petitioner received the money and kept the same.

He further submitted that the prosecution has failed to prove that the petitioner Achyutananda Panda had any role in forging the withdrawal slips (Exts.5, 8, 15 & 30). He further submitted that P.W.7, the U.D. Clerk of the post office has not stated anything as to who forged the withdrawal slips. Learned counsel further submitted that the finding of the learned trial Court that both the petitioners joined hands in forging the withdrawal forms is also based on no evidence on record. Relying on the evidence of D.W.1, learned counsel further submitted that the duty of P.W.8 was to inspect the post office and during his inspection, he could not detect the alleged fraudulent actions. P.W.3 who is one of the depositors admitted in his evidence that the withdrawal slip Ext.15 is not a forged one, which has been accepted by the learned appellate Court and therefore, the prosecution story with regard to Ext.15 is false. He further submitted that the signatures of the depositors and the signature of the petitioner Achyutananda Panda have not been compared and therefore, the possibility that the signatures appearing on Exts.5, 8 and 30 purporting to be that of P.W.1, P.W.2 and P.W.4 respectively cannot be ruled out. The disputed signatures have not been examined by the handwriting expert and thus, the petitioner Achyutananda Panda had no criminal liability as he passed the withdrawal slips by putting his initials on it in due course of his official duty when those were put up before him by the petitioner Hrudananda Sethi, the Postal Assistant and thus, it cannot be said that the petitioner Achyutananda Panda took part in making false documents within the meaning of sections 463 and 464 of the Indian Penal Code. Learned counsel further submitted that the learned trial Court fell in error in comparing the signatures of P.Ws.1 to 4 with that of the petitioner Achyutananda Panda as the same has not been done in accordance with the provisions made in section 73 of the Evidence Act. He further submitted that except the initial of the petitioner Achyutananda Panda on Exts.5, 8, 15 and 30, no other part of the said exhibits has been proved against the petitioner Achyutananda Panda. Learned counsel further submitted that since the prosecution has failed to bring home the charge under section 468 of the Indian Penal Code, the order of conviction and the sentence passed thereunder is liable to be set aside. Learned counsel further submitted that in order to bring home the charge under section 471 of the Indian Penal Code against the petitioner Achyutananda Panda, the prosecution was required to prove that the petitioner Achyutananda Panda fraudulently or dishonestly used the withdrawal slips as genuine knowing or having reason to believe that those were forged documents. Learned counsel further submitted that the learned trial Court as well as the appellate Court have not analyzed the evidence properly with reference to each and every ingredients of the offence and have not considered the legal aspects. The findings of the learned trial Court as well as appellate Court suffers from perversity and tantamount to gross miscarriage of justice and thus, the impugned judgments of the learned trial Court as well as the appellate Court are liable to be set aside.

Mr. Sarthak Nayak, learned Special Public Prosecutor appearing for the C.B.I. submitted that the scope of interference by this Court in exercise of revisional

jurisdiction in view of concurrent finding of fact is limited and reappreciation of evidence is not permissible and in absence of any error of law, error of record committed by the courts below, it cannot be said that there is any perversity in the impugned judgments and therefore, the revision petitions should be dismissed. He placed reliance in the case of **Malkeet Singh Gill -Vrs.- State of Chhattisgarh reported in (2022) 8 Supreme Court Cases 204** and **Murari Lal -Vrs.- State of Madhya Pradesh reported in (1980) 1 Supreme Court Cases 704**.

Scope of interference in revisional jurisdiction:

7. In the case of **Malkeet Singh Gill** (supra), the Hon'ble Supreme Court held where there are concurrent findings of conviction arrived at by two Courts **after detailed appreciation of the material and evidence brought on record**, the High Court in criminal revision against conviction is not supposed to exercise the jurisdiction alike to the appellate Court and the scope of interference in revision is extremely narrow. Section 397 of Cr.P.C. vests jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court. The object of the provision is to set right a patent defect or an error of jurisdiction or law. There has to be well-founded error which is to be determined on the merits of individual case. It is also well settled that while considering the same, the Revisional Court does not dwell at length upon the facts and evidence of the case to reverse those findings.

In the case of **State of Kerala -Vrs.- Putthumana Illath Jathavedan Namboodiri reported in (1999) 2 Supreme Court Cases 452**, it has been held by the Hon'ble Supreme Court that the revisional jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting the miscarriage of justice and the revisional power cannot be equated with the power of an Appellate Court nor it can be treated even as a second Appellate Jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice.

In the case of **Sanjaysinh Ramrao Chavan -Vrs.- Dattatray Gulabrao Phalke and Ors. reported in (2015) 3 Supreme Court Cases 123**, the Hon'ble Supreme Court held as follows:

> "14.....Unless the order passed by the Magistrate is perverse or the view taken by the court is wholly unreasonable or there is non-consideration of any relevant material or there is palpable misreading of records, the Revisional Court is not justified in setting aside the order, merely because another view is possible. The Revisional Court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence. The revisional power of the court under sections 397 to 401

> Code of Criminal Procedure is not to be equated with that of an appeal. Unless the finding of the court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional jurisdiction."

Whether the findings recorded by the Courts below are correct, legal and proper:

8. The prosecution case is that in between 14.06.1993 to 20.10.1993, there was an illegal act of withdrawal of Rs.8,500/- from the account of P.W.1 whose S.B. Account number is 132441. P.W.1 in his evidence has stated that on 08.06.1993, he approached the petitioner Hrudananda Sethi for withdrawal of some amount and he was informed by the said petitioner that his account had been made dormant and the same has to be made up-to-date only after deposit of passbook with the petitioner which would be sent to the Jajpur Head Post Office and accordingly, P.W.1 handed over his passbook to the petitioner who in token of receipt of the passbook granted one receipt vide Ext.1, wherein the balance the account of P.W.1 was mentioned to be Rs.9,928.87 paise. P.W.1 thereafter approached the petitioner on number of occasions to get back his passbook but since he failed to get the same from the petitioner, he approached Jajpur Head Post Office and reported the matter to the higher officials. P.W.1 specifically stated that he had never withdrawn Rs.8,500/- on 20.10.1993 from his S.B. account through messenger Pramod Kumar Sethi and he denied the signature marked as 'X' in the withdrawal slip (Ext.5) to be that of him. It further appears from the evidence of P.W.1 that an enquiry was conducted by postal authority during course of which his specimen signatures were taken in one sheet. It was suggested to P.W.1 by the defence that by submitting withdrawal slip through his messenger Pramod Kumar Sethi, he had received Rs. 8,500/- from his S.B. account and therefore it was not a fake withdrawal, to which P.W.1 has denied.

P.W.8 Satyabrata Satpathy, the Assistant Superintendent of Post Offices on being directed by Superintendent of Post Office, Cuttack conducted an enquiry and according to him, it revealed that from the withdrawal slip (Ext.5) that P.W.1 had applied for withdrawal citing one Pramod Kumar Sethi as the messenger who had also put his signature in the withdrawal form which was passed by both the petitioners and their signatures are appearing in Ext.5, however the amount of Rs.8,500/- had not been taken payment of by P.W.1 and that P.W.1 also denied to have applied for withdrawal and also denied to have put his signature in Ext.5. P.W.8 in his cross-examination specifically stated that he was not acquainted with the handwriting and signatures of P.W.1 and that he could not ascertain who had signed the withdrawal form in the name of P.W.1 and he could not ascertain whether those handwriting and signatures in the withdrawal form belonged to the petitioners or not. P.W.8 has specifically stated that in some cases, withdrawal is allowed in respect of S.B. accounts and R.D. accounts through messengers and the procedure is

that the depositors should attest the signature of the messenger in the application side of the application for withdrawal and the Postal Assistant who deals with the withdrawal should verify the specimen signature of the depositor in the application for withdrawal and if he is satisfied with the genuineness of the messenger, he may allow withdrawal to the messenger and when an unknown person comes to the post office being deputed as messenger by the depositor, the genuineness of the messenger should be verified by the Postal Assistant before allowing withdrawal.

If it is the prosecution case that in the withdrawal slip (Ext.5), the signature of P.W.1 was a fake signature and that he had not authorized any messenger namely Pramod Kumar Sethi for withdrawal of Rs.8,500/- from his S.B. account no.132441, when his specimen signatures were obtained by the postal authority, it should have been sent to the handwriting expert for its comparison and to opine whether the signature appearing on Ext.5 was that of the P.W.1 or not. Similarly, the petitioners should have been asked to write the name of the petitioner and such samples should have also been sent to the handwriting expert to verify whether both the petitioners made the fake signatures on Ext.5 or not. P.W.9, the I.O. has stated in the cross-examination that during investigation, it could not be established who had forged the signatures of the depositors. When the assistance of the handwriting expert has not been taken and it could not be established as to who had forged the signature of P.W.1 and P.W.8 himself was not acquainted with the handwriting and signature of P.W.1 and there is no evidence that the petitioners had forged the signatures of the depositors or at their instance, somebody else had forged the signatures of the depositors, merely basing on the statement of P.W.1 that Ext.5 did not contain his signature, the same should not have been accepted by both the Courts below as gospel truth.

Law is well settled that the science of identification of handwriting by comparison is not an infallible one and prudence demands that before acting on such opinion, the Court should be fully satisfied about the authorship of the admitted writings which is the sole basis for comparison and the Court should also be fully satisfied about the competence and credibility of the handwriting expert. As a rule of prudence, the Court should look for corroboration before acting on such evidence. The Court should not take upon himself the hazardous task of adjudicating upon the genuineness and authenticity of the signatures even without the assistance of a skilled and trained person. It is not advisable that a Judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two tallied with each other and the prudent course is to obtain the opinion and assistance of an expert. The opinion or a handwriting expert is fallible/liable to error like that of any other witness. There is no legal bar to prevent the Court from comparing signatures or handwriting, by using its own eyes to compare the disputed writing with the admitted writing and then from applying its own observation to prove the said hand writings to be the same or different, as the case may be, but in doing so, the Court cannot itself become an expert in this regard and

must refrain from playing the role of an expert. For the simple reason, the opinion of the Court may not be conclusive. The Court as matter of prudence and caution should hesitate and slow on its finding solely on the comparison made by itself. However if there is an opinion whether of the expert or any witness, the Court may apply its own observation by comparing the signatures or handwritings for giving a decisive weight or influence [**Ref: State of Maharashtra -Vrs.- Sukhdev Singh : 1992 Criminal Law Journal 3454, O. Bharatan -Vrs.-K. Sudhakaran : A.I.R. 1996 S.C. 1140, The State (Delhi Administration) -Vrs.- Pali Ram : A.I.R. 1979 S.C. 14**]. In case of **Murari Lal** (supra), the Hon'ble Supreme Court held that section 73 of the Evidence Act expressly enables the Court to compare disputed writings with admitted or proved writings to ascertain whether a witting is that of the person by whom it purports to have been written. There may be cases where neither side calls an expert, being unable to afford him. In all such cases, it becomes the plain duty of the Court to compare the writings and come to its conclusion. The duty cannot be avoided by recourse to the statement that the Court is no expert. Where there are expert opinions, they will aid the Court. Where there is none, the Court will have to seek guidance from some authoritative textbook and the courts own experience and knowledge.

Therefore, when clinching evidence is not available on record that the signature appearing on the withdrawal slip (Ext.5) was not that of P.W.1 and it was a fake signature and the assistance of handwriting experts has not been taken, the learned trial Court should not have compared the disputed signature of P.W.1 appearing on such withdrawal slip with the admitted signature of P.W.1 to come to the conclusion that Ext.5 contains the fake signature of P.W.1. Needless to say, that the Court has not sought for any guidance from any authoritative textbook nor anything is available on record regarding Court's own experience and knowledge and ability for making such comparison and therefore, I am of the view that the finding of the learned trial Court on this score which has been confirmed by the learned appellate Court is perverse and illegal and this Court while exercising revisional jurisdiction can certainly look into the same as it has resulted in miscarriage of justice and therefore, this Court is of the view that the prosecution case regarding illegal withdrawal of Rs.8,500/- (rupees eight thousand five hundred) from the account of P.W.1 is unsatisfactory and cannot be accepted.

P.W.2 Janaki Ballav Pradhan has stated that he had got R.D. account in Jajpur Road Railway Station Post Office bearing no.11663. He proved his specimen signature which was taken at the time of opening of the account marked as Ext.7/1. He stated that on 03.07.1993, he never withdrew Rs.6,000/- from his R.D. account and he has stated that the signatures marked as 'Y' and 'Y/1' appearing on the withdrawal slip dated 03.07.1993 (Ext. B) were not his signatures. He further stated that the postal authority took his specimen signature in a sheet which was marked as Ext.10. In the cross-examination, he has stated that his pass book in respect of the R.D. account always remained with Murali Babu, the Office Cashier and that he had

received the matured amount after eight moths of the matured date and he did not complain against the petitioners before any authority. PW.7 Muralidhar Satpathy who was working as U.D.C. in Jajpur Road Electrical Division stated that P.W.2 was working with him in his office and had R.D. account in Jajpur Road Post Office. He further stated that as per the practice adopted for R.D. account, the amount was being deducted from the salary and was accounted to the concerned post office along with the amount and passbook account number and after receiving the amount, the post office used to grant stamp receipts. He stated that he had no discussion with the petitioner Hrudananda Sethy about the misappropriation and he had no knowledge about the misappropriation. He further stated that after deposit on the passbook in the post office, after up-to-date entries, the passbooks are returned and it sometimes takes about a month or so when there is shortage of hands. The prosecution has not chosen to put any question to P.W.7 as to if the R.D. account passbook of P.W.2 was remaining with him, how a withdrawal of Rs.6,000/-(rupees six thousand) was made from such account. The withdrawal slip and the signatures appearing thereon have also not been confronted to P.W.7. Therefore, there is no clinching evidence that there was illegal withdrawal of Rs.6,000/- (rupees six thousand) from the account of P.W.2 and that the petitioners are responsible for the same.

Coming to the evidence of P.W.3 Ramakanta Sahu, it appears that that he was having a R.D. account in Jajpur Road Post Office where he was depositing Rs.100/- per month in that account and that the cashier of the electricity department of Jajpur Road where he was working as a helper used to deduct Rs.100/- per month from his salary and used to deposit the same on his behalf in the R.D. account which was bearing no.11569. He proved his signatures in the specimen signatures slip which was taken at the time of opening of account and he has also proved the R.D. passbook vide Ext.13. He specifically stated that on 26.06.1993 he withdrew a sum of Rs.2,500/- from the said account. He has also proved his signatures in the withdrawal form which has been marked as Exts.15/1 and Ext.15/2 respectively. This witness has been declared hostile by the prosecution and cross-examined under section 154 of the Evidence Act. In the cross-examination by the defence, he has stated that he never visited the post office and deposited the amount, however, at the time of withdrawal, he used to go in person to the post office and that he had not lost any amount in the said account. P.W.7, who was working as U.D.C. in Jajpur Road Electrical Division, stated about filling up of the withdrawal slip on behalf of P.W.3 as the latter approached him for such purpose. In view of such categorical statement made by P.W.3, the prosecution case that there has been illegal withdrawal of Rs.2,500/- from the R.D. account of P.W.3 on 26.06.1993 is not acceptable.

Coming to the evidence of P.W.4 Gangadhar Nayak, he has stated that he was working as lineman at Jajpur and his cashier used to deduct Rs.200/- per month from his salary and deposit the same in Jajpur Road Post Office where R.D. account has been opened in his name. He has proved his signatures in the specimen signature

slips, however he has stated that he had never withdrawn Rs.5,000/- from the said account on 14.06.1993 and that he had not submitted the withdrawal slip marked as 'X1' and he also disputed his signatures as 'X2' and 'X3' and further stated that he had lost Rs.5,000/- from his account. In the cross-examination, he has stated that the deposits in his account were used to be made through his office only and further stated that after the maturity of the deposit, he went to the post office to withdraw the amount and at that time, he saw the petitioners for the first time. He further stated that initially he had lost Rs. 5,000/- but thereafter he had withdrawn the amount from his account which he was entitled to. P.W.7 has stated that P.W.4 was working with him in his office. The passbook of P.W.4 was remaining with P.W.7 like the passbook of P.W.2, however no question has been put to P.W.7 by the prosecution as to how a withdrawal of Rs.5,000/- was made from the account of P.W.4 and even the withdrawal slip and the signatures appearing thereon marked 'X1', 'X2' and 'X3' were not confronted to P.W.7 and therefore, there is no clinching evidence that there was any illegal withdrawal of Rs.5,000/- on 14.06.1993 from the account of P.W.4 bearing no.11508 and that the petitioners are responsible for the same.

Section 420 of the I.P.C. deals with cheating and dishonestly inducing delivery of property. In the case of **Archana Rana -Vrs.- State of U.P. reported in (2021) 3 Supreme Court Cases 751**, the Hon'ble Supreme Court has summarized the principles governing prosecution under section 420 of the I.P.C. and held that cheating is an essential ingredient for an act to constitute an offence under section 420 of I.P.C. Cheating is defined under section 415 of I.P.C. The ingredients to constitute an offence of cheating are that there should be fraudulent or dishonest inducement of a person by deceiving him. The person who was induced should be intentionally induced to deliver any property to any person or to consent that any person shall retain any property, or the person who was induced should be intentionally induced to do or to omit to do anything which he would not do or omit if he were not so deceived. Thus, a fraudulent or dishonest inducement is an essential ingredient of the offence under section 415 of I.P.C. A person who dishonestly induced any person to deliver any property is liable for the offence of cheating.

Section 468 of the I.P.C. deals with forgery for the purpose of cheating. The prosecution must prove that the document is a forged document and the accused forged the document and that he did so intending that the forged document would be used for the purpose of the cheating. If it is proved that the purpose of the accused in committing forgery, is to obtain property dishonestly, or if his guilty purpose comes within the definition of cheating, he would be punishable under section 468 of the I.P.C.

So far as section 471 of the I.P.C. is concerned, it deals with fraudulently or dishonestly using any document as genuine, knowing or having reason to believe it to be a forged document. The prosecution must prove on the basis of material

available on record that the accused had knowledge and had reason to believe that the document in question was a forged one and in spite of such knowledge or belief, he used the document as a genuine one. Knowledge is an awareness on the part of the person concerned indicating his state of mind. Reason to believe is another facet of the state of mind. The two requirements i.e. knowledge and reason to believe have to be deduced from various circumstances in the case and even if such circumstances need not necessarily be capable of absolute conviction of inference, it is sufficient, if the circumstances are such creating a cause to believe by chain of probable reasoning leading to the conclusion or inference about the nature of thing.

Section 120-B of the I.P.C. deal with criminal conspiracy and the prosecution must prove that the accused agreed to do or caused to be done an act which was an illegal one or was to be done by illegal means and that some overt act was done by one of the accused in pursuance of the agreement. Mere evidence of association is not sufficient to lead an inference of conspiracy. Mere meeting by itself would not be sufficient to infer the existence of criminal conspiracy. In cases of conspiracy, the agreement between the conspirators cannot generally be directly proved, but only inferred from the established facts in the case as conspiracy is a clandestine activity. Mere circumstantial evidence to prove the involvement of the accused persons would not be sufficient to meet the requirements of the criminal conspiracy and meeting of minds to form a criminal conspiracy has to be proved by placing substantive evidence. In the case of **Sudarsan Sahani** (supra), it is held that the meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is the sine qua non of criminal conspiracy. The offence can be proved largely from the inferences drawn from the acts or illegal omission committed by the conspirators in pursuance of a common design in as much as the conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the common intention of the conspirators. The entire agreement is to be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve. The essence of criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed.

In the case in hand, P.W.9 has stated that during course of investigation, it could not be established who had forged the signature of the depositor. The nature of evidence adduced by the prosecution during trial also not established that the petitioners have committed forgery and that to for the purpose of cheating and that they used the forged documents as genuine and there was any kind of criminal conspiracy between them. Mere deposit of the amount in question by the petitioner Hrudananda Sethi cannot be an admission of guilt.

9. In view of the foregoing discussions, I am of the humble view that the learned trial Court was not justified in convicting the petitioners under section 420/468/471 read with section 120-B of the I.P.C. and it was also not proper on the part of the learned Appellate Court just to quote the evidence of few witnesses and

abruptly coming to the conclusion that it agreed with the conviction judgment passed by the learned trial Court. It is well settled that in a criminal appeal, a duty is enjoined upon the appellate Court to reappraise the evidence itself and it cannot proceed to dispose of the appeal upon appraisal of the evidence by the learned trial Court alone especially when the appeal has already been admitted and placed for final hearing. The duty of an appellate Court is to look into evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution can be said to have been proved its case beyond reasonable doubt on the said evidence. The presumption of innocence with which the accused starts, continue right through until he is held guilty by the final Court of appeal and that presumption is not weakened by a conviction in the trial Court. In the case in hand, the quality of exercise which was expected of the appellate Court to be undertaken has not been done and that was the reason for which this Court in its revisional jurisdiction, in the interest of justice was constrained to have a relook at the evidence and assess the evidence as an exceptional case to set right the patent defect. In the result, the conviction of the petitioners under sections 420/468/471 read with section 120-B of the I.P.C. is hereby set aside and the petitioners are acquitted of all the charges.

Accordingly, both the revision petitions are allowed. The petitioners are on bail by virtue of the orders of this Court. Their bail bonds and surety bonds stand cancelled.

Before parting with the case, I would like to put on record my appreciation to Mrs. Madhumita Panda, learned counsel for the petitioner in CRLREV No.21 of 2003 and Mr. Ashok Kumar Sarangi, learned counsel for the petitioner in CRLREV No.17 of 2003 for rendering their assistance in arriving at the above decision. I also appreciate Mr. Sarthak Nayak, learned Special Public Prosecutor appearing for the C.B.I. for ably and meticulously presenting the case. A copy of the judgment along with the case records be sent to the concerned Court.

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2024 (I) ILR-CUT-111

K.R. MOHAPATRA, J.

W.P.(C) NO. 17932 OF 2011

KULAMANI DASH ……Petitioner

-V-

SAKUNTALA LENKA (DEAD) & ORS. ……Opp.Parties

CODE OF CIVIL PROCEDURE, 1908 – Order 1, Rule 10 r/w Order XXII-Rule 4 – The Defendant No.3 during his lifetime was set ex-parte – The plaintiff/petitioner had filed an application U/o. XXII Rule 4(4) CPC to dispense with his substitution – But said application was rejected and

due to non-substitution the suit abated against deceased/defendant No.3 in the year 1998 – In the year 2011 the petitioner filed an application U/o. 1 Rule 10 CPC to implead the legal heirs – Whether application U/o. 1 Rule 10 maintainable in the instance of plaintiff/petitioner? – Held, No – The only remedy available to file an application U/o. XXII Rule 4 along with application U/o. XXII Rule 9 as well petition U/s. 5 and 14 of Limitation Act. (Para 12)

Case Law Relied on and Referred to :-

1. AIR 1983 SC 355 : Bhagwan Swaroop & Ors. V. Mool Chand & Ors.

For Petitioner : Mr. Bibekananda Bhuyan.

For Opp.Parties : None

JUDGMENT Heard and disposed of on 15.12.2023

K.R. MOHAPATRA,J.

1. This matter is taken up through hybrid mode.

2. Order dated 17th May, 2011 (Annexure-6) passed by learned 2nd Additional Civil Judge (Senior Division), Cuttack in T.S. No.18 of 1993 is under challenge in this writ petition, whereby an application filed by the Plaintiff-Petitioner under Order 1 Rule 10 CPC to bring on record the legal heirs of deceased Defendant No.3, has been rejected.

3. It is submitted by Mr. Bhuyan, learned counsel for the Plaintiff-Petitioner that petition dated 19th April, 2011 was filed to implead legal heirs of deceased Defendant Nos.3 and 5 as Defendants. By order under Annexure-6 the said application was allowed in part permitting the Petitioner to bring on record the legal heirs of deceased Defendant No.5 only. However, prayer to implead the legal heirs of deceased Defendant No.3 was rejected. Hence, this writ petition has been filed.

4. It is his submission that since Defendant No.3 during his life time was set ex parte, the Plaintiff-Petitioner had filed an application under Order XXII Rule 4 (4) CPC to dispense with his substitution. But, the said application was rejected and due to non-substitution the suit abated against deceased Defendant No.3 on 12th November, 1998. The Plaintiff-Petitioner, however, filed an application under Order I Rule 10 CPC to implead the legal heirs of deceased Defendant Nos.3 and 5 to the suit, which is filed for partition. Since the branch of Defendant Nos.3 and 5 are required to be represented, they should have been impleaded as parties to the suit. Learned trial Court resorting to hyper technicality, rejected the application so far as impletion of legal heirs of deceased Defendant No.3 is concerned. However, the application to implead the legal heirs of deceased Defendant No.5 was allowed.

5. Mr. Bhuyan, learned counsel for the Plaintiff-Petitioner relied upon the case of ***Bhagwan Swaroop and others –v- Mool Chand and others***, reported in AIR 1983 SC 355, in which the Hon'ble apex Court held as under;

"12. It is no doubt true that a code of procedure "is designed to facilitate justice and further its ends and it is not a penal enactment for punishment and penalty and not a thing designed to trip people up". Procedural laws are no doubt devised and enacted for the purposes of advancing justice. Procedural laws, however, are also laws and are enacted to be obeyed and implemented. The laws of procedure by themselves do not create any impediment or obstruction in the matter of doing justice to the parties. On the other hand, the main purpose and object of enacting procedural laws is to see that justice is done to the parties. In the absence of procedural laws regulating procedure as to dealing with any dispute between the parties, the cause of justice suffers and justice will be in a state of confusion and quandary. Difficulties arise when parties are at default in complying with the laws of procedure. As procedure is aptly described to be the hand-maid of justice, the court may in appropriate cases ignore or excuse a mere irregularity in the observance of the procedural law in the larger interest of justice. It is, however, always to be borne in mind that procedural laws are as valid as any other law and are enacted to be observed and have not been enacted merely to be brushed aside by the Court. Justice means justice to the parties in any particular case and justice according to law. If procedural laws are properly observed, as they should be observed, no problem arises for the court for considering whether any lapse in the observance of the procedural law needs to be excused or overlooked. As I have already observed depending on the facts and circumstances of a particular case in the larger interests of administration of justice the Court may and the Court in fact does, excuse or overlook a mere irregularity or a trivial breach in the observance of any procedural law for doing real and substantial justice to the parties and the Court passes proper orders which will serve the interests of justice best.

13. Excuse of lapses in compliance with the laws of procedure, as a matter of course, with the avowed object of doing substantial justice to the parties may in many cases lead to miscarriage of justice.

14. Civil Procedure Code requires that in the event of death of a particular party, heirs and legal representatives of the deceased have to be brought on record within a particular period, provided the cause of action survives. If the legal representatives are not brought on record within the stipulated period, certain consequences follow and the action abates either wholly or partially depending on the facts and circumstances of a particular case. The Code further provides that an application may be made for setting aside the abatement within a stipulated period. It is now well settled that an abatement can be set aside at any time even beyond the period prescribed for making an application for setting aside the abatement, if sufficient cause is shown explaining the delay in the making of the application. If, irrespective of the provisions of the Code and the merits of the case, abatements are to be set aside as a matter of course merely on the ground that abatement is only a consequence of non-compliance of law of procedure and substantial justice is denied to the parties, the result may really amount to a denial of justice and in an indefinite prolongation of a litigation.

15. The provision fixing a particular time for making an application for bringing legal representatives on record with the consequence of the suit or appeal abating if no application is made within time, have been enacted for expeditious disposal of cases in the interest of proper administration of justice. It is further to be borne in mind that when a suit or an appeal abates, a very valuable right accrues to the other party and such a right is not to be ignored or interfered with lightly in the name of doing substantial justice to the party, as depriving a party of a lawful right created in the

interest of administration of justice in the absence of good grounds results in injustice to the party concerned. For doing justice to the parties, the courts have consistently held that whenever sufficient cause is shown by a party at default in making an application for substitution, abatement will have to be set aside as the good cause shown for explaining the delay in making the application is sufficient justification to deprive the other party of the right that may accrue to the other party as a result of the abatement of the suit or appeal. The courts have also consistently ruled that latches or negligence furnish no proper grounds for setting aside the abatement. In such cases, a party guilty of negligence or latches must bear the consequences of his latches and negligence and must suffer. In appropriate cases, taking into consideration all the facts and circumstances of a case, the court may set aside the abatement, even if there be slight negligence or minor latches in not making an application within the time provided an overall picture of the entire case, requires such course for furthering the cause of justice. When negligence and latches are established on the part of the party who seeks to set aside the abatement, the application of such a party should be entertained only in the rarest of cases for furthering the ends of justice only and on proper terms."

6. In view of the ratio decided in Bhagwan Swaroop and others (supra), Mr. Bhuyan, learned counsel for the Plaintiff-Petitioner submits that though the Hon'ble Supreme Court disapproved filing of an application under Order 1 Rule 10 CPC, but for the interest of justice, the same was allowed. Learned trial Court in the instant case should have taken a pragmatic view and allowed the application under Order 1 Rule 10 CPC for impletion of legal heirs of deceased Defendant No.3 instead of rejecting the petition resorting to hyper technicality. He, therefore, prays for setting aside the impugned order under Annexure-6 so far as it relates to refusal of application for impletion of legal heirs of deceased Defendant No.3 is concerned.

7. In spite of service of notice on the Opposite Parties, none has entered appearance.

8. Heard Mr. Bhuyan, learned counsel for the Petitioner and perused the case record as well as the case law cited.

9. There can be no iota of doubt that on death of a Defendant out of several Defendants, the Plaintiff has to file an application for substitution under Order XXII Rule 4 CPC to bring its legal heirs on record. If the application is not filed within a period of 90 days of the death of the Defendant, the petition for substitution should accompany an application under Order XXII Rule 9 CPC for setting aside abatement. If the petition for substitution and setting aside abatement are not filed within 150 days of the death of the Defendant, both the petitions should accompany with a petition for condonation of delay in filing the petition for substitution.

10. In the instant case, admittedly, the petition under Order 1 Rule 10 CPC was filed beyond 150 days of the death of Defendant No.3, as would be apparent from the case record i.e. the suit abated against the deceased Defendant No.3 on 12th November, 1998 and the petition under Order 1 Rule 10 CPC was filed on 19th April, 2011. It further appears that the deceased Defendant No. 3 was set ex parte

when he was alive. As such, the Plaintiff had filed an application under Order XXII Rule 4(4) CPC to dispense with the substitution of Defendant No.3 as he was set ex parte. The said application was rejected. The Plaintiff-Petitioner unsuccessfully challenged the same in the higher forum. Thus, the only remedy available for the Plaintiff-Petitioner was to file an application under Order XXII Rule 4 CPC along with an application under Order XXII Rule 9 CPC and for condonation of delay in filing a petition for substitution of the legal heirs of deceased Defendant No.3. In order to get rid of the effect of law for non-substitution, an application under Order 1 Rule 10 CPC was filed.

11. In the case of Bhagwan Swaroop and others (supra), the Hon'ble apex Court was entertaining a case where the legal heirs of deceased had filed an application under Order 1 Rule 10 CPC. However, Hon'ble Supreme Court has made the law clear stating that an application under Order 1 Rule 10 CPC at the instance of the Plaintiff-Petitioner is misconceived. A party cannot be rewarded for his latches or default. But, for the latches of the Plaintiff, the legal heirs of Defendant should not suffer and they should not go remediless on the plea that the suit has already abated against their predecessors.

12. In the instant case, no application was filed by the legal heirs of deceased Defendant No.3 to be impleaded as parties. It is at the instance of the Plaintiff such an application was filed, which is misconceived. In that view of the matter, the only remedy for the Plaintiff-Petitioner is to file an application under Order XXII Rule 4 CPC along with an application under Order XXII Rule 9 CPC as well as a petition under Sections 5 and 14 of the Limitation Act for condonation of delay. The case law cited by Mr. Bhuyan, learned counsel for the Plaintiff-Petitioner is of no assistance to his case. As such, I find no infirmity in the impugned order under Annexure-6.

13. While confirming the impugned order under Annexure-6, this Court disposes of the writ petition with an observation that the Petitioner, if so advised, may file an application under Order XXII Rule 4 CPC along with an application under Order XXII Rule 9 CPC and a petition under Sections 5 and 14 of the Limitation Act to bring on record the legal heirs of deceased Defendant No.3. While considering the aforesaid applications, learned trial Court should take a lenient view and also keep in mind that the writ petition was pending before this Court since 1st July, 2011 till date.

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2024 (I) ILR-CUT-116

K.R. MOHAPATRA, J.

CMP NOS. 578 & 1358 OF 2017

UMESH CH. DIXIT & ORS. ……Petitioners

-V-

BHIKARI MAHAKUD & ORS. ……Opp.Parties

CODE OF CIVIL PROCEDURE, 1908 – Order XXI Rule 32(5) – Power of executing court – Whether the executing court is empower to do the act ancillary and incidental for execution of a decree? – Held, Yes – Although Order XXI Rule 32(5) CPC is in relation to executing a decree of permanent injunction but it clearly stipulates that the executing court is not powerless to direct demolition of the property, if the same is required for execution of a decree be it for demarcation or for recovery of possession. (Para 17)

Case Laws Relied on and Referred to :-

1. AIR 1996 SC 780 : B. Gangadhar V. B.G. Rajalingam.
2. AIR 1973 SC 171 : M/s. M. Laxmi & Co. V. Dr. Aant R. Deshpande & Anr .
3. AIR 1998 SC 2765 : Sameer Khan V. Bindu Khan.
4. 2017 (Supp.-I) OLR 937 : Kuni Mohanty V. Upendra Barik & Ors.
5. (2007) 14 SCC 173 : Gurdev Singh V. Narain Singh.
6. 1970 (1) SCC 670 : Dhanjibhai Modi V. Rajabhai Abdul Rehman & Ors.

For Petitioners : Mr. S.S. Rao, Sr. Adv. & Mr. Syed Ejazul Haque
Mr. Ajodhya Ranjan Dash

For Opp.Parties : Mr. Ajodhya Ranjan Dash
Mr. S.S. Rao, Sr. Adv. & Mr. Syed Ejazul Haque

JUDGMENT Heard & Disposed of on : 18.12.2023

K.R. MOHAPATRA,J.

1. This matter is taken up through hybrid mode.

2. CMP No.578 of 2017 has been filed assailing the order dated 15th February, 2017 passed by learned Additional Civil Judge (Junior Division), Basudevpur in Execution Case No.4 of 2013, whereby the execution case was dropped holding that the decree for demarcation is not executable.

3. CMP No.1358 of 2017 has been filed to set aside the Commissioner's report dated 26th March, 2016 and order dated 2nd February, 2017, whereby the Commissioner's report was accepted.

4. Since both the CMPs arise out of Execution Case No.4 of 2013 and relates to a chain of events in accepting the Commissioner's report as well as dropping of the execution case accepting the said Commissioner's report, the same are taken up

together for convenience. The parties are described as per their status in the execution case.

5. C.S. No.22 of 2009 was filed by the D.Hrs for demarcation of the suit property as well as for injunction. The suit has been decreed vide judgment dated 30th March, 2013 with the following order:

> *"The suit of the plaintiffs be and same is decreed on contest against the Def. Nos. 1, 2, 3, 4, 5, 6 & 7 and on ex-parte against Def. No. 8. Both parties are at liberty to get the boundary line of the suit property demarcated as per prayer in the plaint, amicably within a period of 3(three) months failing which, the parties may take resort to the process of this Court for the said purpose. Once boundary lines of the suit plots are duly demarcated, the contesting defendants will be permanently injuncted from entering into the suit property and from disturbing the peaceful possession of the plaintiffs over the suit land. But in the present facts and circumstances, there is no order as to cost."*

6. As amicable demarcation of the property could not be possible within the time stipulated, the D.Hrs filed Execution Case No.4 of 2013. The J.Drs filed an application under Section 47 CPC, which was registered as I.A. No. 201 of 2016. The said application was rejected vide order dated 6th February, 2017. Thereafter, Plaintiff in C.S. No.83 of 2015 filed an application to be impleaded as party to the execution case (CMA No.1486 of 2015), which was rejected. In due course, learned executing Court appointed a Civil Court Commissioner for demarcation of the property, who submitted his report on 26th March, 2016. Relevant portion of the said report reads as under:

> *"Then the DHR No.3 identified me the decretal plot which is to be demarcated and supplied me the original village M.S. map of Mouza Apartipur. I was directed by the Hon'ble Court for demarcation of southern side of 'Ka' schedule land, eastern side of 'Kha' schedule land and Eastern and Southern side of 'Ga' schedule land as per plaint. I verified the records and original village map and started my measurement work on the field. By checking from various fix point nearby the suit plot and finally I demarcated the Southern side of 'Ka' schedule property, Eastern side of 'Kha' schedule property and Eastern and Southern side of 'Ga' schedule property. The DHRs and his labourers put pucca pillars on Southern side of 'Ka' schedule property and Southern side of 'Ga' schedule property. But the eastern side of 'Kha' & 'Ga' schedule property though I have demarcated, but the DHRs could not pillaring on it because on the demarcating line the JDRs have encroached some portion and created building house and some thatched house over the decretal plot. the thatched house are used as cowshed and kitchen which I have clearly shown in my demarcation map. The DHRs and their labourers put pucca pillars on Southern side of 'Ka' & 'Ga' schedule property in presence of police Personnel, Villagers and JDRs.*
>
> *So without demolition of house which is standing over the decretal plot, I though demarcated but the DHRs could not put pucca pillar on it. So necessary demolition of house and order may kindly be passed."*

7. Although the D.Hrs raised objection to the said report, but overruling the same, learned executing Court accepted the report vide its order dated 2nd February, 2017. The report of the Commissioner as well as the order dated 2nd February, 2017

is under challenge in CMP No.1358 of 2017. In furtherance to the said report, the D.Hrs filed an application on 8th February, 2017 for demolition of the structures made by the J.Drs over eastern side of the 'Kha' and 'Ga' Schedule property at their cost and to deliver possession to them. While considering the said application, learned executing Court held that it cannot go behind the decree and direct demolition of the structure as it would amount to execute a decree of mandatory injunction, which is neither prayed for nor granted in the suit.

8. Mr. Rao, learned Senior Advocate for the D.Hrs submits that Order XXI Rule 32(5) CPC clearly states that while executing an order of injunction, the Court in lieu of or in addition to any of the processes of execution of a decree of permanent injunction, the Court can act as required to be done for execution of a decree. Thus, the executing Court has ample jurisdiction to direct demolition of the structure for execution of the decree of permanent injunction. It is his submission that even if there would not have been any prayer for demarcation of the suit property, still then learned executing Court has power to direct for demarcation of the property for execution of a decree of permanent prohibitory injunction. Thus, learned executing Court should have exercised its discretion under Order XXI Rule 32(5) CPC to direct demolition of the structure for putting of poles for effecting the decree of permanent injunction. In support of his case, Mr. Rao, learned Senior Advocate relied upon the case of B. Gangadhar –v- B.G. Rajalingam, reported in AIR 1996 SC 780, wherein at Paragraph-6, it is held as under:

> *"6. Rule 35(3) of Order 21, itself manifests that when a decree for possession of immovable property was granted and delivery of possession was directed to be done, the Court executing the decree is entitled to pass such incidental, ancillary or necessary orders for effective enforcement of the decree for possession. That power also includes the power to remove any obstruction or super-structure made pendent lite. The exercise of incidental, ancillary or inherent power is consequential to deliver possession of the property in execution of the decree. No doubt, the decree does not contain a mandatory injunction for demolition. But when the decree for possession had become final and the judgment debtor or a person interested or claiming right through the judgment-debtor has taken law in his hands and made any construction on the property pending suit, the decree-holder is not bound by any such construction. The relief of mandatory injunction, therefore, is consequential to or necessary for effectuation of the decree for possession. It is not necessary to file a separate suit when the construction was made pending suit without permission of the Court. Otherwise, the decree becomes in executable driving the plaintiff again for another round of litigation which the Code expressly prohibits such multiplicity of proceeding."*

9. It is his submission that when in a decree for delivery of possession, the Court can direct for demolition of unauthorized structure made, there is no legal impediment for a direction to demolish the structure for effectuating the decree of permanent injunction. He also relied upon the case law in ***M/s. M. Laxmi & Co. –v- Dr. Aant R. Deshpande and another***, reported in AIR 1973 SC 171, in which it is held as under:

> *"27. It is true that the Court can take notice of subsequent events. These cases are where the court finds that because of altered circumstances like devolution of interest it is necessary to shorten litigation. Where the original relief has become inappropriate by subsequent events, the Court can take notice of such changes. If the court finds that the judgment of the Court cannot be carried into effect because of change of circumstances the Court takes notice of the same. If the Court finds that the matter is no longer in controversy the court also takes notice of such event. If the property which is the subject matter of suit is no longer available the Court will take notice of such event. The court takes notice of subsequent events to shorten litigation, to preserve rights of both the parties and to subserve the ends of. justice……."*

10. He, therefore, submits that subsequent events can be taken into consideration by the executing Court to sub-serve the ends of justice by shortening the litigation. The executing Court is not powerless to take all such ancillary and incidental steps for execution of decree even if no such direction is made in the suit itself.

11. He further relied upon the case of ***Sameer Khan –v- Bindu Khan***, reported in AIR 1998 SC 2765, wherein it is observed as under:

> *"11. At the first blush the above interpretation appeared attractive. But on a closer scrutiny we feel that such interpretation is not sound and it may lead to tenuous results. No doubt the wording as framed in Order 21 Rule 32(1) would indicate that in enforcement of the decree for injunction a judgment-debtor can either be put in civil prison or his property can be attached or both the said courses can be resorted to. But sub-rule (5) of Rule 32 shows that the court need not resort to either of the above two courses and instead the court can direct the judgment- debtor the perform, the act required in the decree or the court can get the said act done through some other person appointed by the court at the cost of the judgment-debtor. Thus, in execution of a decree the Court can resort to a threefold operation against disobedience of the judgment-debtor in order to compel him to perform the act. But once the decree is enforced the judgment-debtor is free from the tentacles of Rule 32. A reading of that Rule shows that the whole operation is for enforcement of the decree. If the injunction or direction was subsequently set aside or if it is satisfied the utility or Rule 32 gets dissolved."*

12. Reliance to the case of ***Kuni Mohanty –v- Upendra Barik and others***, reported in 2017 (Supp.-I) OLR 937 was also placed by Mr. Rao, learned Senior Advocate, wherein at Paragraph-12, this Court held as under:

> *"12. Order-21, Rule-32 of the Code concerns with the execution of a decree for an injunction. The various clauses of Rule 32 i.e 1, 2 and 3 are but indirect methods devised to enforce compliance of injunction decrees, each being an intermediate step for further action. From this it cannot, be concluded that execution of decree for prohibitory injunction should end there. When the judgment-debtor commits gross violation of the decree so as to nullify the very decree, the execution cannot be so limited driving the decree-holder to file a fresh suit. Such an interpretation cannot be entertained and it would amount to take rather a too technical and narrow view of the matter. The law has always expressed its dislike for multiplicity of proceedings and has leaned in favour of an interpretation which would prevent multiplicity of proceedings rather than the one which will generate it.*

The significant words used there are 'the court may' in lieu of "or in addition to all or any of the processes aforesaid i.e. attachment of property or detention in civil prison". This expression enlarges the scope of authority of the court to execute the decree in the manner provided in sub-rule "(1) or (2)" and also under sub-rule (5). The rule also empowers the court to 'direct that the act required to be done' may be done so far as practicable by the decree-holder etc.

A person disobeys an injunction not only if he fails to perform an act which he is directed to do but also when, he does an act which he is prohibited from doing. There is as much disobedience in the one case as in the other. Thus the Court has the power to execute the decree by getting the obstructions removed and obtaining a fresh decree for the purpose is not necessary. The explanation introduced to sub-rule-5 of the said rule clearly reveals the anxiety of the Legislature to ensure that the Executing Court is able to enforce obedience not only of decrees for mandatory injunction but also decrees for prohibitory injunction."

He, therefore, submits that learned executing Court should not have washed its hands in executing a decree stating that it cannot go behind the decree to demolish the structure for its execution.

13. Mr. Dash, learned counsel for the J.Drs. vehemently objects to the same. It is his submission that direction for demolition of the structure was neither prayed for nor made in the suit itself. The executing Court is powerless to go behind the decree and direct for demolition of the structure. During pendency of the suit, the D.Hrs had also filed an application under Order XXXIX Rule 2-A CPC, but the same was not entertained. It is his submission that since the report of the Commissioner itself is defective and learned executing Court has not given a positive finding that there is unauthorized construction over the suit land, the issue raised by the D.Hrs is premature and the judicial time should not be wasted in delving into the same.

13.1. It is his submission that a fresh Civil Court Commissioner should be deputed to demarcate the property and if in his opinion, there is unauthorized construction, learned executing Court may take into consideration the same inviting response to the Commissioner's report from the D.Hrs as well as from J.Drs and proceed with the matter accordingly. He, therefore, submits that if the report of the Commissioner is not acceptable, then further question with regard to acceptance as well as acting upon such report are immaterial and otiose. He also relied upon the case of Gurdev Singh –v- Narain Singh, reported in (2007) 14 SCC 173, wherein it is observed thus;

"7. We agree with the said contention. A bare perusal of the decree in question would clearly demonstrate that the appellant herein was restrained by a permanent injunction from planting any tree on Khasra No. 17/2 on the one side and Khasra Nos. 218/1 and 17/1 on the other side. The decree did not speak of removal of any tree which had already been planted. The executing court, as noticed hereinbefore, while interpreting the said decree proceeded completely on a wrong premise to hold that there should not be any tree within two karams on either side of the common boundary of the parties. Such an interpretation evidently is not in consonance with the tenor of the decree. A jurisdictional error, thus, has been committed by the High Court.

> *8. It is well settled that executing court cannot go behind the decree. As the decree did not clothe the decree-holder to pray for execution of the decree by way of removal of the trees, the same could not have been directed by the learned executing court in the name of construing the spirit of the decree under execution."*

13.2 It is submitted that learned executing Court rightly dropped the proceeding holding that it cannot go behind the decree. In ***Gurdev Singh (supra),*** the Hon'ble Supreme was considering removal of trees from the suit land, which was not directed in the suit. He also relied upon the case of ***Vasudev Dhanjibhai Modi –v- Rajabhai Abdul Rehman and others***, reported in 1970 (1) SCC 670, which also reiterates the aforesaid observation. Relevant portion of which reads as under:

> *"6. A court executing a decree cannot go behind the decree : between the parties or their representatives it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties."*

14. Heard learned counsel for the parties. Perused the case record, more particularly, the impugned order dated 15th February, 2017.

15. No doubt, in the execution case, direction was made to the Commissioner to submit a report. Accordingly, the report was submitted stating that although the suit land was demarcated as per the direction, but the D.Hrs could not fix concrete pillar on the eastern side boundary line of 'Kha' and 'Ga' schedule property as there was construction thereon. Thus, he opined that without demolition of those constructions, no demarcation pillars could be fixed. Vide order dated 2nd February, 2017, the report submitted by the Commissioner was accepted in spite of objection of the J.Drs. Subsequently, the D.Hrs filed an application for demolition of the structure at their cost and while dealing with the same, order dated 15th February, 2017, was passed.

16. Learned executing Court has discussed the matter in threadbare. It took into consideration the provision under Order XXI Rule 32(5) CPC and held that when the decree is for demarcation and there is no specific direction in the suit to demarcate the land by demolishing any structure, if required, the executing Court cannot go behind the decree. It is held that the suit is for prohibitory injunction and by directing so, the executing Court would proceed to execute a decree for mandatory injunction, which was neither prayed for nor directed in the suit. Accordingly, he rejected petition and consequently dropped the execution case.

17. The decree passed in C.S. No.22 of 2009 is in two parts. First part relates to demarcation of the suit property and second part relates to effecting the decree for permanent prohibitory injunction. In fact, no direction has been issued in the suit to demarcate the land by demolishing any structure, if required. As held in the case of B. Gangadhar (supra), the executing Court is not powerless to do the act ancillary and incidental for execution of a decree. It cannot relegate the D.Hr to file a fresh

suit seeking for a direction for demolition of the structure to execute the decree of demarcation/permanent injunction. Although, Order XXI Rule 32(5) CPC is in relation to executing a decree of permanent injunction, but it clearly stipulates that the executing Court is not powerless to direct demolition of the property, if the same is required for execution of a decree be it for demarcation or for recovery of possession. In the case of Kuni Mohanty (supra), this Court has categorically held that the execution cannot be so limited directing the D.Hr to file a fresh suit.

18. In order to execute a decree of permanent injunction, the Court has to issue a Commission for demarcation of the suit property. Thus, the demarcation is made only to facilitate execution of the decree for permanent injunction. As such, learned executing Court has committed an error in holding that no direction for demolition of the property can be given for demarcation of the suit land.

19. Accordingly, the impugned order dated 15th February, 2017 is set aside. The demarcation in question was made in the year, 2017 and in the meantime almost seven years have already elapsed. Thus, demarcation, if any, made is of no avail due to passage of time. Hence, this Court directs that learned executing Court should revive Execution Case No.4 of 2013 and proceed with the same from the stage of issuance of Writ to the Commissioner for demarcation of the property and the Commissioner may demarcate the suit property keeping in mind the Sabik and Hal relation of the suit land. Learned executing Court then proceed with the execution case basing upon the report of the Commissioner and keeping in mind the discussions made hereinabove.

20. In view of the order passed, the Commissioner's report dated 26th March, 2016 and order dated 2nd February, 2017 passed in Execution Case No.4 of 2013 become infructuous.

21. With the aforesaid observation and direction, both the CMPs are disposed of accordingly. In the facts and circumstances of the case there shall be no order as to cost.

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2024 (I) ILR-CUT-122

B.P. ROUTRAY, J.

WRIT PETITION (CIVIL) NO. 24759 OF 2023

SIBA PRASAD @ MAHESH KU. PARIDA & ANR. ……Petitioners

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

ODISHA SURVEY & SETTLEMENT RULES, 1962 – Rule 34 r/w proviso to Rule 35 – The present case, a decree was passed by the learned Civil Court and as per the order of the Civil Court, the Tahasildar required to pass Mutation Order – However the Tahasildar instead of doing so,

rejected the same – The order of Tahasildar Challenged – Held, the impugned order is set aside and the matter remitted back to Tahasildar for fresh decision.

Case Law Relied on and Referred to :-

1. 2016 (II) OLR 290 : Sanatan Acharya vs W. Tahasildar, Panposh

For Petitioners : Mr.N.K.Sahu & Ms. I.Ray
For Opp.Parties : Mr.U.K.Sahoo, ASC

JUDGMENT Date of Judgment : 04.12.2023

B.P. ROUTRAY,J.

1. Heard Mr.N.K.Sahu, learned counsel for the Petitioners and Mr.U.K.Sahoo, learned Additional Standing Counsel for the State-Opposite Parties.

2. The grievance of the Petitioners is that, after the decree passed by the learned Civil Court, he approached the Joint Commissioner,Consolidation and Settlement, Sambalpur and the Joint Commissioner in order dated 27th June 2007, under Annexure-5, directed the original Court i.e. the Tahasildar, for correction of R.O.R. based on the Civil Court decree.

3. Then the Petitioners approached the Tahasildar. The same was registered as Mutation Case No.723 of 2018 and the Tahasildar treating the same as a regular mutation application rejected it in a mechanical manner.

4. As seen from the order-sheet of the Tahasildar in Mutation Case No.723 of 2018, the case was posted to 14th December 2018 on 11th December 2018. But on 14th December 2018 no order was passed and all of a sudden on 1st November 2021, the record was taken up and the case was rejected with the following orders:

> *"This Case is put up today. Concerned R.I. has submitted the case record is contested in nature. Even after repeated notices issue to the party to appear the court for hearing but the petitioner as well as O.P. are unable to present therefore the original documents for verification and field possession of the applicant over the case land is not confirmed. Hence the instant case is rejected at this level. Informed the petitioner is accordingly."*

5. It needs to be mentioned here that Rule 34 of the Odisha Survey and Settlement Rules, 1962 read with proviso to Rule 35 prescribes that the cases registered based on the orders of a decree of Civil Court are to be treated as special cases. Further, this Court in ***Sanatan Acharya vs W. Tahasildar, Panposh, 2016 (II) OLR 290*** have observed that Rule 35 of the O.S.S. Rules provides that the Tahasildar is to carry out the order of superior court with regard to entry in the R.O.R. and he has no authority to sit over the order of the higher court.

6. In the instant case, the decree passed in Tittle Suit No.46 of 1998 is never disputed. The Petitioners have applied for correction of R.O.R. in the light of the decree passed in Title Suit No.46 of 1998. Therefore, the provisions contained in Rule 34 read with the proviso to Rule 35 of the Odisha Survey and Settlement Rules, 1962 are squarely fitted to the instant case and as such, the rejection of mutation case by the Tahasildar is found erroneous. The same is accordingly set aside and the matter is remitted back to the Tahasildar for fresh decision.

7. In the result, the appeal is disposed of with a direction to the Tahasildar, Lathikata, Sundargarh, Opposite Party No.3 to dispose of the Mutation Case No.732 of 2018 on merits in terms of the observation stated above within a period of four months from the date of production of certified copy of this order.

I.A. No.756 of 2024 (ORDER Dt. 29.1.2024)

1. The matter is taken up through hybrid mode.

2. Upon hearing learned counsel for the Petitioners the mutation case number mentioned in 7th paragraph of judgment dated 4th December, 2023 is corrected as "Mutation Case No.723 of 2018" in place of "Mutation Case No.732 of 2018".

3. The I.A. is disposed of.

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2024 (I) ILR-CUT-124

B.P. ROUTRAY, J.

FAO NO.312 OF 2020

PEMMI VENKATARAMANA & ANR. …… Appellants

-V-

UNION OF INDIA ……. Respondent

RAILWAY ACCIDENT – Claim of compensation – In the present case, claimant's son having journey ticket, was travelling from Visakhapatanam to Palasa, died due to accidental fall from running train – But the dead body was recovered from Ichhapuram railway station which is far away from Palasa Station – The Tribunal disbelieved the case of claimant & refused to grant compensation – Order of the tribunal challenged – Compensation allowed.

Case Laws Relied on and Referred to :-

1. (2019) 3 SCC 572: Union of India Vs. Rina Devi

For Appellants : Ms.D.Mahapatra

For Respondent : Mr.A.C.Routray, Sr.Panel Counsel

JUDGMENT Date of Judgment : 02.01.2024

B.P. ROUTRAY, J.

1. Heard Ms. Mahapatra, learned counsel for the Appellants and Mr.Routray, learned Senior Panel Counsel for the Union of India.

2. Present appeal by the claimants is directed against judgment dated 13th February 2020 passed by the Railway Claims Tribunal,Bhubaneswar Bench, in Case No.125 of 2017, wherein the Tribunal has refused to grant any compensation by disbelieving claimants' case.

3. The case of the claimants is that, their son namely, Pemmi Rambabu while travelling in Train No.12664 Trichinapalli-Howrah Express from Visakhapatnam to Palasa on 5th October 2016 died due to accidental fall from the running train.

4. The Railways denied the claim and contested the same. Both the parties adduced their respective evidences. When the claimants examined two witnesses Viz. A.W.1 & A.W.2, the Railways examined one witness Viz. R.W. 1.

5. The undisputed facts reveal that the dead body of the deceased was first noticed by one unknown person, who informed it to the Station Superintendent of Ichhapuram Railway Station. Accordingly, Diary Entry No.3114/A dated 5th October 2016 was entered and the matter was reported to local police who registered Crime Case No.174 of 2016. The dead body was lying on the track at KM No.626/28-26 and head was decapitated. Inquest was held and at the time of inquest a journey ticket bearing no.53985365 dated 5th October 2016 was recovered.

6. As per the postmortem report, the head was severed and injuries were found all over the dead body. The circumstances regarding recovery of the body, which was lying in Ichhapuram Railway Yard at KM No.626/28-26, along with nature of injuries noticed on the dead body during post-mortem examination are definitely supporting the claim of the applicants that the death of the deceased is due to fall from running train. In this regard, the evidence of A.W.2 may be taken into account. A.W.2 has stated in his evidence that he accompanied the deceased to Visakhapatnam Railway Station where the deceased boarded Trichinapalli-Howrah Express on 5th October 2016 after purchasing a journey ticket. This evidence of A.W.2 is left unrebutted during his cross-examination. So, considering the statement of A.W.2 as well as recovery of the ticket at the time of inquest, it is concluded that the deceased was a bona-fide passenger of the train. Further, keeping in view the totality of all such circumstances along with the evidence of A.W.2, it can safely be concluded that the deceased died due to fall from the running train while travelling in Trichinapalli-Howrah Express Train.

7. It is true that the journey ticket though shows travel from Visakhapatnam to Palasa, but the dead body was recovered lying at Ichhapuram Railway Station which is beyond Palasa Station and the Tribunal disbelieved the case of the claimants mainly on this ground that the deceased did not have a valid journey ticket to travel

up-to Ichhapuram. The reason so assigned by the Tribunal to disbelieve bonafide journey of the deceased in the train is not found justified. It is for the reason that A.W.2 has stated in his evidence that the deceased boarded the train for travelling after purchasing the journey ticket and there may be some genuine reason for the deceased to travel beyond Palasa. For the only reason that the journey ticket only authorizes him to travel up-to Palasa would not be enough to say that he was not a bona fide passenger at Ichhapuram.

8. In view of the discussions made above, the claimants are found established their case regarding death of the deceased in an untoward incident while travelling in the train. Accordingly, the appeal is allowed and the impugned award is set aside. The Respondent-Union of India is directed to pay compensation of Rs.4,00,000/- (Four lakhs) along with interest @ 6% per annum from the date of accident or Rs.8,00,000/- (eight lakhs), whichever is higher, in terms of the decision rendered in ***Union of India vs- Rina Devi, (2019) 3 SCC 572***, within a period of four months from today. The same shall be disbursed in favour of both the claimants in equal proportion by keeping 50% of their shares in fixed deposits separately in their names in any Nationalized bank for a period of five years.

9. The copies of evidences and documents, as produced by Ms. Mohapatra in course of hearing, are kept on record.

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2024 (I) ILR-CUT-126

Dr. S.K. PANIGRAHI, J. & G. SATAPATHY, J.

ITA NOS. 1, 3 & 4 OF 2019
ITA NO. 42 OF 2023

PRINCIPAL COMMISSIONER OF INCOME TAX- I, BBSR …Appellant(s)
-V-
PARADEEP PHOSPHATES LIMITED, BBSR …Respondent(s)

(A) INCOME TAX ACT, 1961 – Section 37(1), 40A(10) – Whether the school expenses /donations claimed by the assesse for deduction can be said to be an expenditure as contemplated under section 37(1) of the act ? - Held, Yes.

(B) INCOME TAX ACT, 1961 – Section 143(3) – The Government of India Fertilizer bonds were provided to the respondent in lieu of cash subsidy – Therefore the reduction in the value of the bonds was claimed as a revenue loss by respondent as it was incurred in the course of business – Whether the provisions of dimension GOI bonds is an allowable deduction? – Held, Yes.

Case Laws Relied on and Referred to :-

1. ITA Nos. 939 & 940 of 2015 : DCM Shriram Consolidated Ltd.
2. 156 ITR 585(SC) : Sajjan Mills Limited V. CIT.
3. 151 ITR 446 : Commissioner of Income Tax, Tamil Nadu-1 V. Indian Overseas Bank
4. 161 ITR 365(SC) : Patnaik & Co. Ltd V. CIT.
5. [1979] 118 ITR 261: Season J. David and Co. P. Ltd. V. CIT.
6. [1959] 37 ITR 66 : Indian Molasses Co. (Private) Ltd. V. CIT.
7. [2000] 243 ITR 284 : P. Balakrishnana, CIT V. Travancore Cochin Chemicals Ltd.
8. [1987] 166 ITR 836 : Mysore Kirloskar V. Commissioner of Income Tax.
9. [1996] 219 ITR 521 : CIT Vs.Bombay Dyeing & Manufacturing Company Ltd.

For Appellant(s) : Mr. T.K. Satapathy, Sr. SC. for Income Tax

For Respondent(s): Mr. P.R. Patro, Mr. S. Jolly

JUDGMENT Date of Hearing : 03.10.2023 : Date of Judgment : 24.11.2023

Dr. S.K. Panigrahi, J.

1. In this case, the appellant in ITA No.1 2019, ITA No.4 of 2019, ITA No.3 2019 and ITA No.42 of 2023 has challenged the orders passed by the Income Tax Appellate Tribunal, Cuttack Bench, Cuttack (for short "the Tribunal") in favour of the respondent. Two common issues arise in the aforesaid four appeals. The first issue is whether the Income Tax Appellate Tribunal erred in holding that the provisions of diminution of Government of India Fertilizer Bonds [GoI Bonds] is an allowable deduction. This issue arises in ITA No.1, ITA No.4 and ITA No.42. The other issue that arises for considerations is whether "school expenses" can be treated as business expenditure. This issue arises in ITA No.3 of 2019 and ITA No.4 of 2019. As a result of the overlap in the issues in the aforementioned appeals, they are being dealt with together.

I. FACTUAL MATRIX OF THE CASE:

2. The assessee [the respondent] had filed two appeals against the orders passed by the CIT[A] Bhubaneswar for the assessment years 2010-11 & 2014-15 before the Income Tax Appellate Tribunal, Cuttack Bench. The respondent is an entity engaged in the business of manufacturing and trading of fertilizers. The original assessment under Section 143(3) was completed on 28.04.2014 on a total income of ₹ 2295,87,95,426. The said income was modified to ₹ 115,57,95,426. The AO reassessed the total income at ₹ 171,91,70,480 making an addition of ₹ 56,33,75,052. The latter amount was on account of disallowance of the diminution in value of the GOI Fertilizer Bond. Aggrieved by the order passed by the AO, the respondent preferred an appeal to the CIT[A]. The CIT[A] upheld the order of Assessing Officer. Aggrieved by the order of the CIT[A], the respondent approached the Income Tax Appellate Tribunal.

3. The GOI Fertilizer bonds were provided to the respondent in lieu of cash subsidy. Therefore, the reduction in the value of the bonds was claimed as a revenue loss by the respondent as it was incurred in the course of business. While the AO and CIT[A] had not concurred with this assertion of the assessee, the ITAT relying

on the decisions of the Delhi High Court in DCM Shriram Consolidated Limited[1] [ITA Nos.939 & 940 of 2015] [hereinafter referred to as "**DCM Shriram**"] and the respondent's own case before the same tribunal for the assessment year 2009-10, held that since the fertilizer bonds were received in lieu of cash, they were incurred in the course of business and any reduction in the value of the bonds could be claimed as revenue loss. Thus, the tribunal allowed this to be claimed as business expenditure on account of the diminution of the value of the fertilizer bonds for the assessment year 2010-11 and 2014-15 and allowed for deductions. The diminution in value of the fertilizer bonds amounted to ₹ 23,98,00,000.

4. The second issue pertains to the assessment year of 2014-15. The issue arose due to the disallowance of ₹ 2,84,34,453 by the AO which was incurred by the respondent in running of a school for the benefit of its employees as an incidental and additional business expenditure under Section 40A(9) of the Income Tax Act, 1961 read with Section 37(1) of the IT Act,1961.As this deduction was not allowed by the AO, the respondent felt aggrieved and filed an appeal. The ITAT overturned the ruling of the AO and allowed the deduction.

5. In allowing the deduction under Section 40A(9) of the IT Act, the ITAT relied on its decision in a similar case involving the respondent for the assessment year 2010-2011. The tribunal held that the amount that was being incurred for education and being paid to DAV School was for the welfare of the staff which would ultimately result in the smooth functioning of the business. As it was incurred for the aforementioned purpose, it was an allowable business expenditure. Therefore, the tribunal held in favour of the respondent and allowed the deduction. Aggrieved by the order, the appellants have filed this appeal.

II. APPELLANT'S SUBMISSIONS:

6. Learned counsel for the appellant earnestly made the following submissions in support of his contentions:

(i) The running of the school by the DAV School Management is within the premises of the respondent and it has no direct nexus with the business. Further, the expenditure incurred was being debited to the profit and loss account. Thus, it is not an allowable deduction as per Section 40A(9) and Section 37(1) of the Income Tax Act, 1961.

(ii) The appellant contends that the reduction in value of the GOI Fertilizer Bonds cannot be claimed as the loss has not actually been incurred but it is merely on the anticipation of loss that a deduction is being claimed. In asserting so, reliance was placed on the decisions of the Supreme Court in Sajjan Mills Limited v. CIT[2] [hereinafter referred to as "**Sajjan Mills**"] and of the Madras High Court in Commissioner of Income Tax, Tamil Nadu-1 v. Indian Overseas Bank[hereinafter referred to as "**Indian Overseas Bank**"][3] .

[1]ITA Nos.939 & 940 of 2015 [2]156 ITR 585(SC) [3]151 ITR 446

III. SUBMISSIONS OF RESPONDENTS:

7. Per contra, learned counsel for the Respondent intently made the following submissions:

(i) The payment to DAV School Management is neither falling under "setting up" nor under "formation of" nor under "as contribution to" any fund/trust. As a result of this, it is outside the purview of Section 40A(9) of the IT Act. Further, the running of a school for the benefit and welfare of the staff is a business expenditure. Thus, it is an allowable deduction under Section 40A(10) and Section 37(1) of the IT Act.

(ii) The GOI Fertilizer bonds were received in lieu of cash subsidy. The bonds were not purchased and were received from the government in course of transaction of business. Thus, the reduction in the value of the bond is a business expense and the amount of reduction is value that can be claimed as allowable business expenditure. Further, the respondent relied on the decision of the Honorable Apex Court in Patnaik & Co. Ltd v. CIT[4] [hereinafter referred to as "**Patnaik & Co**."] where it was held that as the fertilizer bonds being allotted under compulsion, they were to be considered as business expenditure. Thus, they are to be considered as revenue expenses and can be claimed as allowable business expenditure.

IV. COURT'S REASONING AND ANALYSIS:

8. At the outset, the much relied **Sajjan Mills and Indian Overseas Bank** has a different factual matrix which is different from the present set of facts. In **Sajjan Mills**, the issue was in relation to payment of gratuity. The court has held that gratuity was in the nature of a contingent liability and becomes payable to the employee only under certain circumstances. However, gratuity cannot be treated as a loss as it is in the nature of a statutory obligation which has little relevance in the present case. Further, in the **Indian Overseas Bank** case (supra) the assessment of loss was for foreign exchange transactions. The foreign exchange transactions were not accepted by the bank in lieu of any other payment. On account of this, the facts of the present case are entirely different.

9. In **DCM Shriram** case (supra), the Delhi High Court as well as the tribunal from which the appeal was preferred held that the fertilizer bonds were accepted in the course of business in lieu of fertilizer subsidy by the Government of India. The company had no intention to hold bonds as such and the same had been received by the company under compulsion in lieu of cash fertilizer subsidy amount. Thereby, the loss incurred due to the diminution in the value of the bonds may be regarded as a revenue loss and can be claimed as deduction while computing taxable income for the period under consideration. The Supreme Court in the case of Patnaik Company Limited vs. CIT[5] , held that since the investment in the fertilizer bond was made by the respondent under commercial expediency it did not bring an asset of a capital

[4]161 ITR 365(SC) [5][1986]161 ITR 365(SC)

nature and the diminution in the value of the said bond are allowable as revenue loss. Having regard to the facts of the present case and after placing reliance on theabove decisions by the Delhi High Court and the Supreme Court of India, this Court is of the view that the decision of the ITAT, Cuttack Bench is correct and the claim by the respondent as revenue loss on account of the diminution in the value of the GOI Bonds is held in favour of the Respondent. Thus, the appeal of the appellant on this ground is dismissed.

10. As far as the second issue of payment of a corpus to DAV School Management, the reasoning of this Court is as follows:

As per Section 40A (9) of the Income Tax Act, 1961, no deduction shall be allowed in respect of any sum paid by the assesse as an employer towards the setting up or formation of, or as contribution to, any fund, trust, company, association of persons, body of individuals, society registered under the Societies Registration Act, 1860 (21 of 1860),or other institution for any purpose, except where such sum is so paid, for the purposes and to the extent provided by or under clause (iv) [or clause (iva)] or clause (v) of sub-section (1) of section 36, or as required by or under any other law for the time being in force. As per Section 40A (10) of the Income Tax Act, 1961, notwithstanding anything contained in sub-section (9), where the Assessing Officer is satisfied that the fund, trust, company, association of persons, body of individuals, society or other institution referred to in that sub-section has, before the 1st day of March, 1984, bona fide laid out or expended any expenditure (not being in the nature of capital expenditure) wholly and exclusively for the welfare of the employees of the assessee referred to in sub-section (9) out of the sum referred to in that sub-section, the amount of such expenditure shall, in case no deduction has been allowed to the assesse in respect of such sum and subject to the other provisions of this Act, be deducted in computing the income referred to in section 28 of the assessee of the previous year in which such expenditure is so laid out or expended, as if such expenditure had been laid out or expended by the assessee.

The sole and whole object and reasons for the introduction of Section 40A (9) and (10) in the Act to make it clear that any expenditure met by an assessee wholly and exclusively for the welfare of the employees of the assessee is an allowable deduction in computing the income of the assessee.

As per Section 37(1) of the Income Tax Act, 1961, any expenditure (not being expenditure of the nature described in Sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head “Profits and gains of business or profession”.

To be an allowance within section 37(1), barring the exceptions mentioned therein, "*the money paid out or away must be paid out wholly and exclusively for the*

purpose of the business". The assessee can claim the whole of it for deduction in computing the income chargeable under the head "*Profits and gains of business or profession*". The money by way of such expenditure must be "*laid out or expended wholly and exclusively for the purpose of business*". The word "*wholly*" refers to the quantum of expenditure and the word "*exclusive*" refers to the move, object or purpose of the expenditure.

While applying section 37(1), it must be kept in mind that the expenditure claimed therein need not be "necessarily" spent by the assessee. It might be incurred "voluntarily" and without any "necessity", but it must be for promoting the business. In other words, if the expenditure has been incurred by the assessee voluntarily, even without necessity, but if it is for promoting the business, the deduction would be permissible under section 37(1) of the Act.

11. In ***Season J. David and Co. P. Ltd. v. CIT***[6] , the Supreme Court observed (at page 275 and 276) has succinctly echoed the similar sentiment which are as follows:

> *"It is relevant to refer at this stage to the legislative history of section 37 of the Income-tax Act, 1961, which corresponds to section 10(2)(xv) of the Act. An attempt was made in the Income-tax Bill of 1961 to lay down the 'necessity' of the expenditure as a condition for claiming deduction under section 37. Section 37(1) in the Bill read 'any expenditure... laid out or expended wholly, necessarily and exclusively for the purpose of the business or profession shall be allowed...." The introduction of the word 'necessarily' in the above section resulted in public protest. Consequently, when section 37 was finally enacted into law, the word 'necessarily' came to be dropped. The fact that somebody other than the assessee is also benefited by the expenditure should not come in the way of an expenditure being allowed by way of deduction under section 10(2)(xv) of the Act if it satisfied otherwise the tests laid down by law".*

12. Again, the words "*for the purpose of business*" used in section 37(1) should not be limited to the meaning of "earning profit alone". Business expediency or commercial expediency may require providing facilities like school, hospital, etc., for the employees of their children or for the children of the ex-employees. The employees of today may become the ex-employees tomorrow. Any expenditure laid out or expended for their benefit, if it satisfied the other requirements, must be allowed as deduction under section 37(1) of the Act. It may also be stated, as observed by the Supreme Court in the aforesaid case, that the fact that somebody other than the assessee is also benefited or incidentally takes advantage of the provision made, should not come in the way of the expenditure being allowed as a deduction under section 37(1) of the Act. But, nevertheless, it must be an "expenditure" allowable as deduction under the Act.

13. The question that, however, still remains is whether the donation claimed by the assessee for deduction can be said to be an "*expenditure*" as contemplated under section 37(1) of the Act. "*Expenditure*" primarily denoted the ideal of "*Spending*" or "*paying out or away*". It is something which is gone irretrievably, but should not be

[6][1979] 118 ITR 261

in respect of an unascertained liability of the future. It must be an actual liability in present, as opposed to a contingent liability of the future. Some of these principles have been explained by the Supreme Court in **Indian Molasses Co. (Private) Ltd. v. CIT**[7] , wherein it has been reiterated that:

> *"The income-tax law does not allow as expense all the deductions a prudent trader would make in computing his profits. The money may be expended or grounds of commercial expediency but not of necessity. The test of necessity is whether the intention was to earn trading receipts or to avoid future recurring payment of a revenue character. But the income-tax law does not take every such allowance as legitimate for purposes of tax. A distinction is made between an actual liability in present and a liability de futuro which, for the time being, is only contingent. The Former is deductible but not the latter".*

14. Yet in some other cases like:- **P. Balakrishnana, CIT v. Travancore Cochin Chemicals Ltd.**[8] , the assessee is a Public Sector Unit engaged in the manufacture and sale of certain chemicals. During the Previous year, the assessee had made certain payments to the FACT school. The assessee claimed that the payment should be included under the welfare expenditure as the said expenditure was essential for the smooth running of the assessee's business. The assessing officer held that the above payment had no direct relation with the business activity of the assessee and was more or less in the nature of a donation and, therefore, disallowed the claim under Section 40A(9). On appeal by the assessee, the Commissioner (Appeals) confirmed the disallowance of expenditure made by the assessing officer under section 40A(9) of the Income Tax Act, 1961 ('the Act'). However, the Tribunal held that the assessee's contribution to the FACT school was for the assessee's business purpose and allowed deduction thereof. The expenditure met towards the FACT school was not a donation but it was in the form of reimbursement of the proportionate expenditure met for the running of the school where the children of the employees of the assessee were having their education and such an expenditure was wholly and exclusively for the welfare of the employees of the assessee and also it was an expenditure for the business purpose of the assessee. the above expenditure shall not come within the purview of section 40A(9) and the expenditure made by the assessee for the welfare of the employees of the assessee is allowable under section 40A(10) and also section 37(l). Kerala High Court held that this payment was made towards contribution of the share of expenditure in running of the FACT School, wherein the children of the employees were studying. The expenditure met wholly and exclusively for the welfare of the employees of the assessee not covered under Sections 30 to 36 of the Act and not in the nature of capital expenditure or personal expenses is allowable under Section 37(1). Moreover, the expenditure of this nature leads to an increase in efficiency of the business. Thus, the court held this to be a business expense under 37(1) and also outside the purview of 40A(9).

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[7][1959] 37 ITR 66 [8][2000] 243 ITR 284

15. Similarly, in ***Mysore Kirloskar v. Commissioner of Income Tax***[9] , the assesse is a public limited company engaged in the manufacture and selling of tools, lathes, etc. The company constituted a trust, the object of which is to apply its income for the promotion and encouragement of education principally of the children of the employees and ex-employees of the company. The company was established in a place called Harihar which is not a developed city. In order to attract technocrats and men of managerial skill, the company had to establish facilities for the employees and education for their children. Hence, in furtherance of the object of the trust, the trust established a school at Harihar. To that school, the children of the employees and ex-employees as well as of general public are admitted. The assessee-company donates a certain sum every year to meet the expenditure of the school. In the accounting year relevant to the assessment year, the assessee has donated Rs.62,000/- and claimed out of it 61.1 per cent, by way of deduction under Section 37(1) of the Act. Such claim was made on the ground that 61 per cent of the school children are the children of the employees and the ex-employees of the assessee. The income tax officer did not allow the exemption as claimed. The Commissioner of Income Tax and the Appellate Tribunal also held similar view. Rather they allowed 50% deduction for the same expenditure under Section 80G as donation. There the Karnataka High Court held:

> *"(i) that the words 'for the purpose of business' used in Section 37(1) should not be limited to the meaning of 'earning profit alone'. Business expediency or commercial expediency might require providing facilities like schools, hospitals, etc., for the employees or their children or for the children of the ex-employees. Any expenditure laid out or expended for their benefit, if it satisfied the other requirements, must be allowed as a deduction under Section 37(1) of the Act. Nevertheless, it is an expenditure allowable as deduction under the Act."*

16. In ***CIT v.Bombay Dyeing and Manufacturing Company Ltd.***[10], the Supreme Court has held that the contribution of Rs.2,25,000 by the assessee company to the State Housing Board (Maharashtra Housing Board) for constructing tenements for the company's workers was incurred wholly and exclusively for the welfare of the employees which was necessary for carrying on the business of the assessee - company more effectively by having a contented labour force and constitute legitimate business expenditure. The Apex Court upheld the decision of the Tribunal which held that the expenditure was not in the nature of a capital asset to the assessee – company as the tenements, remained the property of the Housing Board and there was no obligation on the assessee – company to provide its workers tenements constructed by the Housing Board and that the benefit of better and cheaper housing obtained by the industrial workers of the assessee – company did not constitute a direct benefit of an enduring nature of the assessee. The Tribunal held that the expenditure was incurred merely with a view to carry on the business of the assessee-company more efficiently by having a contented labour force. The High

[9][1987] 166 ITR 836 [10][1996] 219 ITR 521

Court held that no question of law arose for reference from the order of the Tribunal. There, the Supreme Court held that, on the facts of the case the amount constituted revenue expenditure and, thus, it was an allowable expenditure.

17. After analysing the existing legal provisions of the Act and placing reliance on the above legal precedents, this Court is of the view that the Tribunal is fully justified in allowing the above expenditure towards contribution for the running of the school, as an expenditure for the smooth functioning of the business of the assessee and also an expenditure wholly and exclusively for the welfare of the employees of the assessee and, thus, allowable under Section 37(l) as well as Section 40A(10) as business expenditure. Thus, the tribunal decided correctly and there is no reason to set aside the orders of the Tribunal.

18. Accordingly, all the above stated ITAs are disposed of.

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2024 (I) ILR-CUT-134

Dr. S.K. PANIGRAHI, J.

ARBA NO.24 OF 2009

M/S. OPTCL, BBSR ……Appellant(s)

-V-

M/S. RANJIT SINGH & CO. ……Respondent(s)

(A) ARBITRATION AND CONCILIATION ACT, 1996 – Section 37(1)(b) – Whether the validity of the arbitral proceedings can be challenged on non-compliance of any Pre-Arbitration procedure/condition for invoking arbitration ? – Held, Yes – The Multi-tiered Dispute Resolution clauses plays a significant role in facilitating smoother business and transaction by offering a structural approach to resolving dispute, if the same are inefficient and ineffective the aggrieved party can seek a remedy against the arbitrator/arbitral tribunal and the compulsory nature of the MDR can there be relaxed. (Paras 33-53)

(B) ARBITRATION AND CONCILIATION ACT, 1996 – Section 37(1)(b) – When the High Court can interfere with any award passed by arbitral tribunal? – Explain with reference to case laws. (Paras 56-86)

(C) ARBITRATION AND CONCILIATION ACT, 1996 – Section 31(7) (a)(b) – Whether the arbitral tribunal is empowered to award interest? – Held, No – Arbitrator is a creator of the contract, if the contract bars payment of interest it cannot award interest.

Case Laws Relied on and Referred to :-

1. [2013] SGCA 55 : International ResearchCorp PLC v. Lufthansa Systems Asia Pacific Pte Ltd
2. [2018] SGHC 153 : Ling Kong Henry v.Tanglin Club
3. [2023] HKCFA 16 : C v. D
4. [2021] EWHC 286 (Comm):Republic of Sierra Leone v SL Mining Ltd
5. [2021] EWHC 2666 (Comm):NWA v NVF
6. [2023] EWCA Civ 292 : Kajima Construction Europe (UK) Ltd v. Children's Ark Partnership Ltd
7. 524 F.3d 1235 (11th Cir. 2008):Advanced Bodycare Solutions v Thione Int.
8. ILR 1979 Delhi 364:Sikand Construction Co. v. SBI
9. AIR 1999 Ker 440:NirmanSindia v. IndalElectromeltsLtd
10. 2009 SCC OnLine Del 4355:Sushil Kumar Bhardwaj v. Union of India
11. (2009) 2 SCC 494:Manohar Reddy v. Maharashtra Krishna Valley Dev. Corp
12. AP Case No. 700 of 2011, Cal HC:Build Fab v. Airport Authority of India
13. 2014 SCC OnLine Del 6602: Ravindra Kumar Verma v. BPTP Ltd
14. 2014 SCC OnLine All 16608:Sun Security Services v. Babasaheb Bhimrao Ambedkar University
15. 2016 SCC OnLine Raj 3814:JIL-Aquafil (JV) v. Rajasthan Urban Infrastructure Development Project
16. 2017 SCC OnLine Del 9039:VedPrakashMithal and Sons v. DDA
17. 2019 SCC OnLine Del 6793:NHAI v. Pati-Bel (JV)
18. AdityaTayal, Issue of Mandate of Pre-Arbitral Steps/Preceding Steps before invoking Arbitration,SCC ONLINE (Jan 04, 2023), https://www.scconline.com/blog/post/2023/01/04/issue-of-mandate-of-pre-arbitral-steps-preceding-steps-before-invoking-arbitration/
19. (2019) 15 SCC 131:SsangyongEngg. & Construction Co. Ltd. v. NHAI
20. (2019) 7 SCC 236:ParsaKente Collieries Limited v. Rajasthan Rajya Vidyut Utpadan Nigam Limited
21. (2006) 11 SCC 181:McDermott International Inc. v. Burn Standard Co. Ltd.
22. (2012) 5 SCC 306:RashtriyaIspat Nigam Ltd. v. Dewan Chand Ram Saran
23. SLP (CIVIL) NO. 8791/2020:M/s UNIBROS v. All India Radio
24. (1999) 9 SCC 283:Rajasthan State Mines& Minerals Ltd. v. Eastern Engg. Enterp
25. 1988 SCR (3) 103:Continental Construction Co. Ltd.v. State of Madhya Pradesh
26. (2009) 12 SCC 26:Sayeed Ahmed and Company v. State of Uttar Pradesh &Ors
27. (2022) 4 SCC 463:Indian Oil Corporation Ltd. v. Shree Ganesh Petroleum
28. (2021)18 SCC 716:PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust
29. (2004) 9 SCC 619:Army Welfare Housing Org. v. Sumangal Services (P) Ltd
30. (2014) 2 SCC (Civ) 252:Satyanarayana Construction Co. v. Union of India
31. (2010) 3 SCC 690:State of Haryana v. S.L. Arora& Co
32. 2023 SCC OnLine Del 5183:National Highways Authority of India v. Trichy Thanjavur Expressway

For Appellant : Mr. N. C. Panigrahi, Sr. Adv.

For Respondents : Mr. A. Sanganeria

JUDGMENT Date of Hearing : 05.10.2023 : Date of Judgment : 10.11.2023

Dr. S.K. Panigrahi, J.

1. This Appeal under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "A&C Act") has been filed against the judgment dated07.08.2009 passed by the District Judge, Khurda at Bhubaneswar in Arbitration Petition No.60 of 2008 rejecting the application under Section 34 of the Arbitration and Conciliation Act to set aside the award dated 30.11.2007 passed by the Arbitral Tribunal on the ground that the judgment and award are illegal, bad in law due to non-application of mind, perverse and contrary to the settled position of law.

I. FACTUAL MATRIX OF THE CASE:

2. Orissa Power Transmission Corporation Ltd.(the "Appellant") is a Govt. of Orissa undertaking, which deals with the transmission of electricity in the State of Orissa.The Respondent, being the successful bidder, was entrusted with the work of erection and commissioning of 220 KV DC transmission line from Indravati to Therubali and from Meramunduli to Duburi by the petitioner vide Letter of Award (LOA) dated 30.05.1996; the dispute pertains to the latter.

3. The contract agreement was signed on 03.08.1996. The schedule of completion period was 11 months from the date of LOA i.e. 01.05.1997. Subsequently, there were several correspondences between the parties concerning the spotting and survey of towers and extension of time schedule on the request made by the respondent-contractor. Initially, the original value was fixed at Rs. 1 crore.Later, it wasenhanced to Rs5.5 crores and again to Rs. 8,03,91,550/-.On similar note, the time was extended till June 2004 for completion of the work by amending the IOA on 22.05.2003. These terms and conditions were accepted by the respondent.

4. However, the respondent did not furnish the enhanced Bank guarantee and his request for further extension of time was not acceded to by the petitioner without review of the progress of the work. Ergo, the respondent in his letter dated 24.12.2003 expressed his inability to complete the work by June 2004 and refused to give enhanced Bank guarantee on the enhanced contract price while also raising certain other demands.

5. Thereafter, the respondent referred the dispute for Arbitration and nominated his arbitrator to resolve the dispute. Since, the respondent did not resume the work, the petitioner issued notice to close the contract on 27.05.2004 and ultimately, terminated the contract on 21.03.2005 and en-cashed the Bank guarantee. The petitioner thereafter entered into a contract for the work with another organization. The petitioner also nominated one arbitrator and the third arbitrator was co-opted.

6. The Respondent made claim on the counts of amount deducted against Retention Money, Withheld against Penalty/LD, Withheld against performance Guarantee, Bank Guarantee Encashment, Price Variation charges on actual beyond ceiling of +20%, Bank Guarantee charges beyond 15 months from scheduled date of completion (01.11.1997) w.e.f. 01.02.1998 onwards i.e. 09.04.05 @Rs. 59532/Year, Establishment/Overhead charges beyond scheduled date of completion (01.11.1997) (amended), Interest on Delayed Payment beyond 30 days, Interest on Price Variation @18% per annum from the date of delayed/withheld till the date of payment, Interest for Delayed/withheld payment (I.No.1, 2&3) @18% per annum from the date of Delayed/withheld till the date of payment, Interest on BG encashment for Rs. 2976600/- @18% per annum from the date of encashment (dated09.04.2005) to the date of payment, Damage/Loss of Profit (Amended), Cost of Arbitration and any other relief, before the Arbitral Tribunal.

7. After hearing the parties and considering their respective materials including the claims and counter claims, the Arbitration Tribunal passed the impugned award as following:

CLAIM ITEMS	**AMOUNT AWARDED**
Item No.1: Deduction against Retention Money	Rs.10,79,851.00
Item No.2: Amount withheld against Penalty	Rs. 01,04,704.00
Item No.3: Amount withheld against Performance Guarantee	Rs. 02,05,088.00
Item No.4: Bank Guarantee Encashment	Rs.29,76,600.00
Item No.5: Price Variation charges as per Actuals beyond ±20 percent	Allowed
Item No.6: Bank Guarantee Charges beyond 15 months from the scheduled date of completion (01.11.1997) with effect from 01.02.1998	Not allowed
Item No.7: Idle establishment and overhead charges	Rs. 12,00,000.00
Item No.8: Interest on delayed payment beyond 30 days	Rs. 02,00,000.00
Item No.9: Interest on Price Variation beyond±20 percent ceiling as per Actuals	No award
Item No. 10&11: Interest for delayed/withheld payments of the claim statement.	Rs. 3,00,000.00
Item No. 12: Damage/Loss of Profit	Rs.3,00,000.00
Item No. 13: Cost of Arbitration and any other relief	Nil

8. The petitioner has challenged the award on the grounds that the learned Tribunal violated the principles of natural justice by not allowing sufficient opportunity of hearing to the petitioner and that the award was contrary to the terms of the agreement between the parties.

II. **APPELLANT'S SUBMISSIONS**

9. The counsel for the Appellant assails the judgment of the District Judge mainly on the ground that the District Judge failed to appreciate the following points:

10. **Claim I: Jurisdiction of Arbitral Tribunal: -**

i. It is submitted that the initiation of the arbitral proceeding is illegal, and against theaggrieved procedure of the parties. Clause 32.0 of the GCCprovides:

> *"Except as otherwise specifically provided hereinafter, all unsettled dispute(s) or differences if any kind whatsoever, between the owner and the contractor arising out of the contract for performance of contract whether during the execution of the contract or after its completion or whether before or after termination, abandonment or breach of the contract, shall in the first place, referred to and settled by the Engineer, who, within a period of thirty (30) days as being requested to do so, shall give written notice of its decision."*

ii. As per Clause 32.4 of GCC, if, after the engineer has given written notice of his decision, and no claim of arbitration has been communicated to him by either party within 30 days from receipt of such notice, the said decision shall become final and binding on the parties.As per Clause 32.5 & 32.6, only in case of failure of Engineer to decide, the matter can be referred to arbitration.

iii. In the present case, it is alleged that the respondent did not refer any dispute to engineer and suddenly invoked arbitration clause and appointed his arbitrator. Since, the respondent appointed his arbitrator, the appellant had no alternative to choose and appoint his arbitrator. This point was raised in Section34 application filed by the Appellant before the District Judge,Khurda but the said court failed to appreciate and consider this point properly.

11. **Claim II: On the allegation of delay:-**

a. It is submitted that the time extension was granted under Clause 28 of the GCC as per request of the Respondent from time to time.

b. The contract initiated by Letter of Award dated 30.05.1996 was later amended by extending the time of performance till 30.07.1998 and then till June 2004. The letter of amendment extending the period of completion of the work till June 2004 was accepted by the Respondent in his letter dated 19.07.2003. On the face of this position that Respondent agreed to the terms as modified from time to time, the Tribunal could not have concluded that there was delay on the part of the Appellant. The conclusion arrived on the issues framed by the Tribunal in regard to

cause of delay, breach of contract and foreclosure of the contract being contrary to its own finding that the time was not the essence of the contract between the parties. The Tribunal seriously erred by its own contradiction in holding that the Appellant breached the contract. This also amounts to not assigning any reason for such conclusion. It is argued that the District Judge failed to properly consider the said fact and thereby the impugned orders are illegal and are liable to be set aside.

12. **Claim III: Price Variation/ Escalation:**

a. The counsel for the Appellant shed light on Clause 7 of special conditions of contract and Clause 23 of General conditions of contract, which was agreed by the Respondent at the time of enhancement of contract price vide letter No. 1510 dated 22.05.2003 that price variation/escalationup to (±)20% allowed. In response to the same, the Respondent had agreed to execute the work as per the terms and conditions provided in the contract demands vide his letter No. 7897 dated 19.07.2003. Accordingly, 20% of the price adjustment has been done. The Petitioner is not entitled to get the price variation on actual basis.

b. It is also submitted that no deviation ceiling in Price VariationClause ("PV Clause") was then urged by the Respondentswhile asking for extension in project deadline. In his letter dated 06.03.2002, the Respondent requested for sympathetic consideration to lift price variation ceiling to compensate his costs already incurred. He did not then suggest that he would not take up the work if PVceiling were not lifted. In the amendment to LOA; made in the letter dated 22.5.2003 of the Appellant, the clause 2.9 stipulated not to change PVceiling as already fixed. The Respondent accepted the same. The amount claimed under this heading towards PV on actual basis is not supported with any materialsdocuments and bills towards purchasing of oils and making payment towards higher cost of labour and other such materials towards enhanced price. Thereby, it is submitted that the claim is not liable to be entertained.

c. Thereby, it is argued that in the absence of evidence supporting the claim,the claim is not sustainable for it is sansany proof of evidence.

13. **ClaimIV:Claim on Idle Labour and Overhead Charges:**

a. It is submitted that per provisions regarding supply of materials in the technical specifications of the contract, materials to be issued by the Appellant shall be lifted by the Respondent from the departmental stores only after the submission of an indemnity bond and any other conditions required to be fulfilledis done by the Claimant according to the approved program of construction.The Respondent having failed to lift the materials in the stores as per the aforesaid terms and conditions, the Appellant cannot be held responsible for the lapses of the Respondent.

b. The counsel for the Appellant relied onconditions of the contract under the heading "Mode of Billing" in Technical Specification to argue that it was earlier stipulated that the contractor shall not be entitled to any claim on account of his idle

labour for non-delivery of the materials by OSEB or any other cause for which OSEB has no control. But under item no. 7 of award, this claim has been allowed by the Tribunal under this head, 12 lakhs have been awarded. It is submitted that it is illegal, contrary to the agreement and thereby the arbitral Tribunal has misconducted themselves.

14. **Claim V: Claim of Damages and Loss of Profit:**

a. It is submitted that Compensation and damages are prohibited by Clause 37 of GCC but the Arbitral tribunal under each item have awarded 6% compensation on claim amount.The arbitral Tribunal rejected the damages claimed by the respondent in its counter-claim on the ground that there is no agreement for payment of damages. But at the same time, granted damages to the Respondent. This claim is speculative in nature. The claimant to this effect has adduced no proof of evidence. Hence, the Owner has had no opportunity to rebut the same on the contrary the claim is made on a calculation of claimant's own choice which speaks of no reason. It is submitted that it is illegal and the arbitrators have thereby committed misconduct.

15. **Claim VI:Bank Guarantee:**

a. It is submitted that the said bank guarantee encashment is on account of breach of contract and after due notice to Opposite party and termination of contract and termination of contract by foreclosure. Hence,the finding of the Tribunal that encashment of Bank Guarantee is unwarranted and is contrary to clause 22 of GCC. It is submitted that againstthe claim relates to BG, and the Arbitral Tribunal has awarded an amount of Rs.29,76,600/- alongwith compensation at the rate of 6% p.a. which is absolutely without reasons and it is contrary to the terms of agreement since terms of BG authorizes the claimant to encash the BG in case of termination of contract.

16. **Claim VII: On the claim of Deduction against retention money:-**

a. It is submitted that Clause 2.5 of the LOA empowers the owner (“the Appellant”) to pay 85% of the total erection and schedule works against the bills submitted by the contractor and to retain 15% of the bill amount out of which 10% is payable on successful completion of erection and commissioning of the line subject to trial operation and 5% on successful completion of performance and guarantee tests. The aforesaid term was clarified by letter dated 25.11.95. These terms and conditions were clearly incorporated in clause No. 2.5 of Letter of Award which was accepted by the Respondent by his letter dated 10.06.1996 in Respondent's documents.

b. It is also submitted that as per the amendment to LOA made vide letter dated 22.5.2003, the retention money shall be released subject to submission of bank guarantee. As per the acceptance letter dated 19.7.03 of Respondent's documents, the Respondent-contractor agreed to furnish bank guarantee for the amount of 15%

retention money. Butthe Appellantobjected the bank guarantee furnished by the Respondent vide letter dated. 08.09.2003 for it was in animproper format. The Respondent did not comply with the requirements of a proper guarantee. Ergo, the Respondent cannot be allowed to approbate and reprobate claims in the dispute. It is, therefore, submitted that the Respondent having agreed to execute the work but not before November 2003 vide letter dated 19.7.2003cannot be allowed to walk away with the refund of 15% retention money without furnishing a proper and valid bank guarantee to the satisfaction of the Appellant. As per the term of contract the retention money is only payable on successful completion of erection and commissioning of the line subject to trail operation and the rest 5% on successful completion of performance and guarantee test.

c. It is also argued that the Clause 2.16 of L.O.A. extended the guarantee period till expiry of 12 months from the date ofcommissioning of line. After termination of the contract, the Respondentwas requested to arrange final measurement of the work and to handover the work and unutilized material but the Respondent failed to turn up. When the work has not been finally measured, the question of returning the retention money does not arise. Hence this claim is liable to be rejected.

17. **Claim VIII: Interest: -**

a. It is submitted that interest is totally prohibited under the agreement. Reliance has been placed on the terms of the Technical Specification ("TS") on the heading of "Mode of Billing" which provides that the Claimant ("the Respondent") shall not be entitled to claim any interest against any payment any arrears or against any balance which may be due to him at any time and the Claimant shall not be entitled to any claim on account of his idle labour for non-delivery of the materials or any other cause for which the Owner has no control. The Tribunal has erroneously granted interest as well as 6%compensation under the garb of interest on each head of claim.

III. RESPONDENT'S SUBMISSIONS:

18. Per contra, learned counsel for the Respondentsubmitted thatthe award was passed and the claims were allowed within the contours of the agreement, and after considering the documents on record. It is also submitted that the challenge to the award does not fall under any of the grounds as enumerated by several judgments under Section 37 of the Arbitration and Conciliation Act, 1996.

19. The counsel for the Respondent also presented the arguments to rebut the claims of the Appellant which have been arranged as follows:

20. **Jurisdiction of the Arbitral Tribunal:**

a. It is submitted that the constitution of the Arbitral Tribunal derives from Clause 32 of the GCC/Agreement. The Respondent herein asper Clause 32 had raised disputes in respect of the PV Clause vide its letter dated 10.10.2002 but no action was taken by the Engineer on the letter of the Respondent. Thereafter, as the differences/ disputes arose between the parties leading to the foreclosure of the contract by the Appellant vide letter dated 21.03.2005, the Respondent as on 02.03.2004 had nominated Mr.R.P. Mahapatra as their Arbitrator. Subsequently, as the Appellant had failed to appoint his choice ofArbitrator, the Respondent approached this Court in ARBP No. 42 of 2004 under Section 11 of the A&C Act, 1996. This Court, on the representation of the Appellant, appointed Mr. R.N. Mahapatra as the 2nd Arbitrator being nominated by the Appellant. It is submitted that the appointment of the Arbitrators is as per

b. Clause 32 of the Agreement and the Tribunal members are former employees of GRIDCO. The Arbitral Tribunal has not dealt with any issue which was not covered under the Agreement and as well as passed the award in contours of the Agreement and following the procedure as prescribed under the Arbitration and Conciliation Act,1996.

c. It is, also, submitted that the Appellant had participated in the entire arbitral proceedings, adduced evidence and submitted documents and did not raise the issue of non - compliance of Clause 32 before the Arbitral Tribunal. It is only as an afterthought it has invoked this pleading before the Ld. District Judge in the appeal U/S. 34 of theArbitration Act, 1996 and now in present before this Hon'ble Court.

d. The award is a well reasoned one and both the parties were properly heard and documents considered before passing of such an award. No principles of natural justice were violated by the Ld. Arbitral Tribunal. The said District Judge has dealt has rightly held that the Tribunal had the jurisdiction to dealwith the reference made by the Respondent.

e. It is humbly submitted that the scope of interference u / s 37 of the Arbitration and Conciliation Act, 1996 is very limited. The Apex Court in plethora of judgments has reiterated that the High Court cannot go into the merits of the award and only if the award is against the principle of natural justice /illegal/interest of thecountry/ fundamental policy of the country, it can interfere.

f. In the present case, the award does not suffer from any patent illegality nor does it fall under the definition of public policy of India as one of the grounds as stated u/s 34 of the Act. It is submitted that the Arbitral Tribunal has been appointed as per Clause 32 of the Agreement and as no objection was raised during the proceedings, the Appellant waived its right u / s 4 of the Act. It is, also submitted that all the documents were examined and after hearing the parties had found the

Appellant to be liable for the delay of the execution ofthe contract as well as illegal foreclosure of the contract.

21. **Reasons for delay:** The Arbitral Tribunal found the Appellant to be the cause ofdelay in the contract on the following reasons:

a. The Appellant was unable to supply materials as per theprogramme / work schedule

b. The Appellant stopped work from 28.02.2000 to 17.10.2000without any reason

c. The Appellant directed the Respondent not to do any work inthe forest land and in about 3 kms stretch from Meramundali sideand about 10 kms from Duburi End.

d. 19 months delay in doing the survey of the land. '

e. Non-availability of land / stubs and templates by the Appellateas per the terms of the contract.

22. It is submitted that the reasons are well founded and the arbitral tribunal rightly held that the delay is majorly attributable to the Appellant only.

23. **Time is essence of contract** — It is submitted that the Arbitral Tribunalexamined Clauses 21.0, 3.3 of the GCC and Clause 7.0.0 of theSpecial Conditions of contract and had held that time was not the essence of the contract due the actions of the parties during theexecution of the contract. The time was extended without any levy ofpenalty despite of there being a clause for levying penalty/ damagesin case of delay in completion of contract.

24. **Breach of contract** — The Arbitral Tribunal found the Appellant to have breached the contract on several counts. It is submitted that the Arbitral Tribunal had referred to the different clauses of the contract and held that the Appellant had failed todischarge his obligations under the contract such as:

a. The Appellant took over the survey work from the Respondent,even though it was his responsibility to do it under the contract.'

b. Stubs and other materials were not provided to the Respondent,

c. Failure to provide required number of sites for construction

d. Delay in payment of bills or clearance of pending dues

e. The Appellant was in violation of Clause 21 of GCC by notadhering to the clause of time being the essence of contract.

25. **Foreclosure justified or not** - The Arbitral Tribunal found that the Appellant was not justified in foreclosing the contract because of the huge delay in the execution of contract, increase in the quantity or the work, withholding of the

bills and deducting money as well as non-consideration of making a change to the PVclause.

26. It is submitted that the Arbitral Tribunal had after examining all the correspondences, documents and clauses of the contracts had held the Appellant responsible for the delay in execution of contract and foreclosure of the contract being unjustified.

IV. ISSUES FOR CONSIDERATION:

27. This court has heard the counsels for both the parties at length, and also perused the material available on record.I will deal with the judgments cited by learned counsels at the time of discussing the merits of the case. Here, this Court has identified the following issues to be determined:

A. Whether the validity of the arbitral proceedings can be challenged on non-compliance of any pre-arbitration procedure/condition for invoking arbitration?

B. Whether the order of the District Judge warrants interferencekeeping in mind the limitations of this court's powers under Section 37 of the A&C act?

C. Whether the Arbitral Tribunal erred in their award of interest against the contractual provision to the contrary?

V. ISSUE A: WHETHER THE VALIDITY OF THE ARBITRAL PROCEEDINGS CAN BE CHALLENGED ON NON-COMPLIANCE OF ANY PRE-ARBITRATION PROCEDURE/CONDITION FOR INVOKING ARBITRATION?

28. It is trite in the field of alternate dispute resolution that arbitration is a "creature" of contract where the latter is both progeny and progenitor of rules of the dispute resolution. However, it should not be forgotten that in all these years, Arbitration has carved a personality of its own. It is not just another extension of a contract but also a procedure whose design and regulation must be informed in important ways by procedural norms. Those norms, in turn, might find themselves in tension with the private ordering values that are most commonly associated with a regime of contract.

29. Now, it is common for construction contracts toinclude a pre-arbitration clause in the agreements such that, in the event of disputes arising between the parties, they will take certain steps before they can refer the disputes to arbitration. These conditions are also known as Multi-tiered Dispute Resolution ("MDR") Clauses that prescribe certain pre-steps to be followed before the commencement of arbitration proceedings.These actions can include, among others, mediation, conciliation, internal proceedings, and other discussions to assist resolve the conflict amicably and swiftly. If these measures fail to settle the conflicts, the agreement may provide that they may then be directed to arbitration.

30. In the present case, the counsel for the Appellant has shed light on Clause 32.0 of the GCC which provides for referral of any dispute, contractual or other, to the Engineer, appointed by the Appellant, who shall give written notice of its decision within a period of thirty (30) days of such referral. According to the terms of the contract, only after the engineer fails to give written notice of his decision can the matter can be referred to arbitration.

31. Ergo, it is now pertinent to decide, if the failure to refer the matter to the Engineer before triggering the midnight clause of the contract would render the subsequent arbitral proceeding invalid.

32. The regulatory development of MDR differsnot only among jurisdictions, but also among the different legal systems. A strong contrast can be seen in the attitudes of popular jurisdictions of International Arbitration:

33. The business and legal setting of Singapore showcases an open attitude towards MDR as can be seen from both its judicial decisions and legislations. The Singaporean judiciary's recognition of MDR can be seen in the landmark decision of ***International ResearchCorp PLC v. Lufthansa Systems Asia Pacific Pte Ltd***[1], in which the Singaporean Court of Appeal demonstrated its willingness to enforce MDR clauses in contracts in the spirit of the principle of party autonomy and laissez faire. The Singapore Court of Appeal decided that the Appellant was not bound by the arbitration agreement when the preconditions to commence arbitration were not adhered to. It was also held that there must be actual compliance with the preconditions to commence arbitration. Again, in ***Ling Kong Henry v.Tanglin Club***[2] the Singaporean High Court levelled that a MDR clause is not a series of separate dispute resolution agreements, but forms part of a unitary arbitration agreement. The combined effect of these judicial decisions has been a clearly pro-arbitration stance, whichserves to promote the use of MDR in Singapore.

34. As a matter of Singapore law, this means that the parties are bound by their agreement to ultimately arbitrate their disputes as per the agreed terms by the parties. Any attempt to resolve the dispute through litigation is thus a breach of contract and such proceedings will likely be stayed by the Court pending resolution under the provisions of the multi-tier dispute resolution clause.

35. In Hong Kong, the popularity of MDR in taking baby steps whilethe attitude of the judiciary remains pro-arbitration. In the judgment of ***C v. D***[3], the Hong Kong Court of Final Appeal ("CFA") laid down authoritatively the proper approach to understanding the nature of and interpreting multi-tiered dispute resolution clauses. Ribeiro PJ, who delivered the majoritydecision,held that, in absence of clear language to the contrary, the question of compliance with an MDR clause is an admissibility question and is thus a matter for tribunals to decide, and is not subject to judicial review. This has the consequence that if the tribunal decides that the pre-

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[1][2013]SGCA55 [2][2018]SGHC153 [3][2023]HKCFA16

arbitration procedural requirement is a precondition to arbitration that has not been satisfied, it may order a stay of the arbitration proceedings pending compliance with the precondition, dismiss the claim and/or impose costs sanctions.

36. However, the approach towards MDR by Western common law jurisdictions, most notably the United Kingdom (the "UK") and the United States (the "USA"), are markedly different from what is seen in Hong Kong and Singapore. Instead of welcoming and facilitating MDR, common law jurisdictions in the West have demonstrated skepticism out of due process concerns.

37. The United Kingdom's 1996 English Arbitration Act does not address MDR. In England, pursuant to section 67 of the Arbitration Act 1996, an arbitralaward may be challenged on the grounds of the tribunal's substantivejurisdiction, which may require the court to consider the scope of the matterssubmitted to arbitration in accordance with the parties' arbitration agreement.

38. In the recent case of ***Republic of Sierra Leone v SL Mining Ltd***[4], the English Commercial Court held that alleged non-compliance with preconditions toarbitration is exclusively a matter of admissibility for the arbitral tribunal andcannot lead to a successful jurisdictional challenge. The arbitral award in question was challenged on theground that the three-month negotiation period provided for by the disputeresolution clause had not expired at the date on which a request for arbitrationwas served. The court held that an objection that a claim was brought toosoon goes to the admissibility of the claim rather than the substantivejurisdiction of the tribunal.

39. The approach taken in SL Mining was applied by the court in ***NWA v NVF***[5] the court wasclear that to deprive one party of a right to refer a dispute to Arbitration because of another's failure to comply with a precondition would deprive thearbitration agreement of business common sense.On a separate note, in ***Kajima Construction Europe (UK) Ltd v. Children's Ark Partnership Ltd***[6], the English Court of Appeal recently concluded that contractual provisions providing for mandatory alternative dispute resolution procedures can create a condition precedent to the commencement of litigation. However, such contractual provisions are enforceable only when the drafting is sufficiently clear, precise and certain, with the mechanism referring to objective criteria, and tailored to the specific contract.

40. In the United States, both legislations and judicial decisions are generally not supportive of multi-tier dispute resolution. The courts in the United States are also dismissive of multi-tier dispute resolution, as shown by the case of ***Advanced Bodycare Solutions v Thione International***[7], in which the Court of Appeals for the 11th Circuit ruled that a contractual provision allowing parties to either mediate or arbitrate is unenforceable, because arbitration as defined in the Federal Arbitration

[4][2021]EWHC286(Comm) [5][2021]EWHC2666(Comm) [6][2023]EWCA Civ 292 [7]524F.3d 1235 (11th Cir. 2008)

Act requires a resolution produced by an independent third party, not a voluntary agreement by the parties. Another issue arises from how courts in the United States address non-compliance under such agreements where the agreements are found to be valid. Some courts would stay the judicial proceedings and allow parties to complete the alternative dispute resolution process.However, other courts may dismiss the action altogether by treating MDR as a condition precedent to judicial adjudication.

41. While the Indian Courts have tried to deal with the issue; it cannot be said that the position of law regarding MTDRC is clear. Some High Court judgments have held such clauses to be mandatory whereas the others have held them to be directory.

42. In ***Sikand Construction Co. v. SBI***[8], the contract clause provided for decision of the architect first, before reference to arbitration. The Delhi High Court held that the clause was directory and not mandatory, and that disputes can be referred to arbitration without referring them to architect first. The reasons given for arriving at this conclusion were : First, the decision of the architect was not final and was subject to the right of arbitration and review. Second, there was no indication of a judicial hearing by the architect. Thirdly, clause 37 conferred absolute power in the arbitrator without any restriction. Fourth, consequences of not following the procedure have not been provided for.

43. However, in ***NirmanSindia v. IndalElectromeltsLtd***[9]., the Kerala High Court held that if the contract clause required prior decisions of engineer and adjudicator, before reference to arbitration; the parties were bound to comply with the mode prescribed in the agreement before referring the disputes to arbitration.

44. In ***Sushil Kumar Bhardwaj v. Union of India***[10], the Delhi High Court relied on the Apex Court decision in ***Manohar Reddy v. Maharashtra Krishna Valley Development Corp.***[11], and ***NirmanSindia***(supra) to hold that where the contract clause required hierarchical adjudication of claims by various authorities before arbitration; it is mandatory and not directory.

45. In ***Build Fab v. Airport Authority of India***[12], before the Calcutta High Court, the contract clause required decision by Dispute Resolution Board upon a request being made within ninety days of dispute arising, and only the matters which are not resolved before DRB could be referred to arbitration. This requirement was not complied with. The court held that since the matter was not referred to DRB, arbitration clause could not have been invoked. It was further held that the regular remedy of filing of suit was available to the claimant, as the arbitration clause applied only to certain category of disputes which go through the procedure before DRB.

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[8]ILR 1979 Delhi 364 [9]AIR 1999 Ker 440 [10]2009 SCC OnLine Del 4355 [11](2009) 2 SCC 494 [12]AP Case No. 700 of 2011,Cal HC

46. Then again, in ***Ravindra Kumar Verma v. BPTP Ltd.***[13], Delhi High Court changed its stance and held that the existence of conciliation or mutual discussion should not be a bar in seeking to file proceedings for reference of the matter to arbitration:

> *"8(i) In my opinion, there are two other reasons, and which are in addition to the reasoning given in the case of Saraswati Construction Co. (supra), for holding that a prior requirement to be complied with before seeking reference of disputes to the arbitration is only directory and not mandatory.*
>
> *(ii) The first reason is that if the arbitration clause is read in a mandatory manner with respect to prior requirement to be complied with before invoking arbitration, the same can result in serious and grave prejudice to a party who is seeking to invoke arbitration because the time consumed in conciliation proceedings before seeking invocation of arbitration is not exempted from limitation under any of the provisions of the Limitation Act, 1963 including its Section 14.Once there is no provision to exclude the period spent in conciliation proceedings, it is perfectly possible that if conciliation proceedings continue when the limitation period expires the same will result in nullifying the arbitration clause on account of the same not capable of being invoked on account of bar of limitation i.e when proceedings for reference to arbitration are filed in court, the right to seek arbitration may end up being beyond three years of arising of the disputes and hence the petition for reference may be barred by limitation. Another example would make this position clear that suppose on the last date of limitation period of three years a party wants to invoke an arbitration clause but the arbitration clause contains the requirement of invoking the precondition of 'mutual discussion'. Surely, on the last date if a notice has to be given for invoking mutual discussion, no mutual discussion or conciliation can take place on the same date of the notice itself i.e no mutual discussion can take place before expiry of the period of limitation which expires on that very day on which the notice for mutual discussion is given. Therefore, if the pre-condition of mutual discussion is treated as mandatory, valuable rights of getting disputes decided by arbitration will get extinguished and which is not a position which should be acceptable in law."*

47. The aforementioned judgement was influential in way that led to change in perceptions of other High Courts.In ***Sun Security Services v. Babasaheb Bhimrao Ambedkar University***[14], the contract clause provided for "settlement" by the Registrar; failing that, decision of the Vice-Chancellor shall be final and binding; if not satisfied, arbitration shall be conducted. The Allahabad High Court held that it is not mandatory to go to the Registrar or the Vice-Chancellor before going for arbitrationas the contractual clause did not contemplate any adjudicatory mechanism or passing of any order. It is only a pre-arbitration settlement mechanism.

48. In ***JIL-Aquafil (JV) v. Rajasthan Urban Infrastructure Development Project***[15], the contract clause required the matter to be referred to the Project Manager for decision, and if a party was dissatisfied with the decision, then, it had to give a notice of arbitration within 28 days of the decision of the Project Manager. The disputes were submitted to the Project Manager for his decision. He gave his

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[13]2014 SCC OnLine Del 6602 [14]2014 SCC OnLine All 16608 [15]2016 SCC OnLine Raj 3814

decision. The Rajasthan High Court heavily relied on ***Ravindra Kumar Verma*** (supra) and held that this requirement shall merely be directory.

49. Later, in ***Ved Prakash Mithal and Sons v. DDA***[16], the contract clause required hierarchical adjudication of claims by various authorities before arbitration. The Delhi High Court relied on the decision in ***Sushil Kumar Bhardwaj*** (supra) and followed it, and held that the procedure is mandatory. The decisions in ***Ravindra Kumar Verma*** (supra)was distinguished for the following:

> *"In my view these judgments have no application to the facts of the present case inasmuch as they deal with the Arbitration Agreement, which required the party to first explore the possibility of an amicable settlement before seeking appointment of an Arbitrator. This is very different from the procedure as has been prescribed in Clause 25 of the Agreement in question, which not only provides for a hierarchical manner of adjudication of the claims raised by the Contractor, but also gives specific timeline for the decision of each authority."*

50. Then again, in ***NHAI v. Pati-Bel (JV)***[17], the contract clause required prior reference to DRB. The Delhi High Court held this pre-arbitration procedure to be mandatory for the contractual unequivocally demonstrated that the parties intended it to be mandatory. If the clause is so structured that it does give rise to a binding obligation, it may not be possible to contend that the preliminary step provided in the clause concerned is not a condition precedent. In a major boost to the principle of party autonomy in dispute resolution, Rajiv Shakdher J. opined that:

> *"32. To my mind, the observations are relevant to the present case as well. The parties should be able to show good reason, as to why they should not be held to, what they have agreed between themselves. The parties, in this case, had agreed that before they trigger the arbitration agreement, they would agitate their grievance before the DRB. The DRB is constituted in a manner whereby each party is entitled to select a nominee and the two nominees can decide upon the Chairperson of the DRB. It is only when there is no agreement as to the Chairperson of the DRB that another Authority has been given the right to select the Chairperson. Furthermore, the decision of the DRB has been given pre-eminence and, as noted hereinabove, is factored in the final adjudication, in case of one of the parties refuses to accept the decision of the DRB.*
>
> *33. Therefore, in my view, the language of Clause 67.1 gives an enforceable right to the parties to insist that the opposite party should, in the first instance, take their grievance to the DRB before it embarks upon the arbitration route. The clause, apart from anything else, provides for a defined structure and the timeline within which the DRB is to process the matter, once it is placed before it."*

51. From the aforesaid discussion, it is discernible that there exist differential perspectives on the nature of the MTDR clauses in the contract. While, the High Courts have not been able to find a common ground over the question of enforceability of MTDR clauses, one can decipher a near consistent pattern from the judgements of High Courts and the Foreign Courts — it may be decided from the language used in the contract and the intention of the parties emanating therein.

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[16]2017 SCC OnLine Del 9039 [17]2019 SCC OnLine Del 6793

52. The business fraternity anticipates that the court will uphold the principles over which they willingly agree to adhere to in order to engage in economic activities.Ergo, in a case where the parties planned, agreed, and stated in the contract that attempts to address the disputes by MDR methods before embarking on arbitration, then the courts should recognise that purpose and agreement and enforce the same to the extent practicable. The decision made by the contracting parties about how they wish to settle possible disagreements between them should be respected.

53. In all the aforementioned discussion, it is established that a MDR clauses make lives easier for the parties of a transaction however, if the same are inefficient an ineffective, the aggrieved party can seek a remedy against the arbitrator/arbitral tribunal and the compulsory nature of the MMRT can there be relaxed.

54. MDR clauses play a significant role in facilitating smoother business transactions by offering a structured approach to resolving disputes. However, it is important to acknowledge that these clauses may not always be foolproof. In cases where the MDR methods prove to be inefficient or ineffective, the party who has suffered harm can seek a remedy against the arbitrator or arbitral tribunal involved. This allows for flexibility in situations where the compulsory nature of the MDR process may need to be relaxed to ensure a fair resolution. By providing recourse against the ineffective tier of settlement, the legal system ensures that parties have the means to address any shortcomings in arbitration. Ultimately, the objective is to maintain fairness and uphold the principles agreed upon by the parties involved in the contract. Thus, in my opinion, while MDR clauses are mandatory in nature, any procedural or structural shortcoming in the pre-arbitral resolution stage should allow the aggrieved party to approach the court and demand arbitral dispute resolution.

55. Now, in the present case, the Respondent had, as per Clause 32, raised disputes in respect of the PV Clause vide its letter dated 10.10.2002. However,asno action was taken by the Engineer on the letter of the Respondent, theRespondent would have no option but to trigger the arbitral clause of the agreement. Ergo, this Court is of the opinion that the arbitral tribunal in the present case has legitimate and sufficient jurisdiction vis-a-vis the case in hand.

VI. ISSUE B: WHETHER THE ORDER OF THE DISTRICT JUDGE WARRANTS INTERFERENCE KEEPING IN MIND THE LIMITATIONS OF THIS COURT'S POWERS UNDER SECTION 37 OF THE A&C ACT?

56. It is well recognized in Arbitration jurisprudence that the scope of interference by the Courts in arbitration proceedings and arbitral awards is narrow and that the Courts ought to be cautious and circumspect in interfering with any award which is passed by an arbitral tribunal which has been appointed pursuant to an agreement between the parties to the dispute. The exceptions of the aforementioned rule finds place in Section 34 of the A&C Act wherein certain

instances have been outlined where the Courts can interfere with any award passed by arbitral tribunals and set it aside. This court would also examine the award with the aforesaid restrictive mandate of law.

57. The submission of counsel for the Appellant that the District Judge has failed to appreciate that the award suffers from the vice of 'patent illegality' and that the interpretation given to the contract by the Arbitrator was completely perverse, illegal cannot be accepted.

58. The proviso to Section 34(2A) makes it aptly clear that awards cannot be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence. Further, Explanation 2 of Section 34(2)(b) makes it clear that "for the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."

59. To elucidate upon the aforesaid terms and concepts as contained in Section 34, one must refer to the judgment of the Supreme Court in ***MMTC Ltd. v. Vedanta Ltd.***, the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words :

> *"11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses Ltd. v. WednesburyCorpn., (1948) 1 KB 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract."*

60. For a better understanding of the role ascribed to Courts in reviewing arbitral awards while considering applications filed under Section 34 of the 1996 Act, it would be relevant to refer to a judgment of the Supreme Court in ***SsangyongEngg. & Construction Co. Ltd. v. NHAI***[19], wherein R.F. Nariman, J. has in clear terms delineated the limited area for judicial interference, taking into account the amendments brought about by the 2015 Amendment Act:

> *"34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e.,the fundamental policy of Indian law would be relegated to the "Renusagar" understanding*

[19](2019) 15 SCC 131

of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, ***the Court's intervention would be on the merits of the award, which cannot be permitted post amendment****. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).*

35. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paragraphs 36 to 39 of Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, ***there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law****. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.*

38. Secondly, it is also made clear that ***re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award****.*

39. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award.Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in Associate Builders (supra), namely, that ***the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would ; in short, that the arbitrator's view is not even a possible view to***

> ***take****.Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2A).*
>
> *41. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (supra), while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."*
>
> *(Emphasis supplied)*

61. A similar view, as stated above, has been taken by the Delhi High Court in ***K. Sugumar v. Hindustan Petroleum Corpn. Ltd.***, wherein it has been observed as follows:

> *"2. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act indicates the highly constricted power of the civil court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator."*

62. In short, the court must scrutinize three questions: first, the arbitrator had to adopt a judicial approach; second, the principles of natural justice had to be upheld; third, the decision must not have been egregious, or rather, perverse.

63. Here, in light of the aforementioned, I find it difficult to accept the contentions of the counsel for the Appellant wherein he has stated that the claimsallowed by the Arbitrator is contrary to the terms of the contract itself, or that the impugned Awards were based on no material/ evidence at all. The Impugned Judgements and Awards make it aptly clear that the Arbitrator had relied on the written submissions, documentary evidence and statements of actors involved in the transaction to come to its conclusion with respect to quantification of claims.

64. In the judgment dated 07.08.2009 passed by the Learned District Judge, Khurda, he has held that the there is no scope for the courts to interfere with the findings of the sole Arbitrator and the supporting reasons assigned by him.

65. Now, as the first claim of the appellant has been answered in first issue, we move to thesecond claim of the Appellant, it issubmitted that the time extension was granted under Clause 28 of the GCC as per request of the Respondent from time to

time. On the face of this position that Respondent agreed to the terms as modified from time to time, the Tribunal could not have concluded that there was delay on the part of the Appellant.

66. I have perused the arbitral award and find it relevant to produce the reasons elucidated by the tribunal to attribute the delay on the part of the appellant. On page 23 of the arbitral award, the tribunal has found that the delay attributable, to a large extent, on the appellant due to express disapproval to carry out work, due to delay in conducting survey, and delay in supply of material and availability of site:

> *"1.1*
> *(i) The Claimant was intimated by the Respondent on 02.08.1996 (Exh. C-1/13) to defer commencement of the work to 01.12.1996 since the Respondent was not in a position to supply materials as per the programme in the Bar Chart (Exh. C- 1/23)*
> *(ii) From the records available, the Stub Setting work commenced in the month of March, 1998 (Exh. C-143). However, the Respondent for reasons best known to them directed the Claimant to stop work from 28.02.2000 to 17.10.2000 (Exh. C- 127 & C-34).*
> *(iii) There were problems in execution of work. The Respondent therefore directed the Claimant not to do any work in the forest land and in about 3 Kms stretch from Meramundali side and about 10 Kms from Duburi end (Exh. R-19).*
>
> *1.2: Due of Survey*
> *The intent of the tender specification was that the detail survey of the line was to be done by the Claimant and this was also included in the scope of work of the LOA dated 30.05.1996 (Exh. R-1). However, in the 1 week of August, 1996 the Respondent decided to carry out the survey departmentally. The survey work was completed by the Respondent and the original profiles were handed over for tower spotting to the Claimant on 06.08.1997. The Claimant resubmitted the profiles after tower spotting etc. on 04.11.1997The survey by the Claimant was approved on 23.12.1997 by the Respondent. This resulted in an initial delay of 19 months. The fact of the delay in survey have been dealt with in details under Section-II "Facts of the Case", at Para-5.*
>
> *1.3: Delay in supply of material/ availability of site*
> *....*
> *....But on examination of the documents it is seen that the Claimant was asked to stop work on 28.02.2000 (Exh. C-127) and was allowed to resume work on 17.10.2000 (Exh. C-34) Evidently work could not have progressed during these 8 months. Further, Monsoon intercepted during June1998 to October, 1998 and June1999 to November, 1999 as mentioned in the statement S-4 (Exh. C-141) of the Claimantwhich has not been taken in to consideration in the reply of the Respondent. At this stage the Claimant's statement at S-6 (Exh. C-143) deserve examination. Here it has been stated that there were only 3 locations available from March, 1998 to May, 1998 for casting of foundation. The rest of locations from Location No. 1 to Location No94 were not available due to different reasons stated in the document S-6 (ExhC-143)."*
>
> *3.2.2 Supply of Material*
> *.....*
> *The Respondent has evidently failed to supply Tower materials to the Claimant in the required quantities and in time even after a lapse of almost six years of award of the contract. The submission of the Respondent in their written note of argument at Para-7*

> *that his progress revealed at Document S-4clearly discloses that the Claimant has not progressed in doing the work commensurate with the stock of materials and thereby has deliberately breached the true spirit of the contract"isthus unacceptable. Non-supply of materials on time constitutes a breach of contract by the Respondent"*
>
> *3.2.4 Payment of Bills*
>
> *An examination of a series of correspondences made by the Claimant to the Respondent vide Exhibits C-38, C-40, C-41, C-45, C-47, C-48C-49C-54 to C-59, C-61, C-63 to C-66, C-68, C-77, C-80, C-85, C-87, C-92, C-93 and C- 96 between October, 2001 to May, 2002, it is seen that the Claimant had made several requests repeatedly for release of payments against their Running Account Bills and Price Variation Bills, with-held by the Respondent. The with-held amounts as per the Claimant were varying between Rs.18.0 lakhs (approximately) to Rs.43.0 lakhs (approximately) at different points of time."*

67. Then again, from page 26 of the arbitral award, it is apparent that the delay was not attributable to the respondent. It is specifically provided in Clause-21.0 of the GCC (ExhC01/143) and Clause-3.3 of the Contract Agreement (ExhC-1/5) that "*Time is essence of contract*" however, the tribunal noted that subsequent conduct of the parties to the contract reveal that both the parties have given a go by to this Clause. In many instances, there were lapses on both the sides which actually reduced the time-factor of the transaction to pennies.

68. The arbitral tribunal has very competently examined the documents and other evidence on record under various heads and held that:

> *"The letter dated 21.03.2005 (Exh. R-39) the contract was foreclosed by the Respondent. In the Issue No.3 it has already been held that the delay occurred primarily on account of the failures on the part of the Respondent in timely discharge of obligations provided in the contract. It has been held by the Tribunal vide Issue No.4 that foreclosure of the contract by the Respondent is arbitrary and unjustified. Therefore, withholding the Retention Money is arbitrary and unjustified."*

69. From the aforementioned excerpt, it is apparent that the arbitraltribunal has considered the facts of the case, the contentions of both the parties and other documentary and oral evidence taken on record to take a decision.So, even if the respondent agreed to the terms as modified from time to time, it is largely undisputed that the delay was indeed on the part of the appellant more than that of the respondent and ergo, the foreclosure was illegitimate.

70. Now, coming to the submission against the Claim III (Item No. 5: Price Variation Charges a per Actuals beyond ±20%), the counsel for the Appellant shed light on Clause 7 of Special Conditions of Contract and Clause 23 of General conditions of contract, which was agreed by the Respondent at the time of enhancement of contract price vide letter No. 1510 dated 22.05.2003 that price variation/escalation up to (±)20% allowed. Accordingly, it is submitted that 20% of the price adjustment has been done and the respondent is not entitled to get the price variation on actual basis.

71. The arbitral tribunal has dealt with the issue on page 41 of the arbitral award and held that the respondent is entitled to price variation on actual basis due to the following reasons:

> "*Clause-2.9 of the Letter of Award, provides that price variation is payable from the day the contract is operative. As per the Letter of Acceptance of the Claimant dated 10.06.1996 (Exh. R-4), the Claimant has stated that "we agree to a ceiling of ±20% till scheduled completion of the line as per specifications*"
>
> *Immediately on receipt of the Letter of Acceptance from the Claimant, the Respondent issued an Amendment on 18.06.1996 (Exh. R-7) to the original Letter of Award dated 30.05.1996 (Exh. R-1). This amendment referred to the Claimant's Letter of Acceptance (Exh. R-4) without refuting the stand taken by the Claimant on the PV Clause. Further during the entire period from 30.05.1996 (date of LOA) to 21.03.2005 (date of foreclosure), nowhere has the Claimant shifted from the stand taken by them in the Letter of Acceptance. Reference may be made to letters of the Claimant dated 13.02.2002 (Exh. C-50), 23.05.2002 (ExhC-55)07.08.2002 (Exh. C-57) ending with letter dated 24.12.2003 (Exh. C-90).*
>
> *There has been clear breach of contract by the Respondent in the instant case, in survey, supply of materials making sites available for construction and in making payments of Bills as per the terms of the contract. This has resulted in prolonging the period of construction for which the Claimant cannot be held responsible. The arguments made by the Respondent that the Claimant while requesting to lift Price Variation ceiling did not say that he would not take up the work if PV ceiling is not lifted, is not acceptable since from the very inception of the contract, the Claimant refers to price adjustment as per terms of contract documents."*

72. While the stand taken by the arbitral tribunal sounds good and equitable, it is also true that the arbitrators cannot go beyond the agreement between the parties. This means that arbitrators must stay within the scope of the agreement when making decisions. If they attempt to go outside of the agreement, their decision may be overturned by a court. The ruling is a victory for businesses, as it helps to ensure that arbitrators will not make decisions that are not authorized by the parties. It also helps to protect businesses from being held liable for decisions that they did not agree to.

73. As such, as held by the Supreme Court in ***Ssangyong Engineering and Construction Company Limited*** (supra), the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. The Supreme Court has further held that a party to the Agreement cannot be made liable to perform something for which it has not entered into a contract. In my view, rewriting a contract for the parties would be breach of fundamental principles of justice entitling a Court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in theexceptional category.

74. It is an undisputed fact that while the impugned PV Clause was being regularly challenged by the respondent but it is also the fact that the appellant never acceded to the demand of the respondent on record. Ergo, an award which goes

beyond the agreed terms of the contract (on record), cannot be sustained. Ergo, the respondent is not entitled to get the price variation on actual basis and the arbitral award approving Item no. 5 it is liable to be set aside.

75. Next, in rebuttal to the amount awarded against Claim IV (Item No. 7: Claim on Idle Labour and Overhead Charges), the counsel for the appellant submitted that per provisions regarding supply of materials in the Technical Specifications of the contract, materials to be issued by the Appellant shall be lifted by the Respondent from the departmental stores only after the submission of an indemnity bond and any other conditions required to be fulfilled is done by the Claimant according to the approved program of construction. The Respondent having failed to lift the materials in the stores as per the aforesaid terms and conditions, the Appellant cannot be held responsible for the lapses of the Respondent. It is also submitted that the contractor shall not be entitled to any claim on account of his idle labour for non-delivery of the materials by OSEB or any other cause for which OSEB has no control. However, the arbitral tribunal having already established that the delay in the purported construction is largely attributed to the appellant awarded 12 lakhs under this head as noted:

> *"The agreed date of completion of works under the contract was 31.10.1997. The execution of the contract was delayed for various reasons mostly on account of survey, inadequate and delayed supply of materials and clearance of the route including forest clearance and non-payment of bills in time by the Respondent. The extension of the completion date was 30.09.1998 and on 22.05.2003 the date of completion was further extended up to 30.06.2004. The Respondent delayed in amending the LOA, contract completion period and to revise the scheduled quantities of work. From the statement submitted by the Claimant (ExhC-141) to the Tribunal it is inferred that the Claimant stopped execution of the works from June, 2002 onwards and the contract was fore-closed on 21.03.2005The Claimant was asked to take final measurement and hand over the completed works and the balance materials in the letter of fore-closure (Exh. R-39) The Tribunal estimates the period required for such handing over as one month and therefore is of the opinion that the Claimant is entitled to some relief in regard to idle establishment and overhead charges for the period from 01.06.2002 to 30.04.2005 Le for a period of 35 months."*

76. The arbitral tribunal has aptly noted that the award of idle charges is mostly due to the wrongful foreclosure of the contract by the appellant against which the respondent is entitled to the idle charges on the material and machinery employed by it.

77. Now, one might feel that the reasoning could be elaborate to buttress the award, however, the Supreme Court in ***Parsa Kente Collieries Limited v. Rajasthan Rajya Vidyut Utpadan Nigam Limited***[20], adverting to the previous decisions of the Apex Court in ***McDermott International Inc. v. Burn Standard Co. Ltd.***[21] and ***RashtriyaIspat Nigam Ltd. v. Dewan Chand Ram Saran***[22] has dictated that :

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[20][2019]7SCC236 [21][2006]11SCC181 [22][2022]5SCC306

"9.1...

It is further observed by this Court in the aforesaid decision in paragraph 33 that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. ***A possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It is further observed that thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.***

9.2 Similar is the view taken by this Court in NHAI v. ITDCementation (India) Ltd. (2015) 14 SCC 21, para 25 and SAIL v. GuptaBrother Steel Tubes Ltd. (2009) 10 SCC 63, para 29."[Emphasis supplied]

78. Ergo, the lump sum amount awarded by the arbitral tribunal in the present matter cannot be faulted when the award doesn't reek of arbitrariness or illegality or lack of evidence.

79. Next, the appellant has submitted against the amount submitted against Claim V(Item No. 12: Claim of Damages and Loss of Profit)that Compensation and damages are prohibited by Clause 37 of GCC but the Arbitral tribunal under each item have awarded 6% compensation on claim amount.The arbitral Tribunal also rejected the damages claimed by the respondent in its counter-claim on the ground that there is no agreement for payment of damages.

80. The arbitral tribunal on the other hand, held that particular contract the period of delay is as high as 7 (seven) times of the scheduled period of completion. Therefore, application of Emden's formula gives rise to absurd figures. However, the arbitral tribunal went on with the assumption that "*It is undoubtedly true that the contract value includes an element of profit for the unexecuted portion of the work*." The arbitral tribunal relied on the affidavit furnished by the respondent giving the figures of audited profit/loss account of the Company for the years 1996-97 to 2001-02 (6 years) duly certified by the Chartered Accountant.After due consideration of all circumstances, the Tribunal was of the opinion that "*a mathematical calculation of loss of profit is not possible in this case.*"

81. However, in my opinion the amount awarded against the Claim V cannot be sustained because, first, Compensation and damages are prohibited by Clause 37 of GCC and, second, the tribunal was itself confused about the corpus of amount to be awarded against the claim as the calculations were based on various assumptions and extraneous considerations which cast doubt over the veracity of the award and therefore, cannot be approved.

82. In ***M/s UNIBROS v. All India Radio***[23], DipankarDatta, J. held that a claim for damages cannot as a matter of course result in an arbitral award without sufficient proof of the claimant having suffered injury:

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[23]SLP (CIVIL) NO. 8791/2020

> *"the First Award was interfered with by the High Court for the reasons noted above. The Arbitrator, in view of such previous determination made by the High Court, could have granted damages to the appellant based on the evidence on record. There was, so to say, none which on proof could have translated into an award for damages towards loss of profit. A claim for damages, whether general or special, cannot as a matter of course result in an award without proof of the claimant having suffered injury. The arbitral award in question, in our opinion, is patently illegal in that it is based on no evidence and is, thus, outrightly perverse; therefore, again, it is in conflict with the "public policy of India" as contemplated by section 34(2)(b) of the Act."*

83. In context of the aforementioned discussion, the amount awarded against Claim V deserves to be set aside.

84. Now, to examine the appellant submissions against the amount awarded against Claim VI(Item No. 4: Bank Guarantee Encashment), it is submitted that the said bank guarantee encashment is on account of breach of contract and after due notice to Opposite party and termination of contract and termination of contract by foreclosure. However, as the blame of the appellant in causing delay and illegitimately foreclosing the agreement is already established, the arbitral tribunal reiterated it and held that:

> *"The Bank Guarantee of 10% of the contract value is intended to cover the Contract Performance Security. In the performance of the contract the Respondent has certain obligations relating to providing inputs such as drawing stubs, templates and other materials which have been listed earlier. There have been failures on the part of the Respondent to meet the obligations. Further there has also been unreasonable delay in releasing payments to the Claimant. Even after the original award till amendment i.e. 30.05.1996 to 22.05.2003 very little quantity materials required for the work had been procured by the Respondent. Only 20 locations were available for casting foundation. When the Claimant requested for prorata extension of completion time considering the huge extension of scope the Respondent was willing to consider extension only after review of progress of work during the extended period without making a firm determination. Liquidated damages had been stipulated for works after the extended period up to 30.06.2004. Since the outstanding issues were not solved the Claimant gave notice for resolution through Arbitration on 02.03.2004 (Exh. R-36). Thereafter the Respondent gave notice for foreclosure and foreclosed w.e.f. 21.03.2005 (Exh. R-39). Under the circumstances encashment of the Bank Guarantee is not warranted."*

85. This claim is a no brainer. The arguments of the appellant were destined to fail due to the latches attributed to it by the arbitral tribunal. The submissions of the appellant have been aptly answered by the arbitral tribunal in the award itself making the claims of the appellant fall flat on the face. Ergo, the amount awarded against this claim is approved.

86. Subsequently, in rebuttal to the amount awarded under Claim VII (Item No. 1: On the claim of Deduction against retention money), it is submitted by the appellants that Clause 2.5 of the LOA empowers the owner ("the Appellant") to pay 85% of the total erection and schedule works against the bills submitted by the

contractor and to retain 15% of the bill amount out of which 10% is payable on successful completion of erection and commissioning of the line subject to trial operation and 5% on successful completion of performance and guarantee tests. It is also submitted that as per the amendment to LOA made vide letter dated 22.5.2003, the retention money shall be released subject to submission of bank guarantee. On perusal of the arbitral award, it is clear that the challenge under this Claim is no challenge at all:

> *"As per Clause-2.5 of the L.O.A. (Exh. R-1) 15% of each bill amount is to be retained by the Respondent. Out of this retention amount 10% is payable on successful completion of erection and commissioning of the line subject to trial operation and the rest 5% on successful completion of performance and guarantee tests.*
>
> *In the letter dated 21.03.2005 (Exh. R-39) the contract was foreclosed by the Respondent. In the Issue No.3 it has already been held that the delay occurred primarily on account of the failures on the part of the Respondent in timely discharge of obligations provided in the contract.*
>
> *It has been held by the Tribunal vide Issue No.4 that foreclosure of the contract by the Respondent is arbitrary and unjustified. Therefore withholding the Retention Money is arbitrary and unjustified*
>
> *In their written argument the Respondent have submitted that the Claimant was requested to arrange final measurement of the work already executed to hand over the completed work and the unutilized materials, but the Claimant did not turn upWhen the work has not been finally measured, the question of returning Retention Money does not arise.*
>
> *During the Arbitration proceedings on 28.09.2007 vide Order No.12 of the Tribunalboth the parties agreed that there is no dispute in this regard and nobody has any claim on the other on this account.*
>
> *In view of the above position, there is no reason to hold back the retention money of 15% after foreclosure of contract on 21.03.2005."*

87. From the above produced excerpt, it is apparent that the arbitral tribunal has considered the relevant facts vis-a-vis this case, the contentions of both the parties and other documentary and oral evidence on record to take a decision. The award has been sufficiently explained by the Tribunal such that I don't have to do it again. Ergo, this claim is accepted.

VII. ISSUE C: WHETHER THE ARBITRAL TRIBUNAL ERRED IN THEIR AWARD OF INTEREST AGAINST THE CONTRACTUAL PROVISION TO THE CONTRARY?

88. It is submitted by the counsel of the appellant that interest is totally prohibited under the agreement by relying on the terms of the Technical Specification ("TS") on the heading of "Mode of Billing"which provides that the Claimant ("the Respondent") shall not be entitled to claim any interest against any payment any arrears or against any balance which may be due to him at any time

and the Claimant shall not be entitled to any claim on account of his idle labour for non-delivery of the materials or any other cause for which the Owner has no control.

89. Under Section 31(7)(a) of the A&C Act, an arbitral tribunal is empowered to include interests on any sum awarded in the arbitral award:

> *"31(7)(a)* ***Unless otherwise agreed by the parties****, where and insofar as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made."*

90. Further, in terms of Section 31(7)(b) of the A&C Act, the amount awarded is also liable to carry interests unless the award indicates otherwise. Thus, an arbitral tribunal would also have the power to award future interests on the awarded amounts, which as expressly provided under Section 31(7)(a) of the A&C Act, may include interests on the amounts awarded. However, a bare reading of Section 31(7)(a) also makes it evident that the Section applies only where there is no previous Agreement as to the rate of interest to be awarded. It is as plain as a pikestaff that the Arbitral Tribunal has gone beyond the contract and awarded an interest rate when it was previously decided vide Technical Specification ("TS") of the Contract that the contractor shall not be entitled to interest on any arrears.

91. The powers of an Arbitral Tribunal are those conferred upon it by the parties within the limits allowed by the applicable law, together with any additional powers that may be conferred automatically by the operation of law. The Supreme Court has held that there is the primacy of Agreement over the powers of the Arbitral Tribunal regarding the rate of interest of an Arbitral Award.

92. In ***Rajasthan State Mines and Minerals Limited v. Eastern Engineering Enterprises***[24], the Supreme Court held that:

> *"44. From the resume of the aforesaid decisions, it can be stated that:*
>
> *(a) It is not open to the Court to speculate, where no reasons are given by the Arbitrator, as to what impelled Arbitrator to arrive at his conclusion.*
> *(b) It is not open to the Court to admit to probe the mental process by which the Arbitrator has reached his conclusion where it is not disclosed by the terms of the Award.*
>
> *(c) If the Arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication then the Court cannot interfere.*
>
> *(d)If no specific question of law is referred, the decision of the Arbitrator on that question is not final, however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. In a case where specific question of law touching upon the jurisdiction of the Arbitrator was referred for the decision of the Arbitrator by the parties, then the finding of the Arbitrator on the said question between the parties may be binding*

24(1999) 9 SCC 283

(e) In a case of non-speaking Award, the jurisdiction of the Court is limited. The Award can be set aside if the Arbitrator acts beyond his jurisdiction.

(f) To find out whether the Arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the Agreement between the parties containing the Arbitration clause. Arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the Award.

(g) In order to determine whether Arbitrator has acted in excess of his jurisdiction what has to be seen is whether the Claimant could raise a particular Claim before the Arbitrator. If there is a specific term in the Contract or the law which does not permit or give the Arbitrator the power to decide the dispute raised by the Claimant or there is a specific bar in the Contract to the raising of the particular Claim then the Award passed by the Arbitrator in respect thereof would be in excess of jurisdiction.

(h) The Award made by the Arbitrator disregarding the terms of the reference or the Arbitration Agreement or the terms of the Contract would be a jurisdictional error which requires ultimately to be decided by the Court. He cannot Award an amount which is ruled out or prohibited by the terms of the Agreement. Because of specific bar stipulated by the parties in the Agreement, that Claim could not be raised. Even if it is raised and referred to Arbitration because of wider Arbitration clause such claim amount cannot be awarded as Agreement is binding between the parties and the Arbitrator has to adjudicate as per the Agreement."

93. The Supreme Court clarified its stance in ***Continental Construction Co. Ltd.v. State of Madhya Pradesh***[25] , wherein SabyasachiMukharji, J. elucidated that :

"....

The Contract Act does not enable a party to a Contract to ignore the express covenants thereof, and to Claim payment of consideration for performance of the Contract at rates different from the stipulated rates, on some vague plea of equity. The parties to anexecutory contract are often faced, in the course of carrying it out, with a turn of event which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the Contract merely because on account of an uncontemplated turn of events, the performance of the Contract may become onerous."

94. This trend continued in ***Sayeed Ahmed and Company v. State of Uttar Pradesh &Ors***[26]. the Supreme Court has held that a provision has been made under Section 31(7)(a) of the 1996 Act in relation to the power of the arbitrator to award interest. As per this section, if the contract bars payment of interest, the arbitrator cannot award interest from thedate of cause of action till the date of award.

95. In ***Indian Oil Corporation Ltd. v. Shree Ganesh Petroleum***[27], the Supreme Court has reiterated that the Arbitrator is a creature of the contract and the arbitrator cannot decide in contravention of the instrument which made him. The relevant paragraphs are reproduced below:

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[25]1988 SCR (3) 103 [26](2009) 12 SCC 26 [27] (2022) 4 SCC 463

"43. An Arbitral Tribunal being a creature of contract, is bound to act in terms of the Contract under which it is constituted. An Award can be said to be patently illegal where the Arbitral Tribunal has failed to act in terms of the Contract or has ignored the specific terms of a Contract.

44. However, a distinction has to be drawn between failure to act in terms of a Contract and an erroneous interpretation of the terms of a Contract. An Arbitral Tribunal is entitled to interpret the terms and conditions of a Contract, while adjudicating a dispute. An error in interpretation of a Contract in a case where there is valid and lawful submission of arbitral disputes to an Arbitral Tribunal is an error within jurisdiction.

45. The Court does not sit in appeal over the Award made by an Arbitral Tribunal. The Court does not ordinarily interfere with interpretation made by the Arbitral Tribunal of a Contractual provision, unless such interpretation is patently unreasonable or perverse. Where a Contractual provision is ambiguous or is capable of being interpreted in more ways than one, the Court cannot interfere with the arbitral Award, only because the Court is of the opinion that another possible interpretation would have been a better one.

46. In Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204] , this Court held that an Award ignoring the terms of a Contract would not be in public interest. In the instant case, the Award in respect of the lease rent and the lease term is in patent disregard of the terms and conditions of the lease Agreement and thus against public policy. Furthermore, in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] the jurisdiction of the Arbitral Tribunal to adjudicate a dispute itself was not in issue. The Court was dealing with the circumstances in which a court could look into the merits of an Award.

48. The lease Agreement which was in force for a period of 29 years with effect from 15-4-2005 specifically provided for monthly lease rent of Rs 1750 per month for the said plot of land on which the retail outlet had been set up. It is well settled that an Arbitral Tribunal, or for that matter, the Court cannot alter the terms and conditions of a valid Contract executed between the parties with their eyes open.

49. InSsangyongEngg. & Construction Co. Ltd. v. NHAI [SsangyongEngg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , this Court held : (SCC pp. 199-200, para 76) "76. However, when it comes to the public policy of India, argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the Agreement continued to be applied till February 2013 in short, it is not correct to say that the formula under the Agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a circular, unilaterally issued by one party, cannot possibly bind the other party to the Agreement without that other party's consent. Indeed, the circular itself expressly stipulates that it cannot apply unless the Contractors furnish an undertaking/affidavit that the price adjustment under the circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority Award has created a new Contract for the parties by applying the said unilateral

circular and by substituting a workable formula under the Agreement by another formula dehors the Agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a Contract can never be foisted upon an unwilling party, nor can a party to the Agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral Award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment."

96. In ***PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust***[28] the Supreme Court clearly held that the role of the Arbitrator was to arbitrate within the terms of the Contract. He had no power apart from what the parties had given him under the Contract. If he has travelled beyond the Contract, he would be acting without jurisdiction. The court held as under:

"85. As such, as held by this Court in SsangyongEngg. & Construction [SsangyongEngg.& Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a Contract has been foisted upon an unwilling party. This Court has further held that a party to the Agreement cannot be made liable to perform something for which it has not entered into a Contract. In our view, re-writing a Contract for the parties would be breach of fundamental principles of justice entitling a court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in the exceptional category."

97. In PSA Sical Terminals (supra), the Supreme Court referred to and relied upon the earlier judgment of Supreme Court in ***Army Welfare Housing Organisation v. Sumangal Services (P) Ltd***[29]**.** and held that an Arbitral Tribunal is not a court of law. It cannot exercise its power ex debitojustitiae.

98. Then, in ***Satyanarayana Construction Co. v. Union of India***[30], the Supreme Court reiterated that once a rate had been fixed in a Contract, it was not open to the Arbitrator to rewrite the terms of the Contract and Award a higher rate.Where an Arbitrator had in effect rewritten the Contract and Awarded a rate, higher than that agreed in the Contract, the High Court was held not to commit any error in setting aside the Award.

99. Finally, I would like to refer to the pronouncement of the Supreme Court in ***State of Haryana v. S.L. Arora& Co***[31]., which held as under:

"34. Thus it is clear that Section 31(7) merely authorises the Arbitral Tribunal to Award interest in accordance with the Contract and in the absence of any prohibition in the Contract and in the absence of specific provision relating to interest in the Contract, to

[28](2021) 18 SCC 716 [29](2004) 9 SCC 619 [30](2014) 2 SCC (Civ) 252 [31](2010) 3 SCC 690

> *Award simple interest at such rates as it deems fit from the date on which the cause of action arose till the date of payment. It also provides that if the Award is silent about interest from the date of Award till the date of payment, the person in whose favour the Award is made will be entitled to interest at 18% per annum on the principal amount Awarded, from the date of Award till the date of payment. The calculation that was made in the execution petition as originally filed was correct and the modification by the respondent increasing the amount due under the Award was contrary to the Award."*

100. The Court may only interfere where the Arbitrator has failed in adopting a judicial approach during the arbitration proceedings, analysis of the contract, and thus while giving the award. Where it is evident that the learned Sole Arbitrator had worked well within his limits and there has not been any arbitrary exercise of power, there is no scope of interference of this Court with respect to the change in the rate of interest of an award.

101. In light of the aforementioned judicial decisions, it can be said that the Arbitral Tribunal cannot grant a different interest rate when a specific rate of interest has been decided by the parties, bound by an Agreement.

102. In the instant case, the Agreement specifically prescribed that no interest shall be granted. This takes away the power of the Arbitrator to deviate and grant his own rate of interest.In this view, the Tribunal has erroneously granted interest as well as 6%compensation under the garb of interest on each head of claim which is indeed erroneous. Ergo, in the amount awarded under claims which are uncontested or have been approved by this court, only the interest component awarded therein need to be set aside.

103. In conclusion, most of the contestations in the aforementioned discussion have gone in the favour of the appellants; in disapproval of the arbitral award. However, it cannot be ignored that a few have also gone in the favour of the respondent. Ergo, setting the award aside in its entirety would not be very wise. I would like to cite the Delhi High Court in ***National Highways Authority of India v. Trichy Thanjavur Expressway***[32] wherein it has held that the arbitral award can be partially awarded by severing the parts of the award which are perverse. The principle of severability which is the imprimatur of judicial interpretation (***J. C. Budhraja v. Chairman, Orissa Mining Co. Ltd. &Anr.***, (2008) 2 SCC 444;***B. R. Arora v. Airports Authority of India,*** 2019 SCC OnLine Del 7765,***R.S. Jiwani v. Ircon International Ltd***., 2009 SCC OnLineBom 2021, ***MMTC Ltd. (India) v. Alacari, SA (Switzerland)***, 2013 SCC OnLine Del 2932) applies with full rigour and force in situations where the Section 34 or 37 Court reaches the conclusion that the award suffers from illegalities or irregularities of the nature specified under Section 34(2). In such a situation, to set aside an award in its entirety is akin to throwing the baby out with the bath water.

[32][2023] SCC OnLine Del 5183

104. In ***National Highway Authority of India*** (supra), the Delhi High Court has relied on extract cited with approval from Redfern and Hunter, would show that under the UNCITRAL Model Law, the reviewing Court has the power either all or part of an award null and void:

> *"10.06. The purpose of challenging an award before a national court at the seat of arbitration is to have that court declare all, or part, of the award null and void. If an award is set aside or annulled by the relevant court, it will usually be treated as invalid, and accordingly unenforceable, not only by the courts of the seat of arbitration, but also by national courts elsewhere. This is because, under both the New York Convention and the Model Law, a competent court may refuse to grant recognition and enforcement of an award that has been set aside by a court of the seat of arbitration. It is important to note that, following complete annulment, the claimant can recommence proceedings because the award simply does not exist -that is, the status quo ante is restored. The reviewing court cannot alter the terms of an award nor can it decide the dispute based on its own vision of the merits. Unless the reviewing court has a power to remit the fault to the original tribunal, any new submission of the dispute to arbitration after annulment has to be undertaken by commencement of a new arbitration with a new Arbitral Tribunal."*

105. The decision to set aside a partial award shall ensure that parties successful in arbitration are not caused unnecessary hardship when losing parties attempt to second guess arbitral awards in courts. This decision will be helpful in saving considerable time both of the court and the parties, as the parties will not need to commence fresh arbitration or approach the courts for other reliefs.

106. The application of the doctrine of severability ensures that reason prevails over any instance of arbitrariness in the arbitration proceedings but also makes sure that the contractual autonomy of the parties is also respected. Moreover, I feel that through this approach courts will be able to realize the true mandate of the Arbitration and Conciliation Act and fulfil the cardinal purpose of the legislation to further convenience of business transactions in the country and take the next step towards non-interference of courts in the alternate dispute resolution proceedings.

VIII. **CONCLUSION**

107. In the said case also, this Court finds it relevant to invoke the doctrine of severabilityasthere are several claims that can be said to be separate and distinct, the Court can segregate the Award on items that do not suffer from any infirmity and uphold the Award to that extent. Thus, it becomes clear that the contention raised on behalf of the appellants in the present case, that submission of the appellant that the Arbitral Award is to be set aside in its entirety, is notjustified.

108. The award dated 30.11.2007 to the extent of Claim Item Nos.5, 8, 10, 11, and 12 is set aside. Moreover, the interest factor under various heads of the award is also set aside. The rest of the award is upheld.

109. The challenge in ARBA No. 24 of 2009is partlyadmitted.

110. Accordingly, this ARBA is disposed of.

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2024 (I) ILR-CUT-167

Dr. S.K. PANIGRAHI, J.

W.P.(C) NO. 20209 OF 2023

KUSUM DEI .....Petitioner(s)

-V-

STATE OF ODISHA & ORS. .....Opp.Party(s)

COMPENSATION – Petitioner's husband died in Puri car festival in stampede – The Petitioner claimed for compensation/ex-gratia amount – The claim of Petitioner rejected on the ground that the post-mortem report stated that death was due to pathological cause of disease in heart – Whether the rejection is sustainable? – Held, No – Any death due to stampede during Rath Yatra is likely to be due to suffocation leading to chocking of the heart, it cannot be opined that death was due to pathological cause of disease in heart – The Petitioner deserves to get the compensation.

For Petitioner(s) : Mr. Gyanendra Chandra Swain

For Opp.Party (s): Mr. G.R. Mohapatra, ASC, Mr. S.K. Mishra, Mr. Adam Ali Khan

JUDGMENT Date of Hearing : 27.09.2023 : Date of Judgment : 20.11.2023

Dr. S.K. Panigrahi, J.

1. The Petitioner through this Writ Petition has challenged the order dated 28.09.2022 passed by the Opposite Party No.2/Collector, Puri wherein the legitimate prayer of the Petitioner to extend/release the ex-gratia amount in favour of the Petitioner whose husband has died in Puri Car Festival, 2011 in stampede has been rejected.

I. **FACTUAL MATRIX OF THE CASE:**

2. The present petitioner is the widow of the deceased who has passed away in stampede during the Car Festival on 03.07.2011 has not been paid the ex-gratia amount though declared by the Govt. of Odisha.

3. It is pertinent to mention here that the petitioner's husband namely Sudhakar Swain had been to Puri for witnessing Ratha Yatra on 03.07.2011 with her son-in-law namely Pradip Mohapatra, Near Singhadwar they are painstakingly standing in a long queue under scorching sun for hours, all on a sudden a sudden push from behind, as a result her husband fell down and senseless.

4. Due to traffic congestion a stampede like situation arose. Due to such stampede he became senseless for which he was shifted to District Headquarter

Hospital, Puri at about 11 A.M, where the Medical Officer declared him dead. The said incident was covered of the all leading news papers of the State.

5. After the death of the husband of the petitioner namely Sudhakar Swain has been taken up to the District Headquarter Hospital, Puri and declared as dead. Thereafter undergone postmortem and he was cremated at Swargadwar, Puri, on the same day.

6. After this occurrence the in-laws of the deceased namely Pradeep Kumar Mohapatra has lodged F.I.R before the I.I.C, Kumbharapada P.S, Puri and U.D. Case was registered as U.D. Case No.30/2011 and the matter was entrusted to the Enquiry Officer for details investigation. On perusal of the report of unnatural death, which was send to the Magistrate U/s.174 of Cr.P.C, it reveals that in the present case, the death was due to traffic jam.

7. The son of the present petitioner has also immediately received Rs.5,000/- from the Red Cross Fund in order to fetch the instant requirement by way of an application to the Opp.party No.2. After the sad demise of husband of the petitioner, she has procured the death certificate and the death report from the competent authority.

8. Sue to negligence on the part of the District Administration/Police Personnel/Temple Administration/Govt. Machinery, the area became over crowded as a result of which there was a stampede like situation arose and he husband out of the above situation fell down became senseless and died due to above effect.

9. It is pertinent to mention here that the crowd swelled to such an extent that the District Administration was totally failed to maintain crowd management and traffic management, uncontrolled crowd coupled with traffic jam is the main reason behind the death of Sudhakar Swain. That, reasons leads to suffocation and stampede like situation.

10. If the Administration had taken proper care and caution for smooth running of the devotees during Car festival, the stampede like situation could not be happened. It is the duty of the District Administration, Temple Administration to take care of the visitors/ devotees during the Car festival being a welfare State.

11. The son-in-law of the petitioner namely Pradip Mohapatra who lodged an F.I.R before the Kumbharapada Police Station which was registered as the U.D. Case No.30/2011. After registration of the aforesaid U.D. case the Investigation Officer proceeded for inquiry. He collected the Postmortem report from the competent medical officer wherein it is ascertained that the cause of death is due to Myocardial infarction leading to shock and cardiac failure.

12. Local inquiry report was also received from the IIC, Singhadwar Police Station and opinion was obtained that due to heavy traffic congestion and heavy rush of people in Car festival on 03.07.2011 near Singhadwar, the oldman felt paucity of

oxygen and lost his sense at the spot and was carried to Hospital where he breathed his last. From the above reports, it is crystal clear that husband felt paucity of Oxygen and died due to heavy traffic congestion on 3.7.2011 near Singhadwar which is occurred due to negligence of administration authorities.

13. Due to this reason the petitioner is liable to get ex-gratia compensation (insurance coverage) as per guidelines framed by Jagannath Temple Management Committee/Jagannath Temple Administration.

14. It is needless to mention here that when the Car festival was insured for a period of 15 days from the day of "NABA JAUBAN DARSHAN" to "NILADRI BIJE" and the area Bada Danda (Grand Road) was insured from Singhadwar to Gundicha Temple and in the event of an accidental death of any Devotee during the period Rs.1,00,000/- will be given to the kith and kin of the deceased and accordingly the same was also confirmed by the Jagannath Temple Management Committee.

15. In the earlier occasion the petitioner moved this Hon'ble Court in W.P.(C) No.1222 of 2012 fervently praying therein for issue Rule NISI to the Opp.parties to release the ex- gratia amount in favour of the petitioner as declared by the authority in an early date. Said writ petition is disposed of by this Hon'ble Court with view that "The petitioner's representation dated 27th December, 2011 will be examined by the Collector, Puri and after hearing the petitioner and any other parties as considered necessary including the Opp.party No.3, a reasoned order shall be passed thereon not later than 10th October, 2022 and be communicated to the petitioner not later than 17th October, 2022. The court clarifies that it has not expressed any view on merits.".

16. in compliance to mandate of this Hon'ble Court as stated above in the preceding paragraphs, the petitioner filed the certified copy of order of this Court before Collector, Puri i.e. O.P. No.2. fervently praying therein to consider his legitimate claim in the matter of extending/releasing the ex-gratia amount in favour of the petitioner.

17. More or less O.P.No.2 in a mechanical casual manner has rejected the same having accepted the version of the O.P.No.3 and 4 as gospel of truth. More or less O.P.No.2 simply endorsed the views of O.P.Nos.3 and 4 as universal truth without analysis the materials on record.

18. It is pertinent to mention here that the O.P.No.2 i.e. Collector, Puri has opined that Sr. Branch Manager of concerned Insurance Company reported vide his letter No.862 dt.27.09.2022 that the claim of the petitioner is not coming under the scope of the Insurance Policy as the Postmortem report, the cause of death of Sudhakar Swain is mentioned that the cause of death appears to be due to acute, gross myocardial infarction leading to shock and cardiac failure. The nature of death appears to be natural sequence to a pathological cause of disease in heart and the

O.P. No.2 rejected the prayer of the petitioner to grant ex-gratia amount in favour of the petitioner.

19. The O.P. No.2 has not analysed the medical report of the doctor properly because the petitioner's husband has not suffered in any heart problem prior to the incident but due to stampede the petitioner's husband has died. So without application of independent mind and without evaluation the materials available on record rejected the prayer of dated 28.09.2022 the petitioner for ex-gratia amount. True copy of rejection order is annexed hereto as Annexure-7.

II. COURT'S REASONING AND ANALYSIS:

20. The O.P No-3 Administrator, Shree Jagannath Temple, Puri submitted that, the Insurance Policy No.55100246112900000001 was issued by the New India Assurance Co Ltd for the period from 01.07.2011 to 15.07.2011 which covers personal accident of Pilgrims and devotees of Rath Yatra 2011 with individual sum insured for Rs.100,000/- (Rupees one Lakh only). Accordingly the Temple Administration referred the matter to the New India assurance Co. Ltd for settlement of the ex-gratia amount, if any, in favour of the petitioner in connection with the death of her husband Sudhakar Swain as per her alleged claim. But the Sr. Branch Manager of concerned Insurance company reported vide his Letter No.862 dated 27.09.2022 that the claim of the petitioner is not coming under the scope of the Insurance policy as in the postmortem report, the cause of death of Sudhakar Swain is mentioned that:-

> *"the cause of death appears to be due to acute, gross, my cardial infraction leading to-shock and cardiac failure: The nature of death appears to be natural sequence to a pathological cause of disease in heart."*

21. However, any death due to stampede during Rath Yatra, 2011 is likely to be due to suffocation leading to chocking of the heart especially when Puri Bada Danda witnesses lakhs of devotees. In such situation, it cannot be opined that the death was due to "pathological cause of disease in heart". Such huge crowd likely to kill even a healthy person, if stampede occurs. In such view of the matter, the Petitioner deserves to get the compensation.

22. With respect to the aforesaid discussion, this Court is inclined to entertain the prayer of the Petitioner. The Writ Petition is, therefore, allowed.

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2024 (I) ILR-CUT-170

SAVITRI RATHO, J.

BLAPL NO. 12976 OF 2023

SOUMYA RANJAN SINGH .....Petitioner

-V-

STATE OF ODISHA .....Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – The petitioner is in custody since 28.08.2023 for commission of offence U/ss. 427,376,493,417 and 420 of the IPC – The investigation has been completed in the meantime – Whether the petitioner is entitled to be released on bail? – Held, Yes– Considering the nature of allegation against the petitioner & the age of victim, the Court is inclined to release the petitioner on bail. (Para 8)

Case Laws Relied on and Referred to :-

1. (2013) 7 SCC 675 : Deepak Gulati V. State of Haryana
2. (2019) 9 SCC 608 : Pramod Suryabhan Pawar V. State of Maharashtra & Anr.

For Petitioner : Mr. Anshuman Nanda
For Opp.Party : Mr. D.K. Mishra, AGA

JUDGMENT Date of Judgment : 16.01.2024

SAVITRI RATHO, J.

1. This is an application under Section 439 of Cr.P.C. in connection with Hirakud P.S. Case No.85 of 2023 corresponding to G.R. Case No.259 of 2023, pending in the file of the learned J.M.F.C.-1 (Cog.Taking), Sambalpur registered under Sections 427,376,493,417,420 of IPC on 10.04.2023 against the petitioner after the complaint (in 1.C.C Case No 5 of 2023) was sent to the Police Station under Section – 156 (3) of the Cr.P.C. Final form dated 02.10.2023 has been filed against the petitioner for commission of offences punishable under Sections – 427,376,493,417 and 420 of the I.P.C.

2. The prayer for bail of the petitioner had been rejected vide order dated 03.11.2023 passed by the learned 1st Addl. Sessions Judge, Sambalpur in BL AP No. 1350-306 of 2023.

3. The prosecution case in brief is that the complainant was in love with the petitioner since of the year 2018 and the petitioner was on visiting terms to her house since then. On 19.02.2023 at about 10.00 a.m., the petitioner went to the house of the complainant and told her they should get married in Samaleswari Temple on the same day. But the petitioner took the complainant towards Right Dike, Burla and committed rape on her against her wishes and thereafter assured to marry her. On the same day at 2.00 p.m., the petitioner took the complainant to Saiphoon near 18000, Burla made the complainant believe that she is his married wife and kept physical relation with her. Thereafter he told her that his parents would go to her house. On 26.02.2023, he spent some intimate moments with and took photographs of their activities. When she asked him to fix the date of marriage, he avoided to fix the date of marriage and asked her to wait for six months. When she and her parents went to the Hirakud Police Station on 27.02.2023 to report the matter, the police asked her to settle the matter amicably. As the police did not

register any FIR, the petitioner consulted a lawyer on 09.03.2023 and thereafter, filed the complaint on 28.03.2023. The complaint has been sent to the I.I.C., Hirakud Police Station, pursuant to order passed under Section 156(3) of IPC by the learned J.M.F.C-I, Sambalpur and the Sambalpur P.S. case No. 85 of 2023 was registered on 10.04.2023 against the petitioner for commission of offences punishable under Section 427,376,493,417,420 of IPC.

4. I have heard Mr.Anshuman Nanda, learned counsel for the petitioner appearing from the Virtual High Court at Sambalpur and Mr.D.K.Mishra, learned Addl. Government Advocate and perused the case diary.

5. Mr. A. Nanda, learned counsel appearing from the Virtual High Court at Sambalpur has submitted that the petitioner is a law abiding person and is in custody since 28.08.2023. False allegations have been made against him that he raped the victim against her wishes and that he induced her to have physical relations with him promising to marry her and giving her the impression of marriage . He has also submitted that no injury was found on any part of the body of the victim- informant and the no mark of injury was found on the petitioner. He further submits that the petitioner and the victim are both adults and from the statement of the victim it is apparent that they were in a consensual relationship and were supposed to marry. When the petitioner did not agree to marry the complainant, she has made false allegation against him. The ingredients of the offences under Section 376 (2) (n) IPC and Section 493 of the I.P.C are not satisfied for which the offences are not made out against the petitioner and the other offences alleged against him are triable by a Magistrate. He further submits that as investigation has been completed in the meanwhile, he may be released on bail.

6. Mr. D.K.Mishra, learned Addl. Government Advocate opposed the prayer for bail stating that the offences alleged against the petitioner is heinous in nature and he has spoilt the life of the victim. As the petitioner has enjoyed a physical relationship with the victim after giving her the false assurance of marriage and also false impression of marriage and thereafter avoided to marry her, he does not deserve to be granted bail. He also submits that if such a person is released on bail, it will send a wrong message to the society and encourage unscrupulous people to spoil the lives of young girls.

7. The narration in the complaint and the statement of the victim reveal that she was in love with the petitioner since a number of years and they have had physical relations on at least two different occasions. The petitioner had assured to marry her after the first incident and on the same day giving her the impression that she is his wife had relations with her again. Statements of witnesses reveal that the petitioner and the victim were in love with each other and the petitioner used to go to her house, but since he broke his promise to marry her, she had lodged FIR against him. A few witnesses have also stated that the victim had lodged FIR against the petitioner on 14.02.2022 and after the petitioner was granted bail by the High

Court on 20.05.2022, he had told the victim that his family members wanted her to marry him and they should live together. But she insisted that he should marry her and till then they should only speak over the phone. Thereafter the subsequent events have taken place.

8. Keeping in mind the decisions of the Supreme Court in the case of Deepak Gulati vs State of Haryana : (2013) 7 SCC 675 and Pramod Suryabhan Pawar vs State of Maharashtra and another : (2019) 9 SCC 608, and considering the nature of allegations against the petitioner, the age of the victim and as investigation has been completed in the meanwhile, I am inclined to release the petitioner on bail.

9. The petitioner - Soumya Ranjan Singh, shall be released on bail by the learned Court in seisin over the matter, on such terms and conditions as deemed fit and proper by it after verifying that he has no criminal antecedents of similar nature.

10. The BL APL is accordingly allowed.

11. Observations in this order have been made for the purpose of consideration of the prayer for bail and should not influence the learned trial court.

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2024 (I) ILR-CUT-173

M.S. SAHOO, J.

CRLLP NO. 47 OF 2010

STATE OF ORISSA .....Petitioner

-V-

MURALIDHAR SWAIN .....Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 378 – Scope and ambit of interference by the High Court in an appeal against acquittal – Discussed with reference to case laws.

Case Laws Relied on and Referred to :-

1. (2012)3 SCC 563 : Office of the Chief Postmaster General & Ors. V. Living Media Ltd. & Anr.
2. (2014) 4 SCC 108 : Chennai Metropolitan Water Supply and Sewerage Board & Ors. V. T.T.Murali Babu
3. (2020) 10 SCC 166 : 2020 SCC OnLine SC 776 (at page 179 of SCC) : Anwar Ali V. State of H.P.
4. (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179 : Babu V. State of Kerala.
5. 1934 SCC OnLine PC 42 : (1933-34) 61 IA 398 : Sheo Swarup V. King Emperor.
6. (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325 : Chandrappa V. State of Karnataka.
7. (2008) 10 SCC 450 : (2009) 1 SCC (Cri) 60 : Ghurey Lal V. State of U.P.

8. (2009) 9 SCC 368 : (2009) 3 SCC (Cri) 1069 : State of Rajasthan V. Naresh.
9. (2009) 4 SCC 271 : (2009) 2 SCC (Cri) 260 : State of U.P. V. Banne.
10. (2009) 10 SCC 401 : (2010) 1 SCC (Cri) 336 : Dhanapal V. State.
11. (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179] , SCC p. 199 : Babu V. State of Kerala.
12. (2019) 5 SCC 436 : (2019) 2 SCC (Cri) 586 : Vijay Mohan Singh V. State of Karnataka.
13. (1998) 5 SCC 412 : 1998 SCC (Cri) 1320 : Sambasivan V. State of Kerala.
14. (1999) 3 SCC 309 : 1999 SCC (Cri) 410 : K. Ramakrishnan Unnithan V. State of Kerala.
15. AIR 1955 SC 807 : 1955 Cri LJ 1653 : Atley V. State of U.P.
16. (1979) 1 SCC 355 : 1979 SCC (Cri) 305 : K. Gopal Reddy V. State of A.P.

For Petitioner : Mr. Sangram Das, Standing Counsel (Vig.)

For Opp. Party : None

JUDGMENT Date of Hearing & Judgment : 06.12.2023

M.S. SAHOO, J.

The petition has been filed under Section 378 Cr.P.C. seeking leave to appeal against order of acquittal passed by learned Special Judge (Vigilance), Bhubaneswar in T.R. No.117 of 2006 arises out of Bhubaneswar Vigilance P.S. Case No.32/2006 acquitting the opposite party from the charges under Section 7/13(d) read with Section 13(2) of Prevention of Corruption Act, 1988 and under Section 248(1) Cr.P.C.

2. I.A. No.6 of 2018

The petition has been filed for condonation of delay of 6 years 146 days in filing the petition.

3. On Perusal of the petition, the reason indicated in the petition is that the file had to be routed through different Departments of the State which requires considerable time for taking final decision by different Departments.

As per law laid down by the Hon'ble Supreme Court in ***(2012)3 SCC 563 (Office of the Chief Postmaster General & others v. Living Media Ltd. and another) and (2014) 4 SCC 108 (Chennai Metropolitan Water Supply and Sewerage Board and others v. T.T.Murali Babu)*** such explanation for delay in filing of petition beyond the statutory period i.e. pushing file through different Departments causing delay, is not a good ground to condone the delay when statutory period of limitation has been prescribed and valuable right accrues in favour of the person against whom petition/appeal has been filed.

4. Since no cogent reason has been shown to condone the delay, this Court is not inclined to condone the delay of 6 years 146 days in filing the petition, and accordingly the I.A. along with the CRLLP are directed to be dismissed.

CRLLP No.47 of 2010

5. Apart from not condoning the delay in filing the petition and rejecting the I.A. praying for condonation of delay, this Court has examined the judgment passed by the learned trial court, in view of the leave sought for filing the appeal. Learned Standing Counsel for the petitioner-State referring to the grounds stated in the petition seeking leave to appeal strenuously argued that it is a fit case where leave should be granted for filing the appeal against acquittal.

However, it is fairly submitted that while exercising the jurisdiction for grant of leave, this Court has only to consider the material produced by the prosecution and/or the defence that was considered by the learned trial court.

6. Having gone through the judgment against which the petition has been filed, it is evident that the learned trial court has considered all the relevant materials brought before it, has given cogent reason for not accepting the prosecution case.

The learned trial court after due consideration has found that the over hearing witnesses or the shadow witness who had accompanied the decoy-complainant to hear the conversation between the complainant and the accused, was not produced as witness. It has been therefore held that the said vital link in the entire chain of circumstances is completely missing.

P.W.2-complainant/decoy in his deposition has not supported the prosecution as far as demand of bribe by the accused is concerned, rather, his statement as P.W. has helped the accused regarding his plea that he refused to accept the money and "pushed" the money kept on the tea table in the drawing room, at the residence of the accused. The evidence of a Trap Laying Officer-P.W.7 does not lend any support to the prosecution as far as demand and acceptance of bribe is concerned.

7. *In* ***Anwar Ali v. State of H.P., (2020) 10 SCC 166 : 2020 SCC OnLine SC 776 (at page 179 of SCC)****, the law on the appeal against acquittal and the scope and ambit of Section 378 CrPC and the scope of interference by the High Court in an appeal against acquittal was considered by the Hon'ble Supreme Court and it has been held:-*

> ***14.1****. In* ***Babu [Babu v. State of Kerala, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179]*** *, this Court had reiterated the principles to be followed in an appeal against acquittal under Section 378 CrPC. In paras 12 to 19, it is observed and held as under: (SCC pp. 196-99)*
>
> *"12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into*

consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject-matter of scrutiny by the appellate court. (Vide Balak Ram v. State of U.P. [Balak Ram v. State of U.P., (1975) 3 SCC 219 : 1974 SCC (Cri) 837] , Shambhoo Missir v. State of Bihar [Shambhoo Missir v. State of Bihar, (1990) 4 SCC 17 : 1990 SCC (Cri) 518] , Shailendra Pratap v. State of U.P. [Shailendra Pratap v. State of U.P., (2003) 1 SCC 761 : 2003 SCC (Cri) 432] , Narendra Singh v. State of M.P. [Narendra Singh v. State of M.P., (2004) 10 SCC 699 : 2004 SCC (Cri) 1893] , Budh Singh v. State of U.P. [Budh Singh v. State of U.P., (2006) 9 SCC 731 : (2006) 3 SCC (Cri) 377] , State of U.P. v. Ram Veer Singh [State of U.P. v. Ram Veer Singh, (2007) 13 SCC 102 : (2009) 2 SCC (Cri) 363] , S. Rama Krishna v. S. Rami Reddy [S. Rama Krishna v. S. Rami Reddy, (2008) 5 SCC 535 : (2008) 2 SCC (Cri) 645] , Arulveluv. State [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288] , Perla Somasekhara Reddy v. State of A.P. [Perla Somasekhara Reddy v. State of A.P., (2009) 16 SCC 98 : (2010) 2 SCC (Cri) 176] and Ram Singh v. State of H.P. [Ram Singh v. State of H.P., (2010) 2 SCC 445 : (2010) 1 SCC (Cri) 1496])

(Underlined to Supply Emphasis)

*13. **In Sheo Swarup v. King Emperor [Sheo Swarup v. King Emperor, 1934 SCC OnLine PC 42 : (1933-34) 61 IA 398 :** AIR 1934 PC 227 (2)] , the Privy Council observed as under: (SCC Online PC: IA p. 404)*

'... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.'

14. The aforesaid principle of law has consistently been followed by this Court. (See Tulsiram Kanu v. State [Tulsiram Kanu v. State, 1951 SCC 92 : AIR 1954 SC 1] , Balbir Singh v. State of Punjab [Balbir Singh v. State of Punjab, AIR 1957 SC 216 : 1957 Cri LJ 481] , M.G. Agarwal v. State of Maharashtra [M.G. Agarwal v. State of Maharashtra, AIR 1963 SC 200 : (1963) 1 Cri LJ 235] , Khedu Mohton v. State of Bihar [Khedu Mohton v. State of Bihar, (1970) 2 SCC 450 : 1970 SCC (Cri) 479] , Sambasivan v. State of Kerala [Sambasivan v. State of Kerala, (1998) 5 SCC 412 : 1998 SCC (Cri) 1320] , Bhagwan Singh v. State of M.P. [Bhagwan Singh v. State of M.P., (2002) 4 SCC 85 : 2002 SCC (Cri) 736] and State of Goa v. Sanjay Thakran [State of Goa v. Sanjay Thakran, (2007) 3 SCC 755 : (2007) 2 SCC (Cri) 162] .)

*15. **In Chandrappa v. State of Karnataka [Chandrappa v. State of Karnataka, (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325]** , this Court reiterated the legal position as under: (SCC p. 432, para 42)*

'(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such
phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.'
(Underlined to Supply Emphasis)

16. ***In Ghurey Lal v. State of U.P. [Ghurey Lal v. State of U.P., (2008) 10 SCC 450 : (2009) 1 SCC (Cri) 60]****, this Court reiterated the said view, observing that the appellate court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court's acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.*

17. In ***State of Rajasthan v. Naresh [State of Rajasthan v. Naresh, (2009) 9 SCC 368 : (2009) 3 SCC (Cri) 1069],*** *the Court again examined the earlier judgments of this Court and laid down that: (SCC p. 374, para 20)*

'20. ... An order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused.'

18. ***In State of U.P. v. Banne [State of U.P. v. Banne, (2009) 4 SCC 271 : (2009) 2 SCC (Cri) 260]*** *, this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances include:(SCC p. 286, para 28)*

'(i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court's conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) This Court must always give proper weight and consideration to the findings of the High Court;
(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.'

A similar view has been reiterated by this Court in Dhanapal v. State ***[Dhanapal v. State, (2009) 10 SCC 401 : (2010) 1 SCC (Cri) 336]*** .

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

14.2. *When can the findings of fact recorded by a court be held to be perverse has been dealt with and considered in paragraph 20 of the aforesaid decision, which reads as under:* ***(Babu case [Babu v. State of Kerala, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179] , SCC p. 199)***

(Underlined to Supply Emphasis)

"20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (Vide Rajinder Kumar Kindra v. Delhi Admn. [Rajinder Kumar Kindra v. Delhi Admn., (1984) 4 SCC 635 : 1985 SCC (L&S) 131] , Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312] , Triveni Rubber & Plastics v. CCE [Triveni Rubber & Plastics v. CCE, 1994 Supp (3) SCC 665] , Gaya Din v. Hanuman Prasad [Gaya Din v. Hanuman Prasad, (2001) 1 SCC 501] , Aruvelu [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288] and Gamini Bala Koteswara Rao v. State of A.P. [Gamini Bala Koteswara Rao v. State of A.P., (2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372])"

(Emphasis supplied)

It is further observed, after following the decision of this Court in Kuldeep Singh v. Commr. of Police [Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] , that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.

(Underlined to Supply Emphasis)

14.3. *In the recent decision of* ***Vijay Mohan Singh [Vijay Mohan Singh v. State of Karnataka, (2019) 5 SCC 436 : (2019) 2 SCC (Cri) 586]*** *, this Court again had an occasion to consider the scope of Section 378 CrPC and the interference by the High Court [State of Karnataka v. Vijay Mohan Singh, 2013 SCC OnLine Kar 10732] in an appeal against acquittal. This Court considered a catena of decisions of this Court right from 1952 onwards. In para 31, it is observed and held as under: (SCC pp. 447-49)*

"31. An identical question came to be considered before this Court in Umedbhai Jadavbhai [Umedbhai Jadavbhai v. State of Gujarat, (1978) 1 SCC 228 : 1978 SCC (Cri) 108] . In the case before this Court, the High Court interfered with the order of acquittal passed by the learned trial court on reappreciation of the entire evidence on record. However, the High Court, while reversing the acquittal, did not consider the reasons given by the learned trial court while acquitting the accused. Confirming the judgment of the High Court, this Court observed and held in para 10 as under: (SCC p. 233)

'10. Once the appeal was rightly entertained against the order of acquittal, the High Court was entitled to reappreciate the entire evidence independently and come to its own conclusion. Ordinarily, the High Court would give due importance to the opinion of the Sessions Judge if the same were arrived at after proper appreciation of the evidence. This rule will not be applicable in the present case where the Sessions Judge has made an absolutely wrong assumption of a very material and clinching aspect in the peculiar circumstances of the case.'

(Underlined to Supply Emphasis)

***31.1**. In **Sambasivan [Sambasivan v. State of Kerala, (1998) 5 SCC 412 : 1998 SCC (Cri) 1320]** , the High Court reversed the order of acquittal passed by the learned trial court and held the accused guilty on reappreciation of the entire evidence on record, however, the High Court did not record its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. Confirming the order passed by the High Court convicting the accused on reversal of the acquittal passed by the learned trial court, after being satisfied that the order of acquittal passed by the learned trial court was perverse and suffered from infirmities, this Court declined to interfere with the order of conviction passed by the High Court. While confirming the order of conviction passed by the High Court, this Court observed in para 8 as under: (SCC p. 416)*

'8. We have perused the judgment under appeal to ascertain whether the High Court has conformed to the aforementioned principles. We find that the High Court has not strictly proceeded in the manner laid down by this Court in Doshi case [Ramesh Babulal Doshi v. State of Gujarat, (1996) 9 SCC 225 : 1996 SCC (Cri) 972] viz. first recording its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable, which alone will justify interference in an order of acquittal though the High Court has rendered a well-considered judgment duly meeting all the contentions raised before it. But then will this non-compliance per se justify setting aside the judgment under appeal? We think, not. In our view, in such a case, the approach of the court which is considering the validity of the judgment of an appellate court which has reversed the order of acquittal passed by the trial court, should be to satisfy itself if the approach of the trial court in dealing with the evidence was patently illegal or conclusions arrived at by it are demonstrably unsustainable and whether he judgment of the appellate court is free from those infirmities; if so to hold that the trial court judgment warranted interference. In such a case, there is obviously no reason why the appellate court's judgment should be disturbed. But if on the other hand the court comes to the conclusion that the judgment of the trial court does not suffer from any infirmity, it cannot but be held that the interference by the appellate court in the order of acquittal was not justified; then in such a case the judgment of the appellate court has to be set aside as of the two reasonable views, the one in support of the acquittal alone has to stand. Having regard to the above discussion, we shall proceed to examine the judgment of the trial court in this case.'

(Underlined to Supply Emphasis)

*31.2. In **K. Ramakrishnan Unnithan [K. Ramakrishnan Unnithan v. State of Kerala, (1999) 3 SCC 309 : 1999 SCC (Cri) 410]** , after observing that though there is some substance in the grievance of the learned counsel appearing on behalf of the accused that the High Court has not adverted to all the reasons given by the trial Judge for according an order of acquittal, this Court refused to set aside the order of conviction passed by the High Court after having found that the approach of the Sessions Judge in recording the order of acquittal was not proper and the conclusion arrived at by the learned Sessions Judge on several aspects was unsustainable. This Court further observed that as the Sessions Judge*

was not justified in discarding the relevant/material evidence while acquitting the accused, the High Court, therefore, was fully entitled to reappreciate the evidence and record its own conclusion. This Court scrutinised the evidence of the eyewitnesses and opined that reasons adduced by the trial court for discarding the testimony of the eyewitnesses were not at all sound. This Court also observed that as the evaluation of the evidence made by the trial court was manifestly erroneous and therefore it was the duty of the High Court to interfere with an order of acquittal passed by the learned Sessions Judge.

31.3. In ***Atley [Atley v. State of U.P., AIR 1955 SC 807 : 1955 Cri LJ 1653] ,*** *in para 5, this Court observed and held as under: (AIR pp. 809-10)*

'5. It has been argued by the learned counsel for the appellant that the judgment of the trial court being one of acquittal, the High Court should not have set it aside on mere appreciation of the evidence led on behalf of the prosecution unless it came to the conclusion that the judgment of the trial Judge was perverse. In our opinion, it is not correct to say that unless the appellate court in an appeal under Section 417 CrPC came to the conclusion that the judgment of acquittal under appeal was perverse it could not set aside that order.

It has been laid down by this Court that it is open to the High Court on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, of course, keeping in view the well-established rule that the presumption of innocence of the accused is not weakened but strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of witnesses whose evidence have been recorded in its presence.

It is also well settled that the court of appeal has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should attach due weight to the opinion of the trial court which recorded the order of acquittal.

If the appellate court reviews the evidence, keeping those principles in mind, and comes to a contrary conclusion, the judgment cannot be said to have been vitiated. (See in this connection the very cases cited at the Bar, namely, Surajpal Singh v. State [Surajpal Singh v. State, 1951 SCC 1207 : AIR 1952 SC 52] ; Wilayat Khan v. State of U.P. [Wilayat Khan v. State of U.P., 1951 SCC 898 : AIR 1953 SC 122]) In our opinion, there is no substance in the contention raised on behalf of the appellant that the High Court was not justified in reviewing the entire evidence and coming to its own conclusions.'

(Underlined to Supply Emphasis)

31.4. In ***K. Gopal Reddy [K. Gopal Reddy v. State of A.P., (1979) 1 SCC 355 : 1979 SCC (Cri) 305]*** *, this Court has observed that where the trial court allows itself to be besetwith fanciful doubts, rejects creditworthy evidence for slender reasons and takes a view of the evidence which is but barely possible, it is the obvious duty of the High Court to interfere in the interest of justice, lest the administration of justice be brought to ridicule."*

(Emphasis supplied)

8. In view of the well-reasoned findings given by the learned trial court applying the principles laid down by Hon'ble Supreme Court in **Anwar Ali** (Supra), in considered opinion of this Court, the present case is not fit for grant of leave to appeal and the same stands disposed of.

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2024 (I) ILR-CUT-181

R.K. PATTANAIK, J.

SA NO.112 OF 1993

ABDUL HANAN KHAN (DEAD) BY LRS & ORS. .....Appellants

-V-

DAYAN KHAN (DEAD) BY LRS & ORS. .....Respondents

MUSLIM PERSONAL LAW – Joint holding of property – Whether the Muslim personal law recognise joint holding of property, to be construed as common property alike Hindu Personal Law? – Held, No.

Case Laws Relied on and Referred to :-

1. AIR 1976 Madras 84:Mohammed Ibrahim Vrs. Syed Muhammad Abbubakker & Ors.
2. 1986(II) OLR 427 :Achutananda Swain Vrs. Hadibandhu Swain & Ors.

For Appellants : Mr. S.K. Mohanty

For Respondents : Mr. D.P. Dhal

JUDGMENT Date of Judgment : 13.11.2023

R.K. PATTANAIK, J.

1. Instant appeal under Section 100 of the Code of Civil Procedure, 1908 is filed by the appellants assailing the impugned judgment and decree promulgated in Title Appeal No.35 of 1991 by the learned Additional District Judge, Jajpur, whereby, the decision of the learned Sub-Ordinate Judge, Jajpur in T.S. No.5 of 1986 was set aside excluding the suit schedule land from the hotchpotch partition on the grounds inter alia that the same is illegal and hence, not tenable in law and thus, liable to be interfered with.

2. The appellants are the successors of the plaintiffs, who instituted the suit in T.S. No.5 of 1986 for partition of the schedule property which corresponds to Lot Nos.4 and 5 with allotment of 1/3 share each including defendant Nos.1 to 3. The said suit was contested by above defendants, who filed a joint Writing Statement (WS). Ultimately, the suit was disposed of and decreed against defendant Nos.1 to 3, 5 and 6 on merit and ex-parte vis-à-vis defendant No.4, consequent upon which, the learned Sub-Ordinate Judge, Jajpur directed the parties to partition the property in question within the stipulated period each being entitled to 1/3 share, failing which, the plaintiffs having the liberty to seek division and allotment of shares by due process of law. Being aggrieved of, defendant Nos.1 to 3 filed the appeal and as mentioned earlier, Title Appeal No.35 of 1991 was allowed overruling the decision in the suit. Since dissatisfied with the impugned judgment and decree in Title Appeal No.35 of 1991, the appellants as the successors-in-interest approached this Court challenging the same.

3. Heard Mr. Mohanty, learned counsel for the appellants and Mr. Dhal, learned counsel for the respondents.

4. The plaintiffs filed the suit for partition, wherein, the learned Sub-Ordinate Judge, Jajpur framed the following issues, namely, whether Lot No.4 and 5 are joint family properties or self-acquired interest of Sovan Khan? (ii) Is the suit maintainable? (iii) To what share, the parties are entitled? and (iv)To any other relief, the parties are entitled to?

5. Considering the evidence received from the parties, the Trial court reached at a conclusion that Lot Nos.4 and 5 have not been included in the partition which was held in the year 1954 under Ext.1, a registered partition deed. It has also been concluded that the property in question belongs to the joint family, so therefore, the members of each of the branches are entitled to 1/3 share. Furthermore, it has been held and concluded in the suit that fraud has been played with regard to the settlement of the property in dispute which is based on a manufactured 'hatpatta' referring to which lease in respect thereof measuring Ac.0.92 decimal appertaining to Plot No.673 and Plot No.440 was claimed leading to the order passed in Misc. Case No.1679 of 1982 i.e. Ext.C. With such a conclusion reached at, the suit of the plaintiffs was preliminarily decreed on contest against defendant Nos.1 to 3, 5 and 6 with a direction to amicably partition Lot Nos.4 and 5 or to effectuate the same by process of court. The learned Lower Appellate Court was, however, of the view that Ext.C clinched the issue between the parties and when there was no appeal preferred against the order of the competent court, the settlement in respect of Lot Nos.4 and 5 has become final which cannot be reopened in a suit. In other words, the suit was dismissed allowing the appeal on contest excluding Lot Nos.4 and 5 from being partitioned.

6. Mr. Mohanty, learned counsel for the appellants submits that the Lower Appellate Court fell into serious error while upsetting the decision in the suit. It is contended that Ext.C dated 29th July, 1983 passed in Misc. Case No.1679 of 1982 which regularized the tenancy in respect of the disputed properties is not in accordance with Section 8(1) of the OEA Act and hence, the same is without jurisdiction which raises substantial question of law for decision and that apart, 1st proviso to Section 5(i) of the OEA Act has not been complied with the fact which was lost sight of by the Lower Appellate Court. It is further submitted that bar under Section 39 of the OEA Act is inapplicable since Ext. C is a decision which is not tenable in law. It is also contended that a portion of the disputed property measuring Ac.0.28 decimal said to have been included after order in Misc. Case No.1679 of 1982 which has since been acquired by the wife of common ancestor, it could be held in favour of one of her sons on the strength of an unregistered lease deed. It is lastly contended that in view of the principles applying to Mohammedans, any such property acquired in the name of managing member of the family and it is proved that the same is possessed by all the members jointly, the presumption shall be that the property belongs to the family and not separate interest of the member in whose

name the same stands and the burden to establish it to be a separate property so held by one of the members would arise only if the same is held commonly and the entire family lives in commensality and as by the time, the disputed properties were acquired, the family was in jointness and hence, it has to be held as belonging to the family of the parties and not the separate interest of Sovan Khan, the predecessor-in-interest of defendant Nos.1 to 3.

7. On the contrary, Mr. Dhal, learned counsel for the respondents submits that the learned Lower Appellate Court did not err while setting aside the judgment and decree in the suit since Lot Nos.4 and 5 exclusively belong to Sovan Khan having been settled with him under the provisions of the OPLE Act. The conclusion of the court in appeal that order under Annexure-C has not been challenged and became final is also justified. It is further contended that the law on presumption which is applicable to a Hindu Family does not apply to Muslims and in support thereof, he refers to a decision of Madras High Court in the case of **Mohammed Ibrahim Vrs. Syed Muhammad Abbubakker and others AIR 1976 Madras 84**. In so far as, the joint interest vis-à-vis Lot Nos.4 and 5 is concerned, Mr. Dhal, learned counsel for respondent Nos.1 to 3 refers to the evidence on record and submits that there is no material to satisfactorily suggest that such properties were acquired with the contribution of the family.

8. Following are the substantial questions of law which needs determination:

(i) Whether Lot Nos.4 and 5 to have acquired when the family was in jointness and out of the joint nucleus?

(ii) Whether such acquisition of Lot No.4 and 5 is on account of the contribution received by Karta of the family and hence, it is liable for partition with entitlement of 1/3 share each?

(iii) Whether defendant Nos.1 to 3 acquired exclusive interest over and in respect of the schedule property in view of Ext.C for a decision not to be challenged in view of Section 39 of the OEA Act?

9. In course of hearing, a decision in **Achutananda Swain Vrs. Hadibandhu Swain and others 1986(II) OLR 427** is referred to in order to contend that bar under Section 39 of the OEA Act is applicable and the suit to be maintainable. In the decision (supra), this Court held and observed that settlement of lease created by the ex-proprietor prior to 1st January, 1946 cannot be questioned under the OEA Act and any such tendency in terms of Section 8(1) thereof not to be enquired into by the OEA Authority which is only to be declared. Since, there was no order in any of the provisions related to Chapters-II to IV of the OEA Act and provisions of Section 5(i) not to be applicable and as the order under Section 8(1) thereof was without jurisdiction, this Court therefore, held therein that the suit is not bared under Section 39 of the OEA Act and hence, maintainable. In so far as Section 5(i) of the OEA Act is concerned, it in relation to settlement of the land consequent upon vesting in the State, wherein, it is stipulated that in case any such settlement of lease of any land etc. comprised in such estate made or created at any time after 1st January, 1946, the Collector shall have the power to make enquiry in respect thereof and may after

giving reasonable notice to the parties concerned, set aside any such settlement, lease or transfer as the case may be and dispossess the person claiming under the Act and take possession of such property in the manner provided in clause (h) thereof on such terms as may appear to him fair and equitable and in the event, where such settlement lease or transfer is not set aside, it shall be referred to the Board of Revenue for confirmation, decision of which shall be final. In the instant case, admittedly, the lease in question has been executed on 11th January, 1946 which was after 1st January, 1946 as referred to in Section 5(i) of the OEA Act. In fact, no separate issue was framed by the court of 1st instance vis-à-vis legality of the order under Ext.C. The suit instituted at the behest of the plaintiffs is a partition simpliciter. Nevertheless, the learned Sub-Ordinate Judge, Jajpur examined the lease deed, namely, 'hatpatta' dated 11th January, 1946 and concluded that the same was manufactured and created at a later point of time and was not in existence even during the life time of Sovan Khan. The genuineness of the rent receipt under Ext.B series did not inspire confidence of the court as well. Hence, taking into account the above facts and that the Ekpadia only confined to Ac.0.64 decimal and that OEA Authority could not have settled Lot Nos.4 and 5 in favour of defendant Nos.1 to 3 exclusively when such conclusion is based on a manufactured document i.e. Ext.A. In absence of any issue framed in the suit with regard to lease executed in 1946 and evidence received as to the genuineness of execution of 'hatpatta' leading to the order passed by OEA Authority under Ext.C, in the considered view of the Court, it could not have been discarded. In fact, the Court perused the order under Ext.C which indicates that the entire of Ac.0.92 decimal stood recorded in the name of intermediary as 'nijdakhal' land and the predecessor of defendant Nos.1 to 3 had been inducted as a raiyat and since tenant ledger was opened only in respect of Ac.0.64 decimal appertaining to Plot No.673, the rest of Ac. 0.28 decimal from Plot No.440 was included, in respect of which, the tenancy was recognized and settled subject to payment of rent, cess and salami. In fact, the alleged 'hatpatta' dated 11th January, 1946 issued by ex-intermediary was verified by OEA Authority which included Plot No.440 under Holding No.2 measuring Ac.0.28 decimal and hence, it was settled with the defendants predecessor-in-interest. Referring to order under Ext.C, the pleading from the side of defendant Nos.1 to 3 appears to be that the 'hatpatta' is dated 11th January, 1946 but Ekpadia was issued confining to Ac.0.64 decimal. It is made to understand that tenancy ledger was opened only in respect of Ac.0.64 decimal leaving out Ac.0.28 decimal which was included and settled under Ext.C. As earlier stated, no issue was framed by the Trial court on the legality of Ext.C. When a lease is created after 1st January, 1946 in view of Section 5(i) of the OEA Act, the same either may be accepted or rejected and if such settlement is not set aside by the OEA authority, it needs confirmation by the Board of Revenue. From the evidence on record, it is not clear and apparent as to if any such confirmation was obtained from Board of Revenue in respect of the alleged lease for which tenancy was settled in favour of defendant Nos.1 to 3 being the successors of late Sovan Khan. No doubt, the parties was in jointness by the time, the alleged lease

was created but it has not been included in partition on the ground that the same belongs to late Sovan Khan succeeded by defendant Nos.1 to 3, who are the exclusive tenants in respect thereof. When such a question is raised with regard to legality of Ext.C or settlement of Lot Nos.4 and 5 exclusively in favour of late Sovan Khan and thereafter, succeeded by defendant Nos.1 to 3, it could have been adjudicated upon in the suit with an issue framed. The pleading of the appellants suggest that Ext.C is a product of fraud, inasmuch as, no such lease was ever created in 1946 and the same was manufactured not during the life time of Sovan Khan. In such view of the matter, when the dispute centres around the alleged lease and subsequent settlement which is stoutly denied on the ground that the acquisition in respect of Lot Nos.4 and 5 to be out of joint nucleus, the Court is of the humble view that the issue in prominence is whether the subject matter in dispute belongs to the family and acquired out of joint nucleus. In other words, the question on the lease is of no relevance when the suit is for partition with a claim by the appellants that Lot Nos.4 and 5 are the joint interest. A decision on the legality of Ext.C is unlikely to yield any result on partition unless the appellants satisfactorily prove and establish by evidence regarding its acquisition out of the joint nucleus. So to say, it would be a futile exercise to deal with such an issue vis-à-vis Ext.C as the real dispute is by claiming joint interest over Lot Nos.4 and 5. Having said that, the Court considering the evidence on record received from the appellants is not fully satisfied to reach at a definite conclusion that the interest over which the dispute has emerged really belongs to the family. Such a decision is for the reason that the material on record is not so convincing to take a side in favour of the appellants. So, therefore, leaving aside the question on the validity vis-a-vis Ext.C and since the evidence on record is not convincing enough on joint acquisition of Lot Nos.4 and 5 and keeping in view the legal position as discussed in **Mohammed Ibrahim** (supra) to the effect that the personal law of Muslims does not recognize a system of joint holding as is common amongst Hindus, the Court is not inclined to interfere with the decision of the Lower Appellate Court though for different reasons. In view of the above, the substantial questions of law stand answered accordingly.

10. Hence, it is ordered.

11. In the result, the appeal is hereby dismissed, however, in the circumstances without any order as to costs.

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2024 (I) ILR-CUT-185

R.K. PATTANAIK, J.

SAO NO. 11 OF 2018

M/s. SRI ADINATH REAL ESTATES (P) LTD. ….Appellant

-V-

ASIT KUMAR DASH & ANR. ….Respondents

CODE OF CIVIL PROCEDURE, 1908 – Order 41 Rules 23, 23-A, 25 – Remand of case – Power of the Appellate Court – When the suit has been tried on the merit of the case & no objection with regard to jurisdiction been raised in the trial, whether the Appellate Court without hearing the case/appeal on merit, can remand the case on the ground of jurisdiction? – Held, No.

Case Laws Relied on and Referred to :-

1. 97 (2004) CLT 83 (SC):REMCO Industrial Workers House Building Co-operative Society Vrs. Lakshmeesha M. & Ors.
2. AIR 1975 SC 1409:Pasupuleti Venkateswarlu Vrs. The Motor & General Traders
3. 2014 (SUPP.-II) OLR NOC 251:Purna Chandra Chand Vrs. State & Ors.
4. 2011 (1) CCC 0074:Jagtar Singh & Ors. Vrs. Bachan Singh & Ors.
5. 2015 (SUPPL.)CCC 0298:Ramesh Chand Vrs. Kamli Ram & Ors
6. 2007(Supp.-II) OLR 360:Krushna Chandra Nayak Vrs. M/s. Orissa Sanitary Mart
7. AIR 1954 SC 340:Kiran Singh & Ors. Vrs. Chaman Paswan & Ors.

For Appellant : Mr. S.S. Mohanty & Associates
For Respondents : Mr. H.N. Mohapatra

JUDGMENT Date of Judgment:13.11.2023

R.K. PATTANAIK, J.

1. Instant appeal under Order XLIII Rule 1(u) of the Civil Procedure Code, 1908 is at the behest of the appellant assailing the impugned judgment dated 18th July, 2018 promulgated in RFA No. 49 of 2017 by the learned District Judge, Puri whereby the decision of the learned Civil Judge(Junior Division), Puri in C.S. No. 82 of 2013 was set aside with a remand to assess the market value on the suit subject for the purpose of pecuniary jurisdiction and thereafter, disposal of the suit with findings on all issues.

2. The appellant as the plaintiff instituted the suit for eviction against the respondents, who filed a joint Written Statement (WS). The appellant instituted the suit to evict the respondents as the latter did not have any right to remain in occupation of the suit house, the possession being unauthorized and illegal. The respondents, as earlier mentioned, challenged the suit on the grounds stated in WS. The learned court below framed issued considering the pleadings of the parties and thereafter, received evidence and finally decreed the suit on contest with the direction to respondents to vacate the suit premises within the stipulated period. The judgment and decree in C.S. No. 82 of 2013 dated 31st July, 2017 was challenged by the respondents before the Lower Appellate Court and the appeal was allowed with a remand as stated before. The challenge of the appellant is on account of wholesome remand while the dispute is in relation to pecuniary jurisdiction of the court of first instance.

3. Heard Mr. Mohanty, learned counsel for the appellant and Mr. Mohapatra, learned counsel for the respondents.

4. Mr. Mohanty, learned counsel for the appellant submits that after a full-fledged trial, the suit was disposed of wherein pecuniary jurisdiction of the court was an issue, so therefore, for a decision on such a question, if at all, remand was justified, learned Lower Appellate Court could not have directed a fresh trial on all issues. In other words, Mr. Mohanty submits that de-novo trial was directed which is not in consonance with the provisions of Order 41 Rules 23, 23-A or 25 CPC, hence, the same is liable to be interfered with and set aside. While contending so, Mr. Mohanty, learned counsel for the petitioner refers to the following judgments of the Apex Court, such as, **REMCO Industrial Workers House Building Co-operative Society Vrs. Lakshmeesha M. and others 97 (2004) CLT 83 (SC); Pasupuleti Venkateswarlu Vrs. The Motor & General Traders AIR 1975 SC 1409; Purna Chandra Chand Vrs. State & others 2014 (SUPP.-II) OLR NOC 251; Jagtar Singh & others Vrs. Bachan Singh & others 2011 (1) CCC 0074; and Ramesh Chand Vrs. Kamli Ram & others 2015 (SUPPL.)CCC 0298**. The contention is that if for consequential relief, pecuniary jurisdiction of the court was challenged, a decision having been rendered in the suit on the said issue and other issues as well on merit, learned Lower Appellate Court fell into gross error in setting aside the judgment of the learned Civil Judge (Junior Division), Puri with a plain remand for a de novo trial.

5. Mr. Mohaptra, learned counsel for the respondents on the other hand submits that the impugned judgment is perfectly justified and in accordance with law. It is submitted that learned Lower Appellate Court did not commit any serious illegality while remanding the suit for a fresh determination on all issues, since it interfered with the finding on pecuniary jurisdiction with a conclusion that Section 7(v) of the Court Fees Act to be applicable and issued consequential direction for appointment of a Commission under Order XXVII Rule 9 CPC. It is contended by Mr. Mohapatra that Order XLI Rule 25 does not apply to the case at hand. It is further contended that the remand of the suit is in terms of Order XLI Rule 23 since on a preliminary point it was disposed of for a decision on jurisdiction and court fee as Section 7(v) for the Court Fees Act is prima facie held to be applicable and not Section 7(iv) thereof and rightly, directed to receive evidence in that regard through a Commission. In support of such contention, Mr. Mohapatra refers to a judgment of this Court case of **Krushna Chandra Nayak Vrs. M/s. Orissa Sanitary Mart** reported in 2007(Supp.-II) OLR 360, wherein, general principles on remand have been discussed.

6. In so far as Order XLI Rule 23 CPC is concerned, the same is a remand, if a decree on a preliminary point decided and disposed of stands reversed in appeal. In such a case, the Court in appeal may if it things fit by order remand a suit which has been disposed of on a preliminary point and further direct as to what issue or issues shall be tried in case of such remand. Rule 23-A of Order XLI CPC is related to

remand in other cases where the decree and disposal of the suit is otherwise than on a preliminary point said to have been reversed. In case, the Court of first instance omitted to frame or try any issue or to determine any question of fact which appears to the Appellate Court essential to the right decision of the suit upon merits, it may frame such issue(s) and refer the same for trial and shall direct to take additional evidence necessary and such court shall proceed to try such issues and thereafter, to return the evidence together with the findings thereof for a final decision in appeal which is in terms of Order XLI Rule 25 CPC.

7. In so far as the present case is concerned, the order of remand is in terms of Rule 23-A of Order XLI CPC for the reason that the suit was not disposed of on any such preliminary point but returned with findings on all issues. In other words, the Court finds that the impugned judgment of the Lower Appellate Court is an open remand. Admittedly, it is not a case under Order XLI Rule 25 CPC. Mr. Mohapatra, learned counsel for the respondents submits that since on the question of pecuniary jurisdiction, the suit was remanded back, such remand is to be covered by Order XLI Rule 23 CPC. The Court is, however, in disagreement with Mr. Mohapatra, learned counsel for the respondents as the suit was disposed of with a decision on all issues and on merit with a finding on pecuniary jurisdiction as well. Rule 23 of Order XLI CPC does apply to a case where the suit has been disposed of upon a preliminary point and the decree is reversed in appeal. In any case, an Appellate Court shall have the same powers as it has under Rule 23 while directing a remand in terms of Rule 23-A of Order XLI CPC. It is well settled law that jurisdiction under Rule 23-A should be sparingly exercised since the public policy is that a litigation is to be concluded finally but where remand is felt absolutely necessary, remand may be considered where the remedy under Rule 25 is found to be inadequate. In the suit, learned Civil Judge (Junior Division), Puri received evidence and returned findings on all issues. The issue of pecuniary jurisdiction has been considered along with other issues. In so far as remand is concerned, it is not a case under Rule 23 or 25 of Order XLI CPC but relates to Rule 23-A thereof. It is no doubt right to contend that a defect of jurisdiction whether it is pecuniary or territorial or whether in respect of subject matter of the action, strikes at the very authority of the court to pass any decree and such a defect cannot be cured even by consent of the parties.

8. Learned Lower Appellate Court referred to a judgment of the Apex Court in **Kiran Singh and others Vrs. Chaman Paswan and others AIR 1954 SC 340** and held that the decision on jurisdiction materially affects the rights of the respondents. The fundamental principles vis-a-vis jurisdiction and a decree without jurisdiction to be a nullity have been discussed in the decision (supra). The impugned judgment of the Lower Appellate Court and its legality is questioned confining it to the extent that open remand for a de novo trial is bad in law. In the aforesaid decision, the Apex Court referring to Sections 21 and 99 CPC read with Section 11 of the Suit Valuation Act held and observed that when a case has been tried by a Court on merits, it should not be liable to be reversed purely on technical grounds unless it

had resulted in failure of justice and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an Appellate Court, unless there has been a prejudice on merits. It is concluded therein that the definition of 'prejudice' in Section 11 of the Suit Valuation Act does mean a prejudice not on merits but due to wrong jurisdiction invoked related to territorial or pecuniary or on such other possible situations which cannot be exhaustively enumerated. if the above decision is read and understood with reference to Section 11 of the of the Suit Valuation Act, any such objection by the parties, the requirement as to prejudice has to be satisfied. In any case, want of pecuniary jurisdiction, in view of Section 21(2) CPC is no more considered lack of inherent jurisdiction. So therefore, a question on jurisdiction, if has not been raised at the earliest point in time and furthermore, prejudice not on merits of the case but on technical ground is not established, having understood the ratio laid down in the decision (supra) in its proper perspective, a decree with findings on all issues is not to be set at naught. The said aspect has not been duly examined by the lower Appellate Court though it referred to the aforesaid decision. No prejudice is shown to have been suffered by the respondents, who admittedly raised no any objection on pecuniary jurisdiction before the Trial court at or before the hearing at which issues were first framed and recorded rather wholeheartedly participated in the suit resulting thereby its disposal on merit with decision on all issued involved. Hence, it has to be concluded that there was no basis or justification for the learned Lower Appellate Court to remand the suit for determination vis-à-vis pecuniary jurisdiction instead ought to have decided the appeal on merit. In so far as other citations are concerned, the Court is of the humble view that the same need no discussion as the principles of remand have been discussed therein whereas its conclusion is otherwise and opposed to the view expressed by the learned Lower Appellate Court.

9. Hence, it is ordered.

10. In the result, the appeal stands allowed. As a necessary corollary, the impugned judgment dated 18th July, 2018 promulgated in RFA No. 49 of 2017 is hereby set aside. Consequently, for the reasons discussed herein above, the appeal i.e. RFA No. 49 of 2017 is hereby restored to file for its early disposal on merit by the learned District Judge, Puri.

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2024 (I) ILR-CUT-189

SASHIKANTA MISHRA, J.

W.P.(C) NO.7388 OF 2023

PRAKASH CHANDRA DAS & ORS. ….Petitioners

-V-

STATE OF ODISHA & ORS. ….Opp.Parties

ODISHA FOREST SERVICE GROUP-A (SENIOR) (METHOD OF RECRUITMENT AND CONDITIONS OF SERVICE) RULE, 2015 – Rules 5, 14 r/w Articles 16(1) and 16(4A) of the Constitution of India – The private opposite parties, who are inherently junior to the petitioners but had marched ahead of them by virtue of the principle of reservation – The seniority of petitioner restored by application of the catch-up principle in the year 2022 – The authority have not considered the case of petitioner for promotion to the senior branch on the ground of eligibility clause as per Rule 5 of 2015 Rules – Effect of – This would be entirely contrary to the principle of equality enshrined under Article 14, 16(1) of the constitution – The inherent seniority between reserved category candidates and general candidates in the promoted category shall continue to be governed by their inter se seniority in the lower grade – The government can relax the eligibility criteria as per Rule 14 in respect of the petitioner if it is felt necessary to grant promotions to the rank of Deputy conservator of forest. (Paras 17-21)

Case Laws Relied on and Referred to :-

1. (2006) 8 SCC 212:Indra Sawhney v. UOI
2. (2006) 8 SCC 212:M. Nagaraj vs. Union of India
3. (2012) 7 SCC 1:U.P. Power Corporation Ltd. vs. Rajesh Kumar
4. (2018) 10 SCC 396 :Jarnail Singh v. Lachhmi Narain Gupta
5. (2020) 15 SCC 297:Pravakar Mallick v. State of Orissa
6. (1996) 2 SCC 715:Ajit Singh Januja v. State of Punjab
7. (2011) 8 SCC 737:State of Tamil Nadu and others v. K. Shyam Sundar and others

For Petitioners : Mr. Gautam Misra,Sr. Adv., Mr. D.K.Patra, Mr.J.R.Deo

For Opp.Parties: Mr.T.K.Pattnaik. A.S.C.(Opp. Party 1 to 3),
Mr. K.P.Mishra, Sr. Adv., Mr. Sridhar Rath(Opp. Party 12,13,14),
Mr. B. Routray, Sr. Advocate Mr.S.K.Samal(Opp. Parties 15,24,25,26),
Mr. Haladhar Sethy(Opp. Parties 18,19,27,30,34,20,22,29,32,33)

JUDGMENT Date of Judgment: 10.11.2023

SASHIKANTA MISHRA, J.

1. The Petitioners, who are 8 in number have filed this Writ Petition with the following prayer;

> *"Under the facts and circumstances as narrated above, this Hon'ble Court may graciously be pleased to issue notice to the Opp. Parties and after hearing the parties, be pleased to:*
>
> *A. Quash the communication dated 03.03.2023 issued by OP No.1 under Annexure-1 so far as it relates to the promotional exercise of O.P. Nos.4 to 34 as the same is contrary to section 4 of the ORV Act and the judgment of the Hon'ble Supreme Court in the case of Pravakar Mallick v. The State of Orissa (2020) 15 SCC 297).*
>
> *AND/OR*
>
> *B. Direct the O.P. Nos. 1 to 3 not to promote Opp. Party No. 4 to 34 by resorting to reservations in promotions without recasting the gradation list under Annexure-2 keeping*

mind the judgment of the Hon'ble Supreme Court in the cases of Pravakar Mallick v. State of Orissa, (2020) 15 SCC 297, (Paras 15, 23 & 26), M. Nagaraj v. UOI. (2006) 8 SCC 212 (Paras 85, 121 to 123), Indra Sawhney v. UOI AIR 1993 SC 477 (Para 700), Uttar Pradesh Power Corporation Limited v. Rajesh Kumar, (2012) 7 SCC 1 (Paras 81 to 86);

AND/OR

C. Direct the O.P No. 1 to issue a fresh communication for promotion to the post of Deputy Conservator of Forest OFS Group-A (SB) in the Forest, Environment and Climate Change Department, Govt. of Odisha without considering the aspect of reservation in promotion for such posts and by considering the petitioners as senior to the Opposite Party Nos.4 to 34;

AND/OR

D. Pass any other order/orders as this Hon'ble Court deems fit and proper;

And for which act of kindness, the humble petitioners as in duty bound shall ever pray".

2. Though much has been pleaded by the parties but in view of the issues involved, it is not necessary to refer to the same in extenso. It would suffice to refer to the basic facts only as the same are not generally disputed.

3. **Factual matrix:**

All the 8 Petitioners belong to the general category and were initially appointed as Forest Rangers in the year 1993 and 1994 on different dates. They were subsequently promoted as Asst. Conservator of Forests, OFS Group-A (JB) on different dates in the year 2018. The following table shows the dates of initial appointment and promotion of the Petitioners;

Sl.No	Name	Date of entry into initial service	Date or promotion to ACF	Position in the tentative seniority list dated 29.4.2013
1	Prakash Chandra Das	02.8.1993	01.2.2018	247
2	Gouri Shankar Das	08.8.1993	01.2.2018	248
3	Sarat Kumar Mishra	04.8.1993	01.2.2018	252
4	A.Uma Mahesh	05.8.1994	01.2.2018	262
5	Sisir Kumar Mishra	03.8.1994	25.6.2018	263
6	Soubhagya Kumar Sahoo	01.8.1994	25.6.2018	264
7	Bijay Kumar Parida	05.8.1994	25.6.2018	271
8	Amaresh nath Pradhan	01.8.1994	25.6.2018	272

4. The private Opposite Party Nos.4 to 34 were similarly appointed initially as Forest Rangers and were promoted as Asst. Conservator of Forests ahead of the Petitioners by applying the principles of reservation. After being subsequently promoted to the rank of Asst. Conservator of Forests however, the Petitioners' seniority was restored by applying the catch-up principle and accordingly a final gradation list of Asst. Conservator of Forests (ACF) as on 9th September, 2022 was published. On 3rd March, 2023 a letter was issued by the Government of Odisha in Forest, Environment and Climate Change Department (Forest Department) to the PCCF, Odisha, intimating that the Departmental Promotion Committee (DPC) meeting for considering promotion of ACFs to the rank of Deputy Conservator of Forest (DCF), OFS Group-A (SB) is going to be held shortly (copy enclosed as Annexure-1). Accordingly, it was requested to intimate whether any disciplinary

proceeding is pending against the Officers (ACF) as per the list enclosed to the said letter. The names of the Petitioners were not included whereas the list contained only the names of private Opposite Parties. Apprehending that such grant of promotion to the rank of DCF would perpetually make them junior to said private Opposite Parties, the Petitioners have approached this Court in the instant Writ Petition. By order dated 15th March, 2023, a co-ordinate Bench of this Court directed as an interim measure that the DPC may meet but the final decision shall be kept in a sealed cover and shall not be given effect to without leave of this Court. By order dated 12th May, 2023, the previous order was modified to the extent that the case of Opposite Party Nos.4 to 11 could be considered by the State-opposite parties as they are admittedly senior to the Petitioners.

5. Heard Mr. Gautam Misra, learned Senior counsel, with Mr.D.K.Patra and Mr. J.R.Deo, learned counsel, for the Petitioners, Mr. T.K.Pattnaik, learned Addl. Standing Counsel for the State, Mr. K.P.Mishra, learned Senior counsel, with Mr. Sridhar Rath and Associates, learned counsel, for the Opposite Parties 12,13 and 14, Mr. B. Routray, learned Senior counsel, with Mr. S.K.Samal, learned counsel, for Opposite Parties 15, 24, 25 and 26, Mr. Haladhar Sethy, learned counsel, for the Opp.Party Nos.18,19,27,30 and 34 and Mfr. D.K.Pani, learned counsel, for the Opp. Party Nos.20,22,29,32 and 33.

6. **Rival contentions:**

The case of the Petitioners, plainly stated is, firstly, the post of ACF being a promotional one, the principle of reservation could not have been applied. Secondly, having applied the catch-up principle to restore the seniority of the Petitioners, it is no longer permissible for the authorities to apply the principles of reservation again in case of promotion to the rank of DCF.

Per contra, it is the case of all the Opposite Parties including the State that the Petitioners have no locus standi to challenge the promotion process initiated by the authorities as they are admittedly not eligible for being considered for promotion as such. Even otherwise, it is factually incorrect for the Petitioners to contend that the principle of reservation is being applied while considering the case of the private Opposite Parties for being promoted to the rank of DCF, rather they are being considered because they have acquired the required eligibility of serving as ACF for five years.

7. Since the locus standi of the Petitioners to maintain the Writ Petition has been raised, it would be apposite to first deal with the said issue.

Maintainability:

Mr. B. Routray, and Mr. K.P.Mishra, learned Senior Counsel as well as Mr. T.K.Pattnaik, learned Add. Standing Counsel have all argued in one voice that as per Rule 5 of the Odisha Forest Service Group-A (Senior) (Method of Recruitment and Conditions of Service) Rules, 2015 (for short, 2015 Rules), an officer has to

complete 5 years of continuous service in the grade of Odisha Forest Service Group-A (Junior Branch) as on the first day of January of the year in which the Board meets. Admittedly, the private Opposite Parties have completed 5 years in the grade of OFS, Group-A (Junior Branch) as on 1st January, 2023, but the Petitioners have not. Therefore, they are not eligible for being considered for promotion to the next higher post. It has also been argued that a person lacking eligibility himself cannot challenge the proposed promotion/promotions of persons who are eligible.

8. Mr. Gautam Misra, learned Senior counsel, on the other hand, has argued with vehemence that the question of locus standi cannot be dealt with only from the point of view of application of Rule 5 of 2015 Rules. Elaborating his argument, Mr. Misra submits that admittedly, the Petitioners had joined in service earlier than private Opposite Parties (except Opposite Party Nos.4, 6 to 11, 13). So they are inherently senior to the concerned private opposite parties. The authorities committed gross illegality in applying the principle of reservation while promoting the private Opposite Parties to the next higher grade that i.e. ACF, which is a Group-A post, as the same runs contrary to the provisions of the ORV Act.

9. Be that as it may, the proposed action of the authorities to grant further promotion to the private Opposite Parties to the next higher rank of DCF is nothing but applying the principles of reservation again which is entirely contrary to law laid down by the Apex Court in several judgments beginning from ***Indra Sawhney v. UOI*** (2006) 8 SCC 212 and reiterated in ***M. Nagaraj vs. Union of India*** (2006) 8 SCC 212, ***U.P. Power Corporation Ltd. vs. Rajesh Kumar***; (2012) 7 SCC 1, ***Jarnail Singh v. Lachhmi Narain Gupta***; (2018) 10 SCC 396 and ***Pravakar Mallick v. State of Orissa***; (2020) 15 SCC 297. In all these judgments the principle that reservation cannot be granted in promotions has been reiterated. While interpreting the amended provision of Article 16(4A) of the Constitution of India, it has been held that such promotions can be effected only if the State is ready with quantifiable data showing inadequacy of representation of the reserved category persons in public services. Such exercise has not been done in Odisha. Such being the factual and legal scenario, according to Mr. Misra, granting promotion to the private opposite parties to the rank of DCF ignoring the case of the Petitioners only on the ground that they have not completed the mandatory residency period in the feeder grade would enable the former to steal a march over the latter. In other words, if such promotion is effected, the Petitioners, despite being inherently senior would become juniors to the private opposite parties for all times to come. Mr.Misra, thus concludes his argument by submitting that in such factual scenario, the Petitioners are definitely persons aggrieved so as to maintain the Writ Petition challenging the proposed promotion of the private opposite parties.

10. **Analysis and findings on maintainability:**

The facts as have been pleaded are not disputed inasmuch as the Petitioners joined in service as Forest Ranger earlier than the private opposite parties (except

Opp.Party Nos.4, 6 to 11, 13 and 15). It is also not disputed that the private opposite parties were promoted as Asst. Conservator of Forest, OFS Group-A (Junior Branch) ahead of the Petitioners despite being junior by application of the principles of reservation. Since such promotion was effected way back in the year, 2014 and was never challenged, this Court does not propose to enter into the controversy as to whether such promotion was legally valid or not. In any case, the Petitioners were also promoted as ACF in the year 2018. Regardless, in the final gradation list of ACF as on 9th September, 2022, the seniority of Petitioners vis-à-vis the private opposite parties (who were promoted earlier) was restored by applying the catch-up principle. According to learned counsel appearing for the Opposite Parties, it is a settled and accepted position which has gone unchallenged and therefore, cannot be allowed to be unsettled at this belated stage. This being the factual position, this Court would like to envision as to what effect the proposed promotion would have vis-à-vis the Petitioners.

11. As per the impugned communication under Annexure-1 the list of Officers (ACF) short listed for being considered by the DPC contains only the names of the private opposite parties and not the Petitioners. It has been specifically pleaded in the separate counter affidavit filed by the Opposite Parties that consideration of the case of the private opposite parties for promotion is not on the basis of reservation but entirely by application of Rule 5 of the 2015 Rules, which mandates 5 years of continuous service in the Junior Branch for being eligible for promotion to the Senior Branch. Admittedly, the Petitioners have not completed 5 years of continuous service as ACF as on 1st January, 2023. So if Rule 5 is applied, the Petitioners will have to be kept out of the zone of consideration. However, this would also entail promotion of juniors ahead of seniors thereby rendering the catch-up principle a nullity. Assuming that the Petitioners would be promoted subsequently upon completing the required 5 years of continuous service, they would become juniors to the private opposite parties and since there is no possibility of the application of catch-up principle again at the next higher grade, they would continue to remain junior to the private opposite parties for all times to come. Whether such a course of action can be countenanced in law is something that has to be examined in detail, but there can be no denying that the Petitioners would be aggrieved by such action, inasmuch as the same seeks to nullify their inherent seniority vis-à-vis the private opposite parties perpetually. This Court is therefore, of the considered view that the Petitioners definitely have locus standi to challenge the proposed promotion of the private opposite parties and therefore, holds that the Writ Petition is maintainable.

Finding on merits:

12. Having held the Writ Petition to be maintainable, the next question that falls for consideration before this Court is whether the Petitioners have made out any case for interference with the impugned communication under Annexure-1. In this regard, it is contended by Mr. G. Misra, learned Senior counsel that the action of the authorities initiating the process of promotion only in respect of the private Opposite

Parties is nothing but granting them benefit of reservation yet again, which is otherwise not permissible in view of several judgments of the Apex Court. Mr. Misra further contends that the Petitioners despite being inherently senior to the private Opposite Parties, their seniority cannot be taken away by promoting their juniors in the garb of invoking the so-called eligibility clause. According to Mr. Misra this would amount to nullifying the benefit of the catch-up principle that has already been applied to restore the seniority of the Petitioners vis-à-vis the private Opposite Parties. Though the authorities have not explicitly said so but the proposed promotion of the private Opposite Parties ahead of the Petitioners would be akin to granting them the benefit of reservation again which is not permissible in view of the ratio of ***M. Nagaraj (supra), U.P. Power Corporation Ltd. (supra), Jarnail Singh (supra)***, and ***Pravkar Mallick (supra)***. Mr. Misra has relied upon the decision of this Court in the case of ***State of Odisha v. Amar Chhatoi***; 124(2017) CLT 976, wherein the State Government admitted that the exercise envisaged as per ***M. Nagaraj*** (Supra) has not yet been undertaken in Odisha. Thus, granting promotion to the reserved category candidates by invoking only the eligibility clause would be entirely contrary to the law of the land.

13. The State counsel as well as the learned Senior counsel Mr. B. Routray and Mr. K.P.Mishra have argued that the Petitioners having received the benefit of catch-up principle at the stage of ACF and the next promotion, i.e. to the rank of DCF not being proposed to be done on the basis of reservation but entirely on considerations of eligibility, the Petitioners can raise no grievance legally against the impugned communication. In any case, since there are adequate vacancies, the Petitioners can be considered for promotion to the rank of DCF as and when they acquire eligibility, but presently the promotion proposed to be granted to the private Opposite Parties cannot be stalled at their instance as admittedly they do not satisfy the eligibility condition.

14. Having noted the rival contentions as above, it would be apposite for this Court to refer to the relevant facts at the outset with a view to ascertain as to how the ratio of the decisions cited at the bar would be applicable. As already stated, the Petitioners joined as Forest Ranger earlier than the private opposite Parties, but they were promoted as ACF later than the private Opposite Parties, who were admittedly granted such promotion by following the principle of reservation. It has been argued on behalf of the Petitioners that even such promotion was contrary to the provisions of the Odisha Reservation of Vacancies in Posts and Services (Scheduled Castes and Scheduled Tribes) Act, 1975 (for short the "1975 Act"). Rule 4 has been referred to in particular, which is quoted herein below;

> *"4. Reservation and the percentage thereof (1) Except as otherwise provided in this Act, the vacancies reserved for the Scheduled Castes and the Scheduled Tribes shall not be filled up by candidates not belonging to the Scheduled Castes and Scheduled Tribes*
>
> *(2) The reservation of vacancies in Posts and Services shall be at such percentage of the total number of vacancies as the State Government may, from time to time, by order determine:*

[Provided that the percentage so determined shall in no case be less than the percentage of the persons belonging to the Scheduled Castes of the Scheduled Tribes as the case may be in the total population of the State:

Provided further that there shall be no reservation of vacancies to be filled up by promotion where

(a) the element of direct recruitment in the grade or cadre in which the vacancies have occurred is more than sixty-six and two third percent,

(b) the vacancies have occurred in Class I posts and are to be filled up by promotion, through limited departmental examination; or

6) the vacancies have occurred in Class I posts which are above the lowest rung thereof, and are to be filled up on the basis of selection

Explanation-The expression "population" means the population as ascertained at the last census for which the relevant figures have been published."

15. Learned Senior counsel for the Petitioners has argued that the post of ACF is a Group-A post and can be filled up either by direct recruitment or by promotion from amongst the Forest Rangers. In this context, reference has been made to the Odisha Forest Services Group-A (JB) (Recruitment and Condition of Services) Rules, 2013 of which Rules 3,4 and 5 are relevant inasmuch as the Odisha Forest Service Group-A (JB) is a separate cadre altogether but is a Class-1 (Group-A) post. It is contended that Sub-section (2) of Section-4 of the 1975 Act prohibits reservation in case of promotion in Class-I (Group-A) post. However, this Court observes that promotions to the post of ACF were effected in the year 2014 (in case of private Opposite Parties) and 2018 in case of the Petitioners. The final gradation list prepared subsequently after application of the catch-up principle to restore the seniority of the Petitioners has never been challenged. To such extent therefore, this Court is inclined to accept the argument advanced on behalf of the private Opposite Parties that it is too late in the day to raise any grievance as regards the legality and validity of promotions granted to the rank of ACF.

16. This Court would now focus its attention as to the legality of the impugned communication. As already stated, according to the Petitioners, the benefit of restoration of seniority that they received by application of the catch-up principle is sought to be nullified by the impugned communication. On the other hand, according to the Opposite Parties, the seniority of the Petitioners having already been restored, but they being ineligible for further promotion, cannot raise any grievance.

17. Now the question is, whether the principle of reservation is sought to be extended by the authorities in the proposed promotion. The impugned communication under Annexure-1, on the face of it does not say so. The State counsel as well as the learned Senior counsel appearing for the private Opposite Parties have emphatically argued that the principle of reservation is not sought to be extended for promotion to the rank of DCF, rather the promotion is sought to be made by invoking the eligibility clause. This being the fact situation, the decisions

cited by Shri G. Misra in relation to the applicability or otherwise of Article 16(4A) of the Constitution would not be relevant at all. To amplify, the need of obtaining quantifiable data by the State regarding inadequacy of representation of reserved category persons in public service being sine qua non to apply the principles of promotion with consequential seniority to them as envisaged in ***M. Nagaraj, U.P. State Power, Jarnail Singh, Pravakar Mallick*** (supra) are rendered redundant.

18. Rule 5 of 2015 Rules reads as follows;

> *"Eligibility Criteria:- (1) No Officer shall be eligible for promotion to the post in Group-A (Senior Branch) of the service unless he or she has competed five years of continuous service in the grade of Odisha Forest Service Group 'A' (Junior Branch) as on the 1st day of January of the year in which the Board meets.*
>
> *(2) Appointment to Supertime Scale in the service shall be made on promotion cfrom amongst the officers who have completed two years of service in Odisha Forest Service Group 'A' (Senior Branch)as on the 1st day of January of the year in which the Board meets.*
>
> *(3) Appointment to Superior Administrative Grade in the service shall be made on promotion from amongst the officers who have completed one year of service in Odisha Forest Service (Supertime Scale) as on the 1st day January of the year in which the Board meets."*

Thus, the Rule provides that an Officer shall not be eligible for promotion to the post in Senior Branch unless he has completed 5 years of continuous service in the Junior Branch as on the first day of January of the year in which the Board meets. The proposed promotional exercise being scheduled to be held in the current year i.e. 2023, the relevant date for consideration of eligibility would be 1st January, 2023. Admittedly as on that date the private Opposite Parties had completed 5 years of continuous service whereas the Petitioners had not. Thus, prima facie, they are not eligible for being considered for promotion to the Senior Branch, but then if only the eligibility clause is harped upon and the proposed promotions are effected, it would entail a situation where the private Opposite Parties, who by virtue of the principle of reservation had been promoted to the Junior Branch earlier than the Petitioners (General Category candidates) would definitely steal a march over the Petitioners. Since on the face of it and on record the principle of reservation would not be applied in case of promotion to the post of DCF, the catch-up principle would also not be applicable if and when the Petitioners are promoted to the Senior Branch. In other words, this would lead to a situation where the inherent seniority of the Petitioners restored by application of the catch-up principle in the year 2022 would be lost forever. It would be back to square one. To further elaborate, the private Opposite Parties, who are inherently junior to the Petitioners but had marched ahead of them by virtue of the principle of reservation would become seniors to them for all times to come. According to the considered view of this Court, this would be entirely contrary to the principle of equality enshrined under Articles 14 and 16(1) of the Constitution of India. Thus, as between the question of seniority and the eligibility criteria, this Court is of the view that the former shall take precedence over the latter as otherwise the balance between Articles 16(1) and 16(4A) of the

Constitution would be disturbed.

19. In its judgment rendered in the case of ***Ajit Singh Januja v. State of Punjab***; (1996) 2 SCC 715, the Supreme Court's following observations are noteworthy;

> *"Whenever a question arises for filling up a post reserved for Scheduled Caste/Tribe candidate in a still higher grade then such candidate belonging to Scheduled Caste/Tribe shall be promoted first but when the consideration is in respect of promotion against the general category post in a still higher grade then the general category candidate who has been promoted later shall be considered senior and his case shall be considered first for promotion applying either principle of seniority-cum-merit or merit-cum-seniority."*
>
> *(Emphasis added)*

Thus, the principle laid down is that the inherent seniority between reserved category candidates and general candidates in the promoted category shall continue to be governed by their inter-se seniority in the lower grade.

20. If, on the other hand, the proposed promotions are effected, it would be akin to taking away by one hand what was granted by the other. Moreover, even if, it is not explicitly stated so, but the logical conclusion of the proposed promotional exercise would enure only to the benefit of the reserved category candidates i.e. private Opposite Parties. Thus, what could not be done directly the State is attempting to do so indirectly, which needless to say is not conscionable in law. Reference in this regard may be had to the decision of the Apex Court in the case of ***State of Tamil Nadu and others v. K. Shyam Sundar and others***; (2011) 8 SCC 737; wherein it was held as follows;

> *"It is a settled proposition of law that what cannot be done directly, is not permissible to be done obliquely, meaning thereby, whatever is prohibited by law to be done, cannot legally be effected by an indirect and circuitous contrivance on the principle of quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud. An authority cannot be permitted to evade a law by 'shift or contrivance'."*

21. How then to go about it. It has been argued by learned State counsel that there being large number of vacancies in the rank of DCF, the posts need to be filled up at the earliest for the overall efficiency and smooth functioning of the work of the Department. This Court finds that the Petitioners having been promoted to the Junior Branch on different dates in the year 2018 have acquired or will be acquiring the eligibility on different dates in this year itself. Moreover, we are at the fag end of the year 2023. As on 1st January, 2024 the Petitioners would have acquired the required eligibility. Thus, taking a larger view of the matter and in order to satisfy the requirements of the law of the land, this Court is of the view that if it is felt necessary to grant promotions to the rank of DCF urgently then the Government can relax the eligibility criteria in respect of the Petitioners and effect promotion to the Senior Branch basing on the final gradation list as on 9th September, 2022. Significantly, the 2015 Rules provide such a clause in Rule 14, which is quoted herein below;

> *"14. Relaxation - whenever it is considered by the Government that it is necessary or*

expedient to do so in the public interest, it may, by order, for reasons to be recorded in writing, relax any of the provisions of these rules in respect of any class or category of officers in consultation with the Commission."

In fact, it has been brought on record by way of an Additional Affidavit filed by the Petitioners on 20.4.2023 that the Government has in the past relaxed the eligibility condition of five years with concurrence of OPSC for promotions to the post of DCF by reducing it to 4 years/2 1/2 years etc. Copies of the relevant documents in this respect for the years 2018, 2019, 2020 and 2021 have been enclosed as Annexures-9,10,11 and 12 to the Additional Affidavit. So, given the fact situation obtaining in the present case this is no reason why such course of action should not be adopted now.

22. Since filling up the post of DCF would be in public interest, the Government shall do well to consider relaxation of Rule 5 in exercise of its power under Rule 14 or in the alternative, to defer the promotional exercise to a date after 1st January, 2024 so as to consider all officers as per the gradation list as on 9th September, 2022.

Conclusion.

23. In view of the foregoing narration, this Court is left with no doubt that the impugned communication under Annexure-1 being a product of arbitrary exercise of power, cannot be sustained in the eye of law inasmuch as it indirectly seeks to grant the benefit of reservation in the promotional posts to the juniors like the private Opposite Parties ignoring the inherent seniority of the Petitioners as correctly reflected in the gradation list.

24. The Writ Petition is therefore allowed. The impugned communication under Annexure-1 is hereby quashed. The Opposite Party-authorities are directed to take necessary steps to fill up the posts in the promotional cadre i.e. DCF in terms of the observations made in this judgment. It is made clear that if any promotion has been granted to any officer pursuant to orders dated 12.5.2023 and 04.9.2023 passed by this Court, the same shall remain unaffected by this judgment.

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2024 (I) ILR-CUT-199

SASHIKANTA MISHRA, J.

RSA NO. 88 OF 2013

LATIKA KAR & ORS. .....Appellants

-V-

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

(A) ORISSA SURVEY AND SETTLEMENT ACT, 1958 – Section 42 r/w Article 58 of the Limitation Act – The suit for correction of record of right was filed after a lapse of 9 years – Whether the suit is barred by limitation? – Held, Yes.

(B) WORDS & PHRASES – "Dafayat" – Meaning – Discussed.
(Paras 19-20)

(C) DIFFERENCE BETWEEN LICENCE AND LEASE – Discussed.
(Paras 21-24)

(D) PROPERTY LAW – The plaintiffs claim to be in possession for long time and was paying the rent – In the ROR of the suit plot, the entries made therein hold that, the status of father of plaintiff was 'Dafadar' and the nature of the tenancy was Dafayat – Whether the licence granted to predecessor of plaintiff can be transformed to lease on the ground of long possession? – Held, No – Mere conferment of right of user does not make it a permanent lease.

Case Laws Relied on and Referred to :-

1. 2016 (Supp.-1) OLR 529: Basanti @ Basantirani Jena vs. State of Odisha.
2. (1991) 2 SCC 180: Puran Singh Sahani vs. Sundari Bhagwandas Kripalani.
3. (1971) 1 SCC 276: Sohan Lal Naraindas vs. Laxmidas Raghunath Gadit.

For Appellants : M/s. Sourya Sundar Das, Sr. Adv.
M/s. K. Behera, S. Modi, P.K. Ghosh, S.S. Pradhan, S. Pradhan & M. Pattnaik

For Respondents: M/s. S. Pattanaik, Addl. Govt. Adv.

JUDGMENT Date of Judgment : 13.12. 2023

SASHIKANTA MISHRA, J.

1. The present appeal is directed against the judgment dated 02.02.2013 passed by learned District Judge, Khurda in RFA No. 37 of 2008, whereby the judgment passed by learned 2nd Additional Civil Judge (Sr. Division), Bhubaneswar in Title Suit No. 119/440 of 2005/1997 on 24.05.2008 was confirmed. The plaintiffs of the said suit are the appellants before this Court.

2. For convenience, the parties are referred to as per their respective status in the Court below.

3. The suit was originally filed by one Sankar Kar and Gourkrushna Kar for declaration, correction of record of right, confirmation of title and permanent injunction in respect of the suit land.

4. The case of the plaintiffs, briefly stated, is that one Nabakrushna Kar of village-Barabati was settled with an area measuring Ac.5.000 dec. appertaining to Plot No. 3550 under Khata No.1118 in Mouza-Badagada as per order dated 06.09.1934 in case No. 8/33-34 on payment of rent. The plot is called "Chilli Pokhari". Nabakrushna died leaving behind the plaintiffs and other children, who possessed the same as per mutual partition among them. During pendency of the suit, Sankar Kar died leaving behind his widow and sons, who were substituted in

his place. It is claimed that the plaintiffs are enjoying the suit property with right to repair and maintain the same at their own cost by keeping the tank clean for the purpose of bathing, drinking, irrigation etc. and by constructing a temporary structure over the same. The suit tank was however, recorded in the name of the Government in G.A. Department in current settlement as Plot No. 1680 and 1071 with a reduced area of Ac.1.135 dec. The plaintiffs filed a revision before the Commissioner, Settlement and Land Records bearing Revision No.815/91, but the same was withdrawn and thereafter the suit was filed.

5. The defendants, on the other hand contested the suit challenging its maintainability, inter alia on the ground of limitation. It was stated that the plaintiffs have no manner of right, title and interest over the suit land and the G.A. Department being the lawful owner, the ROR was rightly published in its name. In the 1988-89 settlement ROR, a note of illegal possession by the plaintiffs was recorded but the same is without jurisdiction and not binding on the defendants. A case for eviction being, O.P.P. Case No. 983 of 1999 was initiated against the plaintiff for eviction and by order dated 31.05.2002, the Estate Officer directed the plaintiffs to vacate the suit land. It is further stated that the revision petition was filed after the statutory period of limitation and the plaintiffs having come to know that they have no possession and title over the suit land withdrew the same and filed the suit to grab the suit land.

6. On the above pleadings, the trial Court framed six issues, of which Issue Nos. (iii) and (iv) being important are as follows:

> *(iii) Whether the suit is barred by law of limitation?*
>
> *(iv) Whether the plaintiffs have right, title, interest and possession over the suit land and direction be given to the defendants to correct the R.O.R. in respect to right of user of the plaintiffs over the suit land?*

7. Plaintiffs examined three witnesses from their side and exhibited 24 documents. Defendants examined one witness and marked one document as exhibit from their side.

8. The trial Court took up Issue Nos.(iii) and (iv) for consideration at the outset. After scanning the oral and documentary evidence, it was of the view that the suit land was given in favour of Nabakrushna Kar for a limited purpose namely, to look after the tank and to clean the same at his own cost for the purpose of use of the villagers. As such, the claim of title by the plaintiffs over the suit land merits no consideration. As regards limitation, the trial Court held that the ROR was published in the year 1988-89 but the suit was filed in the year 1997, i.e., after a lapse of 9 years. As such, the suit is barred by limitation. On such findings on the pivotal issues, the other issues were also answered against the plaintiffs to the extent that the plaintiffs having claimed possession on the basis of the note in the ROR are deemed to have accepted the title of the defendants and therefore, do not have a better title than the defendants over the suit land in order to claim the relief of injunction. On the above findings, the suit was dismissed.

9. The plaintiff carried the matter in appeal mainly challenging the findings of the trial Court with regard to Issue Nos.(iii) and (iv). Learned District Judge took note of the certified copy of the ROR in respect of the suit plot marked Ext.1 and particularly, the entries made therein to hold that the status of Nabakrushna was 'Dafadar' and the nature of the tenancy was 'Dafayat'. According to learned District Judge, Dafayat is akin to a licence and not lease. The disposition in favour of the plaintiff vide Ext.1 does not speak of settlement of land in his favour nor is a lease but a mere conferment of right of user along with right of the public. Learned District Judge also concurred with the finding of the trial Court regarding limitation with reference to Section 42 of the Orissa Survey and Settlement Act, 1958, which provides that a suit for correction of record of rights has to be filed within a period of three years from the date of publication of ROR. Learned District Judge held that even assuming that the claim of the plaintiffs is based on title, then also they having failed to prove title over the suit land, their possession cannot be stated to have matured into title. On such findings, the appeal was dismissed.

10. Heard Mr. S.S. Das, learned Senior Counsel with Mr. A. Pradhan, learned counsel for the appellants and Mr. S. Pattanaik, learned Addl. Government Advocate for the State.

11. Before proceeding to refer to the rival contentions put forth by the parties, it would be proper to mention that the present appeal has been admitted on the following substantial questions of law.

> *"(1). Whether both the courts below misdirected themselves in holding that the suit is barred by limitation in view of provisions under Section 42 of the Orissa Survey and Settlement Act, 1958?*
>
> *(2) Whether, in view of the fact that the plaintiffs' claim for correction of ROR in the suit is based upon the claim for relief of declaration and confirmation of title, the appellate court should have held that cause of action for filing of the suit arose after 1989? and*
>
> *(3) Whether the lower appellate court was justified in holding that the plaintiffs were licensees and not tenants under Ext 1?"*

12. Mr. S.S. Das, learned Senior Counsel has argued that both the Courts below have misdirected themselves in holding the suit as one for declaration of right, title, interest and possession of the plaintiffs. The fact that the suit was for correction of record of right and declaration of right of user over sabik plot No. 3551 -3553 along with permanent injunction was lost sight of by both the courts below. The plaintiffs have also not laid any claim of adverse possession and therefore, finding of the trial Court in such regard is entirely wrong. The suit land was leased out to the plaintiffs for a limited purpose on payment of rent but the courts below misconstrued the lease deed (Ext.1) as a licence. The law of limitation as applied by the courts below in the case is erroneous for the reason that the record of right was though published in the year 1988-89, the plaintiffs filed the suit in the year 1997 only being faced with the

imminent threat of dispossession. Moreover, the revision preferred earlier was withdrawn and therefore, the suit cannot be treated as being barred by limitation. According to learned Senior Counsel the term 'Dafayat' as per *Purnachandra Odia Bhasakosh* means rent to be paid as 'Jala Kara, Phala Kara' etc. and therefore, the lease deed vide Ext.1 reflects grant of a permanent lease by the ex-intermediary with some conditions attached in conformity with Section 105 of the Transfer of Property Act. The term 'Dafayat' cannot convert a lease to a licence. As per Section 105 of the T.P. Act, lease creates a right on the lessee to enjoy the property in perpetuity, if not otherwise expressed. Therefore, the findings of the courts below to the contrary is entirely erroneous and a product of misconception of the nature of the relationship between ex-intermediary and the predecessor-in-interest of the plaintiffs.

13. Mr. S. Pattnaik, learned State Counsel on the other hand contends that the prayer in the plaint being for correction of record of right published in the year 1988-89, the suit ought to have been filed within three years of its publication but having been filed admittedly after lapse of nine years, it is therefore, grossly barred by limitation. As regards the prayer for declaration of right of user, the right being mentioned as Dafayati in Ext.-1 cannot be held to be a lease but is a licence. In any case, the document (Ext.1) itself suggests the right of the public over the suit land and therefore, the same is essentially communal in nature without any exclusive or independent right being conferred upon the plaintiffs. According to Mr. Pattanaik therefore, both the courts below rightly rejected the claim of the plaintiffs.

14. From the rival contentions noted above, it is evident that two questions primarily fall for consideration before this Court as reflected in the substantial questions of law referred to earlier, (i) whether the suit is barred by limitation. (ii) whether the disposition of the suit land under Ext.-1 is in the nature of a lease or licence.

15. In order to determine the issue of limitation, it would be apposite to refer to the relief claimed in the plaint, which is reflected herein below:

> *"(i) Direction to defendants to correct the Record of Right in respect of an area of Ac.5.000 decimal, corresponding to Sabik Plot No.3554 (Hal Plot No. 1680/1071) and portions of Plot No.3550/4673 & 3550/4674, corresponding to such Hal records to which they may co-relate.*
>
> *(ii) Declaration of rights of user of the plaintiffs in respect of Hal Plot Nos. 1070, 1072, 1116, 1117 & 1114 (part), corresponding to Sabik Plot Nos. 3551 & 3553, with noting of the same in the Record of Right.*
>
> *(iii) Permanently restraining the defendants from invading the plaintiffs' right in respect of such property.*
>
> *xxx xxx xxx "*

16. There is no dispute that the ROR was published in the year 1988-89 in the name of the Government in G.A. Department with note of illegal possession by the plaintiffs. It is claimed that a revision was filed in the year 1991 being Revision Case No. 815 of 1991 before the Commissioner, Settlement and Land Records. It is

stated that said Revision was withdrawn on 28.08.1997. The suit was filed a few days before i.e. on 12.08.1997. Section 42 of the Odisha Survey and Settlement Act, 1958 reads as follows:

> *"**42. Limitation of jurisdiction of Civil Court.** - (1) No suit shall be brought in any Civil Court in respect of any order directing survey, preparation of record-of-rights or settlement of rent under this Act or in respect of publication, signing or attestation of any record thereunder or any part thereof :*
>
> *Provided that any person aggrieved by any entry in or omission from any record finally published under Sections 6-C, 12-B or 23 in pursuance of Section 36 may, within three years from the date of such publication, institute a suit for relief in a Civil Court having jurisdiction.*
>
> *(2) When such Court has passed final orders it shall notify the same to the Collector of the district and all such alterations as may be necessary to give effect to the orders of the said Court shall be made in the records published as aforesaid."*

17. Therefore, ordinarily a suit for correction of record of rights could be filed within three years from the date of publication of ROR. Learned Senior Counsel, Mr. Das has argued that mere entry in the record of right neither creates nor extinguishes title in favour of any person. A title holder continues to remain in possession of the property despite the wrong recording because the erroneous ROR cannot extinguish his right, title and interest over the property nor does be become disentitled to continue to be in possession. He has relied upon the judgment passed by the court in the case of **Basanti @Basantirani Jena vs. State of Odisha,** reported in 2016 (Supp.-1) OLR 529.

18. This Court is however, unable to accept the contention of learned Senior Counsel in this regard for the reason that the ratio of the cited case would apply only when the person concerned is actually the title holder notwithstanding the wrong recording of the ROR. Here it has been specifically contended that the plaintiffs are not claiming title over the suit property but their prayer is for correction of record of right simpliciter along with declaration of right of user. The filing of the revision and its subsequent withdrawal by the plaintiffs cannot have any bearing on the present case since the suit was filed on the same prayer i.e., correction of record of right. Both the Courts below have held and according to this Court, rightly so, that in so far as the relief for correction of record of right is concerned, the suit is clearly barred by limitation having regard to the provision under Article 58 of the Limitation Act read with Section 42 of the Orissa Survey and Settlement Act. This Court holds accordingly.

19. As regards the nature of disposition of the property conveyed under Ext-1, i.e., whether it is lease or licence, it would be proper to refer to the document itself. In the remarks column of Ext.-1 which purports to be certified copy of the ROR, the name of Nabakrushna Kar is mentioned under the tenant column with further reference to case No. 8/1934-35. Further, the term 'dafayat' has been mentioned. The special remark runs as follows;

> *"DAFADARA BYAYARE POKHARIRA PANKODHARA KARIBA; DAFADARA HUDA SABU MARAMATA KARI BHALABHABARE RAKHIBA; GRAMABASIMANE KHAIBA, GADHOIBA O FASALA SAKASHE POKHARIRA PANI BEBAHARA KARIPARIBE; GOMAHISADI ETHIRE GADHOIBE NAHIN".*

20. As regards the meaning of the term 'Dafayat', learned Senior Counsel has referred to Purnchandra Odia Bhasakosh, which refers to 'Dafayat'- "Jala Kara, Phala Kara, Machha Diaa, Pattu Jamira Khajana etc." On such basis it is submitted by learned Senior Counsel that the tenant being required to pay rent, the document is nothing but a lease deed. Mr. S. Pattnaik, learned State Counsel on other hand submits that dafayati is not a tenancy right but a right to enjoy usufructs of land on payment of certain fees. Moreover, had it been in nature of a lease no communal right would have accrued to the general public over the suit land and the same would have been conferred on the person concerned for his exclusive enjoyment. Such is however, not the case as the expression "GRAMABASIMANE KHAIBA, GADHOIBA O FASALA SAKASHE POKHARIRA PANI BEBAHARA KARIPARIBE" clearly shows the communal nature of the property notwithstanding the responsibility cast upon Nabakrushna Kar to maintain and repair the embankment and to desilt the tank. Here payment of rent is nothing but payment of fees charged for user of the property not rent as such.

21. As to whether a particular disposition is a lease or licence, law is well settled that the crucial test is the intention of the parties. If the intention was to create an interest in the property it would be lease but it if did not, it would be licence. Reference can be had in this regard to the decision of the Apex Court in the case of **Puran Singh Sahani vs. Sundari Bhagwandas Kripalani,** reported in (1991) 2 SCC 180, wherein relying upon an earlier judgment rendered in the case of **Sohan Lal Naraindas vs. Laxmidas Raghunath Gadit,** reported in (1971) 1 SCC 276 it was held as follows;

> *15. Following Sohan Lal Naraindas v. Laxmidas Raghunath Gadit [(1971) 1 SCC 276] , we reiterate that the intention of the parties to an agreement has to be gathered from the terms of the agreement construed in the context of the surrounding, antecedent and consequent circumstances. The crucial test would be what the parties intended. If in fact it was intended to create an interest in the property, it would be a lease, if it did not, it would be a licence. In determining whether the agreement was a lease or licence, the test of exclusive possession, though of significance, is not decisive. Interest for this purpose means a right to have the advantage accruing from the premises or a right in the nature of property in the premises but less than title.*
>
> *16. Lease has been defined in Section 105 of the Transfer of Property Act as under:*
>
> *"105. A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."*
>
> *The essential elements of a lease are:*
>
> *1. the parties*

2. the subject matter, or immovable property

3. the demise, or partial transfer

4. the term, or period

5. the consideration, or rent."

22. Thus, the intention behind the disposition of the property in question is to be inferred from the surrounding facts and circumstances. Plaintiffs would insist that the disposition was in the nature of a permanent lease whereas the defendants insist that it was nothing but a licence. The facts leading to initiation of the lease case, i.e. Case No. 8/33-34 are not forthcoming from the materials on record nor put forth before this Court by the parties. Per force, the recitals/remarks in the documents (Ext.1) are to be interpreted in order to ascertain the intention of the ex-intermediary in making the disposition in favour of the predecessor-in-interest of the plaintiffs. The recitals have already been referred to hereinbefore. As is evident, the predecessor-in-interest of the plaintiffs was granted a right to enjoy the property, which is a pond, on payment of rent but then such right of enjoyment is qualified by the direction to desilt the pond, maintain and repair its embankment and most importantly, it also confers the right on the general public (villagers) to enjoy such property by way of using the water of the pond for bathing, cooking, washing and for irrigation purpose. So, the right of user that was purported to be transferred on the predecessor-in- interest of the plaintiffs was not an exclusive right nor such possession was exclusive and absolute to him as others had right to use the pond too. To such extent therefore, it cannot be said that the disposition was in the nature of lease. Had it been an exclusive or independent right of user on the plaintiffs' predecessor-in- interest, it would certainly have qualified as a lease but in view of what has been said hereinbefore, such is not the case. Moreover, it cannot be said that the disposition intended to create an exclusive interest of the plaintiffs' predecessor- in-interest in the property. Under such circumstances, it can only be treated as licence to occupy the property and for enjoyment of the usufructs but only upon discharging certain responsibilities/duties. The so-called rent payable therefore, has to be treated as fees for the licence and not rent for any lease.

23. Reference can be made again to the case of **Puran Singh Sahani** (supra) in this regard, wherein it was observed as follows;

> *"17. The relationship of lessor and lessee is one of contract. In Bacon's Abridgement, a lease is defined as "a contract between the lessor and the lessee for the possession and profits of land, etc., on the one side and recompense by rent or other consideration on the other". Hence it has been held that "a mere demand for rent is not sufficient to create the relationship of landlord and tenant which is a matter of contract assented to by both parties". When the agreement vests in the lessee a right of possession for a certain time it operates as a conveyance or transfer and is a lease. The section defines a lease as a partial transfer, i.e., a transfer of a right of enjoyment for a certain time."*

24. Thus, merely because the plaintiffs claim to be in possession for a long time and also paid rent till about 1997 cannot transform the licence granted to their

predecessor-in-interest into a lease as such possession is not exclusive to them. The Lower Appellate Court has examined the evidence to be convinced that mere conferment of right of user does not make it a permanent lease regard being had to the right of the public also in the property.

25. In view of the discussion made above, this Court finds itself in agreement with the reasoning adopted by the Lower Appellate Court and is therefore, not inclined to accept the contentions raised by learned Senior Counsel that the property had been leased out permanently in favour of the predecessor-in-interest of the plaintiffs.

26. Once it is held that the disposition was a licence, it automatically nullifies the claim of the plaintiffs for declaration of the right of user for the reason that the licensor has the right to annul the licence at any point of time, which in the instant case is reflected by refusal of the State to receive rent from the plaintiffs. Evidently, the plaintiffs could not establish their claim over the suit property before the settlement authorities during current settlement operations in the manner that they claimed in the suit nor challenged the record of rights so published within the statutory period of limitation. Thus, there is no way by which the relief claimed in the suit could be granted to the plaintiffs.

27. Thus, from a conspectus of the analysis of the facts, law and the contentions raised by the parties, this Court is of the considered view that both the courts below have correctly decided the lis between the parties leaving no room whatsoever for this Court to interfere. The appeal must therefore, fail for the reasons indicated in detail hereinbefore.

28. In the result, the appeal is dismissed but in the circumstances, without any cost.

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2024 (I) ILR-CUT-207

A.K. MOHAPATRA, J.

W.P.(C) NO. 5214 OF 2021

BISWAJIT SWAIN .....Petitioner

-V-

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

AND

W.P.(C) NO. 27752 OF 2022

ACHYUT KUMAR BHOI -V- STATE OF ODISHA & ORS.

(A) ODISHA CIVIL SERVICES (REHABILITATION ASSISTANCE) RULE, 1990 r/w O.C.S (R.A) RULES, 2020 – The deceased government employees had died prior to the new Rules 2020 came into force and

the applications were also made by the petitioner's/legal heirs much prior to the new Rules 2020 were notified in the Gazette by the Government of Odisha – The authority rejected the application being not qualified/eligible as per 2020 Rules – Whether the ground for rejection is sustainable? – Held, No – The family members of the Government employee who died in harness after 17.02.2020 are to be governed by 2020 Rules – The Rule that was enforce at the time of the death of the government employee should be considered.

(B) CONSTITUTION OF INDIA, 1950 – Articles 226, 309, 14, 16, r/w Rule 6(a) of OCS(R.A) Rule, 2020 – Whether court has Jurisdiction to interfere with the policy decision, Scheme/Rule framed by the government? – Held, Yes – When the same is violative of Articles 14 & 16 of the constitution of India – This court can interfere and declare the provisions contained in Rule 6(9) of 2020 Rule as void.

Case Laws Relied on and Referred to :-

1. (2020) 7 SCC 617:N.C. Santosh vs. State of Karnataka
2. 2020 (2 SCC 729):Indian Bank and Ors. Vs. Promila and Another
3. (2020) 10 SCC 496:State of M.P. v. Amit Shrivas
4. (2022) 2 SCC 157:State of M.P. v. Ashish Awasthi
5. AIR 2022 SC 402:The Secretary to Government Department of Education (Primary) and others vs. Bheemesh alias Bheemappa
6. (1977) 8 SCC 85:Haryana State Electricity Board vs. Hakim Singh
7. AIR 1998 SC 2230:Director of Education vs. Puspendra Kumar
8. (2005) 7 SCC 206:Commissioner of Public Instruction vs. K.R. Viswanath
9. (2003) 7 SCC 704:State of Haryana and Anr. vs. Ankur Gupta
10. (2007) 2 SCC 481:National Institute of Technology vs. Niraj Kumar Singh
11. (2014) 13 SCC 583:MGB Gramin Bank Vs. Chakrawarti Singh
12. (2015) 7 SCC 412:Canara Bank and another Vs. M. Mahesh Kumar
13. (2007) 9 SCC 571:State Bank of India Vs. Jashpal Brar
14. (2010) 11 SCC 661:State Bank of India and another Vs. Rajkumar
15. (2009) 5 SCC 600:State Bank of India and others Vs. Sheo Shankar Tiwari
16. AIR 2022 SC 2836 : 2022 (11) OLR (SC)1 : Malaya Nanda Sethy Vs.State of Odisha & Ors.
17. 2023 SCC OnLine SC 219:State of West Bengal vs. Debabrata Tiwari
18. W.P.(C) No.2081 of 2021:Suchitra Bal v. State of Orissa
19. AIR 1998 SC 1050:A.K. Krishna Vs. State of Karnataka.
20. (1997) 3 SCC 641:R.S. Ajara Vs. State of Gujurat
21. (1997) 6 SCC 623:Chairman Railway Board Vs. C.R. Rangadhamaiah
22. (2007) 11 SCC 681:State of Karnataka Vs. Ameerbi
23. AIR 1979 SC 1060:Distt. Registrar v. M.B. Koyakutty
24. AIR 1981 SC 411:S.L. Sachdev v. Union of India,
25. (2002) 2 SCC 188:Sharma Transport Vs. Govt. of A.P.
36. AIR 1974 SC 555: E.P.Royappa Vs. State of T.N.
27. AIR 1978 SC 597:Maneka Gandhi Vs. Union of India
28. (2006) 3 SCC 434 : Bombay Dyeing & Mfg. Co.Ltd Vs. Bombay Environmental Action Group

29. AIR 2007 SC 2276 :Bidhannagar (Salt Lake) Welfare Assn. Vs. Central Valuation Board
30. (2009) 5 SCC 342:Grand Kakatiya Sheraton Hotel and Towers Employees and workers union Vs. Srinivasa Resorts Ltd.
31. (2011) 9 SCC 286:A.P. Dairy Development Corpn. Federation Vs. B. Narasimha Reddy
32. (1993) Supp. 4 SCC 595:S.Nagaraj Vs. State of Karnataka
33. (1991) 1 SCC 212:Shrilekha Vidyarthi (Kumari) Vs. State of U.P.

W.P.(C) No.5214 of 2021
For Petitioner : Mr. Biswajit Parida.
For Opp.Parties : Mr. Saswat Das, AGA

W.P.(C) No.27752 of 2022
For Petitioner : Mr. Ranjit Samal.
For Opp. Parties : Mr. Arnav Behera, ASC

JUDGMENT Date of hearing: 19.10.2023: Date of judgment : 31.10.2023

A.K. MOHAPATRA, J.

1. The above noted batch of writ applications have been filed by the petitioners named in such writ applications calling in question either the inaction of the Opposite Parties in the matter of appointment of the petitioners under the Odisha Civil Service (Rehabilitation Assistance) Rules, 1990 or rejection of the prayer of the petitioners by considering such applications under the O.C.S. (R.A.) Rules, 2020. A prayer has been made for a direction to the Opposite Parties to appointment the petitioners w.e.f. the date of their respective fathers in consonance with the above noted Rules, 1990 on compassionate ground. Other than the issue involved in the batch of writ applications which are almost identical, the factual background of the almost all the writ applications, to be dealt with by this court in the following common judgment, are also strikingly similar. The above noted batch of writ applications involve an identical issue/ question as to which Rules i.e. O.C.S. (R.A.) Rules, 1990, which was in force at the time of death of the deceased Government employee, or the new rules i.e. Odisha Civil Service (Rehabilitation Assistance) Rules, 2020 would apply to the facts of their cases as the common factual background in all above noted cases is that the deceased Government employees had died prior to the new Rules, 2020 came into force and the applications were also made by the petitioners-legal heirs much prior to the new Rules, 2020 were notified in the Gazette by the Government of Odisha.

2. On perusal of the pleadings on behalf of the petitioners in all such cases, this Court is of the considered view that a dichotomy exists in various judicial pronouncements with regard to applicability of the rules so far appointments on compassionate ground in the State of Odisha is concerned that is whether the Odisha Civil Service (Rehabilitation Assistance) Rules, 1990 shall apply to the legal heirs of the deceased Government employee where the Government employee has died prior to the (Rehabilitation Assistance) Rules, 2020 came into force or there cases for appointment on compassionate ground shall be governed under the old Rules of the year 1990 as amended by the Amendment Rules of 2016.

3. For the sake of convenience and brevity, the factual backdrop of the writ applications mentioned at the top of this judgment are being taken up for consideration and analysis by this Court. It is, however, made clear that most of the cases in the present batch of writ applications involve a similar question of law for determination. The determination of the question of law shall, more or the less, govern connected batch of cases involving identical question of law.

FACTS OF W.P.(C) No.5214 of 2021

The factual matrix of the present case as it stands;

4. The petitioner's late father Ganesh Kumar Swain, who was a regular Government employee as a driver under Opposite Party No. 1, died in harness on 04.07.2018 leaving behind a wife, one married daughter, one unmarried daughter, and a son Biswajit Swain, i.e. the present petitioner. After the death of the father of the petitioner, who was the sole bread earner of the family, the petitioner with consent of other legal heirs, filed an application for appointment under the Rehabilitation Assistance Scheme under Rule 8(i)(a) of the Orissa Civil Services Rehabilitation Assistance Rules, on 22.04.2019 before opposite party No. 2. Along with the application, the petitioner also submitted all other necessary documents. The service book of the late father of the petitioner, along with Death Certificate and Legal Heir Certificate Copies have been attached to the writ petition by the petitioner. After receiving the application from the petitioner, the same was duly verified and such application was referred to the Opposite Party No.3 to enquire and furnish a distress certificate regarding the financial condition of the petitioner's family.

5. The learned counsel for the petitioner further submits that, despite the completion of all procedures for the appointment under Rehabilitation Assistance Scheme, the appointing authority did not pass the order for appointment. The learned counsel for the petitioner alleges mala fide intention on behalf of the appointing authority in light of the above mentioned pendency regarding granting appointment under rehabilitation assistance scheme.

6. Furthermore, the learned counsel for the petitioner, submits that, while the above mentioned application was pending, the Government amended some of the provisions of the Orissa Civil Services (Rehabilitation Assistance) Rules, 2020 (herein after referred to as the '2020 Rules') vide notification no. 5651 dated 17.02.2020. Learned counsel for the petitioner submits that the opposite party no.2 following the above amendment, has rejected the application of the petitioner for appointment under the 2020 Rules, vide letter No. 4011 dated 17.12.2020. It is this impugned rejection order which is under challenge in the present writ application.

7. As to the grounds of rejection, the learned counsel for the petitioner submits that the opposite party no. 2 has rejected the petitioner's application since he has

complied with 35 points out of the total 85 points in Form-D Part-1 under the 2020 Rules. However, the learned counsel submits that as per the 2016 Rules, which according to the learned counsel for the petitioner is the Rule that is applicable in the case of the petitioner, the petitioner has complied with all 35 points. He further submits that under the 2020 Rules, the 2016 Rules are not repealed rather there is addition of more points upto 85. Therefore, the counsel for the petitioner submits that the rejection is unsustainable in law.

8. Lastly, the learned counsel for the Petitioner submits that the main grievance of the petitioner is that despite his late father being a government servant who died in harness and the petitioner being a legal heir of his late father, he is entitled to be appointed under the OCS RA Scheme, as is applicable to all government servants. Moreover, the petitioner had rightly submitted the application form on 22.04.2019 along with all requisite documents as per the 2016 Rules.

9. Additionally, the learned counsel for the petitioner submits that despite the petitioner submitting the application on 22.04.2019, which was submitted well before 17.02.2020 when the 2020 Rules were made applicable, no appointment was made before 17.02.2020. He further submitted that the authorities have provided no reason as to why the appointment could not be made before above-mentioned date i.e. 17.02.2020. The learned counsel for the petitioner, in light of the above-mentioned submissions, alleges misconduct and negligence on the part of opposite party No.2 and accordingly prays for the impugned rejection order under Annexure-4 to be set aside.

10. The learned Additional Government Advocate appearing for the opposite parties, referring to the counter filed on behalf of opposite parties No. 1 and 2 submits that, as per Notification No. 5651/Gen., Dt. 17.02.2020, the petitioner has secured 35 points out of a total of 85 points in Form-D, Part-I under the 2020 Rules, whereas the qualifying point is 60, therefore rightfully the application of the petitioner has been rejected as per the new Rules, 2020 notified pursuant to the above-mentioned notification.

11. Further, pointing to Point No. 6 clause 2(b), the learned A.G.A. submits that, if the total points allotted to the petitioner in part-I of the evaluation sheet is 44 or less, then the petitioner shall be automatically ineligible for appointment. Therefore, considering that the petitioner had only secured 35 points, his application has been rightfully rejected. Finally, the learned A.G.A. submits that, considering the above submissions the writ petition by the petitioner is devoid of any merit and is therefore liable to be dismissed.

12. Referring to the rejoinder affidavit, the learned counsel for the petitioner submits that, the opposite parties in their counter have admitted to the service of petitioner's late father and his death in harness on 04.07.2018. Moreover, the learned counsel for the petitioner contends that the opposite parties have not properly explained the delay of four months from the date of receiving the application on

22.04.2019 to the date of intimating the Tahasildar for Distress Certificate on 19.08.2019 and delay in submission of the medical certificate in favour of the wife of the deceased by the CDMO Jagatsinghpur on 11.12.2019.

It is also submitted that the opposite parties have not provided a reason in the said counter as to why the matter of appointment which started in 22.04.2019 could not be completed on or before 17.02.2020 for which no irregularity could be adduced to the petitioner.

13. Additionally it is also submitted that as per Form-D Part-1 the petitioner has secured 35 points out of 85 but the evaluation sheet in Form-D Part-1 was not declared before 2020 Rules came into force, therefore such evaluation sheet is a nullity in the eye of law.

FACTS OF W.P.(C) No.27752 of 2022

14. The factual matrix, as has been pleaded in the writ petition, leading to filing the present writ application is that the father of the petitioner namely Late Benudhar Bhoi was working as an Agriculture Overseer in the Office of District Agriculture Office, Padampur in the District of Bargarh and he died in harness on 28.09.2015 leaving behind four dependants including the present petitioner. In support of the aforesaid facts, the learned counsel for the petitioner has annexed a copy of the Service Book of the late father of the petitioner, Legal Heir Certificate, and other relevant documents and papers for consideration by this Court.

15. The present petitioner, who has the qualification of +2 Arts with a Diploma in Computer qualification, submitted an application under the Odisha Civil Service (Rehabilitation Assistance) Rules, 1990 for his appointment on compassionate grounds after the death of his father in harness. The mother of the petitioner has been declared unfit to do any job by the Medical Board. So far other dependents/ family members of the deceased Government employee are concerned, they have given their affidavit stating therein that they have no objection in the event any appointment is given to the petitioner on compassionate grounds under the Rules, 1990. It is stated by the learned counsel for the petitioner that the application for appointment on compassionate ground was submitted by the petitioner within the time stipulated. Upon receipt of the application submitted by the application, on 04.05.2017 the Deputy Director of Agriculture, Bargarh wrote a letter to the Collector and District Magistrate Bargarh for issuance of a Distress Certificate after due inquiry. However, the Collector-cum-District Magistrate, Bargarh informed vide letter dated 19.05.2017 that there was no need to issue the same as per notification dated 05.11.2016.

16. On 06.09.2017, the application submitted by the petitioner for appointment on compassionate ground under the Rules, 1990 along with other supporting documents were forwarded to the Opposite Party No.2 for due consideration. The learned counsel for the petitioner has also attached photocopies of the application,

the Unfit Certificate of Petitioner's mother, other relevant certificates, and the No Objection letter supported by the affidavit of other family members to the writ application. It is further contended by learned counsel for the petitioner that although the application for appointment under the Rehabilitation Assistance Scheme was submitted on 10.06.2016 to the competent authority to consider the case of the petitioner for appointment on compassionate ground, the Opposite Parties ignoring the said valid application under 1990 Rules, asked the petitioner to resubmit the application under the new rules along with supporting documents to consider his case for appointment under the Odisha Civil Service (Rehabilitation Assistance) Rules, 2016 and 2020, however, till date no decision has been taken leaving the petitioner to run from pillar to post in search of a job on compassionate ground to support his family which is otherwise in a financially distressful condition.

17. Learned counsel for the petitioner submits that in view of the provisions contained in the Odisha Civil Service (Rehabilitation Assistance) Rules, 1990 the petitioner is eligible to be appointed in any of the Group "C" or Group "D" post under the Government of Odisha befitting to his educational qualification. He further submits that since the father of the petitioner expired on 28.09.2015, the rule prevailing then, i.e. the OCS (R.A.) Rules, 1990, would have application to the facts of the present case. He further submits that although the Rules 1990 was amended in the year 2016, such amendment was notified vide Government notification dated 05.11.2016, which is much after the death of the petitioner's father and after the application for appointment on compassionate grounds was submitted before the competent authority. He further contends that the new rules, that is, OCS(R.A.) Rules, 2020 came into force in the year 2020, which is much after the death of the father of the petitioner, therefore such rule shall have no application to the facts of the petitioner's case.

18. In view of the aforesaid facts and circumstances, the learned counsel for the petitioner emphatically submitted that the case of the present petitioner for appointment on compassionate grounds shall have to be considered only under the OCS(R.A.) Rules, 1990 which was in force at the time of the death of the petitioner's late father and when the application for appointment under the R.A. rules was made to the competent authority. He further contends that many persons had applied along with the petitioner, and they have already been given the appointment.

19. Learned counsel for the State on the other hand submits that the case of the petitioner for appointment on compassionate grounds is pending for consideration before the competent authority. He further submits that the State Government has prepared a year-wise list of candidates, in chronological order of the date of death of the Government employee, and as and when vacancies arise, the cases of such candidates would be considered and they will be given appointment befitting to their educational qualification. Learned counsel for the State further draws the attention of this Court to the fact that the O.C.S. (R.A.) Rules, 1990 has been repealed in the

meantime and a new set of rules has been enacted that is O.C.S. (R.A.) Rules, 2020. The new Rules of 2020 provides that all new applications as well as pending applications shall be considered under the new rules of the year 2020. Therefore, the learned counsel for the State submits that the case of the petitioner for appointment on compassionate grounds can only be considered under the new rules of the year 2020.

CONTENTIONS RAISED BY THE COUNSELS

20. In support of their contention, the learned counsel for the State relied upon the judgment of the Hon'ble Supreme Court in the case of **N.C. Santosh vs. State of Karnataka** ; reported in **(2020) 7 SCC 617**. The learned counsel for the State submits that in the above-noted case, the Hon'ble Supreme Court has held that the claim of a person seeking appointment under the Rehabilitation Assistance Rules should be considered as per the amended rules that were prevalent at the time of consideration of the application and not the rules that were prevailing at the time of the death of the Government servant. In such view of the matter, the learned counsel for the State submits that the case of the petitioner shall be considered only under O.C.S. (R.A.) Rules, 2020 and no other rules shall have any application to the facts of the case of the petitioner.

21. Learned counsel for the petitioner made an attempt to repel the argument advanced by the learned counsel for the State by relying upon the judgment of the Hon'ble Supreme Court in the case of ***Indian Bank and Ors. Vs. Promila and Another*** *reported in* ***2020 (2 SCC 729), State of M.P. v. Amit Shrivas*** *reported in* ***(2020) 10 SCC 496, State of M.P. v. Ashish Awasthi*** *reported in* ***(2022) 2 SCC 157, Chief General Manager, Telecommunication BSNL vs. Bidya Prasad*** *reported in* ***AIR Online 2021 SC 906*** *and* ***the Secretary to Government Department of Education (Primary) and others vs. Bheemesh alias Bheemappa*** ; reported in **AIR *2022 SC 402***. Relying upon the above-noted judgment of the Hon'ble Supreme Court, the learned counsel for the petitioner advanced his argument in support of the contention that the rules prevailing at the time of the death of the Government employee, who died in harness, and the rules prevailing at the time of submitting the application shall be applied to the claims of the legal heirs of deceased Government employee while seeking appointment on compassionate ground.

22. Considering the submission advanced by the learned counsels appearing for the respective parties, this Court is of the considered view that to resolve the aforesaid dichotomy, this Court is required to examine the judgment relied upon by the respective parties and accordingly come to a conclusion as to which one of the rules shall be applicable to the facts of the batch of writ applications filed by the legal heirs/dependents of deceased Government employees seeking for a direction for appointment on compassionate ground.

23. Heard Sri Biswajit Parida, learned counsel appearing for the petitioner in W.P.(C) No.5214 of 2021; and Sri Ranjit Samal, learned counsel for the petitioner in

W.P.(C) No.27752 of 2022; as well as Sri Saswat Das, learned Additional Government Advocate; and Mr. Arnab Behera, Learned Additional Standing Counsel for the state Opp. Parties. Perused the pleadings from both sides as well as materials on record.

24. Before delving deeper into the aforesaid dichotomy involved in the contentions raised by the counsel for the respective parties, this Court would like to throw light on the objection of the Opp. Parties in giving appointments to the dependants/legal heirs of a Government employee who died in harness. In ***Haryana State Electricity Board vs. Hakim Singh*** reported in ***(1977) 8 SCC 85***, the Hon'ble Supreme Court had an occasion to explain the rationale behind having a set of rules relating to compassionate appointment. In the words of the Hon'ble Supreme Court:

> *"The Rule of appointment to Public Service is that they should be on merits and through open invitation. It is the normal root through which one can get into a public employment. However, as every Rule can have exceptions, there are a few exceptions to the said Rules also which have been evolved to meet the certain contigrncy. As per one such exceptions relief is provided to the bereft family of the deceased employee by accommodating one of his dependents in a vacancy. The objection is to give succor to the family which has been suddenly plunged into penury due to the untimely death of its sole bread earner. This Court has observed time and again that the object providing such ameliorating relief should not be taken as opening an alternative mode of recruitment to public employment".*

25. The aforesaid observation of the Hon'ble Supreme Court has been followed in many subsequent judgments of the Hon'ble Supreme Court as well as High Courts. A similar view has also been taken in ***Director of Education vs. Puspendra Kumar*** reported in ***AIR 1998 SC 2230****; and* ***Commissioner of Public Instruction vs. K.R. Viswanath*** reported in ***(2005) 7 SCC 206***. Similarly, in a judgment of the Hon'ble Supreme Court in the case of ***State of Haryana and Anr. vs. Ankur Gupta*** reported in ***(2003) 7 SCC 704***, it has been held that the compassionate appointment cannot be made de hors the statutory policy. Further in the case of ***National Institute of Technology vs. Niraj Kumar Singh*** reported in ***(2007) 2 SCC 481***, the Hon'ble Supreme Court has held that the grant of compassionate appointment would be illegal in the absence of any scheme providing therefor. Moreover, such a scheme may not be commensurate with the constitutional scheme of equality.

26. Keeping in view the principles of law enunciated by the Hon'ble Supreme Court, the Government of Odisha in the exercise of powers conferred under Article 309 of the Constitution of India, framed a set of Rules known as Odisha Civil Service (Rehabilitation Assistance) Rules, 1990 to regulate the recruitment/ appointment of dependents'/family members of a Government employee who died in harness. Thereafter all appointments on compassionate grounds in the State of Odisha were being guided and governed under the Rules, 1990 till the same was amended in the year 2016. Thereafter in the year 2020 the Rules, 1990 was completely replaced by another set of new rules, known as Odisha Civil Service (Rehabilitation Assistance) Rules, 2020.

27. Now coming to the applicability of the aforesaid rules, which is the subject matter of dispute in the present case, this Court is required to scrutinize various judgments delivered by the Hon'ble Apex Court on the issue in hand.

28. In ***MGB Gramin Bank Vs. Chakrawarti Singh (2014) 13 SCC 583***, the Hon'ble Supreme Court reiterated the law laid down by it in ***Rajkumar's Case: (2010) 11 SCC 661*** and held that an appointment on compassionate grounds may not be claimed as a matter of right nor does an applicant become entitled for an appointment automatically, rather it depends on the eligibility of the applicant and the financial conditions of the applicant's family, etc., that are to be considered in accordance with the scheme. In case the scheme does not create any legal right, a candidate cannot claim his case to be considered as per the scheme existing on the date when the cause of action, i.e. the death of the incumbent while holding the post, had arisen. In the said judgment, while interpreting the word "Vested Right", the Hon'ble Supreme Court has held that Vested Right is a right independent of any contingency and it cannot be taken away without the consent of the person concerned and that the vested right can arise from a contract, a statute or by operation of law in favour of a person.

29. On a careful consideration of the judgment delivered by the Hon'ble Supreme Court in ***MGB Gramin Bank's*** case and ***Rajkumar's case*** (supra), this Court is of the considered view that the Hon'ble Supreme Court was dealing with a scheme/policy decision providing appointment on compassionate ground. Therefore, the Hon'ble Supreme Court has rightly arrived at the conclusion that the same does not confer any vested right on any of the applicants. So far, the present case is concerned, the Odisha Civil Service (Rehabilitation Assistance Rule), 1990 as well as the new rules of the year 2020 are rules framed by the State of Odisha under proviso to Article 309 of the Constitution of India. Therefore, the same has a legal sanctity and as such the right created under the said Rule is an enforceable right, therefore, the aforesaid two judgments could be distinguished on facts.

30. In ***Canara Bank and another Vs. M. Mahesh Kumar*** reported in ***(2015) 7 SCC 412***, the Hon'ble Supreme Court was considering a case of compassionate appointment and the question that cropped up before the Hon'ble Supreme Court was whether the old scheme (1993) is applicable or the new substituted scheme (2005) for ex gratia payment applies to the facts of that case. Finally, it was held that a grant of family pension or terminal benefit cannot be treated as a substitute for providing employment assistance. Furthermore, a claim for compassionate appointment under a scheme of a particular year cannot be decided based on a subsequent scheme that came into force much after the claim was made. On a pleading of the said judgment, it is clear that the Hon'ble Supreme Court in the said case has clearly observed that the scheme which was in force when the claim was made shall be applicable to the claimants for compassionate appointment.

31. In ***State Bank of India Vs. Jashpal Brar***: reported in ***(2007) 9 SCC 571***, the

Hon'ble Supreme Court in clear and unambiguous terms has arrived at a conclusion that the claim of appointment on compassionate grounds should be decided within the parameters of the scheme prevailing at the time when an application for compassionate appointment was submitted and not under any subsequent scheme/Rules. Finally, the Hon'ble Apex Court had held that the High Court erred in considering the scheme prevailing in the year 2005 while deciding the application of the deceased Government Employee's widow filed in the year 2000 and interfered with the decision of the competent authority.

32. In ***State Bank of India and another Vs. Rajkumar*** reported in ***(2010) 11 SCC 661***, while dealing with a case of compassionate appointment, the Hon'ble Supreme Court was called upon to decided the effect of an abolished/modified scheme and the validity of pending application under a previous scheme which was subsequently abolished/modified. While deciding the said case by holding that the claim on compassionate appointment is traceable only to specific scheme framed by the employer and therefore, there exists no right, whatsoever, outside such scheme. Further, it was held that appointment under the scheme can be made only if the scheme is in force and not after the same is abolished/withdrawn.

33. It was also observed in the above noted judgment of the Hon'ble Supreme Court of India that there can be no immediate or automatic appointment merely on an application and that where an earlier scheme is abolished and a new scheme is introduced specifically providing that all pending applications will be considered only in terms of the new scheme, then the new scheme alone shall apply and further went on to conclude that the applicant is not entitled to be considered for compassionate appointment as per his application under the old scheme. It is worthwhile to mention here that the judgment delivered in **Jashpal Brar's Case** (supra) was cited before the Hon'ble Supreme Court by the claimant appellant, however the same was distinguished from the observation made in ***Jashpal Brar's Case*** (supra), which was made in the context of rejecting the widow's request for additional payment under the 2005 scheme and therefore, the Hon'ble Supreme Court allowed the petitioner's appeal and dismissed the claim of the widow for additional benefit under the new scheme and as such the ratio laid down in ***Jashpal Brar's Case*** (supra) has been distinguished by the Supreme Court in the present case.

34. In ***State Bank of India and others Vs. Sheo Shankar Tiwari*** reported in **(2009) 5 SCC 600**, the Hon'ble Supreme Court of India was considering a case of compassionate appointment specifically involving the issue as to whether the old scheme for compassionate appointment vis-à-vis the new substituted scheme for ex gratia payment is applicable to the facts of the respondent-claimant's case. Taking note of the conflicting views by two different two-judge benches of the Hon'ble Supreme Court of India regarding the applicability of the governing scheme, the matter was referred to a larger Bench. However, it was submitted at bar that the larger bench is yet to adjudicate the issue and render a final decision on the matter.

35. In ***Indian Bank and others Vs. Promila and another*** reported ***in (2020) 2 SCC 729***, a two-Judge Bench of the Hon'ble Supreme Court while considering the appointment of the claimant respondent under the compassionate appointment scheme was required to adjudicate the issue with regard to the applicability of the prevalent scheme vis-à-vis subsequent scheme. After a detailed analysis of facts, the Hon'ble Supreme Court has concluded that the claim of compassionate appointment must be decided only on the basis of the relevant scheme prevalent on the date of demise of the Government employee in harness and that the subsequent schemes cannot be looked into. Further, it was held that in a policy/scheme for compassionate appointment, the Courts cannot substitute a scheme or add or subtract therefrom in the exercise of the power of judicial review. On the basis of the law laid down by this judgment, several judgments have been rendered by this Court as well as other High Courts in cases involving compassionate appointment by taking into consideration that the relevant scheme prevalent on the date of the demise of the Government employee in harness, the claim of the dependents'/family members of such deceased Government employees are to be considered.

36. In ***N C Santosh Vs. State of Karnataka*** and others reported in ***(2020) 7 SCC 617***, a three-Judge Bench of the Hon'ble Supreme Court while deciding a case of appointment under the compassionate appointment scheme while reiterating the position of law that to fill up all vacancies in Government employment, equal opportunity should be provided to all aspirants as mandated under Article 14 and 16 of the Constitution. However, compassionate appointment is an exception to the aforesaid general rule whereby the dependents of the deceased Govt. employee are made eligible by virtue of policy subject to fulfillment of norms laid down under the policy. Finally, the Hon'ble Supreme Court came to a conclusion that the norms prevailing on the date of consideration of the application would be the basis for considering a claim for compassionate appointment.

37. In the above reported case, the applicant-claimant was a minor at the time of death of a Government employee, and on attaining 18 years of age, the dependent-applicant applied for the job which was beyond the stipulated period of one year. Therefore, the question arose whether the rule prevalent at the time of the death of the Government employee or the rule in force at the time of consideration of the application of the defendant is to be applied. Further, the relevant rule had been amended in the meanwhile when the application was under consideration. In the facts and circumstances of the said case, the Hon'ble Supreme Court has categorically held that the rule prevalent at the time of consideration of the application would be the basis for considering the claim of the dependent family member for compassionate appointment.

38. The judgment of the Hon'ble Supreme Court in ***N C Santosh's case*** (supra) can also be distinguished on facts as the defendant was a minor and was not eligible to be considered for appointment under the compassionate appointment scheme at the time of the death of the Government employee. However, subsequently, on attaining

majority he submitted his application and by then the relevant rules were amended. Therefore, the right if any accrued only after the dependent family member attained the age of majority. As such, the facts of ***N C Santosh's case*** (supra) are different from the facts of the present case, and accordingly the same can be distinguished. Further, while delivering the judgment in ***N C Santosh's Case*** (supra), the Hon'ble Supreme Court has taken note of the fact that there exists conflicting judgments/ views with regard to the applicability of the rules for appointment on compassionate grounds and accordingly the said issue has been referred to a larger bench of the Supreme Court of India which is pending for final adjudication.

39. In ***State of Madhya Pradesh and others Vs. Amit Shrivas*** reported in ***(2020) 10 SCC 496***, the question that came up for adjudication by the Hon'ble Supreme Court was the payment of higher compensation to the family members of deceased Government employee under the subsequent rules. The three Judge Bench of the Hon'ble Supreme Court while considering the case referred to the judgment in Indian Bank's case (supra) and finally came to the conclusion that they are unable to grant any relief to the respondents as they are constrained by the legal position.

40. On scrutiny of the facts of that case, it is revealed that under the circular dated 29.09.2014 the dependent family member was paid a sum on compassionate ground of Rs.1,00,000/-. Although the said grant of Rs.1,00,000/- was subsequently enhanced to Rs.2,00,000/- by another circular dated 31.08.2016. However, finally the Supreme Court in exercise of their power under Article 142 of the Constitution of India and to do complete justice between the parties enhanced the amount of compensation from Rs.1,00,000/- to Rs.2,00,000/-. On a plain reading of the judgment in Amit Shrivas's case (supra), it appears that the three Judge Bench has affirmed the ratio laid down in Indian Bank's Case supra.

41. In ***State of Madhya Pradesh Vs. Ashish Awasthi*** reported in ***(2022) 2 SCC 157***, the Hon'ble Supreme Court of India was dealing with a case of compassionate appointment, wherein the father of the applicant died on 8.10.2015 while he was working as a work-charged employee. The question arose as to whether the applicant, who is not entitled to employment, would get compensation under the circular of the year 2014 or 2016 i.e. a subsequent circular enhancing the compensation amount. The Hon'ble Supreme Court referring to the judgment in Indian Bank's case (supra) and Amit Shriva's case (supra) finally held that the policy/circular prevalent at the time of the death of the Government employee shall apply and accordingly benefits under such scheme/policy/circular be given to the applicant. Although the Hon'ble Supreme Court did not disturb the appointment of the applicant under the subsequent circular pursuant to the direction of the High Court.

42. In the case of ***The Secretary to Govt., Department of Education (primary) & others Vs. Bheemesh alias Bheemappa*** reported in ***AIR 2022 SC 402***, it has once again been reiterated that the relevant Scheme and/or the Rules prevalent at the time

of time of the death of the Government employee, who died in harness, and/or at the time of submitting the application is required to be considered and not the amended Rules prevalent at the time of consideration of the application.

43. While the above-discussed legal position was holding the field, the learned counsel for the petitioner cited a judgment of the Hon'ble Supreme Court in ***Malaya Nanda Sethy Vs. State of Odisha and others*** reported in ***AIR 2022 SC 2836 : 2022 (11) OLR (SC) 1*** in support of his contention that the rule prevalent at the time of death of the deceased employee shall be applicable to the claim made by the dependents/family members of the deceased Government Employee who died in harness. On a perusal of the judgment delivered by the Hon'ble Supreme Court in ***Malaya Nanda Sethy's case*** (supra), this court observed that the issue involved in the said case was pertaining to a claim by a dependent-claimant under the compassionate appointment Orissa Rules, 1990. Further, the said judgment, rendered by a two-Judge Bench, has taken note of several other judgments rendered by the Hon'ble Supreme Court on the issue of compassionate appointment.

44. In ***Malaya Nanda Sethy's case*** (supra), Hon'ble Apex Court took note of the judgment in ***N. C. Santosh's case*** (supra) which has been heavily relied upon by the learned counsel for the State to impress upon this Court that the Rules, 2020 is the only Rule now in force and the same is required to be followed in the case of the petitioner and similarly placed other persons. Further, in ***Malaya Nanda Sethy's case*** (supra) the applicability of Odisha Civil Service (Rehabilitation Assistance) Rules, 1990 as well as Odisha Civil Service (Rehabilitation Assistance) Rules, 2020 was directly involved. On a careful scrutiny of the facts of the aforesaid case, it appears that the deceased Government employee, who is the father of the appellant-claimant, while working as an Assistant Sub-Inspector of Police in the Government Department died in harness on 02.01.2010. Thereafter, the appellant submitted his application for appointment as a Junior Clerk on compassionate grounds under the OCS (R.A) Rules, 1990 in July 2010.

45. However, the said application was not considered by the Competent Authority for a considerable period of time. The Competent Authority, from time to time, deferred the consideration of the appellant's application for want of compliance with some of the requirements under the rules and as a result, final adjudication of the matter was delayed. Thereafter, the O.C.S. (R.A.) Rules, 1990 was replaced by a new set of Rules namely, O.C.S. (R.A.) Rules, 2020 vide notification dated 17.02.2020, which provides that the family member of a deceased Government servant could be appointed on compassionate grounds against Group-D level post.

46. Thereafter, the application of the appellant was remanded to the authority for fresh consideration under the 2020 Rules. The appellant preferred a writ petition before this court by taking a specific stand that the rule prevalent at the time when the application for compassionate appointment was made shall be applicable and not the subsequent rules that were in force at the time of consideration of the application

for compassionate appointment. This court after considering the contentions raised by the parties and by relying upon the judgment of the Hon'ble Supreme Court in N C Santosh's case (supra) dismissed the writ petition by holding that the claim should be considered under the new Rules that is the Rules, 2020.

47. Finally, feeling aggrieved and dissatisfied with the judgment of this Court, the appellant approached the Hon'ble Supreme Court of India by filing Civil Appeal No.4103 of 2022 arising out of SLP (Civil No.) 936/2020. On a careful perusal of the judgment delivered by the Supreme Court in ***Malaya Nanda Sethy's Case***, this court observed that the issue involved in the present case was directly and substantially in issue before the Hon'ble Supreme Court in Malaya Nanda Sethy's Case. Furthermore, in Paragraph 3 of the judgment the issue has been crystallized by the Supreme Court, and in Paragraph 3.1 several judgments of the Hon'ble Supreme Court have been referred to including the judgment in ***N C Santosh's case*** (supra) in Paragraph 5 of the judgment. The Hon'ble Supreme Court has taken note of the issue involved in the following manner;

> "*5. We have heard the learned counsel for the respective parties at length.*
> *We have noted that there is a conflict of view, as to whether the scheme/rules in force on the date of death of the government servant would apply or the scheme/rules in force on the date of consideration of the application on compassionate grounds would apply. There are divergent views and the conflict of opinion in different decisions of this Court. However, keeping the said question aside, for the reasons stated hereinbelow we are of the opinion that in the peculiar facts and circumstances of the case, the appellant herein shall be entitled for appointment on compassionate ground as per the 1990 rules, which were applicable at the time when the deceased employee died and the appellant herein made an application for appointment on the death of his father, i.e., in the year 2010.*
>
> *7. Thus, from the aforesaid, it can be seen that there was no fault and/or delay and/or negligence on the part of the appellant at all. He was fulfilling all the conditions for appointment on compassionate grounds under the 1990 Rules. For no reason, his application was kept pending and/or no order was passed on one ground or the other. Therefore, when there was no fault and/or delay on the part of the appellant and all throughout there was a delay on the part of the department/authorities, the appellant should not be made to suffer. Not appointing the appellant under the 1990 Rules would be giving a premium to the delay and/or inaction on the part of the department/authorities. There was an absolute callousness on the part of the department/authorities. The facts are conspicuous and manifest the grave delay in entertaining the application submitted by the appellant in seeking employment which is indisputably attributable to the department/authorities. In fact, the appellant has been deprived of seeking compassionate appointment, which he was otherwise entitled to under the 1990 Rules. The appellant has become a victim of the delay and/or inaction on the part of the department/authorities which may be deliberate or for reasons best known to the authorities concerned. Therefore, in the peculiar facts and circumstances of the case, keeping the larger question open and aside, as observed hereinabove, we are of the opinion that the appellant herein shall not be denied appointment under the 1990 Rules.*
> *8. In view of the above discussion and for the reasons stated above, the impugned judgment and order passed by the High Court is hereby quashed and set aside. The respondents are directed to consider the case of the appellant for appointment on compassionate grounds under the 1990 Rules as per his original application made in July, 2010 and if he is otherwise found eligible to appoint him on the post of Junior Clerk. The aforesaid exercise shall be completed within a period of four weeks from today. However, it is observed that the*

appellant shall be entitled to all the benefits from the date of his appointment only. The present appeal is accordingly allowed. However, in the facts and circumstances of the case, there shall be nor order as to costs."

48. It is also noteworthy to mention about a latest judgment of the Hon'ble Supreme Court of India in the case of ***State of West Bengal vs. Debabrata Tiwari, 2023 SCC OnLine SC 219***. The main issue raised in the appeal was whether the state of West Bengal had a policy regulating the appointment on compassionate grounds of relatives of employees of the Burdwan Municipality who had died in harness. Compassionate appointment is not a way of employment. To ensure that the children of the deceased employee are not left without a means of subsistence, the State or public sector organization must implement such a charitable plan. Since it is not a vested right, compassionate work cannot be requested or given after the crisis has passed.

49. In the above noted judgment, the Hon'ble Supreme Court further observed that the main factor that should influence the choice made by the authorities, in this case, is the financial situation of the deceased person's family at the point of the deceased person's passing. The family in need should be rescued right away with that sympathetic meeting. The court observed that if there is a considerable delay in deciding a claim for compassionate appointment, the sense of immediacy is lost and the authorities must take into account the fact that the dependents were able to sustain themselves during the period of delay. The court cautioned that granting compassionate appointment in such cases would be contrary to the principles of the constitution as it would be akin to treating the claim as a matter of inheritance based on a line of succession. The court stated that although the application was submitted in 2006, the qualified applicants had not followed up on the issue for almost ten years. The applicants would no longer be eligible for relief under Article 226 due to their prolonged delay in contacting the High Court, the court observed.

50. A Division Bench of this Court in ***Suchitra Bal v. State of Orissa, W.P.(C) No.2081 of 2021***, was called upon to adjudicate a challenge to Rule-6(9) of the Odisha Civil Services (Rehabilitation Assistance) Rules, 2020. The Hon'ble Division Bench of this Court referring to a catena of decisions of the Apex Court, observes that, compassionate appointment is not an alternative to the normal course of appointment and there is no inherent right to seek compassionate appointment. Moreover, regarding the objective of compassionate appointment, the Hon'ble Division Bench has observed that the objective of rehabilitation appointment or assistance is only to provide solace to the family of the deceased employee/ worker in difficult times. Therefore, the date when the employee passed away is of paramount importance. Further citing a catena of judgements of the apex court, the Hon'ble Division Bench observes that the norms, prevailing on the date of consideration of the applications should be the basis for consideration of the claim for the rehabilitation appointment or the compassionate appointment.

51. Finally, the Hon'ble division bench has held that the application of the

petitioners shall be considered under the Odisha Civil Services (Rehabilitation Assistance) Rules, 1990 in as much as on scrutiny, it is found that all the applications were filed before 17.02.2020 and the delay in considering the applications in time is entirely attributable to the opposite parties.

52. Additionally, regarding the applications in which the petitioners have sought the rehabilitation assistance/ appointment against a direct payment/GIA Rules at the Government aided educational institution, the applicability of the rehabilitation scheme in those institutions shall be separately determined by the opposite parties on the basis of the policy of the Government as discussed by the Hon'ble court and if it is found that the Odisha Civil Services (Rehabilitation Assistance) Rules, 1990 was applicable on the date of death of the deceased employee, the petitioner shall be considered for rehabilitation assistance/appointment. Consequently, the opposite parties were directed to consider the applications of the petitioners under the Odisha Civil Services (Rehabilitation Assistance) Rules, 1990 read with the relevant policy extending such scheme to the Government aided educational institutions at the relevant time of the death of the deceased employee for the purpose of the rehabilitation assistance/appointment

53. Now, let us examine the issue(s) involved in the present writ applications as well as a batch of other similar writ applications from a legal and Constitutional validity point of view. Both, the O.C.S. (Rehabilitation Assistance) Rules, 1990 as well as the O.C.S. (Rehabilitation Assistance) Rules, 2020 are Rules made under the proviso to Article 309 of the Constitution of India by the State of Odisha for compassionate appointment of the family members of a deceased Government employee died in harness. The Rules of the year 1990 came into force w.e.f. 24.09.1990 and the Rules of the year 2020, which superseded 1990 Rules, came into force w.e.f. 17.02.2020. Therefore, there is no doubt that the family members of the Government employee who died in harness after 17.02.2020 are to be governed by the 2020 Rules for compassionate appointment. Rule 6 Sub-rule 9 of the 2020 Rules provides that all applications for compassionate appointment pending as of the date on which the new set of rules came into force shall be governed by the Rules, 2020.

54. On a comparison of the two Rules as demonstrated by the learned counsel for the petitioners, it appears that the Rules, 1990 is less cumbersome and more beneficial to the family members of the deceased Government employee. However, it is seen from the record that many applications filed prior to 17.02.2020 were kept pending for reasons best known to the authorities. In some cases, the applications for appointment on compassionate ground were kept pending for more than a decade. Furthermore, the applications received were scrutinized and a list of applicants was prepared by the appointing authority/agencies. Out of the list so prepared, appointments were being made from time to time by various competent authorities. In some cases, it was found that some of the persons named on the list were given appointments, however, some were not so lucky. As has been stated here in above,

some applications were kept pending for years together although those candidates were eligible for appointment under the scheme/Rules. Their applications were not rejected. When the new Rule, 2020 came into force, the authorities asked such applicants, whose applications are pending as on that date, to apply afresh under the provisions of the new Rules.

55. As has been already stated, both Rules were framed in exercise of power conferred under the proviso to Article 309 of the Constitution of India by the State of Odisha. It is too well known that the recruitment, and service conditions of a person under the State/Union to the public service/post are regulated by the appropriate legislature/parliament. The power to regulate by bringing appropriate legislation is left to the appropriate legislature under List II Entry 41 for the State and List I Entry 70 for the Union under the Constitution of India. The power of appointment belonging to the Executive shall be governed and guided by the appropriate legislation in that regard. The power conferred by Article 309 of the Constitution of India is subject to other provisions of the Constitution of India as has been reflected in the opening words of Article 309. Therefore, it is needless to state here that the law/rules framed under Article 309 if contravenes any of the provisions of the Constitution of India including the provisions of Part III i.e. Fundamental Rights guaranteed under Articles 14, 16, 19, 21, such law/rules shall be void.

56. In the case of Rules of 1990 and 2020, the same were framed under the proviso to Article 309 of the Constitution by the Governor of Odisha. Although laying down the conditions of service is primarily a duty bestowed upon the legislatures/parliament, the proviso to Article 309 carves out an exception where the President of India or the Governor of the State, as the case may be, may notify an appropriate rule to regulate the recruitment/service conditions of Government servants. Such a provision is a transitional provision conferring power upon the executive to frame rules having the force of law and the same shall remain in force till the legislatures legislate on the subject matter as has been decided by the Hon'ble Supreme Court of India in ***A.K. Krishna Vs. State of Karnataka*** reported in ***AIR 1998 SC 1050***.

57. Furthermore, a benefit that has accrued under the existing rules cannot be taken away by an amendment with retrospective effect and no statutory rule or administrative order can whittle down or destroy any right, which has become crystallized and no rule can be framed under this proviso, which affects or impairs the vested rights as has been held in the case of ***R.S. Ajara Vs. State of Gujurat*** reported in ***(1997) 3 SCC 641*** and in ***Chairman Railway Board Vs. C.R. Rangadhamaiah*** reported in ***(1997) 6 SCC 623***. It has also been held by the Hon'ble Supreme Court of India in ***State of Karnataka Vs. Ameerbi*** reported in **(*2007) 11 SCC 681*** that the rules framed under the proviso to Article 309 of the Constitution of India are not attracted in the case of appointees under a scheme which is not of a permanent nature, although the employees might have continued for a long time.

57.A. Rule-6 of the O.C.S. (R.A.) Rules, 2020 provides for the mode of appointment under the new Rules. Sub-rule(1) deals with the form of the application. Sub-rule(2) deals with marks to be awarded on evaluation. Similarly, sub-rule (3) provides for appointment against any vacant Group-'D' post. Sub-rule(5) provides what in the event the applicant does not join, he/she shall forfeit his/her claim under the said Rules and what he/she shall not be provided with any choice. Sub-rule (6) provides that the applications are to be considered in order of date of death of the deceased employee. Sub-rules (7) & (8) deals with process of evaluation. In the present batch of writ petitions, we are concerned with sub-rule (9) of Rule-6, which is quoted herein below:-

> "**6. Mode of Appointment**:-
>
> ….. ….. ….. ..... ….. ….. ….. …..
>
> (9) All pending cases as on the date of publication of these rules in the Odisha Gazette shall be dealt in accordance with the provision of these rules."

The above quoted sub-rule(9) of Rule-6 of the 2020 Rules mandates that all pending applications for compassionate appointment for whatever reasons shall now be considered under the Rules, 2020 w.e.f. 17.02.2020. All applications involved in the present batch of writ petitions having been considered under the new Rules, 2020 and the same having been rejected under the 2020 Rules, although the Government employees in these writ petitions having died much prior to the date 17.02.2020, the Petitioners have approached this Court by filing the present batch of writ petitions. This Court observes that the validity of Rule-6(9) is required to be tested with the parameters prescribed in Article-14 and 16 of the Constitution of India to effectively adjudicate all the pending writ petitions.

58. The Rules framed under Article 309 of the Constitution of India may be struck down only on the grounds that may invalidate a legislative measure. That is when the rules so framed infringes upon the provisions contained in Article 14 and 16 of the Constitution of India and not because the Court considers the same to be unreasonable or that it has been enacted with an improper motive. Needless to say here that the constitutional mandate in Article 14 includes non-arbitrariness. Therefore, this Court can only interfere and declare the provisions contained in Rule 6 Sub Rule 9 of the 2020 Rules as void, only if the provision violates Article 14 of the Constitution of India.

59. Even assuming that the Rules in question are policy decisions of the Government or a scheme by the State to provide benefit to the distressed family members of the Government employees who have died in harness, this Court would not get jurisdiction to interfere with the same unless this Court holds that the same is violative of Article 14 of the Constitution of India. The Govt. has full freedom to change any policy decision and the Court shall not interfere with the same unless such administrative policy/ scheme violates some of the provisions of the Constitution like Article 14, which requires that, even the administrative authority must act fairly and treat its employees equally as has been laid down by the Hon'ble

Supreme Court of India in the case of ***Distt. Registrar v. M.B. Koyakutty*** reported in ***AIR 1979 SC 1060*** and ***S.L. Sachdev v. Union of India***, reported in ***AIR 1981 SC 411.***

60. Thus, where the Rules/Policy/Scheme violates the provisions of Article 14 of the Constitution, the Court would be perfectly justified in interfering with the Rules/Policy/Scheme and may pass suitable directions as to how fairness or equality of treatment could be achieved. Further, a change of policy is also controlled by the doctrine of promissory estoppel, however, in the context of the present case this Court would not like to go into that aspect of the matter and shall confine itself to violation of Article 14 of the Constitution of India.

61. Now, reverting back to the issue of violation of Article 14 of the Constitution of India, this court need not reiterate the guiding principles under Article 14 of the Constitution of India. So far appointments on compassionate grounds in the State of Odisha are concerned, in a large number of cases that have reached this Court it was observed that the authorities have slept over the matter for a long time. In some of the cases it was also observed that the applications have been pending for more than a decade. In some cases, it was found that while giving appointment under the scheme to a selected few, other applications were not even attended to for years together and finally they were asked to submit a fresh application under the new rules of the year 2020. The new rules, as discussed above, is a cumbersome one and less beneficial to the family members of the deceased Government employee. Under the old Rules of the year 1990, the authorities used to prepare a year-wise list of applicants and appointments were being made out of the said list. In many cases it was observed that appointments were being made by adopting the pick-and-choose method, thereby compelling this Court to intervene in the matter repeatedly. Although the mandate of the amendment Rules, 2016 was to consider the applications in the order of date of death of the deceased Government employee, however, the same was not followed scrupulously and diligently. Thus, the aforesaid conduct of the authorities definitely indicates that the families of the deceased Government employees were not treated equally and the competent authorities have acted in an arbitrary manner.

62. It is now a well-settled principle of law that Article 14 applies to cases of appointment, by whatever mode, to public employment and Government jobs. Therefore, the conduct of the authorities in compelling the family members of the deceased Government employees to apply afresh after an inordinate delay, solely attributable to the appointing authorities, that too under the new rules of 2020, while already giving appointments to family members of some of the deceased Government employees irrespective of the date of death of such employee, in the considered view of this Court, is in violation of Article 14 of the Constitution of India. Furthermore, any rule compelling them to do so would not stand the scrutiny of law under Article 14 of the Constitution of India. Therefore, rule 6 sub-rule 9 of the 2020 Rules would not pass the test of judicial scrutiny upon the same being

tested with the touchstone of Article 14 in the factual background of the present cases and similar other cases pending for adjudication before this Court. The discrimination in the present case i.e. the family members of some of the employees who have been given appointment under the old Rules, 1990 in comparison to the ones who have been asked to apply afresh under the new Rules, 2020, although their predecessors have died prior to 2020 Rules came into force, is an actual one and not abstract or theoretical.

63. No doubt the appointment means an actual appointment by posting the person concerned to a particular post lying vacant, whereas, recruitment means the process preceding such appointment. This Court also observed that in certain cases the recruitment year is the same, however, out of the common list appointments were given to some and in some cases the authorities slept over the matters for years. Therefore, the principle of equality demands that both sets of employees should have been treated similarly. However, the authorities by asking some of the leftover candidates to apply again under the new rules and by compelling them to undergo the recruitment process again as provided under the 2020 Rules, have created two different classes of employees under the same category without having any specific object or purpose to achieve thereby. This is clearly hit by Article 14 of the Constitution of India and any rule in that regard is ultra-vires the principles enshrined in Article of the Constitution of India. Therefore, the rule 6 sub rule 9 of the Rules, 2020 is unconstitutional being hit by Article 14 and 16 of the Constitution of India and as such the same is unsustainable in law. In the factual background of the present batch of writ applications, the incorporation of rule 6 sub-rule 9 of the Rules, 2020 may not withstand the test of judicial scrutiny under Article 226 of the Constitution of India.

64. It was also contended by the learned counsel for the Petitioners that the Rules, 1990 was amended by 2016 amendment rules which was notified on 5.11.2016. By virtue of rule 4 of the amending rules, 2016, the existing Rule 5 of the 1990 Rules was amended to the extent that a quota of 10% was fixed for the first time. It says “Provided that a maximum of 10% of the total vacancies in a year shall be earmarked to be filled up by applicants under Rehabilitation Assistance Scheme.” However, the aforesaid quota of up to 10% of the total vacancies arising in a year was never adhered to by the authorities thereby violating the provisions of the Rules itself. No data whatsoever was produced before this Court with regard to the utilization of the aforesaid quota. Upon a careful consideration of the said plea, this Court is of the considered view that such contention raised by the learned counsel has force in it.

65. Finally, this court would like to test the state action or a policy decision of the State Authorities with the touchstone of Article 14 of the Constitution of India. In ***National Highway Authority of India Vs. Madhukar Kumar (Civil Appeal No.11141 of 2018 decided on 23.09.2021***, the Hon’ble Supreme Court of India has held that in India, every State action must be fair, failing which, it will fall foul of

the mandate of Article 14 of the Constitution of India. Similarly, in ***Ajay Hasia Vs. Khalid Mujib Sehravardi reported in AIR 1981 SC 487***, the Hon'ble Supreme Court of India has held that Article 14 of the Constitution of India strikes at arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. Whenever, therefore, there is arbitrariness in State action, whether it be legislature or of the executive, Article 14 immediately springs into action and strikes down such action. Similar view has also been taken in ***E.P.Royappa Vs. State of T.N. reported in AIR 1974 SC 555 and Maneka Gandhi Vs. Union of India reported in AIR 1978 SC 597***.

66. The word "arbitrariness" has been defined in a judgment of the Hon'ble Apex Court in ***Sharma Transport Vs. Govt. of A.P. reported in (2002) 2 SCC 188***. The Hon'ble Supreme Court has defined arbitrariness by observing that a party has to satisfy that action was not reasonable and was manifestly arbitrary. The expression "arbitrarily" means, act done in an unreasonable manner, as fixed or done capriciously or at pleasure without adequately determining the principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone. In ***Bombay Dyeing & Mfg. Co.Ltd Vs. Bombay Environmental Action Group*** reported in ***(2006) 3 SCC 434***, the Hon'ble Supreme Court, in para 205 of the judgment, has held that arbitrariness on the part of the legislature so as to make the legislation violative of Article 14 of the Constitution should ordinarily be manifest arbitrariness.

67. In ***Bidhannagar (Salt Lake) Welfare Assn. Vs. Central Valuation Board reported in AIR 2007 SC 2276 and in Grand Kakatiya Sheraton Hotel and Towers Employees and workers union Vs. Srinivasa Resorts Ltd. reported in (2009) 5 SCC 342*****,** the Apex Court has observed that a law cannot be declared ultra vires on the ground of hardship but can be done so on the ground of total unreasonableness. The legislation can be questioned as arbitrary and ultra vires under Article 14. However, to declare an Act ultra vires under Article 14, the Court must be satisfied in respect of substantive unreasonableness in the statute itself.

68. In **A*****.P. Dairy Development Corpn. Federation Vs. B. Narasimha Reddy*** reported in ***(2011) 9 SCC 286***, the Hon'ble Supreme Court has held that it is a settled legal proposition that Article 14 of the Constitution of India strikes at the arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. This doctrine of arbitrariness is not restricted only to executive action, but also applies to the legislature. Thus a party has to satisfy that the action was reasonable, not done in unreasonably or capriciously or at the pleasure without adequate determining principle, rational and has been done according to reason or judgment, and certainly doesn't depend on the will alone. However, the action of the legislature, violative of Article 14 of the Constitution, should ordinarily be manifestly arbitrary. There must be case of substantive unreasonableness in the Statute itself for declaring the Act ultra vires Article 14 of the Constitution of India.

69. In ***E.P. Royappa's case*** (supra), which is a Constitution Bench judgment of the Supreme Court of India, Justice Bhagawati in a concurring judgment observed as follows;

> *"The basic principle which, therefore, informs both Article 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalizing principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow and pedantic and lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed', cabined and confined within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the Rule of Law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14 , and if it affects any matter relating to public employment, it is also violative of Article 16. Article 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."*

70. Let us now proceed to analyze the validity of a policy decision, the unreasonableness / arbitrariness of such decision and to what extent the same can be reviewed by this Court in exercise of its writ jurisdiction under Article 226 and 227 of the Constitution of India. In ***Krishnan Kakkanth Vs. Govt. of Kerala*** reported in ***(1997) 9 SCC 495***, the Hon'ble Supreme Court of India in para 36 of the judgment has observed as follows;

> *"36. To ascertain unreasonableness and arbitrariness in the context of Article 14 of the Constitution, it is not necessary to enter upon any exercise for finding out the wisdom in the been taken. It is equally immaterial if it can be demonstrated policy decision of the State Govt. It is immaterial whether a better or more comprehensive policy decision could have been taken. It is equally material if it can be demonstrated that the policy decision is unwise and is likely to defeat the purpose for which such decision has been taken. Unless the policy decision is demonstrably capricious or arbitrary and not informed by any reason whatsoever or it suffers from the vice of discrimination or infringes any statute or provisions of the Constitution, the policy decision cannot be struck down. It should be borne in mind that except for the limited purpose of testing a public policy in the context of illegality and unconstitutionality, courts should avoid "embarking on uncharted ocean of public policy"."*

In the context of public policy in public employment two more judgments are relevant for the purpose are (i) ***S.Nagaraj Vs. State of Karnataka*** reported in ***(1993) Supp. 4 SCC 595*** and (ii) ***Shrilekha Vidyarthi (Kumari) Vs. State of U.P***. reported in ***(1991) 1 SCC 212***.

71. In the present batch of writ applications, the predecessor in interest of the applicants die in harness much prior to the new Rule, 2020 came into force. Although they had submitted their respective applications in time, however, the authorities have failed to consider their cases for appointment under O.C.S. (R.A.) Rules, 1990 (as amended in the year 2016 wherever, the same is applicable). This court further observed that it is a matter of record that while not considering the case of the Petitioners, the authorities have considered and appointed persons who had

applied along with the petitioner or subsequent to the petitioner. No reasonable explanation is coming forth from the side of Government-Opp. Parties as to why some persons were shown favour by appointing them and the petitioners and many others were not appointed. Moreover, it has also not been satisfactorily explained as to why the petitioners have been asked apply under the Rules, 2020 which is unfavourable to them except the provision contained in rule 6 sub-rule 9 of the Rules, 2020. The Opp. Parties have thus failed to come up with an intelligible differentia so far the class of the present petitioners are concerned in contrast to the persons who have been appointed under a more favourable Rule, 1990. Such conduct on the part of the Opp. Parties either rejecting the petitioners application or asking some of them to apply afresh under the new Rule, 2020, which is admittedly less favourable, is definitely discriminatory and arbitrary.

72. It would be profitable to refer to the words of S.R.Das, J, in ***State of W.B. Vs. Anwar Ali Sarkar*** reported in ***1952 SCR 284***, which speaks that a classification is reasonable when the same satisfies the twin test of (i) the classification must be based on an intelligible differentia which distinguishes persons or things that are grouped, from others left out of the group; and (ii) The differentia must have a rational relationship to the object sought to be achieved by the statute. Das, J. further observed that there must be some yardstick to differentiate the class included and the others excluded from the group. The differentia used for the classification in the scheme is the total extent of landholding by every individual. Therefore, there is a yardstick used for constituting the class for the purpose of the scheme. By applying the aforesaid test to the facts of the present batch of cases, this court found that there exists no intelligible differentia between the two groups i.e. the ones who have been appointed under the old Rules, 1990 and the ones (the Petitioners) whose cases were kept pending and by operation of Rule 6(9) of the New Rules, 2020, there cases have been taken out of the purview of the old rules, 1990 which was more favourable and there was a certainty of getting the job on compassionate ground. The background facts in both classes of persons remains the same i.e. they are children or dependents of deceased Government employee who dies in harness. Since the petitioners stand in a similar footing with the persons who have been given appointment giving them preference over and above the petitioner, their cases deserve to be considered under the old Rules, 1990 i.e. the Rule that was in force at the time of the death of the Government employee.

73. In view of the aforesaid analysis of facts as well as the legal position and on a careful scrutiny of the materials on record the conclusion is irresistible and the same has been stated here in below;

CONCLUSION :

74.1. The Scheme for compassionate appointment is a policy decision of the Government, as such the same doesn't confer an absolute right in favour of the claimant to claim appointment as a matter of right.

74.2. Even a policy decision like every State action has to be in conformity with Article 14 and 16 of the Constitution of India. In the event it is found that the same is discriminatory or arbitrary, this Court in exercise of its writ jurisdiction can always declare such scheme/ Rules/Legislation to be ultra vires the Constitution of India.

74.3. In the present batch of cases the provision in the shape of Rule 6 (9) of the Rules, 2020 is held to be ultra vires Article 14 and 16 of the Constitution of India as the same creates a class within the class with any intelligible differentia/ reasonableness. Accordingly, Rule 6 (9) is hereby declared ultra vires of Article 14 and 16 of the Constitution of India.

74.4. The Opp. Parties are directed to consider the cases of the Petitioner under the O.C.S. (R.A.) Rules, 1990 without insisting on filing of a fresh application under the OCS (R.A.) Rules, 2020. All pending cases are directed to be considered under the old rules of the year 1990 as amended upto the year 2016 (wherever such amendment is applicable).

74.5. Applications filed for appointment on compassionate ground after 17.02.2020 are to be considered under the new rules of the year 2020.

74.6. The State Government is further directed to revisit the O.C.S. (R.A.) Rules, 2020 and consider to provide monetary compensation either in lieu of appointment or any other suitable alternative keeping in view the broader object of the Rules to immediately provide assistance to the dependents of the Government employee who died in harness.

74.7. While considering the applications for appointment on compassionate ground the State Government and its instrumentalities shall consider the immediacy of such appointment as observed by the Hon'ble Supreme Court in the case of **Debabrata Tiwari** (Supra).

74.8. The appointing authorities are further directed to give appointment as per the provisions of the relevant Rules in force and they shall also ensure that the application filed before them shall be taken up on first come first serve basis without disturbing the order in which applications have been accepted. No pick and choose method should be adopted while considering the applications for appointment on compassionate ground.

74.9. All applications received shall be disposed of in a time bound manner. Where the applications are incomplete and as such the same cannot be considered by the authorities, such fact as well as the defect found out by the authorities be immediately intimated to the concerned applicant within four weeks from the date of receipt of such application by Regd. Post. Further opportunity be given to the applicant to rectify the mistake within four weeks from the date of receipt of the communication with regard to the defect by the authorities.

74.10. Absolute transparency be maintained while giving appointment to the dependents of the deceased Government employee and the details starting from the receipt of the application to issuance of appointment letter/ rejection letter be notified to the public.

75. With the aforesaid observations/directions, all the writ applications are allowed by this common judgement, however in the facts and circumstances without any costs.

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2024 (I) ILR-CUT-232

A.K. MOHAPATRA, J.

W.P.(C) NO.4604, 9296 OF 2022 & 16616 OF 2023

DEBENDRANATH SAMAL .....Petitioner

-V-

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

&

PHANINDRA KU.MISHRA -V- STATE OF ODISHA & ORS. [W.P.(C) No. 9296/2022]
SAROJ KU.ROUT -V- STATE OF ODISHA & ORS. [W.P.(C) No.16616/2023]

PENSION – Work Charged employee – Whether the work charged employees who have rendered worked for several decades as daily wager in the establishment till their retirement, would be eligible for pension? – Held, Yes –The Opp. Party shall do well to regularize the service of the petitioners for a day at least i.e. a day before the date of their retirement and accordingly the petitioners be paid the pensionary benefits. (Paras 30-32)

Case Laws Relied on and Referred to :-

1. W.P.(C) No.7246 of 2016:State of Odisha v. Kasidev Maharana
2. W.P.(C) No.21585 of 2014 :Gobardhan Prusty and others
3. W.P.(C) No.24041 of 2017:State of Odisha vs. Pitambar Sahoo
4. W.P.(C) No.19950 of 2011 :Chandra Nandi vs. State of Odisha and others
5. W.P.(C) No.27950 of 2019 :Premananda Tripathy vs. State of Odisha
6. O.A. No.1189 (C)/2006:Narasu Pradhan vs. State of Odisha
7. W.P.(C) No.5570 of 2023:Narayan Swain vs. State of Odisha & others
8. W.P.(C) No.36686 of 2021:Jageswar Mahanta vs. State of Odisha
9. 2006 (4) SCC 1 :State of Karnataka vs. Uma Devi
10. AIR 2010 SC 2587:State of Karnataka and others vs. M. L. Kesari & ors.
11. 2013 AIR SCW 4919:Nihal Singh vs. State of Punjab
12. 2014 (13) SCC 249:Malathi Das vs. Suresh & others
13. 2014 (13) SCC 264:Yashwant Arjun More & others vs. State of Maharashtra & others
14. 2015 (8) SCC 265:Amar Kant Ray vs. State of Bihar & others
15. (2018) 8 SCC 238:Narendra Kumar Tiwari vs. State of Jharkhand
16. 2016 (1) SCC 397:Sunil Kumar Verma & others vs. State of Uttar Pradesh & others.
17. WPC(OAC) No.865 of 2018:Sadananda Setha vs. State of Odisha & others

For Petitioner : Mr. S. Mallik
For Opp. Parties : Mr. N. Pratap, A.S.C

JUDGMENT Date of hearing & Judgment : 22.11.2023

A.K. MOHAPATRA, J.

1. All the above noted writ applications have been filed with a common prayer to quash the order of rejection of their prayer by the Opposite Parties i.e. the order dated 05.01.2022 under Annexure-12 to W.P.(C) No.4604 of 2022, dtd.26.11.2021 under Annexure-11 in W.P.(C) No.9296 of 2022 and dtd.04.03.2022 under Annexure-13 in W.P.(C) No.16616 of 2023 and further for a direction to the Opposite Parties by issuing a writ of mandamus to allow pensionary benefits to the Petitioners after regularizing their service upon completion of five years of service in the work charged establishment or in the alternative to at least regularizing their service for a day prior to the retirement and on such basis treating the Petitioner as regular employee and further to grant all consequential benefits including pensionary benefits along with interest @ of 12% on such arrear dues. It is relevant to mention here that all the above noted writ applications involved a common question of law and an identical prayer which is based on similar set of facts. In view of the aforesaid factual background, this Court deems it proper to take up all the matters together for hearing and the above noted batch of writ applications are being disposed of by the following common order.

02. For the sake of brevity and convenience the facts involved in the W.P.(C) No.4604 of 2022 are being taken up for analysis and discussion. One Debendranath Samal-Petitioner in W.P.(C) No.4604 of 2022 was duly selected and appointed on 25.01.1992 as Clerk-cum-Typist under daily wage establishment and pursuant to order dated 02.07.2009 issued by the Director Ground Water Survey & Investigation he was appointed as work charge Clerk. Since the date of joining, the Petitioner has been discharging his duties sincerely to the satisfaction of the higher authorities. During his service career the Petitioner had worked under different divisions and while working under Opposite Party No.3 the Petitioner has retired from service with effect from 31.03.2021 on attaining the age of superannuation.

03. In the year 2001, the Petitioner came to know about the fact that similarly situated work charged employees have been brought over to the regular establishment in view of the Finance Department Resolution dtd.22.01.1964 and 06.03.1990. Accordingly, the Petitioner approached the Opposite Party No.2 for regularization of service of the Petitioner with effect from the date on which they have completed five years of services and for a further direction that entire service period be taken into consideration for the purpose of granting pension/ pensionary benefits. While this was the position, pursuant to the direction of the Hon'ble Supreme Court, the Finance Department issued another circular on 15.05.1997 to bring over the NMRs, DLRs employees to regular establishment wherein it has stipulated to give preference to employees under work charged establishment on the

basis of their seniority according to their respective date of joining in service.

04. In the writ petition, it has also been pleaded that vide order dated 27.05.2014 & 26.06.2014, 569 work charged employees were brought over to the regular (wages) establishment against created post.

05. While this was the position, the Petitioner approached this Court in W.P.(C) No.10073 of 2021. This Court vide order dated 30.03.2021 was pleased to dispose of the said W.P.(C) No.10073 of 2021 by directing the Opposite Party No.2 to consider the case of the Petitioner by taking into account the judgment in W.P.(C) No.25696 of 2014 and W.P.(C) No.19550 of 2011.

06. Since no action was taken immediately, the Petitioner was compelled to file CONTC No.7229 of 2021, which is stated to be pending before this Court. In the meanwhile, the Opposite Party No.2 vide order dated 05.01.2022 rejected the claim of the Petitioner on some untenable and unreasonable grounds. Being aggrieved by such rejection order dated 05.01.2022 the Petitioner has approached this Court by filing the present writ application.

07. Heard Sri S. Mallik, learned counsel appearing for the Petitioner and Sri N. Pratap, learned Additional Standing Counsel for the State-Opposite Parties. Per-used the writ application and the documents annexed thereto as well as other materials placed before this Court in course of hearing.

08. Mr. Mallik, learned counsel appearing for the Petitioner at the outset contended that the Government of Odisha had issued notification/ circular on 22.01.1965 and 06.03.1990 to bring over the work charged employees to the regular establishment in order to give them pension/ pensionary benefits. In view of such circulars/ notifications a number of work charged employees pursuant to orders passed by different departments/ authorities under the Government have allowed pension and pensionary benefits to such work charged employees by bringing them over to regular establishment upon their completing five years of service in the work charged establishment. In the aforesaid context, Mr. Mallik, learned counsel, referred to the order dated 18.05.1990 passed by the learned Odisha Administrative Tribunal in O.A. No.84/1987 (Mohan Singh & others vs. State of Odisha).

09. Mr. Mallik, learned counsel for the Petitioner further contended that an identical matter, i.e., in ***State of Odisha v. Kasidev Maharana*** (W.P.(C) No.7246 of 2016), similar view had been taken by this Court. The judgment in said Kasidev Maharana's case (supra) was also followed by the Division Bench in ***Gobardhan Prusty and others*** (W.P.(C) No.21585 of 2014 disposed of on 28.06.2022). It is further contended that the order passed in Gobardhan Prusty's case (supra) by a Division Bench of this Court was assailed before the Hon'ble Supreme Court at the behest of the State-Opposite Parties and the Hon'ble Supreme Court has affirmed the order passed by the Division Bench of this Court in Gobardhan Prusty's case (supra). Similarly, the order passed by in Kasidev Maharana's case (supra) was also

affirmed by the Hon'ble Supreme Court in S.L.P. No.23207 of 2018 vide order dated 30.7.2018.

10. Mr. Mallik, learned counsel for the Petitioner drawing attention of this Court to the order dated 05.07.2023 passed in Special Leave Petition (Civil) Diary No(s).23819 of 2023 in the matter of ***The State of Odisha & Ors. V. Hadibandhu Bhol***, submitted before this Court that in similar matter the State-Opposite Parties again challenged identical order before the Hon'ble Supreme Court. Hon'ble Supreme Court vide order dated 05.07.2023 while affirming the order dated 03.01.2019 passed by this Court in W.P.(C) No.7753 of 2016, has cautioned the State Government not to approach the Hon'ble Supreme Court in the matter covered and decided against it. A copy of order dated 05.07.2023 is filed in Court today and the same is taken on record.

11. In view of the aforesaid legal position, it is crystal clear that the law laid down by a series of decisions of the Tribunal as well as by this Court have been affirmed by the Hon'ble Supreme Court and the same has attained finality. Therefore, this Court once again reiterates that in identical matters, State-Opposite Parties should make every endeavour so that benefits arising out of an order in similar case be extended to similar situated persons at the Government Level itself by following the line of judgments which are already governing the field instead of making unsuccessful attempts to unsettle the same.

12. In the aforesaid matter the learned Odisha Administrative Tribunal had directed that the Petitioners be absorbed in permanent employeement, if required, by creating posts and that their entire service period should be taken into consideration for the purpose of their service benefits and pension/ pensionary benefits. The aforesaid order of the Tribunal has been affirmed by the Hon'ble Supreme Court in Special Leave to Appeal (Civil) No.12410/1990.

13. Similarly, in O.A. No.2559(C)/1999 i.e. in Kashidev Maharana & a batch of similar other matters were disposed of by the Tribunal on 16.11.1999 with a direction to the Opposite Parties to absorb the applicants in the regular post with effect from the date they have completed five years of continuous service. The aforesaid order of the Tribunal was challenged in a review which was dismissed on 13.07.2015. Thereafter, the State-Opposite Parties challenged the order dated 16.11.1999 in W.P.(C) No.7246 of 2016 which was dismissed on 08.07.2018. Thereafter, the State-Opposite Parties preferred a SLP bearing SLP Diary No.23207 of 2018. The Hon'ble Supreme Court has also been pleased to dismiss the SLP.

14. After dismissal of the SLP filed by the State, the State-Opposite Parties have carried out the order passed by the Tribunal vide their order dated 24.08.2021, 26.08.2021 and 27.08.2021 under Annexure-7 series to the writ application. In total 19 number of work charged employees including the retrenched employees were brought over to the regular establishment and extended with the pensionary benefits.

He further contended that this Court also took up another similar case in W.P.(C) No.21585 of 2014 and finally disposed of the said case in the light of decision rendered in Kashidev Maharana's case (supra) which was confirmed by the Hon'ble Supreme Court in SLP (C) Diary No.10145 of 2023 disposed of on 05.04.2023.

15. In the aforesaid factual background and further referring to various orders passed by different courts/ Tribunal and that of the Hon'ble Supreme Court of India, learned counsel for the Petitioner submitted that the Petitioner also stands in a similar footing with the persons who have been extended with similar benefits pursuant to the order passed by the Tribunal, this Court as well as the Hon'ble Apex Court. He further contended that some of the employees who have been regularized and have been given the pensionary benefits are juniors to the Petitioner. Therefore, it was alleged that the conduct of the State-Opposite Parties are in gross violation of Article-14 and 16 of the Constitution of India. As the Opposite Parties have adopted a pick and choose method and treated the present Petitioner in an arbitrary and discriminatory manner. Such conduct of the Opposite Parties violates the Petitioner's fundamental right to equal treatment and therefore, the same is unsustainable in law.

16. In course of his argument, Mr. Patra, learned counsel appearing for the Petitioner referred to the decision of this Court in ***State of Odisha vs. Pitambar Sahoo in W.P.(C) No.24041 of 2017*** disposed of on 20.12.2017 which was confirmed by the Hon'ble Supreme Court in SLP (C) Diary No.30806 of 2018. He also referred to the case in ***Chandra Nandi vs. State of Odisha and others*** in ***W.P.(C) No.19950 of 2011*** decided on 03.02.2021. In ***Premananda Tripathy vs. State of Odisha in W.P.(C) No.27950 of 2019*** decided on 03.02.2021, this Court had taken a similar view.

17. Further, referring to the case of ***Narasu Pradhan vs. State of Odisha in O.A. No.1189 (C)/2006*** disposed of on 11.04.2009, learned counsel for the Petitioner submitted that the order of the Tribunal was affirmed by a Division Bench of this Court in W.P.(C) No.5377 of 2010 vide order dated 19.10.2011. The Division Bench of this Court in ***Narusu Pradhan's*** case directed the Government to regularize the service of the Petitioner at least one day before his retirement and to grant pensionary benefits. The order passed in ***Narusu Pradhan's*** case has also been affirmed by the Hon'ble Supreme Court in Civil Appeal (C.C.) No.22498 of 2012.

18. He further contended that this Court after taking into consideration a number of orders passed by this Court as well as the Hon'ble Supreme Court vide order dated 24.02.2022 in W.P.(C) No.5570 of 2023 (***Narayan Swain vs. State of Odisha & others***) allowed the writ petition and directed to grant similar benefits as has been done in the case of Narasu Pradhan. Further, the attention of this Court was also drawn to the case in ***Jageswar Mahanta vs. State of Odisha*** (W.P.(C) No.36686 of 2021) and batch of other cases. Wherein the hearing is concluded and judgment is yet to be delivered.Accordingly, learned counsel for the Petitioner submitted that thepresent case be taken up along with pending batch of matters.

19. While countering the impugned rejection order, learned counsel for the Petitioner contended that the Opposite Party No.1 by misinterpreting the judgment of the Hon'ble Supreme Court in ***State of Karnataka vs. Uma Devi*** reported in ***2006 (4) SCC 1*** and without taking note of the other two judgments as directed by this Court in the earlier writ petition, refused to grant the relief claimed by the Petitioner and accordingly in an illegal and arbitrary manner rejected the claim of the Petitioner. Therefore, it was also contended that the case of the Petitioner has not been considered in the right perspective and by taking into consideration the above noted facts and the ratio laid down by this Court as well as the Hon'ble Apex Court. In such view of the matter, learned counsel for the Petitioner submitted that the impugned rejection order is not inconformity with the direction issued by this Court in the earlier round of writ application, moreover, the same is also contrary to the ratio laid down by this Court as well as the Hon'ble Apex Court in identical matters.

20. He also contended that the State-Opposite parties having accepted the legal position and the ratio laid down by this Court as well as the Hon'ble Apex Court and after implementing such orders and accordingly giving such benefits to similarly situated persons, are legally estopped to take a different stand in the case of the present Petitioners. Mr. Mallik, learned counsel would further argue that the State being a model employer is expected to act in a fair, reasonable and transparent manner and the authorities are expected to maintain parity at all time while dealing with similarly situated Government employees. However, such well recognized principle of law has not been adhered to by the State-authorities. The Opposite Party No.2 contrary to the settled position of law and the ratio laid down by the above noted judgments has arbitrarily rejected the representation of the Petitioner without considering the same in its perspective and thereby refusing to extend similar benefits which have been extended in favour of the similarly situated persons. Thus, such conduct is grossly violating of Article-14 and 16 of the Constitution of India and as a result of which the impugned rejection order is liable to be quashed and the present writ application deserves to be allowed with a direction to the Opposite Parties to extend similar benefits to the Petitioner.

21. In course of his argument, Mr. Mallik, learned counsel also referred to the judgments in ***State of Karnataka and others vs. M. L. Kesari & ors***. reported in ***AIR 2010 SC 2587***, in ***Nihal Singh vs. State of Punjab*** reported in ***2013 AIR SCW 4919***, in ***Malathi Das vs. Suresh & others*** reported in ***2014 (13) SCC 249***, in ***Yashwant Arjun More & others vs. State of Maharashtra & others*** reported in ***2014 (13) SCC 264***, in ***Amar Kant Ray vs. State of Bihar & others*** reported in ***2015 (8) SCC 265***, in ***Narendra Kumar Tiwari vs. State of Jharkhand*** reported in ***(2018) 8 SCC 238***, in ***Sunil Kumar Verma & others vs. State of Uttar Pradesh & others*** reported in ***2016 (1) SCC 397***. This Court considered all the aforesaid judgments. The legal proposition pronounced by the Hon'ble Supreme court in the above noted judgments are too well known, therefore, the same does not required any further elaboration at this stage. However, it is made clear that this Court has taken note of the law laid

down by the Hon'ble Supreme Court in the above noted judgments while considering the present batch of writ application.

22. Mr. N. Pratap, learned Additional Standing Counsel, on the other hand tried to justify the impugned order dated 22.02.2022 under Annexure-6 to the writ application. He further contended that pursuant to the order passed by this Court earlier the case of the Petitioner was considered by the Opposite Party No.1 and by virtue of a reasoned order the claim of the Petitioner was found to be legally unsustainable and accordingly the prayer of the Petitioner for regularization of his service in the regular establishment and sanction of pensionary benefits was also found to be devoid of merit and accordingly the representation was rejected.

23. Learned Additional Standing Counsel further contended before this Court that the Petitioner was appointed as a Clerk in the work charged establishment under the O.L.I.C. on 25.01.1992 and subsequently he was transferred to the control of Opp. Party No.2 w.e.f. 30.12.1995. While working as such the Petitioner has retired from service w.e.f. 31.03.2021 on attaining the age of superannuation. In such view of the matter, learned Additional Government Advocate further contended that all throughout the Petitioner was working in the work charged establishment till he retired from service on attaining the age of superannuation. Since the Petitioner had not been brought over to the regular establishment, therefore the Petitioner cannot be treated as a regular employee in the pensionable establishment and as such he falls outside the purview of pension rules and accordingly he is not entitled to any pensionary benefits.

24. In course of his argument, learned Additional Standing Counsel referring to the cases of other petitioners also contended that they were also initially engaged on daily wage and thereafter in the work charged establishment and continued as such till they retired from service on their respective date of retirement. He further contended that at no point of time they were brought over to the regular establishment. Therefore, the question of regularization of their service, post retirement, does not arise and since they were not working in regular pensionable establishment the question of grant of pensionary benefits also does not arise. He further contended that the Petitioners worked under the work charged establishment and were regulated under the Odisha work charged employees (appointment and conditions of services) instruction-1974. Although, the Petitioner have prayed for regularization of service on completion of five years as work charged employees, however, their cases cannot be considered for regularization in the regular establishment.

25. Mr. Pratap, learned Additional Standing Counsel in reply to the Finance Department Resolution dated 22.01.1965 submitted before this Court that the principle laid down in the said resolution will not apply to big projects, dams and other construction works, until such projects, dams and construction works are completed and minimum residual staffs necessary for normal functioning of these

projects are determined by the competent authority. On the contrary, learned Additional Government Advocate referred to Finance Department Resolution dated 06.03.1990 to submit before this Court that the service of an employee rendered under the work charged establishment, can be considered for grant of pensionary benefits only if the employee concerned is brought over to the regular pensionable establishment. In such view of the matter, he also contended that the past service of the Petitioners cannot be taken into consideration for grant of pension/ pensionary benefits.

26. He also submitted that there is no provisions in OCS Pension Rules, 1992 under which the work charged employees are entitled to get pension and pensionary benefits. Since the service rendered by the Petitioners are admittedly under the work charged establishment, which is non-pensionable establishment, the question of granting them pension/pensionary benefits does not arise at all for consideration. Similarly, referring to the Finance Department Resolution dated 15.05.1997, learned Additional Government Advocate submitted that there are certain conditions which is required to be fulfill before bringing the employees in the work charged establishment to the regular establishment and that the same is not automatic. Since such conditions could not be satisfied the Petitioners have not been brought over to the regular establishment and accordingly, their services have not been regularized.

27. On a careful analysis of the impugned order under Annexure-12 to the writ application, this Court observed that the Opposite Parties have admitted the factual background of the case, to the extent that the Petitioners were engaged in the work charged establishment right from the beginning and they were continuing as such till the date of their retirement. Moreover, this Court also observed that in the earlier round of writ application, this Court had given a specific direction to consider the case of the Petitioner in the light of the judgments of the Hon'ble Supreme Court. However, the Opposite Party No.2 has although referred to a judgment in Secretary *State of Karnataka vs. Uma Devi's case* (supra), however it appears that the same is completely misunderstood and misinterpreted by the Opposite Party No.1. On the contrary, this Court is of the view that by the time the judgment ***in Uma Devi's case*** (supra) was delivered by the Hon'ble Supreme Court, the Petitioners were eligible to be regularized as a onetime measure as has been directed in para-55 of the said judgment. On a careful reading of the impugned order it appears that the case of the Petitioner has not been considered in the light of the aforesaid observation in ***Uma Devi's*** case (supra).

28. Reverting back to the facts of the present case, this Court observed that since the late 80s or early 90s the Petitioners were engaged in the work charged establishment and as such facts remains unchallenged/ undisputed. Thereafter, the Petitioners continued to render their services in the work charged establishment to the satisfaction of the authorities. Some of them were also given promotion in due course. However, working for several decades continuously they were never brought over to the regular establishment for reasons best known to the authorities. If the

nature of work which they were performing were regular in nature, which fact is established by the materials on record that the Petitioners continued to discharge their services in the work charged establishment for several decades till their retirement, the Opposite Parties should have considered the case of the Petitioner in the light of the Government Resolution and the services of the Petitioners should have been regularised.

29. It is not the case of the Opposite Parties that the employees who were similarly placed and were engaged in the work charged establishment have not been regularised and they have not been given pensionary benefits. As has been discussed, in the preceding paragraphs, in several cases the Tribunal as well as this Court and the Hon'ble Supreme Court have issued directions to regulaize their service and to pay them the pensionary benefits. Further, on an analysis of the factual background of the present batch of writ application, this Court takes an exception to the conduct of the Opposite Parties in allowing the Petitioners to continue in work charged establishment for more than three decades and finally, after their retirement from service refused to grant them the pensionary benefits only on the ground they were not brought over to the regular establishment. In similar type of cases this Court has taken a view that such type of employees be regularised for a day before their retirement and accordingly the pensionary benefits be calculated on that basis and be paid to them.

30. This Court in a recent judgment in ***Sadananda Setha vs. State of Odisha & others in WPC (OAC) No.865 of 2018*** decided on 17.12.2021 was dealing with a case of identical nature. The above named Sadananda Setha was initially engaged as a Khalasi in the work charged establishment on 01.03.1989 and after discharging his duties sincerely for several decades, finally he had retired from service on 30.06.2016. However, due to latches on the part of the authorities, he could not be brought over to the regular establishment. Therefore, he was denied the pensionary benefits. Initially the above named Sadananda Setha approached the Tribunal by filing an O.A. On abolition of the Tribunal the matter was transferred to this Court, this Court by virtue of a detailed judgment dated 17.12.2021 after taking into consideration the judgments delivered in **Abhay Chandra Mohanty vs. State of Odisha and Narasu Pradhan vs. State of Odisha as well as Chandra Nandi vs. State of Odisha** allowed the writ application.

31. While allowing the above noted writ applications, this Court had also taken note of the resolution of Water Resources Department dated 07.09.1995 which provides that on completion of 10 years of service in work charged establishment, the work charged employee is eligible to be brought over to the regular establishment. Since the Petitioner was not brought over to the regular establishment even after completion of 10 years of service in the work charged establishment, this Court finally disposed of the writ application by directing the authorities to grant similar benefits to the Petitioner as has been given in the case of ***Narasu Pradhan's*** case (supra).

32. On a careful analysis of the facts as well as the legal position and after considering the submission made by the learned counsels for both sides, this Court is of the considered view that keeping in view the fact that the Petitioners have worked for several decades in the daily wage and work charged establishment till they retired from service, it would be utter injustice to them if they are not regularised in service and are not paid the pension and pensionary benefits. In such view of the matter, this Court has no hesitation in allowing the present batch of writ applications and accordingly the same are hereby allowed. The impugned order passed by the Opposite Party No.2, thereby rejecting the respective representation of the petitioners, is hereby quashed. Further, it is directed that the Opposite Party No.1 shall do well to regularise the service of the Petitioners for a day at least i.e. a day before the date of their retirement and accordingly, the Petitioners be paid the pensionary benefits as has been given in the case of **Narasu Pradhan** and similarly situated many other employees within a period of three months from the date of communication of a certified copy of this judgment. Upon such regularisation the Petitioners shall also be entitled to other consequential and service benefits, if any, they are entitled to as per law.

33. With the aforesaid observations/ directions, the batch of writ applications are allowed, however, there shall be no order as to cost.

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2024 (I) ILR-CUT-241

A.K. MOHAPATRA, J.

W.P.(C) NO.19501 OF 2023
(WITH BATCH OF CASES)

BANAMALI NAIK ….Petitioner

-V-

STATE OF ODISHA & ORS. ….Opp.Parties

REGULARIZATION – Petitioner were engaged in the work charged establishment right from the beginning and they were continuing as such till the date of their retirement– The state authority rejected the representation for regularization & consequential benefit including pensionary benefits – Whether the impugned order is sustainable? – Held, No – The Court has the considered view that keeping in view the fact that the petitioners have worked for several decades in the work charged establishment till they retired from service it would be utter injustice to them if they are not regularized in service and are not paid the pension and pensionary benefits – It is directed that the Opp. Party No. 1 shall do well to regularize the service of the petitioner for a day at least i.e. a day before the date of their retirement and accordingly the petitioners be paid the pensionary benefits.

Case Laws Relied on and Referred to :-

1. W.P. (C) No.7246 of 2016:State of Odisha v. Kasidev Maharana
2. Special Leave Petition (Civil) Diary No(s).23819 of 2023: The State of Odisha & Ors. V. Hadibandhu Bhol
3. W.P.(C) No.24041 of 2017:State of Odisha vs. Pitambar Sahoo
4. W.P.(C) No.19950 of 2011 :Chandra Nandi vs. State of Odisha and others
5. W.P.(C) No.27950 of 2019:Premananda Tripathy vs. State of Odisha
6. O.A. No.1189 (C)/2006:Narasu Pradhan vs. State of Odisha
7. W.P.(C) No.36686 of 2021:Jageswar Mahanta vs. State of Odisha
8. 2006 (4) SCC 1:State of Karnataka vs. Uma Devi
9. AIR 2010 SC 2587:State of Karnataka and others vs. M. L. Kesari & ors.
10. 2013 AIR SCW 4919:Nihal Singh vs. State of Punjab
11. 2014 (13) SCC 249:Malathi Das vs. Suresh & others
12. 2014 (13) SCC 264:Yashwant Arjun More & others vs. State of Maharashtra & others
13. 2015 (8) SCC 265:Amar Kant Ray vs. State of Bihar & others
14. (2018) 8 SCC 238:Narendra Kumar Tiwari vs. State of Jharkhand
15. 2016 (1) SCC 397:Sunil Kumar Verma & others vs. State of Uttar Pradesh & others
16. WPC (OAC) No.865 of 2018:Sadananda Setha vs. State of Odisha & others

For Petitioners : Mr. S. Patra

For Opp.Parties : Mr. S. Rath, ASC

JUDGMENT Date of Hearing & Judgment : 22.11.2023

A.K. MOHAPATRA, J.

01. All the above noted writ applications have been filed with a common prayer to quash the order of rejection of their prayer by the Opposite Parties i.e. the order dated 20.04.2023 under Annexure-4 to W.P.(C) No.19501 of 2023 and further for a direction to the Opposite Parties by issuing a writ of mandamus to allow pensionary benefits to the Petitioners after regularizing their service upon completion of five years of service in the work charged establishment or in the alternative to at least regularizing their service for a day prior to the retirement and on such basis treating the Petitioner as regular employee and further to grant all consequential benefits including pensionary benefits along with interest @ of 12% on such arrear dues. It is relevant to mention here that all the above noted writ applications involved a common question of law and an identical prayer which is based on similar set of facts. In view of the aforesaid factual background, this Court deems it proper to take up all the matters together for hearing and the above noted batch of writ applications are being disposed of by the following common order.

02. For the sake of brevity and convenience the facts involved in the W.P.(C) No.19501 of 2023 are being taken up for analysis and discussion. One Banamali Naik-Petitioner in W.P.(C) No.19051 of 2023 was duly selected and appointed on 15.10.1974 in the post of Khalasi under work charged establishment. Since the date of joining, the Petitioner has been discharging his duties sincerely to the satisfaction of the higher authorities. During his service career the Petitioner had worked under

different divisions and while working under Opposite Party No.5 the Petitioner has retired from service with effect from 30.04.2014 on attaining the age of superannuation.

03. In the year 2022, the Petitioner came to know about the fact that similarly situated work charged employees have been brought over to the regular establishment in view of the Finance Department Resolution dtd.22.01.1964 and 06.03.1990. Accordingly, the Petitioner approached this Court by filing W.P.(C) No.31554 of 2023 with a prayer for a direction to allow pension after completion of 5 years of service in work charged establishment or at least one day with all consequential benefits along with 12% interest. It was stated that pursuant to the direction of the Hon'ble Supreme Court, the Finance Department issued another circular on 15.05.1997 to bring over the NMRs, DLRs employees to regular establishment wherein it has stipulated to give preference to employees under work charged establishment on the basis of their seniority according to their respective date of joining in service.

04. In the writ petition, it has also been pleaded that vide order dated 27.05.2014 & 26.06.2014, 569 work charged employees were brought over to the regular (wages) establishment against created post. Pursuant to the aforesaid order some of the juniors to the Petitioner have been brought over to the regular wages establishment without considering the case of the Petitioners for regularization of their service. Some of the employees whose services were regularized and they had approached the Tribunal along with the Petitioners had subsequently withdrawn their cases before the Tribunal. Although the Petitioner has retired from service long since and he has been staying in Sorada under Ganjam district and he had no knowledge about the aforesaid developments. When he came to know about the fact that similarly circumstanced persons including the juniors to the Petitioners have been regularized in service and are getting pensionary benefits, only then the Petitioner enquired about the matter.

05. This Court vide order dated 28.11.2022 was pleased to dispose of the writ petition to consider the case of the Petitioner by taking into account the judgments and orders as indicated wherein. Accordingly, the Petitioner submitted a representation on 02.07.2021 before the Opposite Parties along with a copy of order dated 28.11.2022.

06. In the meanwhile, the Opposite Party No.5 vide order dated 20.04.2023 rejected the claim of the Petitioner on some untenable and unreasonable grounds. Being aggrieved by such rejection order dated 20.04.2023 the Petitioner has approached this Court by filing the present writ application.

07. Heard Sri S. Patra, learned counsel appearing for the Petitioner and Sri S. Rath, learned Additional Standing Counsel for the State-Opposite Parties. Perused the writ application and the documents annexed thereto as well as other materials placed before this Court in course of hearing.

08. Mr. Patra, learned counsel appearing for the Petitioner at the outset contended that the Government of Odisha had issued notification/ circular on 22.01.1965 and 06.03.1990 to bring over the work charged employees to the regular establishment in order to give them pension/ pensionary benefits. In view of such circulars/ notifications a number of work charged employees pursuant to orders passed by different departments/ authorities under the Government have allowed pension and pensionary benefits to such work charged employees by bringing them over to regular establishment upon their completing five years of service in the work charged establishment. In the aforesaid context, Mr. Patra, learned counsel, referred to the order dated 18.05.1990 passed by the learned Odisha Administrative Tribunal in O.A. No.84/1987 (Mohan Singh & others vs. State of Odisha).

09. Mr. Patra, learned counsel for the Petitioner further contended that an identical matter, i.e., in ***State of Odisha v. Kasidev Maharana*** (W.P.(C) No.7246 of 2016), similar view had been taken by this Court. The judgment in said Kasidev Maharana's case (supra) was also followed by the Division Bench in ***Gobardhan Prusty and others*** (W.P.(C) No.21585 of 2014 disposed of on 28.06.2022). It is further contended that the order passed in Gobardhan Prusty's case (supra) by a Division Bench of this Court was assailed before the Hon'ble Supreme Court at the behest of the State-Opposite Parties and the Hon'ble Supreme Court has affirmed the order passed by the Division Bench of this Court in Gobardhan Prusty's case (supra). Similarly, the order passed by in Kasidev Maharana's case (supra) was also affirmed by the Hon'ble Supreme Court in S.L.P. No.23207 of 2018 vide order dated 30.7.2018.

10. Mr. Patra, learned counsel for the Petitioner drawing attention of this Court to the order dated 05.07.2023 passed in Special Leave Petition (Civil) Diary No(s).23819 of 2023 in the matter of ***The State of Odisha & Ors. V. Hadibandhu Bhol***, submitted before this Court that in similar matter the State-Opposite Parties again challenged identical order before the Hon'ble Supreme Court. Hon'ble Supreme Court vide order dated 05.07.2023 while affirming the order dated 03.01.2019 passed by this Court in W.P.(C) No.7753 of 2016, has cautioned the State Government not to approach the Hon'ble Supreme Court in the matter covered and decided against it. A copy of order dated 05.07.2023 is filed in Court today and the same is taken on record.

11. In view of the aforesaid legal position, it is crystal clear that the law laid down by a series of decisions of the Tribunal as well as by this Court have been affirmed by the Hon'ble Supreme Court and the same has attained finality. Therefore, this Court once again reiterates that in identical matters, State-Opposite Parties should make every endeavour so that benefits arising out of an order in similar case be extended to similar situated persons at the Government Level itself by following the line of judgments which are already governing the field instead of making unsuccessful attempts to unsettle the same.

12. In the aforesaid matter the learned Odisha Administrative Tribunal had directed that the Petitioners be absorbed in permanent employeement, if required, by creating posts and that their entire service period should be taken into consideration for the purpose of their service benefits and pension/ pensionary benefits. The aforesaid order of the Tribunal has been affirmed by the Hon'ble Supreme Court in Special Leave to Appeal (Civil) No.12410/1990.

13. Similarly, in O.A. No.2559(C)/1999 i.e. in Kashidev Maharana & a batch of similar other matters were disposed of by the Tribunal on 16.11.1999 with a direction to the Opposite Parties to absorb the applicants in the regular post with effect from the date they have completed five years of continuous service. The aforesaid order of the Tribunal was challenged in a review which was dismissed on 13.07.2015. Thereafter, the State-Opposite Parties challenged the order dated 16.11.1999 in W.P.(C) No.7246 of 2016 which was dismissed on 08.07.2018. Thereafter, the State-Opposite Parties preferred a SLP bearing SLP Diary No.23207 of 2018. The Hon'ble Supreme Court has also been pleased to dismiss the SLP.

14. After dismissal of the SLP filed by the State, the State-Opposite Parties have carried out the order passed by the Tribunal vide their order dated 24.08.2021, 26.08.2021 and 27.08.2021 under Annexure-7 series to the writ application. In total 19 number of work charged employees including the retrenched employees were brought over to the regular establishment and extended with the pensionary benefits. He further contended that this Court also took up another similar case in W.P.(C) No.21585 of 2014 and finally disposed of the said case in the light of decision rendered in Kashidev Maharana's case (supra) which was confirmed by the Hon'ble Supreme Court in SLP (C) Diary No.10145 of 2023 disposed of on 05.04.2023.

15. In the aforesaid factual background and further referring to various orders passed by different courts/Tribunal and that of the Hon'ble Supreme Court of India, learned counsel for the Petitioner submitted that the Petitioner also stands in a similar footing with the persons who have been extended with similar benefits pursuant to the order passed by the Tribunal, this Court as well as the Hon'ble Apex Court. He further contended that some of the employees who have been regularized and have been given the pensionary benefits are juniors to the Petitioner. Therefore, it was alleged that the conduct of the State-Opposite Parties are in gross violation of Article-14 and 16 of the Constitution of India. As the Opposite Parties have adopted a pick and choose method and treated the present Petitioner in an arbitrary and discriminatory manner. Such conduct of the Opposite Parties violates the Petitioner's fundamental right to equal treatment and therefore, the same is unsustainable in law.

16. In course of his argument, Mr. Patra, learned counsel appearing for the Petitioner referred to the decision of this Court in ***State of Odisha vs. Pitambar Sahoo in W.P.(C) No.24041 of 2017*** disposed of on 20.12.2017 which was confirmed by the Hon'ble Supreme Court in SLP (C) Diary No. 30806 of 2018. He

also referred to the case in ***Chandra Nandi vs. State of Odisha*** and others in ***W.P.(C) No.19950 of 2011*** decided on 03.02.2021. In ***Premananda Tripathy vs. State of Odisha*** *in* ***W.P.(C) No.27950 of 2019*** decided on 03.02.2021, this Court had taken a similar view.

17. Further, referring to the case of ***Narasu Pradhan vs. State of Odisha*** *in* ***O.A. No.1189 (C)/2006*** disposed of on 11.04.2009, learned counsel for the Petitioner submitted that the order of the Tribunal was affirmed by a Division Bench of this Court in W.P.(C) No.5377 of 2010 vide order dated 19.10.2011. The Division Bench of this Court in ***Narusu Pradhan's*** case directed the Government to regularize the service of the Petitioner at least one day before his retirement and to grant pensionary benefits. The order passed in ***Narusu Pradhan's*** case has also been affirmed by the Hon'ble Supreme Court in Civil Appeal (C.C.) No.22498 of 2012.

18. He further contended that this Court after taking into consideration a number of orders passed by this Court as well as the Hon'ble Supreme Court vide order dated 24.02.2022 in W.P.(C) No.5570 of 2023 *(**Narayan Swain vs. State of Odisha & others**)* allowed the writ petition and directed to grant similar benefits as has been done in the case of ***Narasu Pradhan***. Further, the attention of this Court was also drawn to the case in ***Jageswar Mahanta vs. State of Odisha*** (W.P.(C) No.36686 of 2021) and batch of other cases. Wherein the hearing is concluded and judgment is yet to be delivered. Accordingly, learned counsel for the Petitioner submitted that the present case be taken up along with pending batch of matters.

19. While countering the impugned rejection order, learned counsel for the Petitioner contended that the Opposite Parties by misinterpreting the judgment of the Hon'ble Supreme Court in ***State of Karnataka vs. Uma Devi*** reported in ***2006 (4) SCC 1*** and without taking note of the other two judgments, refused to grant the relief claimed by the Petitioner and accordingly in an illegal and arbitrary manner rejected the claim of the Petitioner. Therefore, it was also contended that the case of the Petitioner has not been considered in the right perspective and by taking into consideration the above noted facts and the ratio laid down by this Court as well as the Hon'ble Apex Court. In such view of the matter, learned counsel for the Petitioner submitted that the impugned rejection order is not inconformity with the direction issued by this Court in the earlier round of writ application, moreover, the same is also contrary to the ratio laid down by this Court as well as the Hon'ble Apex Court in identical matters.

20. He also contended that the State-Opposite parties having accepted the legal position and the ratio laid down by this Court as well as the Hon'ble Apex Court and after implementing such orders and accordingly giving such benefits to similarly situated persons, are legally estopped to take a different stand in the case of the present Petitioners. Mr. Patra, learned counsel would further argue that the State being a model employer is expected to act in a fair, reasonable and transparent manner and the authorities are expected to maintain parity at all time while dealing

with similarly situated Government employees. However, such well recognized principle of law has not been adhered to by the State-authorities. The Opposite Parties contrary to the settled position of law and the ratio laid down by the above noted judgments has arbitrarily rejected the representation of the Petitioner without considering the same in its perspective and thereby refusing to extend similar benefits which have been extended in favour of the similarly situated persons. Thus, such conduct is grossly violating of Article-14 and 16 of the Constitution of India and as a result of which the impugned rejection order is liable to be quashed and the present writ application deserves to be allowed with a direction to the Opposite Parties to extend similar benefits to the Petitioner.

21. In course of his argument, Mr. Patra, learned counsel also referred to the judgments in ***State of Karnataka and others vs. M. L. Kesari & ors.*** *reported in* ***AIR 2010 SC 2587***, in ***Nihal Singh vs. State of Punjab*** reported in ***2013 AIR SCW 4919****, in* ***Malathi Das vs. Suresh & others*** reported in ***2014 (13) SCC 249***, in ***Yashwant Arjun More & others vs. State of Maharashtra & others*** reported in ***2014 (13) SCC 264****, in* ***Amar Kant Ray vs. State of Bihar & others*** reported in ***2015 (8) SCC 265****, in* ***Narendra Kumar Tiwari vs. State of Jharkhand*** reported in ***(2018) 8 SCC 238****, in* ***Sunil Kumar Verma & others vs. State of Uttar Pradesh*** & others reported in ***2016 (1) SCC 397***. This Court considered all the aforesaid judgments. The legal proposition pronounced by the Hon'ble Supreme court in the above noted judgments are too well known, therefore, the same does not required any further elaboration at this stage. However, it is made clear that this Court has taken note of the law laid down by the Hon'ble Supreme Court in the above noted judgments while considering the present batch of writ application.

22. Mr. S. Rath, learned Additional Standing Counsel, on the other hand tried to justify the impugned order dated 20.04.2023 under Annexure-4 to the writ application. He further contended that pursuant to the order passed by this Court earlier the case of the Petitioner was considered by the Opposite Party No.5 and by virtue of a reasoned order the claim of the Petitioner was found to be legally unsustainable and accordingly the prayer of the Petitioner for regularization of his service in the regular establishment and sanction of pensionary benefits was also found to be devoid of merit and accordingly the representation was rejected.

23. Learned Additional Standing Counsel further contended before this Court that the Petitioner was appointed as a Khalasi in the work charged establishment on 15.10.1974. Thereafter, on transfer he came under the control of Chief Engineer and Basin Manager, Subaranarekha & Budhabalanga Basing. While working as such the Petitioner has retired from service w.e.f. 30.04.2014 on attaining the age of superannuation. In such view of the matter, learned Additional Standing Counsel further contended that all throughout the Petitioner was working in the work charged establishment till he retired from service on attaining the age of superannuation. Since the Petitioner had not been brought over to the regular establishment, therefore the Petitioner cannot be treated as a regular employee in the pensionable establishment

and as such he falls outside the purview of pension rules and accordingly he is not entitled to any pensionary benefits.

24. In course of his argument, learned Additional Standing Counsel referring to the cases of other petitioners also contended that they were also initially engaged in the work charged establishment and continued as such till they retired from service on their respective date of retirement. He further contended that at no point of time they were brought over to the regular establishment. Therefore, the question of regularization of their service, post retirement, does not arise and since they were not working in regular pensionable establishment the question of grant of pensionary benefits also does not arise. He further contended that the Petitioners worked under the work charged establishment and were regulated under the Odisha work charged employees (appointment and conditions of services) instruction-1974. Although, the Petitioner have prayed for regularization of service on completion of five years as work charged employees, however, their cases cannot be considered for regularization in the regular establishment.

25. Mr. Rath, learned Additional Standing Counsel in reply to the Finance Department Resolution dated 22.01.1965 submitted before this Court that the principle laid down in the said resolution will not apply to big projects, dams and other construction works, until such projects, dams and construction works are completed and minimum residual staffs necessary for normal functioning of these projects are determined by the competent authority. On the contrary, learned Additional Standing Counsel referred to Finance Department Resolution dated 06.03.1990 to submit before this Court that the service of an employee rendered under the work charged establishment, can be considered for grant of pensionary benefits only if the employee concerned is brought over to the regular pensionable establishment. In such view of the matter, he also contended that the past service of the Petitioners cannot be taken into consideration for grant of pension/ pensionary benefits.

26. He also submitted that there is no provisions in OCS Pension Rules, 1992 under which the work charged employees are entitled to get pension and pensionary benefits. Since the service rendered by the Petitioners are admittedly under the work charged establishment, which is non-pensionable establishment, the question of granting them pension/ pensionary benefits does not arise at all for consideration. Similarly, referring to the Finance Department Resolution dated 15.05.1997, learned Additional Standing Counsel submitted that there are certain conditions which is required to be fulfill before bringing the employees in the work charged establishment to the regular establishment and that the same is not automatic. Since such conditions could not be satisfied the Petitioners have not been brought over to the regular establishment and accordingly, their services have not been regularized.

27. On a careful analysis of the impugned order under Annexure-4 to the writ application, this Court observed that the Opposite Parties have admitted the factual

background of the case, to the extent that the Petitioners were engaged in the work charged establishment right from the beginning and they were continuing as such till the date of their retirement. Moreover, this Court also observed that in the earlier round of writ application, this Court had given a specific direction to consider the case of the Petitioner in the light of the judgments of this Court confirmed by the Hon'ble Supreme Court & orders attached to the writ petition. However, the Opposite Party No.5 has although referred to a judgment in *Secretary State of Karnataka vs. Uma Devi's case* (supra), however it appears that the same is completely misunderstood and misinterpreted by the Opposite Party No.5. On the contrary, this Court is of the view that by the time the judgment in ***Uma Devi's*** case (supra) was delivered by the Hon'ble Supreme Court, the Petitioners were eligible to be regularized as a onetime measure as has been directed in para-55 of the said judgment. On a careful reading of the impugned order it appears that the case of the Petitioner has not been considered in the light of the aforesaid observation in ***Uma Devi's*** case (supra).

28. Reverting back to the facts of the present case, this Court observed that since the late 70s or early 80s the Petitioners were engaged in the work charged establishment and as such facts remains unchallenged/ undisputed. Thereafter, the Petitioners continued to render their services in the work charged establishment to the satisfaction of the authorities. Some of them were also given promotion in due course. However, working for several decades continuously they were never brought over to the regular establishment for reasons best known to the authorities. If the nature of work which they were performing were regular in nature, which fact is established by the materials on record that the Petitioners continued to discharge their services in the work charged establishment for several decades till their retirement, the Opposite Parties should have considered the case of the Petitioner in the light of the Government Resolution and the services of the Petitioners should have been regularised.

29. It is not the case of the Opposite Parties that the employees who were similarly placed and were engaged in the work charged establishment have not been regularised and they have not been given pensionary benefits. As has been discussed, in the preceding paragraphs, in several cases the Tribunal as well as this Court and the Hon'ble Supreme Court have issued directions to regulaize their service and to pay them the pensionary benefits. Further, on an analysis of the factual background of the present batch of writ application, this Court takes an exception to the conduct of the Opposite Parties in allowing the Petitioners to continue in work charged establishment for more than three decades and finally, after their retirement from service refused to grant them the pensionary benefits only on the ground they were not brought over to the regular establishment. In similar type of cases this Court has taken a view that such type of employees be regularised for a day before their retirement and accordingly the pensionary benefits be calculated on that basis and be paid to them.

30. This Court in a recent judgment in ***Sadananda Setha vs. State of Odisha & others*** in ***WPC (OAC) No.865 of 2018*** decided on 17.12.2021 was dealing with a case of identical nature. The above named Sadananda Setha was initially engaged as a Khalasi in the work charged establishment on 01.03.1989 and after discharging his duties sincerely for several decades, finally he had retired from service on 30.06.2016. However, due to latches on the part of the authorities, he could not be brought over to the regular establishment. Therefore, he was denied the pensionary benefits. Initially the above named Sadananda Setha approached the Tribunal by filing an O.A. On abolition of the Tribunal the matter was transferred to this Court, this Court by virtue of a detailed judgment dated 17.12.2021 after taking into consideration the judgments delivered in ***Abhay Chandra Mohanty vs. State of Odisha*** *and* ***Narasu Pradhan vs. State of Odisha*** as well as ***Chandra Nandi vs. State of Odisha*** allowed the writ application.

31. While allowing the above noted writ applications, this Court had also taken note of the resolution of Water Resources Department dated 15.05.1997 which provides that on completion of 10 years of service in work charged establishment, the work charged employee is eligible to be brought over to the regular establishment. Since the Petitioner was not brought over to the regular establishment even after completion of 10 years of service in the work charged establishment, this Court finally disposed of the writ application by directing the authorities to grant similar benefits to the Petitioner as has been given in the case of ***Narasu Pradhan's*** case (supra).

32. On a careful analysis of the facts as well as the legal position and after considering the submission made by the learned counsels for both sides, this Court is of the considered view that keeping in view the fact that the Petitioners have worked for several decades in the work charged establishment till they retired from service, it would be utter injustice to them if they are not regularised in service and are not paid the pension and pensionary benefits. In such view of the matter, this Court has no hesitation in allowing the present batch of writ applications and accordingly the same are hereby allowed. The impugned order passed by the Opposite Parties, thereby rejecting the respective representation of the petitioners, is hereby quashed. Further, it is directed that the Opposite Party No.1 shall do well to regularise the service of the Petitioners for a day at least i.e. a day before the date of their retirement and accordingly, the Petitioners be paid the pensionary benefits as has been given in the case of ***Narasu Pradhan*** and similarly situated many other employees within a period of three months from the date of communication of a certified copy of this judgment. Upon such regularisation the Petitioners shall also be entitled to other consequential and service benefits, if any, they are entitled to as per law.

33. With the aforesaid observations/directions, the batch of writ applications are allowed, however, there shall be no order as to cost.

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2024 (I) ILR-CUT-251

V. NARASINGH, J.

CRLMC NO. 4187 OF 2022

DAMBARUDHAR BARIK @ LITU BARIK ……..Petitioner

-V-

STATE OF ODISHA & ANR. …….Opp.Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Prayer for quashing of order of cognizance for the offence punishable U/ss. 366/376(2)(n)/506/450 IPC r/w Sec 3(2)(va)/3(2)(v) S.C/S.T (PoA) Act – Petitioner and the victim/Opp. Party filed joint affidavit stating that they are married and leading a happy conjugal life – Effect of – Held, interest of justice would be sub-served if the proceeding which is at the stage of cognizance is quashed.

Case Laws Relied on and Referred to :-

1. (2019) 5 SCC 688 : Madhya Pradesh Vs. Laxmi Narayan & Ors.
2. (2012) 10 SCC 303 : Gian Singh Vs. State of Punjab.

For Petitioner : Mr. P.S. Das
For Opp.Parties : Mr. A. Pradhan, ASC & Mr. M. Das

JUDGMENT Date of Hearing & Judgment : 21.11.2023

V. NARASINGH, J.

1. Heard learned counsel for the Petitioner, learned counsel for the State and learned counsel for the informant.

2. The present CRLMC has been filed under Section 482 of the Cr.P.C. by the accused for quashing of order of cognizance dated 03.05.2022 passed by the learned Special Judge, Champua in Special Case No.10 of 2022 under Sections 366/376(2)(n)/506/450 of IPC read with Sections 3(2)(va)/3(2)(v) S.C/S.T (PoA) Act, inter alia, on the ground that the victim has joined the Petitioner in matrimony and both leading a blissful conjugal life.

3. The power of this Court under Section 482 of Cr.P.C. to quash the criminal proceeding in cases which are not compoundable arose for consideration and set at rest by the Larger Bench of the Apex Court in the case of State of **Madhya Pradesh v. Laxmi Narayan and others** reported in **(2019) 5 SCC 688**.

4. The law in this regard was summed up in paragraph-15 of the said judgment which is culled out hereunder:-

> *"15. Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:*
>
> *15.1. That the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those*

arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

15.2. Such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

15.3. Similarly, such power is not to be exercised for the offences under the special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

15.4. Offences under Section 307 IPC and the Arms Act, etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore. the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act, etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delicate parts of the body, nature of weapons used, etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge-sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paras 29.6 and 29.7 of the decision of this Court in Narinder Singh should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove

5.5. While exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non-compoundable offences, which are private in nature and do not have a serious impact on society, on the ground that there is a settlement/compromise between the victim and the offender. the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise, etc."

5. The allegation in the case at hand is inter alia under Section 376(2)(n) of IPC and also under S.C/S.T (PoA) Act.

6. It is submitted by the learned counsel for the State referring to the same that in view of the paragraph-15.2 of the judgment of the Apex Court in the case of **Laxmi Narayan (Supra)**, the proceeding cannot be quashed.

7. Hence, the prayer for quashing as made has to be considered on the touchstone of the judgment passed in the case of **Laxmi Narayan (Supra)**.

8. Pursuant to the notice issued, the victim-Opposite Party No.2 has appeared and filed an affidavit.

9. Paragraphs-3 & 4 of the said affidavit run thus:-

"3.That, your Deponent humbly says and submits that she was known to the present Petitioner as he used to regular visiting term to her house. Therefore, intimacy between them

gradually developed and both decided to marry each other. Thereafter, the Petitioner kept physical relationship with her on assurance of getting marry to the present Deponent. When, the family members of both the Families were/are reluctant on their relationship, lastly on 21.12.2021, when no one was present in the house of the Deponent, she on her own will eloped with the Petitioner by a Motor cycle and they had/ have been residing as husband and wife at Village-Padmapur in the District of Keonjhar in a rented house. But, when their sources with them for living further came to end, the Petitioner left the Deponent to her by a Bus. Thereafter, the Petitioner did not turn up or pay any heed to accept her. Therefore, the present Deponent due to sudden provocation, lodged the F.I.R. against the Petitioner before the Joda P.S.

4. That, thereafter, after lodging of F.I.R. due to intervention of local village gentries as well as relatives and well-wishers from both the families, the aforesaid matter was/is amicably settled between them. Furthermore, the Petitioner got married the Deponent/Victim in a local Village Temple and henceforward the Petitioner and Victim/Informant are/have been living as husband and wife and maintaining peaceful happy conjugal life. On the above premises, the Informant/ Deponent /Opp.Party No.2 does not want to further proceed with the case, which will hamper her Future life. Thus, she has no objection to quash the Order of cognizance, dated 03.05.2022, passed by the learned Special Judge, Champua in Special Case No.10 of 2022 as prayed by the Petitioner. Hence, this Affidavit." (Emphasized)

10. To fortify his submission that in a case of this nature, this Court while exercising its extraordinary jurisdiction under Section 482 of Cr.P.C can quash a proceeding, learned counsel for the Petitioner relied on the judgment of this Court dated 03.07.2023 in **CRLMC No.1947 of 2021**, wherein allegation of Section 376(2)(n) of IPC was quashed at the stage of trial.

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11. In the instant case, indisputably, the marriage has taken place between the parties. The victim has filed an affidavit to that effect stating that she is presently leading a settled marital life. From Annexure-1, it is made to suggest that in some manner both the parties developed relationship after their brief encounter. Of course, the petitioner alleged to have committed certain mischief when the marriage of opposite party No.2 was proposed elsewhere perhaps as a reaction to it. The petitioner is not an outsider but distantly related to the informant as disclosed in Annexure-1. After marriage of the victim was fixed at another place, the petitioner did the mischief and was allegedly instrumental in breaking the former's engagement. Though the conduct of the petitioner is condemnable but as it seems, the same was while encountering an adverse situation. Nevertheless, Court does not in any manner approve such conduct of the petitioner. But, at the same time, considering the circumstances and subsequent marriage, the Court is also of the view that the prosecution needs termination to ensure peace and stability in the lives of the parties. Before parting with, the Court has gone through the nature of evidence deposed by opposite party No.2 which is on record. Under the special circumstances and having regard to the settled position of law discussed above, the Court does feel that it is a fit case where inherent jurisdiction should be exercised in the best interest of the parties.

12. Accordingly, it is ordered.

13. In the result, the petition stands allowed. As a necessary corollary, the criminal proceeding in connection with CT(S) No.94 of 2018 pending before the learned Sessions judge, Dhenkanal corresponding to G.R. Case No.222 of 2018 arising out of Gondia PS Case No. 36 dated 4th March, 2018 is hereby quashed vis-à-vis the petitioner for the reasons discussed herein before."

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11. In **Gian Singh vs. State of Punjab** reported in **(2012) 10 SCC 303**, the inherent power conferred under Section 482 of Cr.P.C has been dealt with in paragraph-61 thereof.

> *"61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz.: (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."*

12. It is no longer res integra that the power under Section 482 of Cr.P.C. is an extraordinary one, but as has been held by the Apex Court in a catena of judgment the same is to be used sparingly inter alia to sub-serve the ends of justice and for that each case has to be evaluated on its own facts and there cannot be a mechanical application. Factors like the conduct of the accused, the stage when such quashing is sought for is to be taken into account, but it is worth noting that these conditions are only illustrative and there cannot be a straight jacket formula in exercising such jurisdiction. As is often said, wider the power greater must be the circumspection to exercise the same.

13. On perusal of the affidavit of the victim-Opposite Party No.2, it is seen that both the Petitioner and the victim-Opposite Party No.2 are married and leading a happy conjugal life. In the light of the same allowing the proceeding to continue

could only result in hardship to the victim and lead to avoidable acrimony between the parties. Hence, keeping the interest of the victim in mind, this Court is of the considered view that allowing the proceeding to be continued and compelling the Petitioner and victim-Opposite Party No.2 to go through the grind of a trial would be an exercise in futility and interest of justice would be sub-served, if the proceeding which is at the stage of cognizance is quashed.

14. Accordingly, the proceeding in respect of Special Case No.10 of 2022, on the file of "learned Special Judge, Champua" arising out of Joda P.S. Case No.19 of 2022, is quashed.

15. The bail bond of the accused be cancelled and surety be discharged.

16. Accordingly, this CRLMC stands disposed of.

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2024 (I) ILR-CUT-255

BIRAJA PRASANNA SATAPATHY, J.

WPC (OAC) NOS.3792, 3989 & 3990 OF 2013, W.P.(C) NO.17908, 18283 & 18285 OF 2023

PRAFULLA KUMAR PUROHIT ……...Petitioner

-V-

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

WPC (OAC) NO.3989 OF 2013
BULU PANIGRAHI -V- STATE OF ODISHA & ORS.

WPC (OAC) NO.3990 OF 2013
NETRANANDA SATAPATHY -V- STATE OF ODISHA & ORS.

W.P.(C) NO.17908 OF 2023
SUDHIR KUMAR SAHU -V- STATE OF ODISHA & ORS.

W.P.(C) NO.18283 OF 2023
SAMBHUPRASAD BISWAL -V- STATE OF ODISHA & ORS.

W.P.(C) NO.18285 OF 2023
KODANDA BHUSAN SELMA -V- STATE OF ODISHA & ORS.

(A) RECRUITMENT AND TRAINING OF VILLAGE AGRICULTURAL WORKERS RULE, 1981– Rule 5(5) –The director agriculture and food production is the competent authority to issue advertisement for recruitment of VAW – In the instant case, Deputy Director Agriculture issued the Advertisement – Whether the advertisement and process of selection made contravening the provisions is sustainable ? – Held, No – As the advertisement was issued by an incompetent authority the same is quashed – Due to latches on the part of the Opp.Party Nos. 1 & 2 in not issuing corrigendum, the petitioners could not get a chance

to participate in the selection process and lost their livelihood this court directs to pay compensation amount of Rs.5,00,000/- each of the petitioners. (Para 10)

(B) INTERPRETATION OF STATUTE – If a statute provides for a thing to be done in a particular manner then it has to be done in that manner only. (Paras 2.13-2.15)

Case Laws Relied on and Referred to :-

1. 2008(2) OLR : Sudhir Kumar Sahu Vs. State of Odisha.
2. (1998) 8 SCC-266 : Chandra Kishore Jha Vs. Mahavir Prasad & Others.
3. (2021) 6 SCC-707 : Opto Circuit India Limited Vs. Axis Bank & Others.
4. Civil Appeal No.4807 of 2022 (arising out of SLP (Civil) No.19886 of 2019) : Union of India & Ors. Vs. Mahendra Singh.
5. WPC (OA) No. 2966 of 2016 (Dt.15.02.2023) :Harapriya Nanda Vs. State of Odisha & Ors.
6. (2002) 7 SCC478 : (1998) 8 SCC-266 : Rabindranath Ghosal Vs. Calcutta University& Ors.
7. (2021) 6 SCC-707: Chandra Kishore Jha Vs. Mahavir Prasad & Ors.

For Petitioner : M/s. J.K. Rath, Sr. Adv. & Mr. D.N. Rath.
M/s. B.K.Hati & R.K. Sahu

For Opp.Parties : Addl. Standing Counsel
Mr.H.K. Panigrahi, ASC.

JUDGMENT Date of Hearing : 31.07.2023 : Date of Judgment:13.10.2023

BIRAJA PRASANNA SATAPATHY, J.

1. All these Writ Petitions have been filed challenging the advertisement issued by the Deputy Director of Agriculture, Bolangir on 04.10.2013 inviting applications from eligible candidates for engagement as Village Agricultural Worker (VAW) on contractual basis in the Revenue District of Bolangir. Further prayer has been made to quash the order passed by the Director of Agriculture & Food Production on 25.10.2013 in rejecting the claim for relaxation of the age and to direct the Opp. Party No.2 to issue a corrigendum in terms of the order passed by this Court in its judgment reported in ***2008(2) OLR*** (***Sudhir Kumar Sahu vs. State of Odisha)*** and subsequent order passed by this Court in W.P.(C) No.18594/2008. Since the issue involved in these batch of writ petitions is identical, all the matters were heard analogously and disposed of by the present common order.

2. It is the case of the Petitioners in all these Writ Petitions that Director of Agricultural and Food Production when issued an advertisement on 18.05.2008 inviting applications to fill up vacant posts of VAW and lady VAW on contractual basis in different districts of the State, the same was challenged before this Court in W.P.(C) No.10285 of 2008.This Court vide its order dtd.14.08.2008, while quashing the advertisement disposed of the writ petition *inter alia* with the following order:-

> *"We are not on the question whether the petitioner will be selected or not. The entire dispute revolves round the question whether the Rules framed by the Government and notified on 11th February, 1981 and amended thereafter, are applicable to the candidates for appointment against the aforesaid post on contractual basis. True, the appointment is contractual, but in the contractual appointment also it is expected that the recruitment authority should follow the rules that have been framed by the Government. The counter affidavit absolutely does*

not meet our query; on the other hand, the Joint Director has tried to justify the violation of the Rules. However, when the Rules framed by the State Government provide for giving preference to the fit candidates for the post of VAW/LVAW that is bound to be followed, be it regular or contractual. The authorities cannot go beyond the scope and ambit of the Rules with a plea that appointments are not regular but contractual because in the present days scenario, regular appointments have been exception; contractual appointments are the rule of the day.

The rules framed by the Government, if not followed by its own authorities, will ultimately lead to conclusion, the advantage of which should be taken by the dishonest officials and unscrupulous candidates. In a case of similar nature (W.P.(C) No.7833/2007 disposed of on 8.7.2008) this Court while dealing with the provision of Section 3(d) of the O.R.V Act has observed that the provision of the O.R.V. Act is also applicable in respect of contractual employment in the Government or in the Governmental organizations, as the case may be.

We are satisfied that the rules that have been framed by the Government, have not been followed and the advertisement has not been made in consonance with the provisions of the aforesaid Rules. Therefore, in our considered opinion, the Rules framed by the Government, i.e., Recruitment and Training of Village Agricultural Workers Rules, 1981 and amended vide notification dated 24.06.1991, are applicable to the cases of recruitment of VAW/LVAW on contractual basis.

Accordingly, the writ petition is allowed. The advertisement in Annexure-2 is quashed to the aforesaid extent. The O.Ps are directed to issue a corrigendum to this effect and fix the last date of application afresh".

2.1. It is contended that without following the direction of this Court so issued on 14.08.2008, when fresh advertisement was issued by the Deputy Director of Agriculture of respective districts inviting applications to fill-up the vacant post of VAW on contractual basis instead of issuing a corrigendum to the advertisement dtd. 05.12.2008, the matter was again challenged before this Court in various writ petitions in W.P.(C) No.18942 of 2008 and batch. All those Writ Petitions were disposed of vide order dtd.03.02.2012.The order passed by this Court from Paragraphs-6 to 9 are quoted hereunder:-

"6. By the aforesaid order this Court while quashing the advertisement directed to issue a corrigendum to the advertisement and refix the last date of application. As per Annexure-A/3 and B/3 the opposite party-State has taken decision that if the marks secured by a candidate of +2 Science Branch and mark secured by candidate in the field of agriculture is equal then candidates having +2 Vocational Course in the field of agriculture shall be preferred.This in our view, is not the spirit of the Rule. It is admitted at the Bar that for the selection to the posts of VAW no selection/recruitment test is contemplated or held. The only basis of selection is the percentage of marks obtained by the candidates in the +2 Vocational course in the field of Agriculture of +2 Science or Intermediate Science. Although all the above categories of candidates are eligible to apply as per Rule-4 of the Rules, the proviso to Rule-4, which is in the nature or an exception to the general provision, makes it clear that candidates who have passed +2 vocational course in agriculture shall be preferred to the other categories. This means that after candidates having qualification of +2 vocational in agriculture are appointed in order of their merit (marks) in such course the balance vacancies, if any, shall be filled up by candidates having +2 Science/Intermediate Science qualification. The nature of work of a VAW being related to agriculture, Rule-4 along with its proviso cannot be susceptible to any other interpretation. The advertisement (Annexure-2), particularly, Clause-4 thereof pertaining to 'Method of Selection' is therefore contrary to the Rules.

7. From the case of Sudhir Kumar Sahu till this case there is no improvement on the part of the State Authority to bring a rationality in the process of selection of VAW rather than bent upon to circumvent the rule which is prevailing and in vogue for which we have express our displeasure in the aforesaid judgment of Sudhir Kumar Sahu which is quoted in the aforesaid paragraph. Accordingly, we have no hesitation to say that the advertisement in Annexure-2 is contrary to the 1981 Rules as amended up-to-date and accordingly the same is quashed.

8. We are constrained to observe that the action of the Secretary, Agriculture is not only contrary to the rule but also contrary to the judgment rendered by this Court in W.P.(C) No.10285 of 2008. While we propose to impose heavy cost on the officers at fault, but on the submission of the learned State Counsel no cost is imposed on them. We hope that the officers shall be careful in future while dealing with the court matter.

9. So far as the age of the petitioners in respect of W.P.(C) Nos.18942 of 2008, 18594 of 2008, 18943 of 2008, 18492 of 2008 and 113 of 2009 is concerned, it is open for the petitioners to approach the authorities in this regard, who shall consider the same looking to the fact that advertisement to the post of VAW has not been made for last seventeen years.

2.2. It is contended that without following the order passed on 14.08.2008 in W.P.(C) No.10285/2008 as well as the order dtd.03.02.2012 so passed in W.P.(C) No.18942/2008 and batch, when a fresh advertisement was issued by the Deputy Director of Agriculture on 04.10.2013 inviting applications to fill up the self-same post of VAW on contractual basis, all these writ petitions were filed challenging the advertisement as well as the order passed by the Director of Agriculture and Food Production in refusing to relax the upper age limit in respect of the candidates of Bolangir District, who had earlier approached this Court.

2.3. It is contended that the Tribunal while issuing notice of the matter vide order dtd.09.12.2013 passed an interim order by restraining the Opposite Parties not to provide appointment to the selected candidates in terms of the advertisement issued on 04.10.2013 without leave of the Tribunal. The order dtd.09.12.2013 is quoted hereunder:-

"The applicant, who has applied for his engagement as against VAW pursuant to an advertisement of the year 2008 have filed this O.A with a prayer to quash the advertisement dtd.4.10.2013 (Annexure-5), for a direction to implement the order of the Hon'ble High Court by way of issuing a corrigendum to the advertisement and also for allowing the applicants to participate in the select list.

Heard Mr. J.K. Rath, learned Senior Advocate and Mr. H.K. Panigrahi, learned Addl. Standing Counsel.

Mr. Rath, learned counsel submits that earlier the applicants had approached the Hon'ble High Court of Orissa in W.P.(C) No.10285 of 2008 challenging the advertisement issued for engagement of V.A.Ws/L.V.Ws and the Hon'ble Court disposed of the said O.A vide order dtd.14.8.2008 with the observation that-

"the Rules framed by the Government, if not followed by its own authorities, will ultimately lead to conclusion, the advantage of which would be taken by the dishonest officials and unscrupulous candidates.In a case of similar nature (W.P.(C) No.7833/2007 disposed of on 8.7.2008) this Court while dealing with the provision of Section 3(d) of the O.R.V. Act has observed that the provision of the O.R.V Act is also applicable in respect of contractual employment in the Government or in the Governmental organizations, as the case may be.

Accordingly, the writ petition is allowed. The Advertisement in annexure-2 is quashed to the aforesaid extent. The O.Ps are directed to issue a corrigendum to this effect and fix the last date of application afresh".

Without complying with the said order of the Hon'ble High Court the respondent authorities again issued a fresh advertisement dated 18.5.2008 as at annexure-2. Challenging the said advertisement under annexure-2 the applicants once again approached Hon'ble Court in W.P.(C) No.18594 of 2008 and batch of cases so also W.P.(C) No.3868 of 2012. The first batch of cases were disposed of vide order dtd.03.2.2012 with the observations that-" 8. We are constrained to observe that the action of the Secretary, Agriculture is not only contrary to the rule but also contrary to the judgment rendered by this Court in W.P.(C) No.10285 of 2008. While we propose to impose heavy cost on the officers at fault, but on the submission of the learned State Counsel no cost is imposed on them. We hope that the offcers shall be careful in future while dealing with the court matter.

9. So far as the age of the petitioners in respect of W.P.(C) No.18942 of 2008, 18594 of 2008, 18943 of 2008, 18492 of 2008 and 113 of 2009 is concerned, it is open for the petitioners to approach the authorities in this regard, who shall consider the same looking to the fact that advertisement to the post of VAW has not been made for last seventeen years".

And the second set of Writ Petition i.e. W.P.(C) No.3868 /2012 was disposed of with order to the effect-" it is stated by the learned counsel for the petitioners that the case of the petitioners in this present writ application is covered by the order passed by this Court in W.P.(C) No.18594 of 2008, disposed of on 3.2.2012.

The direction contained in the aforesaid order is also applicable to the petitioners in this writ application.

Accordingly, the advertisement under annxure-2 is quashed".

As such the respondent authorities were only directed by the Hon'ble court to issue corrigendum in respect of the earlier judgment where they never directed to issue fresh advertisement fixing age limitation. Presently once again after disposal of the second lot of cases vide order under Annexure-4 again fresh advertisement was issued by the respondent authority in daily Dharitri dtd.4.10.2013(Annexure-5) wherein the age limit has been fixed that the candidates should not be less than 21 years of age and more than 32 years. In the mean time the applicants who had earlier approached Hon'ble High Court and their writ petition was disposed of with a direction only to issue corrigendum to the earlier advertisement has not been issued. As on date the applicants are age barred. As such the respondent authority while instead of issuing a fresh advertisement ought to have issued only corrigendum and incase they should issue fresh advertisement they have been protected to earlier advertisement of the year 2008 and 2012 respectively. If in the fresh advertisement appropriate age limit would have been accordingly fixed then the applicant would have been eligible to apply for the post. Even though for respondents pursuant to advertisement all these applicants have applied for the post but their applications have been rejected by the respondent authorities on the grounds of upper age limit as has been prescribed in the advertisement.

In that view of the matter, appropriate order may be passed by this Tribunal protecting the applicants keeping in view the earlier decision of the Hon'ble High Court in W.P.(C) No.10285 of 2008, W.P.(C) No.18594 of 2008 and W.P.(C) No.3868 of 2012.

Mr. Panigrahi, learned Addl. Standing Counsel submits that unless he obtain instruction from the respondent authorities he is not in a position to say anything on the merits of the case. Order of the Hon'ble Court has not been complied instead of order passed in W.P.(C) No.10285 of 2008, W.P.(C) No.18594 of 2008 and W.P.(C) No.3868 of 2012.

Be that as it may, issue notice on the question of admission specifically indicating therein that the matter is likely to be disposed of at the stage of admission.

Counter be filed by the respondent authorities within a period of four weeks and rejoinder, if any, be filed within one week thereafter.

Put up this matter five weeks after.

However, so far as interim prayer is concerned since the advertisement has already been issued and many candidates must have applied to face selection test, the selection test be conducted, result be published but no appointment be made without leave of this Tribunal.

However, after appearance and filing of the counter or otherwise the respondent authorities are at liberty to file appropriate application for modification/variation of the above order".

2.4. However, the order passed by the Tribunal on 09.12.2013 was modified vide order dtd.25.11.2014 with the following effect:-

"Heard Mr. P.K. Rout, learned counsel for the applicants, Mr. B.B. Mohanty, Mr. S.S. Das, learned counsel for the private respondents and Mr. R.K. Dash, learned Government Advocate.

This M.P. No.1394(C)/2014 (O.A. No.3990(C)/2013 has been filed by the State respondents with a prayer to vacate the interim order dtd.9.12.2013 and allow the respondent authority for appointment of VAWs in the interest of the State i.e., Bolangir Agric culture Range.

Similarly M.P. NO.1393(C)/2013 (O.A No.3988(C)/2013 has been filed by the State respondents with a prayer to vacate the interim order dtd.9.12.2013 and allow the respondent authority for appointment of VAW in the interest of the State i.e. Keonjhar, Agriculture Range.

Interim orders have been issued in these O.As No.3990(C)/2013 and O.A No.3988(C)/2013 in which it is stated that selection test be conducted, result be published but no appointment be made without leave of this Tribunal, the same interim order has been issued in O.A No.3548(C)/2013 on 17.1.2014.

Learned Govt. Advocate submits that due to acute shortage of VAWs in Bolangir and Keonjhar Agriculture Range, the Government programmes can not be implemented successfully. Most of the farmers will unaware of the technical message to be delivered by the field functionaries. The State respondents submitted that due to interim order of this Tribunal dtd.9.12.2013, no appointment orders have been issued. Hence, the interim order passed in the above O.As. may be vacated so that the State respondents may be able to issue appointment orders to the selected candidates.

Learned counsel for the applicants submits that appropriate orders may be issued protecting the interest of the applicants.

In view of the submissions made by the learned counsel for both sides, the interim order passed on 09.12.2013 and 17.1.2014 in O.A Nos.3990(c)/2013, O.A No.3998(C)/2013 and O.A. No.3548(c)/2013 are modified to the effect that leave is granted to State respondents to issue appointment orders in respect of selected candidates, but such appointments shall abide by the result of these O.As and this shall be reflected in all such appointment orders. In case applicants succeed in these O.As and are entitled to consequential appointments, junior most of candidates selected and given appointment shall have to make way for the applicants.

With these orders, the M.Ps. No. 1394(C)/2014 (O.A. No.3009(C)/2013) and M.P. No.1393(c)/2014 (O.A. No. 3988(C)/2013) are accordingly disposed of".

2.5. Mr. J.K. Rath, learned Senior Counsel appearing for the Petitioners in the 2013 matters and Mr. B.K. Hati, learned counsel for the Petitioners in 2023 applications vehemently contended that since the Director of Agriculture and Food Production, Odisha without following the relevant recruitment rules issued the

advisement on 18.05.2008 inviting application to fill up the post of VAW and lady VAW on contractual basis, the same was challenged before this Court in W.P.(C) No.10285/2008.The lead case being W.P.(C) No.10285/2008, this Court after giving a detailed discussion of the submission was pleased to quash the advertisement dtd.18.05.2008 and with a further direction to issue a corrigendum and to fix the last date of application afresh.But without following the direction of this Court so passed in its order dtd.14.08.2008, when a fresh advertisement was issued by the Deputy Director of Agriculture of respective districts inviting similar application for the vacant post of VAW on 05.12.2008, the same was again challenged in different writ petitions in W.P.(C) No.18942/2008 and batch.

2.**6**. This Court vide order dtd.03.02.2012 while holding that the advertisement in question has been issued contrary to the judgment rendered in W.P.(C) No.10285 of 2008, quashed the advertisement dtd.05.12.2008. While quashing the same, this Court permitted the Petitioners in some of the cases to move the authority for relaxation of upper age limit so that they can appear and face the recruitment with issuance of a corrigendum as directed by this Court in its order dtd.14.08.2008 in W.P.(C) No.10285/2008.

2.7. It is contended that without following the direction so issued by this Court in its order dtd.14.08.2008 in W.P.(C) No.10285 of 2008 by issuing a corrigendum to advertisement dtd.18.05.2008, when a fresh advertisement was issued by the Deputy Director of Agriculture, Bolangir Range on 04.10.2013 inviting application for the post of VAW on contractual basis, the matter is under challenge in the present batch of writ petitions.

2.8. It is contended that since this Court in its order dtd.14.08.2008 while quashing the advertisement issued by the Director of Agriculture and Food Production directed the said authority to issue a corrigendum, the said order having not been challenged by the State- authority, they are bound to follow the same by issuing a corrigendum to the advertisement dtd.18.05.2008. But without following the said direction with issuance of the corrigendum when a fresh advertisement was issued not by the Director of Agriculture and Food Production, in terms of the provisions contained under Rule-5(5) of the Recruitment & Training of Village Agricultural Workers Rules, 1981 (in short Rules) and the advertisement in question was issued by the Deputy Director of Agriculture, the same is under challenge in all the aforesaid Writ Petitions.

2.9. It is contended that since this Court in its order dtd.14.08.2008 clearly directed the Director of Agriculture to issue a corrigendum and it is the Director of Agriculture who is only competent to issue any advertisement for selection to the post of VAW as provided under Rule-5(5) of the Rules, the corrigendum should have been issued by the Director of Agriculture and Food Production. But without following the said direction when the Deputy Director of Agriculture, Bolangir issued a fresh advertisement on 05.12.2008, the same was again challenged in various

writ petitions.This Court vide order dtd.03.02.2012 quashed the said advertisement by reiterating the order passed in W.P.(C) No.10285 of 2008. But once again the impugned advertisement was issued on 04.10.2013 by the Dy. Director of Agriculture, who is not competent to issue such an advertisement.

2.10. It is contended that in view of the order passed by this Court on 03.02.2012 coupled with the order dtd.14.08.2008, the Director of Agriculture and Food Production should have issued the corrigendum to the advertisement dtd.18.05.2008. But once again without following the direction of this Court with issuance of a corrigendum, a fresh advertisement has been issued by the Deputy Director of Agriculture, who is not competent to issue any such advertisement, in view of Rule-5(5) of the Rules. Since the advertisement dtd.04.10.2013 was issued without following the order passed by this Court in two successive writ petitions and was also issued by an incompetent authority, the selection process undertaken in terms of the advertisement is vitiated. The matter when was challenged, the Tribunal, while issuing notice of the matter vide order dtd.09.12.2013 passed an interim order by restraining the Opposite Parties not to issue the appointment order without leave of the Tribunal. The said order though was modified vide order dtd.25.11.2014, but the Tribunal clearly held that in case the Petitioners succeed in the Original Application, junior most candidates selected and given appointment shall have to make way for the petitioners.

2.11. It is accordingly contended that since as provided under Rule-5(5) of the Rules, it is the Director who is only competent to issue the advertisement and the same having not been issued by the Director, the process of selection undertaken basing on the impugned advertisement so issued by the Deputy Director of Agriculture Bolangir Range on 04.10.2013 is vitiated.

2.12. It is contended that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner only and in no other manner. Since in the present case, the impugned advertisement has been issued without following Rule-5(5) of the Rules, not only the said advertisement but also the selection process conducted thereof is illegal and liable for interference of this Court.

In support of the aforesaid submission, Mr. Rath, learned Senior Counsel appearing for the Petitioners relied on the following decisions:-

1. **(1998) 8 SCC-266 (Chandra Kishore Jha vs. Mahavir Prasad & Others).**
2. **(2021) 6 SCC-707 (Opto Circuit India Limited vs. Axis Bank & Others)**
3. **Civil Appeal No.4807 of 2022 (arising out of SLP (Civil) No.19886 of 2019) (Union of India & Ors. vs. Mahendra Singh)**

2.13. Hon'ble Apex Court in Para-17 of the case in **Chandra Kishore Jha** has held as follows:-

> ***"17.*** *In our opinion insofar as an election petition is concerned, proper presentation of an election petition in the Patna High Court can only be made in the manner prescribed by Rule 6 of Chapter XXI-E. No other mode of presentation of an election petition is envisaged under*

the Act or the Rules thereunder and, therefore, an election petition could, under no circumstances, be presented to the Registrar to save the period of limitation. It is a well-settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. (See with advantage : Nazir Ahrnad v. King Emperor, 63 Indian Appeals 372=AIR 1936 PC 253; Rao Shiv Bahadw Singh & Anr. V. State of Vindhya Pndwh, 1954 SCR 1098 = AIR 1954 SC 322. State of Utter Pradesh v. Singhan Singh & Ors., AIR 1964 SC 358 = (1964) 1 SCWR 57] An election petition under the Rules could only have been presented in the open Court upto 16.5.1995 till 4.15 P.M. (working hours of the Court) in the manner prescribed by Rule 6 (supra) either to the Judge or the Bench as the case may be to save the period of limitation. That, however, was not done. However, we cannot ignore that the situation in the present case was not of the making of the appellant. Neither the designated election Judge before whom the election petition could be formally presented in the open Court nor the Bench hearing civil applications and motions was admittedly available on 16.5.1995 after 3.15 P.M., after the Obituary Reference since admittedly the Chief Justice of the High Court had declared that "the Court shall not sit for the rest of the day" after 3.15 P.M. Law does not expect a party to do the impossible - impossiblium nulla obligatioest as in the instant case, the election petition could not be filed on 16.5.1995 during the Court hours, as far all intent and purposes, the Court was closed on 16.5.1995 after 3.15 P.M".

2.14. Hon'ble Apex Court in Para-14 of the case in **Opto Circuit India Limited** has held as follows:-

"*14. This Court has time and again emphasised that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner alone and in no other manner. Among others, in a matter relating to the presentation of an Election Petition, as per the procedure prescribed under the Patna High Court Rules, this Court had an occasion to consider the Rules to find out as to what would be a valid presentation of an Election Petition in the case of Chandra Kishor Jha vs. Mahavir Prasad and Ors. (1999) 8 SCC 266 and in the course of consideration observed as hereunder: "It is a well settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner". Therefore, if the salutary principle is kept in perspective, in the instant case, though the Authorised Officer is vested with sufficient power; such power is circumscribed by a procedure laid down under the statute. As such the power is to be exercised in that manner alone, failing which it would fall foul of the requirement of complying due process under law. We have found fault with the Authorised Officer and declared the action bad only in so far as not following the legal requirement before and after freezing the account. This shall not be construed as an opinion expressed on the merit of the allegation or any other aspect relating to the matter and the action initiated against the appellant and its Directors which is a matter to be taken note in appropriate proceedings if at all any issue is raised by the aggrieved party".*

2.15. Hon'ble Apex Court in Para-14, 15, 16 & 17 of the case in **Union of India & Ors** has held as follows:-

14*. The argument of Mr. Bhushan that use of different language is not followed by any consequence and, therefore, cannot be said to be mandatory is not tenable. The language chosen is relevant to ensure that the candidate who has filled up the application form alone appears in the written examination to maintain probity. The answer sheets have to be in the language chosen by the candidate in the application form. It is well settled that if a particular procedure in filling up the application form is prescribed, the application form should be filled up following that procedure alone. This was enunciated by Privy Council in the Nazir Ahmad v. King- Emperor9, wherein it was held that "that where a power is given to*

do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."

15. *A three Judge Bench of this Court in a judgment reported as Chandra Kishore Jha v. Mahavir Prasad & Ors.10, held as under:*

"17.....It is a well-settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. (See with advantage: Nazir Ahmad v. King Emperor [(1935-36) 63 IA 372 : AIR 1936 PC 253 (II)] , Rao Shiv Bahadur Singh v. State of V.P. [AIR 1954 SC 322 : 1954 SCR 1098] , State of U.P. v. Singhara Singh [AIR 1964 SC 358 : (1964) 1 SCWR 57] .) An election petition under the rules could only have been presented in the open court up to 16-5-1995 till 4.15 p.m. (working hours of the Court) in the manner prescribed by Rule 6 (supra) either to the Judge or the Bench as the case may be to save the period of limitation. That, however, was not done....."

16*. The said principle has been followed by this Court in Cherukuri Mani v. Chief Secretary, Government of Andhra Pradesh & Ors.11 wherein this Court held as under:*

"14. Where the law prescribes a thing to be done in a particular manner following a particular procedure, it shall be done in the same manner following the provisions of law, without deviating from the prescribed procedure....." 9 1936 SCC OnLine PC 41 10 (1999) 8 SCC 266 11 (2015) 13 SCC 722.

17*. Similarly, this Court in Municipal Corporation of Greater Mumbai (MCGM) v. Abhilash Lal & Ors.12 and OPTO Circuit India Limited v. Axis Bank & Ors.13 has followed the said principle. Since the advertisement contemplated the manner of filling up of the application form and also the attempting of the answer sheets, it has to be done in the manner so prescribed. Therefore, the reasoning given by the Division Bench of the High Court that on account of lapse of time, the writ petitioner might have attempted the answer sheet in a different language is not justified as the use of different language itself disentitles the writ petitioner from any indulgence in exercise of the power of judicial review".*

2.16. It is also contended that because of the in-action of Opposite Party No.2 in not following the direction issued by this Court, since the impugned advertisement was issued by the Deputy Director of Agriculture, Bolangir Range on 04.10.2023, Petitioners could not appear in the selection process and accordingly were deprived from being considered from the purview of such selection.

2.17. It is also contended that in the meantime most of the Petitioners have crossed the age limit to take part in any further selection process and they suffered and lost their livelihood due to inaction of Opposite Party No.2 in not issuing a corrigendum to the initial advertisement issued on 14.08.2008. Petitioners in the alternate were eligible to get suitable compensation for such illegal action of Opposite Party No.2.

In support of his aforesaid submission, learned Senior Counsel for the Petitioners relied on the decisions of this Court passed on 15.02.2023 in WPC(OA) No.2966 of 2016 ***(Harapriya Nanda vrs. State of Odisha & Others).*** This Court placing reliance on the decision reported in the case ***Rabindranath Ghosal vrs. Calcutta University & Others reported in (2002) 7 SCC-478*** and a decision of the High Court of Gujarat in the case of ***Nilubahen Gordhanbhai Machhi vrs. State of Gujarat*** held the Petitioner therein to get compensation of Rs.5,00,000/-. The order passed by this Court in Para-5, 5.1, 5.2, 7.4. and 7.5 are quoted hereunder:-

"5. Taking into account the submissions made by the learned Addl. Government Advocate, Mr. Roy, learned counsel appearing for the Petitioner contended that since due to the admitted latches of the Opposite Parties, the Petitioner was deprived from being appointed as a Stipendiary Engineers in the year 1994 and her claim was never considered in spite of several approaches, the Petitioner in view of such illegalities meted out to her, entitled to get suitable compensation as deem fits and proper by this Court for such admitted negligence on the part of the Opposite Parties in keeping her out of employment.

Learned counsel for the Petitioner relies on a decision of this Court reported in ***1998(I) OLR-108*** and another decision of the Hon'ble Apex Court in the case of ***Rabindranath Ghosal vrs Calcutta University & Others*** reported in ***(2002) 7 SCC-478***.

5.1. Hon'ble Apex Court in Para-9 of the case in ***Rabindranath Ghosal*** has held as follows:-

"9. The Courts having the obligation to satisfy the social aspiration of the citizens have to apply the tool and grant compensation as damages in a public law proceedings. Consequently when the Court moulds the relief in proceedings under Articles 32 and 226 of the Constitution seeking enforcement or protection of fundamental rights and grants compensation, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizens. But it would not be correct to assume that every minor infraction of public duty by every public officer would commend the Court to grant compensation in a petition under Articles 226 and 32 by applying the principle of public law proceeding.The Court in exercise of extraordinary power under Articles 226 and 32 of the Constitution, therefore, would not award damages against public authorities merely because they have made some order which turns out to be ultra vires, or there has been some inaction in the performance of the duties unless there is malice or conscious abuse. Before exemplary damages can be awarded it must be shown that some fundamental right under Article 21 has been infringed by arbitrary or capricious action on the part of the public functionaries and that the sufferer was a helpless victim of that act".

5.2. Mr. Ray, also relies on another decision of the High Court of Gujarat passed in the case of ***Nilubahen Gordhanbhai Machhi vrs. State of Gujarat***. In Para-16 and 19.6 has held as follows:-

"16. *Furthermore, insofar as the submissions on behalf of the State that a candidate does not get an indefeasible right merely on account of name of the said candidate figuring in the select/waiting list, in the considered opinion of this Court, the State cannot be heard to submit the said contention more particularly when the State itself had recommended for operating the waiting list, which had been turned down by the GPSC. In any case, in the considered opinion of this Court, the proposition that a candidate whose name appearing in the select list does not get an indefeasible right for appointment is not a completely unqualified proposition, rather such proposition has been clarified by the Hon'ble Apex Court by holding that the State cannot act in an arbitrary manner and the decision not to fill up vacancies has to be taken bona fide for appropriate reasons. This Court at this stage proposes to refer to the decision of the Constitutional Bench of the Hon'ble Apex Court in case of* ***Shankarsan Dash Vs. Union of India, reported in (1991) 3 SCC 47****. Paragraphs 7 and 8 of the said decision being relevant for the purpose are reproduced herein below for benefit*:-

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha and Others, [1974] 1 SCR 165; Miss Neelima Shangla v. State of Haryana and Others, [1986] 4 SCC 268 and Jitendra Kumar and Others v. State of Punjab and Others, [1985] 1 SCR 899.

8. In State of Haryana v. Subhash Chander Marwaha and Others, (supra) 15 vacancies of Subordinate Judges were advertised, and out of the selection list only 7, who had secured more than 55% marks, were appointed, although under the relevant rules the eligibility condition required only 45% marks. Since the High Court had recommended earlier, to the Punjab Government that only the candidates securing 55% marks or more should be appointed as Subordinate Judges, the other candidates included in the select list were not appointed. They filed a writ petition before the High Court claiming a right of being appointed on the ground that vacancies existed and they were qualified and were found suitable. The writ application was allowed. While reversing the decision of the High Court, it was observed by this Court that it was open to the Government to decide how MANY appointments should be made and although the High Court had appreciated the position correctly, it had ``somehow persuaded itself to spell out a right in the candidates because in fact there were 15 vacancies''. It was expressly ruled that the existence of vacancies does not give a legal right to a selected candidate. Similarly, the claim of some of the candidates selected for appointment, who were petitioners in Jitendra Kumar and Others v. State of Punjab and Others, was turned down holding that it was open to the Government to decide how many appointments would be made. The plea of arbitrariness was rejected in view of the facts of the case and it was had that the candidates did not acquire any right merely by applying for selection or even after selection. It is true that the claim of the petitioner in the case of Miss Neelima Shangla v. State of Haryana was allowed by this Court but, not on the ground that she had acquired any right by her selection and existence of vacancies. The fact was that the matter had been referred to the Public Service Commission which sent to the Government only the names of 17 candidates belonging to the general category on the assumption that only 17 posts were to be filled up. The Government accordingly made only 17 appointments and stated before the Court that they were unable to select and appoint more candidates as the Commission had not recommended any other candidate. In this background it was observed that it is, of course, open to the Government not to fill up all the vacancies for a valid reason, but the selection cannot be arbitrarily restricted to a few candidates notwithstanding the number of vacancies and the availability of qualified candidates; and there must be a conscious application of mind by the Government and the High Court before the number of persons selected for appointment is restricted. The fact that it was not for the Public Service Commission to take a decision in this regard was emphasised in this judgment. None of these decisions, therefore, supports the appellant".

xxx xxx xxx

19.6. Since this Court has come to a conclusion that the petitioners were forced to approach this Court on account of GPSC relying upon a Circular of the Government or on such portion of the Circular which has been declared to be arbitrary and violative of Article 14 and 16 of the Constitution, therefore, the respondent No.2 GPSC is required to be saddled with costs, which would be payable to the petitioners. Costs quantified at Rs.25,000/- in each of the petitions is imposed upon GPSC, which shall be paid by GPSC through the Registry of this Court to the respective petitioners".

xxx xxx xxx

7.4. In view of the order passed by the Tribunal under Annexure-8, which was not interfered with when challenged before this Court in W.P.(C) No.6177 of 2007, it is the view of this Court that the prayer as made in the Writ Petition cannot be entertained at present. However, taking into account the sufferings meted out to the Petitioner and the alleged discrimination meted out to her, this Court basing on the decisions as cited (supra) is inclined to held the Petitioner entitled to get compensation as the Petitioner because of the inaction of the Opp. Parties was deprived of her livelihood, which amounts to violation of Article-21 of the Constitution of India.

7.5. This Court taking into account the entireties of the facts while holding the Petitioner entitled to get compensation of Rs.5,00,000/- (Rupees Five Lakhs) directs the Opposite Party No.3 to release the amount within a period of two months from the date of receipt of this order".

3. Learned State Counsel basing on the stand taken in the counter affidavit when contended that instead of issuing a corrigendum as directed, as the grievances of the Petitioners in W.P.(C) No.10285 of 2008 and W.P.(C) No.18942 of 2008 and batch was taken care of, by the Dy. Director of Agriculture while issuing the advertisement on 04.10.2013, there was no requirement to issue a corrigendum.

3.1. It is also contended that this Court in its order dtd.03.02.2012, though quashed the subsequent advertisement issued on 05.12.2008 but permitted the Petitioners in some of the writ petitions to move the authority seeking relaxation of upper age limit for appearing the recruitment test, as in the meantime they have crossed the upper age limit so prescribed under the 1981 Rules. When prayer was made for relaxation of upper age limit by the candidates belonging to the District of Bolangir, the same was considered and rejected by the Director of Agriculture and Food Production vide order dtd.25.10.2013.

3.2. It is accordingly contended that since the ground on which the advertisement issued by the Director of Agriculture and Food Production on 18.05.2008 and by the Deputy Director of Agriculture on 05.12.2008 were quashed by this Court, was taken care of by the Deputy Director of Agriculture, Bolangir Range while issuing the advertisement on 04.10.2013, which is subject matter of challenge in all these writ petitions, there was no necessity to issue a corrigendum as directed by this Court.

3.3. It is also contended that basing on the advertisement so issued on 04.10.2013 not only the selection process was undertaken but also selected candidates have been

provided with the appointment in the meantime. But since the Petitioners' claim for relaxation of age was not allowed, they have not participated in the selection process.

3.4. It is also contended that in terms of the order passed by this Court in W.P.(C) No.10285/2008 and W.P.(C) No.18942/2008 and batch, Government in the Department of Agriculture vide letter dtd.22.11.2008 requested the Director of Agriculture & Food Production to revise the advertisement so issued by him since VAW is a cadre post coming under different range and the Deputy Director of Agriculture, Bolangir Range is the appointing authority.

3.5. It is contended in terms of the letter issued by the Government on 22.11.2008 and subsequent letter issued by the Director on 13.07.2013, Deputy Director of Agriculture issued the advertisement on 04.10.2013 by incorporating the requirement as provided under the 1981 Rules.

3.6. It is lastly contended that since the ground on which the advertisement dtd.18.05.2008 and 05.12.2008 were quashed by this Court in its order dtd.14.08.2008 and 03.02.2012, were incorporated and taken care of while issuing the fresh advertisement on 04.10.2013 by the Deputy Director of Agriculture, it amounts to compliance of the direction of this Court and there is no requirement to issue a corrigendum as directed.

4. Considering the stand taken by the Writ Petitioners and the State Counsel, this Court passed an order on 25.04.2023 to the following effect:-

> *"2. Heard in Part.*
>
> *3. As requested by Mr. D.K. Mohanty, learned ASC, list this matter on 03.05.2023 in order to enable him to obtain the instruction whether pursuant to the order passed by this Court on 14.08.2008 in W.P.(C) No. 10285 of 200, a corrigendum was issued to the advertisement dtd.18.05.2008".*

5. Pursuant to the said order, instruction was provided by the Chief District Agriculture Officer, Bolangir. Basing on the said instruction, learned Addl. Standing Counsel contended that since the ground on which, this Court quashed the advertisement dtd. 18.05.2008 in W.P.(C) No.10285 of 2008 and advertisement dtd.05.12.2008 W.P.(C) No.18942 of 2008, were incorporated in the advertisement issued on 04.10.2013, there was no occasion to issue a corrigendum as directed by this Court in W.P.(C) No.10285 of 2008.

5.1. It is accordingly contended that the advertisement issued on 03.10.2013 by the Deputy Director of Agriculture, Bolangir Range since has incorporated the objections so raised by the writ petitioners and the selection process was not only undertaken but also completed, the Petitioners have no further grievance to make.

6. On being provided with the instruction so produced by learned Addl. Standing Counsel, Mr. J.K. Rath, learned Senior Counsel while making his submission contended that as provided under Rule-5(5) of the 1981 Rules, it is the

Director of Agriculture who is only competent to issue the advertisement for recruitment to the post of VAW and the 1st advertisement was also issued on 18.05.2008 by the Director of Agriculture in accordance with Rule-5(5). But the said advertisement when was quashed by this Court in its order dtd.14.08.2008, it is the Director who has to issue a corrigendum as directed and not by permitting the Deputy Director of Agriculture to issue a fresh advertisement even though the same was permitted by the Government vide letter dtd.22.11.2008 and by the Director vide letter dtd.13.09.2013.

6.1. It is accordingly contended that since the impugned advertisement dtd.04.10.2013 has not only been issued without complying the earlier order of this Court so passed on 14.08.2008 and 03.02.2012, but also in violation of Rule-5(5) of the 1981 Rules, the said advertisement having not been issued by a competent authority, the same is not only illegal but also the selection process undertaken in terms of the said advertisement is vitiated.

7. Considering the submissions of Mr.Rath, learned Senior Counsel, this Court passed an order on 17.07.2023 to the following effect:-

> *"2. Heard Mr. J.K. Rath, learned Senior Counsel for the petitioner and Mr. Balabantaray, learned Addl. Govt. Advocate for the State.*
>
> *3. It is contended that as per Rule-5(5) of the Recruitment & Training of Village Agricultural Workers Rules, 1981, it is the Director who is only competent to issue advertisement for recruitment to the post in question. In the instant case the first advertisement of the year 2008 was issued by the Director in accordance with Rule-5(5). But when the advertisement was quashed by this Court, the second advertisement was issued by the Deputy Director of Agriculture, which is not in accordance with the Rule. But the said advertisement was also quashed by this Court in its order dated 03.02.2012. The 3rd advertisement which is the subject matter of challenge in the Writ Petition has been issued by the Deputy Director of Agriculture once again vide Annexure-5. It is contended that since it is mandatory that the Director has to issue the advertisement in terms of Rule 5(5), the impugned advertisement since has been issued by an incompetent authority, the same is not sustainable, bereft of the other grounds taken in the Writ Petition.*
>
> *4. Mr. Balabantaray, learned Addl. Govt. Advocate is directed to obtain instruction on the aforesaid submission of Mr. Rath, learned Senior Counsel. The rules as well as the notification dated 28.08.1998 and 06.06.2000 so produced by Mr. Rath, learned Senior Counsel in Court, be kept in record.*
>
> *5. As requested by Mr. Balabantaray, learned Addl. Govt. Advocate, list this matter on 02.08.2023 along with all connected cases.*
>
> *6. Free copy to learned Addl. Govt. Advocate for compliance".*

8. Pursuant to the order passed by this Court on 17.07.2023 instruction is shape of an affidavit was filed on behalf of Opposite Party Nos.1 and 2. Basing on the said instruction, learned Addl. Standing Counsel contended that post of VAW is a district cadre post and Opposite Party No.1 vide letter dtd.22.11.2008 permitted the Deputy Director of Agriculture in respective Districts to issue fresh advertisement, after the advertisement issued by the Director of Agriculture on 18.05.2008 was quashed by this Court in its order dtd. 14.08.2008. It is accordingly contended that no illegality

has been committed with issuance of the advertisement dtd.04.10.2013 by the Deputy Director of Agriculture in their respective districts.

8.1. The stand taken by Opposite Party Nos.1 and 2 in Para-6, 7 and 8 of the affidavit dtd.01.08.2023 are quoted hereunder:-

> ***"6.*** *That, so far as competency of the Deputy Director, Agriculture, Bolangir Range, the Opp. Party No.3 in issuing the advertisement dtd.4.10.2013 vide Annexure-5(impugned) it is submitted that, as it would reveal from the Resolution dtd.31.8.1998 vide Annexure-E/1, following the order contained in O.A No.1548/1995, the post of VAW was converted to district cadre.*
>
> ***7.*** *That, following the resolution dtd.3.18.1998 vide Annexure-E/1 which has the reference in order No.1020 dtd.9.7.1999 vide Annexure-F/1 of the Office of Director, Agriculture and Food Production, Odisha, Bhubaneswar, the guideline has been set out for the VAW to exercise their option to be adjusted in different districts.*
>
> ***8.*** *That, as it reveals from letter No.33603 dtd.22.11.2008 of the Govt. of Odisha, in the department of Agriculture, it has been indicated that, since VAW is a range cadre post and DDAs are appointing authority, fresh advertisement may be issued by respective Deputy Director of Agriculture in their respective districts. Accordingly the advertisement dtd.5.12.2008 vide Annexure-3 has been issued by the Deputy Director of Agriculture, Keonjhar Range, Keonjhar. So also the Advertisement dtd.4.10.2013 vide Annexure-5 has been issued by the Deputy Director of Agriculture, Bolangir Range, Bolangir pursuant to aforementioned govt. resolution and direction. True copy of letter No.33603 dtd.22.11.2008 is filed herewith as Annexure-K/1".*

8.2. It is accordingly contended that since the post of VAW is a district cadre post and subsequent to the order passed by this Court on 14.08.2008, Government-Opposite Party No.1 in the Department of Agriculture permitted the Director to issue necessary instruction to respective Deputy Director of Agriculture to issue fresh advertisement and the advertisement has been issued by the Deputy Director of Agriculture, there is no illegality or irregularity with issuance of such an advertisement and the section undertaken thereof.

9. I have heard Mr. J.K. Rath, learned Sr. Counsel for the Petitioners in 2013 application, Mr. B.K. Hati, learned counsel for the Petitioners in 2023 application and Mr. H.K. Panigrahi, learned Addl. Standing Counsel appearing for the State-Opposite Parties. On their consent, these matters were taken up for final disposal at the stage of admission.

10. Having heard learned counsel for the Parties and after going through the materials available on record, it is found that without following the stipulation contained in the relevant recruitment rules i.e. Recruitment and Training of Village Agricultural Workers, Rules, 1981 when Director of Agriculture issued an advertisement on 18.05.2008 to fill up the post of VAW and lady VAW on contractual basis in different districts which includes the District of Bolangir, the said advertisement was challenged before this Court in W.P.(C) No.10285 of 2008. This Court vide order dtd.14.08.2008 while quashing the advertisement directed the Opposite Party No.2 to issue a corrigendum and to fix the last date of application afresh.

10.1. On the face of such direction and without issuance of a corrigendum by the Director of Agriculture, who had issued the advertisement on 18.05.2008, fresh advertisement when was issued by the respective, Deputy Director of Agriculture of different districts, the same was again challenged before this Court in W.P.(C) No.18942 of 2008 and batch.This Court vide order dtd.03.02.2012 taking into account the earlier order passed on 14.08.2008 in W.P.(C) No.10285/2008, quashed the advertisement issued by the Deputy Director of Agriculture on 05.12.2008. On the face of the order passed by this Court on 14.08.2008 and 03.02.2012, no corrigendum was issued to the advertisement dtd. 18.05.2008 by the Director of Agriculture who as per the considered view of this Court is the competent authority to issue such advertisement in terms of Rule-5(5) of the 1981 Rules. Rule-5(5) of the Rules, 1981 is quoted hereunder:-

> *Rule-5(5): The Director of Agriculture & Food Production shall advertise in leading oriya dailies and call for application in the prescribed form as per schedule-1 indicating the tentative number of trainees to be selected from each Revenue District, preferably in the month of May of the year".*

10.2. Since as provided under Rule-5(5) of the 1981 Rules, it is the Director of Agriculture of Food Production, who is competent to issue advertisement in leading oriya dailies and call for application in the prescribed form as per Schedule-I, to be selected from each Revenue District, the advertisement at any cost could not have been issued by the Deputy Director of Agriculture of respective Districts including the district of Bolangir.

10.3. Pursuant to the order passed by this Court on 25.04.2023, it is also admitted by Opposite Party that in terms of the order passed by this Court on 14.08.2008, no corrigendum was issued by the Director of Agriculture and Food Production. The stand taken by Opposite Party that the ground on which the advertisement dtd.18.05.2008 and 05.12.2008 were quashed by this Court were incorporated /provided in the advertisement issued by the respective Deputy Director of Agriculture on 04.10.2013 is not acceptable,as this Court in its order dtd.14.08.2008, while quashing the 1st advertisement issued on 18.05.2008 by the Director of Agriculture, directed him to issue a corrigendum. Since the order dtd.14.08.2008 was never assailed by the State-Opposite Party, they are bound to comply the said order by issuing a corrigendum. Since at no point of time a corrigendum was issued in terms of the said order and a fresh advertisement was issued by respective Deputy Director of Agriculture on 05.12.2008, the same was again quashed by this Court in its order dtd.03.02.2012 in W.P.(C) No.18942/2008 and batch. On the face of the order passed by this Court on 14.08.2008 and 03.02.2012, no corrigendum was issued by the Director of Agriculture to the advertisement dtd.18.05.2008.

10.4. Since the advertisement dtd.04.10.2013 was issued by the Deputy Director of Agriculture in respect of respective districts including the District of Bolangir, in view of the provisions contained under Rule-5(5) of the 1981 Rules, placing reliance on the decision in the case of ***(1998) 8 SCC-266 (Chandra Kishore Jha vs. Mahavir***

Prasad & Others, (2021) 6 SCC-707 (Opto Circuit India Limited vs. Axis Bank & Others) & Civil Appeal No.4807 of 2022 (arising out of SLP (Civil) No.19886 of 2019) (Union of India & Ors. vs. Mahendra Singh) as per the considered view of this Court Deputy Director of Agriculture, Bolangir is not competent to issue such advertisement. Since as provided under Rule-5(5), the Director of Agriculture and Food Production is required to issue the advertisement and in the instant writ petitions the impugned advertisement has been issued by the Deputy Director of Agriculture Bolangir Range on 04.10.2013, this Court placing reliance on Rule-5(5) of the Rules is of the view that the impugned advertisement dtd.04.10.2013 has been issued by an incompetent authority and that too without issuance of a corrigendum by the Director of Agriculture to the advertisement dtd.18.05.2008.

10.5. Therefore, this Court in view of such material irregularity in the advertisement dtd. 04.10.2013, is inclined to quash the same. In view of such quashing of the advertisement any selection process undertaken in terms of the said advertisement is also quashed. Since because of the admitted latches on the part of the Opposite Party Nos.1 and 2 in not issuing a corrigendum on the face of the order passed by this Court on 14.08.2008 and 03.02.2012, the Petitioners in all these cases could not get a chance to participate in the selection process and in the process lost their livelihood, placing reliance on the decision in the case of ***Harapriya Nanda*** as cited (supra), this court directs Opposite Party No.1 to pay compensation amount of Rs.5,00,000/- each to each of the Petitioners. The compensation as directed be paid within a period of one (1) month from the date of receipt of this order.

11. With the aforesaid observations and directions, all the Writ Petitions stand disposed of.

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2024 (I) ILR-CUT-272

BIRAJA PRASANNA SATAPATHY, J.

W.P.(C) NO. 21396 OF 2023

NIVA NAYAK .....Petitioner

-V-

F.M. UNIVERSITY & ORS. .....Opp.Parties

SERVICE LAW – Appointment – Whether change in procedure / criteria of selection by the commission for selection after the participations of the candidates in the selection process is admissible? – Held, No – Since no cut-off mark was ever prescribed either in the advertisement or in first statute, the ground of rejection of the candidature of petitioner is not sustainable.

(Paras 8-11)

Case Laws Relied on and Referred to :-

1. (2008) 3 SCC 512 : K. Manjusree Vs State of Andhra Pradesh & Anr.
2. (2022) 11 SCC 742 : Goa Public Service Commission Vs. Pankaj Rane & Ors.
3. (2020) 20 SCC 209: Ramjit Singh Kardam and others Vs. Sanjeev Kumar & Ors.

For Petitioner : M/s.S.K. Das, P.K. Behera & N. Jena.
For Opp.Parties : M/s. Mr. D. Mohapatra, Mr. N.K.Sahu, Mr.K.C.R. Mohapatra

JUDGMENT Date of Hearing:14.08.2023 : Date of Judgment:05.12.2023

BIRAJA PRASANNA SATAPATHY, J.

1. The Petitioner has filed the present Writ Petition challenging the communication issued by the Registrar Fakir Mohan University, Vyasa Vihar (North Campus), (in short'University') under Annexure-9, wherein the claim of the Petitioner for her appointment as against the post of Associate Professor in the discipline of Chemistry,pursuant to the selection process initiated vide advertisement dtd.10.07.2019 under Annexure-1 was rejected.

2. It is the case of the Petitioner that pursuant to the advertisement issued by the University on 10.07.2019 under Annexure-1 for the post of Associate Professor in different discipline, Petitioner made her application in respect of the discipline Chemistry as an Unreserved (Women) category candidate. In the advertisement issued under Annexure-1 as against two posts of Associate Professor so advertised in the discipline of Chemistry, one was reserved for Unreserved (Male) and the other one for Unreserved (Women) candidate. Pursuant to the said advertisement issued under Annexure-1, Petitioner made her application on 02.08.2019 vide Annexure-2 and the application of the Petitioner being found in order in all respect, vide Annexure-3, Petitioner was called to appear the interview on 16.03.2020 and for verification of documents on the date of interview itself.

2.1. It is contended that in terms of such intimation issued under Annexure-3, Petitioner appeared in the interview. However after due verification of all the documents as required, when both the posts of Associate Professor in the discipline of Chemistry was filled up by Unreserved (Male) candidates and it was indicated in the proceeding of the meeting of the Selection Committee so held on 16.03.2020 under Annexure-5, that since no women candidates were found suitable, a male candidate was selected as against UR (Women) category, Petitioner challenging such action of the University in declaring her unsuitable with the recommendation made in favour of Opposite Party Nos.5 & 6 approached this Court in W.P.(C) No.19275 of 2021, challenging the decision of the Selection Committee so issued under Annexure-5. Petitioner prayed for the following relief in W.P(C) 19275 of 2021.

> *"Under the above circumstances, it is therefore humbly prayed that the Hon'ble Court be graciously pleased to quash the entire selection of Associate Professor in PG Department of Chemistry of Fakir Mohan University under Annexure-5 and also quash the consequential appointments of the Opposite Party No.5 and 6 thereof;*

And further the Hon'ble Court be pleased to direct Opposite Parties No.1 and 3 to appoint an women candidate against the UR (Women) post of Associate Preofessor in Chemistry by an eligible women candidate preferably the petitioner, who has better academic achievements, experiences and publications then all other women candidate and to grant all consequential service and financial benefit within a stipulated period as deem fit and proper".

2.2. This Court after hearing learned counsels appearing for the Parties and after going through the materials available on record, disposed of the writ petition vide order dtd.09.09.2022. Since it was the stand of the Petitioner in the earlier writ petition that the post meant for UR (Women) candidate cannot be filled up by UR (Male) category candidates, because of the provisions contained under Odisha Civil Services (Reservation of Vacancies for Women in Public Services) Rules, 1994 (in short 1994 Rules) and the method of selection prescribed in the amended Odisha Universities First Statute, 1990, this Court while disposing the writ petition vide order under Annexure-8 issued the following direction on the University. The view of this Court reflected in Para-7 and the direction of this Court reflected in Para-8 of the order are quoted hereunder:-

"7. *In such view of the matter, this Court is of the view that since the reservation of women candidate flaws from the mandate of the Constitution of India, the said constitutional mandate has to be strictly followed. In view of such mandate, the Selection Committee should relook the selection process especially with respect to selection of Associate Professor in the Department of Chemistry of Fakir Mohan University, Vyasa Vihar, District-Balasore, considering the Rules and the Advertisement dated 10.07.2019 under Annexure-1.*

8. *In view of the above, let the University relook the entire issue afresh as stated above taking into account the Rules and the Advertisement dated 10.07.2019 under Annexure-1 within a period of two months from today".*

2.3. The order passed by this Court on 09.09.2022 was further modified vide order dtd.21.11.2012.The modified order dtd. 21.11.2022 is quoted hereunder:-

"I.A. No.15033 of 2022

1. *This matter is taken up through hybrid arrangement.*

2. *This is an application correction of the order dated 09.09.2022 passed in W.P.(C) No.19275 of 2021.*

3. *Heard.*

4. *Considering the averments made in the I.A., the prayer for modification is allowed. The modified paragraphs i.e., 6 & 8 of the order are reproduced hereunder and read as such.*

6. However, it is also true that this Court cannot sit as a Super Selection Committee to decide as to whether the Petitioner is suitable or not. It is also quite apparent that the reason for unsuitability of the present Petitioner has not been reflected in the Resolution of the Selection Committee.

xxx xxx xxx

8. In view of the above, let the University relook the entire issue afresh as stated above taking into account the Rules and the Advertisement dated 10.07.2019 under Annexure-1 within a period of one month from today i.e. 21st of November, 2022.

5. With the aforesaid modification, the I.A stands disposed of".

2.4. It is contended that without following the direction so contained in order dtd.09.09.2022 and so modified vide order dtd.21.11.2022, Opposite Party-University by taking a new plea that the Petitioner since could not secure the required cut-off

mark of 50%, the Selection Committee did not found her suitable and opined that due to non-availability of suitable women candidate, the post so reserved for UR (Women) category was filled up by UR (Male) category, candidates vide the impugned communication issued on 19.04.2023 under Annexure-9. The Present Writ Petition has been filed *inter alia* challenging the order of the University so issued by Opposite Party No.1 on 19.4.2023 under Annexure-9.

3. Learned counsel for the Petitioner contended that the Petitioner with having the requisite qualification and the eligibility in all respect made her application as against the post of Associate Professor in the discipline of Chemistry, pursuant to the advertisement issued by the University on 10.07.2019 under Annexure-1. The eligibility criteria reflected in the said advertisement as against the post of Associate Professor is quoted hereunder:-

> ***"B. Associate Professor***
> *Eligibility*
>
> *(i) A good academic record, with a Ph.D Degree in the concerned/allied/relevant disciplines.*
>
> *(ii) A Master's Degree with at least 55% marks (or an equivalent grade in a point-scale, wherever the grading system is followed)*
>
> *(iii) A minimum of eight years of experience of teaching and/or research in an academic/research position equivalent to that of Assistant Professor in a University, College or Accredited Research Institution/industry with a minimum of seven publications in the peer-review or UGC-listed journals and a total research score of Seventy-Five (75) as per the criteria given in Appendix-II, Table 2 of the UGC Regulation 2018".*

The Petitioner in terms of Anneuxre-1 made her application for the post of Associate Professor in the discipline of Chemistry under Annexure-2 and along with her application, Petitioner enclosed all the documents in support of her teaching experience as well as publication of Journals on 02.08.2019. The application of the Petitioner so submitted under Annexure-2 having been found in order in all respect, Petitioner vide letter dtd.26.02.2020 so issued by Opposite Party No.1 under Annexure-3, was directed to appear in the interview, which was fixed to 16.03.2020 and for verification of all documents.

3.1. It is contended that the selection for the post of Associate Professor in terms of Annexure-1 was required to be conducted in terms of the provision contained in the amended Schedule-A of Odisha Universities First Statute, 1990. Schedule-A of the Odisha Universities First Statute, 1990 prescribed the method of evaluation of the candidates for different teaching post in the University. The evaluation as prescribed in the amended Schedule-A of the First Statute is quoted hereunder:-

> "Amendment of Statute-3
>
> "2. In the Orissa Universities First Statutes, 1990 (hereinafter referred to as the said statutes), in clause (ii) of sub-statute(5) if statute 4, after the word "Professor" the comma and the words "Reader and Lecturer" shall be inserted.
>
> Amendment of Statute-258 Schedule-'A'
>
> 3. In the said statutes, for Schedule 'A' the following Schedule shall be substituted, namely:-

"SCHEDULE-'A'
(Statute-258)

Evaluation of candidates for different teaching post in the University (Professor, Reader, Lecturer)

(1) GENERAL CAREER (30 MARKS)

(A)	1st Class	2nd Class	3rd Class
(i) H.S.C.	4	28	1
(ii) Intermediate (+2)	4	2	1
(iii) Degree. Honours	8	4	1.5. (pass)
(iv) Distinction	2	2	2 (pass)
(v) P.G. Degree			
75-100%	12		
65-74%	0		
55-64%	0		
45-54%	4".		

(b) Marks for matriculation and Intermediate may be re-distributed as follows in the case of candidate passing Higher Secondary/ Pre-University/Pre-Professional etc. in case where Higher Secondary Examination is initial assessable examination.4.S.6. mark (of 4.2.1) be added to it making it 6.3 and 1.5. for I, II and III division.

			1st Class	2nd Class	3rd Class
(i)	Higher Secondary	6	3	1.5	
(ii)	Pre-University	2	1	0.5	
(iii)	Pre-Profession	2	1	0.5	

(c) In case of candidates from Universities/ Institutions which follow the system of grade their grades shall be converted to mark as under-

'C' Grade	-75-100%
'A' Grade	-65-74%
'B' Grade	-55-64%
'C' Grade	-45-54%
'D' Grade	-35-44%

(d) In the case of candidates with more than one Bachelor's Degree, only the Degree in the concerned subject shall be awarded marks and the Division obtained will be treated at par with the Honours.

2. RESEARCH DEGREE : 20 MARKS)

M.Phil	-03 marks
Ph.D. Degree	-10 marks
D.Sc.D.Litt.	-12 marks
M.Phil + Ph.D.	-12 marks
M.Phil+D.Sc./D.Litt	-14 marks
Ph.D + D.Sc./D.Sc./D.Litt	-20 marks
M.Phil+ Ph.D.+ D.Sc./D.Litt	-20 marks

3. TEACHING EXPERIENCE (10 MARKS)

(For each completed year one mark in case of P.G. Teaching. 0.75 marks for Honours teaching and 0.5 marks Graduate level teaching subject to a maximum of 10 marks over and above the minimum prescribed years).

4. Ph. D GUIDANCE (5 MARKS)

One mark shall be awarded for each Ph.D. awarded under the guidance of the candidate subject to a maximum of 5 marks.

5. RESEARCH PUBLICATIONS (15 MARKS)

(IN MARKS FOR PUBLICATION IN International Journal and 5 marks for publication in the National Journals).

6. VIVAVOCE (15 MARKS)
7. C.C.Rs Performance Appraisal Report (5 marks)".

3.2. It is contended that since as against two posts of Associate Professor in the discipline of Chemistry, one post was reserved for UR (Women) category, Petitioner having made her application as against the said category, the provisions contained under the Odisha Civil Service (Reservation of Vacancy for Women in Public Services) Rules, 1994 (in short 1994 Rules) is required to be followed.

3.3. It is contended that Rule-4 of the aforesaid 1994 Rules provides as under:-

*"**4**. Reservation-(1) The following percentage of vacancies, out of the total vacancies arising in a year in Class-II, specially declared gazette, Class-III and Class-IV services/posts to which women candidates are eligible to be appointed and which are filled up by way of direct recruitment, shall be reserved for the women candidates.*

Category	***Women***	***Men***	***Total***
(1)	***(2)***	***(3)***	***(4)***
Physically Handicapped .. .	***1%***	***2%***	***3%***
Sports men .. .	***0.33%***	***0.67%***	***1%***
Ex-Servicemen		***3%***	***3%***
General Candidates	***18.33%***	***36.67%***	***55%***

Notwithstanding anything contained in sub-rule (1), reservation made in favour of women candidates in excess of 30% of the total vacancies in the Class-II, specially declared gazette, Class-III and Class-IV services/posts, shall continue.

***(2)** If in any year, the vacancies reserved for a particular category of women candidates specified under sub-rule(1) remain unfilled due to non-availability of suitable women candidates belonging to the respective category, the unfilled vacancies shall be filled up by suitable male candidates of the same category:*
Provided that in case of non-availability of suitable male candidate of that category, the vacancy shall be filled up by women candidate of general category".

As per the said rules, 33% of the vacancies are to be filled up by women candidates.

3.4. It is contended that Petitioner is having all the eligibility criteria for her selection and appointment as against the post of Associate Professor in terms of the eligibility criteria prescribed by the University Grants Commission in its Regulation, 2018 vide Annexure-4.Petitioner is also having all the eligibility criteria as prescribed in the advertisement issued under Annexure-1. But the University when issued the notice under Annexure-5 by recommending private Opposite Party Nos.5 and 6 as against both the vacancies for the post of Associate Professor in the discipline of Chemistry and in the said notice, it was indicated that since no women candidate was found suitable, a male candidate was selected from UR (Male) category, Petitioner challenging such action of the University approached this Court in W.P.(C) No.19275 of 2021.

3.5. It was the stand of the Petitioner in the earlier writ petition that since in the advertisement under Annexure-1, out of 2 vacancies as against the post of Associate

Professor in the discipline of Chemistry, one post is reserved for UR (Women) candidate, in view of the provisions contained under the 1994 Rules, Petitioner should have been selected as against UR (Women) category and that post could not have been filled up by recommending Opposite Party No.5 who admittedly belongs to UR (Male) category.

3.6. It was also the stand of the Petitioner that since the Petitioner was found suitable and was allowed to appear the interview in terms of Annexure-3, the ground indicated in Annexure-5 that no women candidate was found suitable is not legal and justified.

3.7. It is contended that in the aforesaid writ petition a detailed counter affidavit was filed by the Opposite Party University. In the counter affidavit so filed by the University, it was never the stand of the University that the Petitioner since could not secure the required 50% cut off mark, she was not found suitable as against the vacancy meant for UR (Women) category and Opposite Party No.6 having been found eligible having secured more mark than the Petitioner, he was recommended as against the said vacancy as an UR (Male) category candidates. However, taking into account the contentions raised by the Petitioner before this Court that the post reserved for UR (Women) category candidates could not have been filled up by a candidate belonging to UR (Male) category only by taking the plea that no suitable women candidate was found suitable, this Court disposed of the writ petition vide order dtd.09.09.2022. Subsequently, the order dtd.09.09.2022 was also modified vide order dtd.21.11.2022.

3.8. It is vehemently contended that since it was never the stand of the University in the earlier writ petition that the petitioner was not found suitable as she could not secure the required 50% cut-off mark so fixed by the Selection Committee, the rejection of the Petitioner's claim on that ground vide the impugned communication issued on 19.04.2023 under Annexure-9 is not sustainable in the eye of law.

3.9. To substantiate such stand that no such cut-off mark was ever fixed, learned counsel for the Petitioner brought to the notice of this Court the information provided by the University in favour of one Dr. Suprava Nayak, who was also a candidates in terms of the advertisement issued under Annexure-1 for the post of Associate Professor in the discipline Chemistry, vide Annexure-7 dtd.22.07.2020. In the said information, it is contended that there was no indication of cut-off mark so fixed in the proceeding of the selection board. The information so provided under Annexure-7 vide Cl.IV is quoted hereunder:-

> *"(iv) As per the decision of the selection board no women candidates were found suitable. Hence, a male candidate was selected for UR (W) category. There is no indication of cut-off Mark in the proceedings of the Selection Board".*

3.10. It is accordingly contended that since it was never the case of the University that cut-off mark was fixed at 50% by the Selection Board and the Petitioner having

not secured the said cut-off mark she was not selected, the ground on which the claim of the Petitioner was rejected vide Annexure-9 is not sustainable in the eye of law and requires interference of this Court.

3.11. It is also contended that this Court while disposing the writ petition vide order dtd.09.09.2022 so modified vide order dtd.21.08.2022 clearly held that the University has to relook the entire issue afresh taking into account the rules i.e.1994 rules, which provides the reservation to the extent of 33% in favour of the women candidates and the basis of selection so prescribed in the advertisement dtd.10.07.2019.

3.12. Learned counsel for the Petitioner also contended that since the criteria for such selection as prescribed in the Odisha Universities First Statute vide Schedule-A is to be followed and in the said Schedule, nothing was indicated with regard to fixation of any cut-off mark, the ground taken by the University while rejecting the claim of the Petitioner vide Annexure-9 is also not sustainable in the eye of law.

3.13. It is also contended that Petitioner though is more meritorious, but she has not been given the required mark with regard to her teaching experience as well as research publication. The selection board intentionally and deliberately awarded less mark in favour of the Petitioner with regard to teaching experience and research publication.

The selection board intentionally and deliberately also did not award any mark towards CCR performance appraisal report while awarding such mark in favour of Opposite Party Nos.5 & 6.

3.14. It is also contended that since neither in the advertisement nor in the University First Statute vide Schedule-A, such a cut-off mark was prescribed, the stand taken by the Opposite Party-University while rejecting the claim of the Petitioner under Annexure-9 by indicating that the Petitioner since could not secure the 50% cut-off mark, she was not found suitable cannot be accepted. Such a stand taken by the University is also contrary to the stand taken in Annexure-7.

3.15. In support of his aforesaid submission, learned counsel for the Petitioner relied on a decision of the Hon'ble Apex Court reported in the case of ***K. Manjusree Vs State of Andhra Pradesh and another, (2008) 3 SCC 512***. Hon'ble Apex Court in Paragraph-27 of the said judgment held as follows:

> ***27.*** *But what could not have been done was the second change, by introduction of the criterion of minimum marks for the interview. The minimum marks for interview had never been adopted by the Andhra Pradesh High Court earlier for selection of District & Sessions Judges, (Grade II). In regard to the present selection, the Administrative Committee merely adopted the previous procedure in vogue. The previous procedure as stated above was to apply minimum marks only for written examination and not for the oral examination. We have referred to the proper interpretation of the earlier Resolutions dated 24-7-2001 and 21-2-2002 and held that what was adopted on 30-11-2004 was only minimum marks for written examination and not for the interviews. Therefore, introduction of the requirement*

of minimum marks for interview, after the entire selection process (consisting of written examination and interview) was completed, would amount to changing the rules of the game after the game was played which is clearly impermissible. We are fortified in this view by several decisions of this Court. It is sufficient to refer to three of them — P.K. Ramachandra Iyer v. Union of India, Umesh Chandra Shukla v. Union of India and Durgacharan Misra v. State of Orissa.

3.16. Learned counsel for the Petitioner also relied on another decision of the Hon'ble Apex Court in the case of ***Goa Public Service Commission Vs. Pankaj Rane and Others***, ***(2022)*** **11 SCC 742**. Hon'ble Apex Court in Paragraph 23 to 28 of the said judgment held as follows.

> ***23.*** *In this regard, we must notice that in the facts of this case of the 1866 candidates who appeared in the screening test/computer test, only 7 candidates which included Respondents 1 to 3 cleared the test. The number stood further reduced to 4 and which again included Respondents 1 to 3. Therefore, when the question arose as to how the interview should be conducted, the Commission decided on 16-5-2017 to fix 26 marks out of 40 as cut-off marks. It no doubt works out at 60% of the total marks in the interview segment. Rules did not provide for a separate minimum for the interview. The advertisement did not provide for a separate minimum in the interview. It is almost a week before the interview that the Commission took the decision in this regard.*
>
> ***24.*** *We have stated these facts only to highlight that this is not a case where the Commission was faced with the task of having to interview a very large number of candidates. For 6 unreserved posts and 5 reserved posts finally, only 4 emerged as candidates to be dealt with at the final stage viz. the oral interview. This, therefore, is distinguishable, in other words, from the judgment relied upon by Mr Pratap Venugopal, learned counsel for the appellant viz. M.P. Public Service Commission . That was a case where this Court noted that the appellant Commission therein noting the large number of applications received from the General Category candidates against four posts decided to call only 71 applicants who had 7½ years of practice although 188 applicants were eligible, in view of the fact that under Section 8(3)(c) of the provisions applicable in the said case, five years of practice as an advocate or pleader of Madhya Pradesh was a minimum requirement.*
>
> ***25.*** *It was therefore, a case which though relied upon by the appellant is distinguishable on facts. This is apart from noticing that the appellant has not been able to inform the Court as to whether there was a Rule in the said case similar to Rule 12 as present in this case. As far as Yogesh Yadav is concerned, this again is not a case which involved a rule resembling Rule 12 of the Rules. We further may also notice that in the said case recruitment was carried out by the employer itself and it was not done by the recruiting body which the appellant is and which is limited by statutory rules made under Article 309 of the Constitution.*
>
> ***26.*** *Para 13 of Yogesh Yadav is extracted hereinbelow : (SCC p. 628)*
>
> *"13. The instant case is not a case where no minimum marks are prescribed for viva voce and this is sought to be done after the written test. As noted above, the instructions to the examinees provided that written test will carry 80% marks and 20% marks were assigned for the interview. It was also provided that candidates who secured minimum 50% marks in the general category and minimum 40% marks in the reserved categories in the written test would qualify for the interview. The entire selection was undertaken in accordance with the aforesaid criterion which was laid down at the time of recruitment process. After conducting the interview, marks of the written test and viva voce were to be added. However, since a benchmark was not stipulated for giving the appointment, what is done in the instant case is that a decision is taken to give appointments only to those persons who have secured 70% marks or above marks in the unreserved category and 65% or above marks in the reserved*

category. In the absence of any rule on this aspect in the first instance, this does not amount to changing the "rules of the game". The High Court has rightly held that it is not a situation where securing of minimum marks was introduced which was not stipulated in the advertisement, standard was fixed for the purpose of selection. Therefore, it is not a case of changing the rules of the game. On the contrary in the instant case a decision is taken to give appointment to only those who fulfilled the benchmark prescribed. The fixation of such a benchmark is permissible in law. This is an altogether different situation not covered by Hemani Malhotra case.

27. *Though the learned counsel for the appellant did emphasise the said observations, we are of the view that it is distinguishable at any rate having regard to Rule 12 which we have already noticed which is applicable to the facts of this case. In other words, we would think that in the facts of this case, they are closer to the facts in P.K. Ramachandra Iyer case and the judgment following the same which we have already noted. As far as Tej Prakash Pathak case is concerned, it again did not specifically involve a rule similar to Rule 12.*

28. *It is true that there is a distinction in the facts with those in K. Manjusree . We notice that that was a case where the requirement of minimum marks for interview was made after the entire selection process consisting of the written examination and interview was completed and noticing the facts, the Court declared that it would amount to changing the Rules after process is completed. In this case, the stipulation as to the minimum to be obtained in the interview was announced prior to the holding of the interview. However, we would think that this case must fall to be decided on the principle which has been laid down in P.K. Ramachandra Iyer and Durgacharan Misra for the reasons which we have already indicated."*

3.17. The decision of the Hon'ble Apex Court in the case of ***Ramjit Singh Kardam and others Vs. Sanjeev Kumar and Others (2020), 20 SCC 209*** was also relied on by the learned counsel for the Petitioner.Hon'ble Apex Court in Paragraphs 33.1,33.2,45, 45.1 & 45.2 of the said judgment has held as follows-:

33.1. *Whether the respondent writ petitioners who had participated in the selection were estopped from challenging the selection in the facts of the present case?*

33.2. *Whether the respondent writ petitioners could have challenged the criteria of selection applied by the Commission for selection after they had participated in the selection?*

xxxx xxxx xxxx xxxx

45. *The Division Bench of the High Court is right in its conclusion that the selection criteria, which saw the light of the day along with the declaration of the selection result could be assailed by the unsuccessful candidates only after it was published. Similarly, selection process which was notified was never followed and the selection criteria which was followed was never notified till the declaration of final result, hence, the writ petitioners cannot be estopped from challenging the selection. We, thus, hold that the writ petitions filed by the petitioners could not have been thrown on the ground of stopped and the writ petitioners could very well challenge the criteria of selection applied by the Commission, which was declared by the Commission only at the time of declaration of the final result. We, thus, answer Points 1 and 2 as follows:*

45.1. *The writ petitioners, who had participated in the selection are not estopped from challenging the selection in the facts of the present case.*

45.2. *The writ petitioners could have very well challenged the criteria of selection, which was declared by the Commission only in the final result declared on 10-4-2010.*

3.18. Making all such submission and relying on the decisions as cited (supra), it is contended that the rejection of the Petitioner's claim for her appointment as against the post of Associate Professor in the discipline of Chemistry as an UR (Women) category candidate vide order dated 19.04.2023 under Annexure-9 is not sustainable in the eye of law and it requires interference of this Court with passing of an appropriate order.

4. Mr. D. Mohapatra, learned counsel appearing for the University on the other hand made his submission basing on the stand taken by Opposite Party Nos.1, 3 & 4 in the counter.

4.1. It is contented that though in the advertisement issued under Annexure-1, one post of Associate Professor in the discipline of Chemistry was reserved for UR (Women) category candidate, but in the said advertisement it was clearly indicated that in case of non-availability of suitable women candidates the post shall be filled up by male candidates of the same category.

4.2. It is accordingly contended that since the selection board does not find the Petitioner suitable as against the post in question, the post was recommended to be filled up by a male candidate by the selection board under Annexure-5. The said recommendation of the selection board issued under Annexure-5, when was challenged by the Petitioner before this Court in W.P.(C) No.19275 of 2021, this Court while disposing the writ petition vide order dtd.09.09.2022 directed the University to relook the entire issue afresh taking into account the rules and the advertisement issued under Annexure-1.

4.3. It is contended that in terms of the said order and after relooking the issue in all respect afresh, it was found that the Petitioner has not been found suitable by the Selection Board, as she failed to secure the required 50% cut-off mark which was fixed by the Selection board. Accordingly her claim was rightly rejected vide the impugned communication issued on 19.04.2023 under Annexure-9.

4.4. It is also contended that Section-21 of the University Act, 1989 in the meantime has been repealed with promulgation of Orissa University Amendment Act w.e.f. 04.09.2020. As per the said amended act, University is no more authorized to recommend the name of the Teacher to be appointed as faculty of the University and the said power has now been vested with the Odisha Public Service Commission.

4.5. It is also contended that after the matter was remitted by this Court vide its order dtd.09.09.2022, the then Vice- Chancellor of the University, who was the Chairman of the Selection Board was requested by the University to apprise about the criteria and modality followed while selecting the candidate for the post of Associate Professor in the discipline of Chemistry. The then Vice-Chancellor vide her letter dtd.17.12.2022 under Annexure-A to the counter since indicated that the Selection Board fixed the cut-off mark at 50% and no women candidate including

the present petitioner since could not secure such cut-off mark of 50%, no women candidate was found suitable. Accordingly, the post in question was recommended to be filled up by a male candidate of the same category.

4.6. It is contended that since the selection board fixed the cut-off mark at 50% as opined by the Chairman of the Selection Board vide Annexure-A and the Petitioner admittedly having not secured the said cut-off mark, she was not found suitable and accordingly recommendation was made to fill up the said vacancy by a male candidate of the said category. Such a recommendation to fill up the post in question by a male candidate is in terms of the advertisement issued under Annexure-1.

4.7. It is also contended with regard to selection to the post of Professor in the Department of Education, when this Court directed the University to declare the result of the interview so conducted in terms of Advertisement issued on 10.07.2019 vide order dated 23.12.2020 in W.P.(C) No.32266 of 2020, University sought for instruction from the Govt. in the department of Higher Education. Opp. Party no.1 vide letter dated 10.02.2021 under Annexure-B intimated that in view of the repeal of Odisha Universities (Amendment) Act, 2020 w.e.f. 04.09.2020, the teachers of State Public University shall only be appointed by Odisha Public Service Commission. It is accordingly contended that in view of such clarification issued by Opp. Party No.1 under Annexure-B, University is not competent to provide appointment to the petitioner, even if she is found eligible.

4.8. It is contended that since in terms of the earlier order passed by this Court the entire thing was reassessed and basing on the stand taken by the then Chairman of the Board that the Petitioner could not secure the required cut-off mark of 50%, she was not found suitable, Opposite Party No.1 basing on such communication of the Chairman of the earlier selection board, rejected the claim of the Petitioner. It is accordingly contended that there is no illegality or irregularity with regard to rejection of the Petitioner's claim and it requires no interference.

5. Learned counsel appearing for the Opposite Party Nos.5 & 6 also made their submission basing on the stand taken in the counter affidavit so filed by them. While supporting the stand taken by the University in its counter, learned counsels appearing for the Opposite Party Nos.5 & 6 contended that Petitioner could not secure the required cut-off mark so fixed by the selection board, in terms of the stipulation contained in the advertisement. Accordingly Selection Board vide Annexure-5 while recommending Opposite Party Nos.5 &6, held that no suitable women candidate was available. The selection board rightly made the recommendation under Annexure-5 by recommending Opposite Party No. 5 as against the post meant to be filled up from UR (Women) category candidates.

5.1. It is accordingly contended by the learned counsel appearing for Opposite Party No.5 that since the Petitioner could not secure the cut-off mark so fixed by the

Selection Board and he having secured more marks than the Petitioner, he was rightly recommended and appointed and accordingly no illegality has been committed by the University in rejecting the claim of the Petitioner for her appointment as against the vacancy meant for UR (Women) category candidates.

6. Mr. S.K. Das, learned counsel for the Petitioner made further submission with regard to the stand taken by the University in its counter by filing a rejoinder affidavit. It is contended that though under Rule-4 of the 1994 Rules, it is clearly indicated that the post ear-marked for UR (Women) category can be filled up by a male candidate, if there are no eligible women candidates and the said provision was also reflected in the advertisement issued under Annexure-1, but the action of the selection board while coming to the conclusion that no women candidate was found suitable is not sustainable in the eyes of law and it requires interference of this Court.

6.1. It is contended that since the selection in terms of Annexure-1 was required to be conducted in accordance with the Odisha Universities First Statute so prescribed under Schedule-A, no cut-off mark could have been fixed by the selection board as indicated in the impugned rejection available at Annexure-9.

6.2. It is also contended that since no such cut-off mark was ever fixed by the selection board as indicated by the University under Annexure-7, the ground on which the claim of the petitioner was rejected on remand of the matter by this Court, is also not sustainable in the eye of law.

6.3. It is also contended that Petitioner while being found unsuitable has been awarded 48 marks in the interview while private Opposite Party No.5 has been awarded 56 marks and private Opposite Party No.6 has been awarded 57.5 marks.

6.4. It is further contended that the Petitioner intentionally and deliberately was not awarded the required mark with regard to her research publication and she has also not been awarded the required mark for her teaching experience.

6.5. It is contended that as per the Schedule-A, 10 marks was provided with regard to teaching experience and for research publication 15 mark was prescribed. Out of 15 marks so provided for research publication, 10 marks is for publication of international journals and 5 marks is for publication of national journals. Under Schedule-A no such prescription was there with regard to how many publications in the international journal are required to be provided for award of 10 marks and how many research publications in the national journal for award of 5 marks.

6.6. It is contended that along with her application so submitted under Annexure-2, Petitioner provided the required numbers of national and international journals and accordingly out of 15 marks so prescribed she should have been given the required marks with regard to publication.Similarly with regard to teaching experience, though the Petitioner provided teaching experience of 17 years, but out

of total marks provided for such purpose at 10, Petitioner was only allowed 5 marks, which is not in accordance with the provision contained in Schedule-A of the First Statute Schedule.

6.7. It is contended that if the Petitioner would have been awarded proper mark with regard to teaching experience and research publication as well as CCR performance appraisal report, the Petitioner also could have secured the cut-off mark of 50%. However, it is contended that since neither in the advertisement nor under Schedule-A there is any provision to fix any cut-off mark and as reflected from Annexure-7, no such cut-off mark was also fixed by the selection board while conducting the selection in terms of Annexure-1, the rejection of the Petitioner's claim that she has failed to secure the cut-off mark and accordingly she was not found suitable as against UR (Women) category in terms of the advertisement as well as in terms of the provisions contained under 1994 Rules while recommending Opposite Party No.5 as against the said vacancy is not sustainable in the eye of law.

6.8. It is accordingly contended that the Petitioner since is having all the eligibility criteria and as per the provisions contained under the First Statute vide Schedule-A she was eligible as well as suitable, the recommendation of Opposite Party No.5 as against the vacancy meant for UR (Women) category candidates by holding that the Petitioner is not suitable for such recommendation, is not sustainable in the eye of law and requires interference of this Court.

7. I have heard Mr. S.K. Das, learned counsel for the Petitioner, Mr. D. Mohapatra, learned counsel appearing for the Opposite Party Nos.1, 3 and 4, Mr. N.K. Sahu, learned counsel appearing for Opposite Party No.5 and Mr. C.R. Mohapatra, learned counsel appearing for Opposite Party No.6. On their consent, the matter was taken up for final disposal at the stage of admission with due exchange of pleadings.

8. Having heard learned counsel for the Parties and after going through the materials available on record, it is found that the University issued the advertisement to fill up different teaching post in different Post Graduate Department vide advertisement dtd.10.07.2019 under Annexure-1.As found from the said advertisement as against the post of Associate Professor in the discipline of Chemistry, out of the two vacancy so indicated, one was reserved for UR (Male) and another for UR (Women) candidates.

8.**1**. It is found from the record that the Petitioner made her application as against the vacancy meant for UR (women) category. Petitioner as found from Annexure-2, along with her application, not only produced all the relevant documents in support of her qualification but also submitted the required teaching experience for more than 17 years and the research publication as provided under the Odisha Universities First Statute vide Schedule-A. Though out of two vacancies, one was reserved for UR (women) candidate and the selection board while holding that no women candidate was found suitable, recommended the name of Opposite Party No. 5 as

against the vacancy meant for UR (Women) category vide Annexure-5, the matter was challenged before this Court in W.P.(C) No.19275 of 2021.

8.2. This Court after hearing learned counsel appearing for the Parties, disposed of the matter vide order dtd.09.09.2022 with a direction on the University to relook the entire issue afresh and take into account the relevant rules and the advertisement issued under Annexure-1. This Court in Para-7 of the said order clearly indicated that the Selection Committee is to relook the selection process especially with respect to the selection of Associate Professor.

8.3. It is also indicated in the said order that the reservation for women candidates since flows from the mandate of the Constitution of India, the said Constitutional mandates has to be strictly followed.

8.4. It is also found from the record that in the said writ petition, the University filed a detailed counter affidavit and in the counter no such stand was ever taken that the Selection Board did not find the Petitioner suitable as she failed to secure the required cut-off mark of 50%. But it is found from the impugned communication under Annexure-9, the claim of the Petitioner in terms of the earlier order passed by this Court has been rejected only on the ground that the Petitioner has failed to secure the cut-off mark 50%. Since in the earlier writ petition, it was never the stand of the University that the Petitioner was not selected as she could not secure the required 50% cut-off mark, the said plea which has been taken while rejecting the claim of the Petitioner vide Annexure-9, as per the considered view of this Court is not sustainable in the eye of law.

8.5. It is also found that Opposite Party No.1 while rejecting the Petitioner's claim vide Annexure-9 simply relied on the communication issued by the Chairman of the Selection Board, who happens to be the earlier Vice Chancellor of the University so issued under Annexure-A to the counter affidavit. This Court after going through the said Annexure finds that the Chairman of the earlier selection board was also not sure with regard to fixation of such cut-off mark of 50%. The view of the Chairman of the earlier selection board reflected in Para-2 reads as follows:-

> *"2. As far as I remember the selection committee unanimously decided that the candidate who secures 50 or more marks in toto shall be considered as suitable for the post".*

8.6. Since it is found from the record that no such cut-off mark was ever fixed, which is also fortified with the information provided by the University, under Annexure-7 and the stand of the chairman of the selection board so indicated in Para-2 of Annexure-A, it is the view of this Court that the rejection of the Petitioner's claim on the ground indicated in Annexure-9 is not sustainable in the eye of law.

8.7. Taking into account the stand of the Petitioner that the Petitioner was not awarded proper mark with regard to teaching experience as well as research publication,

this Court while hearing the matter directed learned counsel appearing for the University to provide the selection file with regard to selection as against the post of Associate Professor in the discipline of Chemistry. The same after being produced by the learned counsel for the University was also perused by this Court. On bare perusal of the selection file, it is found that even though the Petitioner in support of her teaching experience provided required certificate showing her teaching experience at 17 years, but the same was calculated at 10 years with award of only 5 marks out of the prescribed 10 marks.

8.8. It is also found that the Petitioner out of 10 marks provided for research publication of international journals, she has only been awarded 3 marks as against publication in international journals and 1 marks as against publication in five national journals. No mark has also been awarded towards CCR appraisal in favour of the petitioner.

8.9. This Court after going through the selection file when found that proper mark has not been awarded with regard to Research Publication and Teaching Experience as well as CCR Appraisal, the matter when listed on 18.10.2023, this Court passed the following order:-

> *"1. This matter is taken up through Hybrid Arrangement (Virtual/Physical) Mode.*
>
> *2.This matter was listed in order to clarify certain queries with regard to award of mark to the candidates in terms of the advertisement issued under Annexure-1. This Court after going through the selection file so produced by learned counsel for the University finds that for award of mark in different heads finds that nothing has been indicated with regard to the basis for awarding of mark towards research publication and CCR appraisal. Nothing has also been indicated as to how many publications in international journal a candidate has to produce in order to get the prescribed "10" marks and how many publications in national journal to get the prescribed "5" marks. Similarly, with regard to award of 859 mark for CCR appraisal, no basis has been prescribed.*
>
> *3. In such view of the matter, this Court directs learned counsel appearing for the University to apprise this Court about the method of award of mark with regard to research publication and CCR appraisal and the basis adopted by the Selection Committee to award such mark.*
>
> *4. As requested by Mr. D. Mohapatra, learned counsel for the Petitioner, list this matter on 01.11.2023 under the heading "to be mentioned".*
>
> *5. The original selection file so produced by Mr. Mohapatra learned counsel is returned with due acknowledgment for the purpose of getting instruction as directed by this Court".*

8.10. In terms of the order passed on 18.10.2023, learned counsel appearing for the University produced relevant record with regard to award of mark in favour of the candidates with regard to Research Publication, Teaching Experience as well as CCR Appraisal. This Court after going through the records finds that no uniformity has been maintained by the Selection Board in awarding marks towards Research Publication, Teaching Experience as well as CCR Appraisal. Nothing is also in the record with regard to the basis for award of mark in favour of eligible candidates in the aforesaid three categories i.e. Research Publication, Teaching Experience as well as CCR Appraisal. Therefore, it is the view of this Court that the Selection Board

has conducted the selection in a very haphazardly manner and awarded marks in absence of any fixed criteria.

8.10. On bare perusal of the marks awarded by the Selection Board, it is also found that the Selection Board has not awarded proper mark in favour of the Petitioner towards teaching experience and research publication and no mark has been awarded towards CCR appraisal. Had the Petitioner been awarded proper mark she could have also secured the cut-off mark so fixed at 50%.

8.11. Be that as it may, since no such cut-off mark was ever prescribed either in the advertisement or in the First Statute vide Schedule-A and no such stand having been taken by the University while filing the counter in the earlier writ petition in W.P.(C) No.19275 of 2021, the ground on which the claim of the Petitioner has been rejected that the Petitioner was not found suitable as she has failed to secure the required 50% cut-off mark is not sustainable in the eye of law in view of the decision of the Hon'ble Apex Court in the case of ***K. Manjusree*** as cited (supra).

8.12. Therefore, this Court is inclined to quash the rejection of the Petitioner's claim on the ground indicated in Annexure-9. While quashing the same, this Court held the Petitioner suitable for her selection and appointment as against the vacancy meant for UR women category for the post of Associate Professor in the discipline of Chemistry. This Court accordingly while holding so directs the University to provide the appointment of the Petitioner as against the post of Associate Professor in the discipline of Chemistry in place of Opposite Party No.5. This Court directs Opposite Party No.1 to comply the aforesaid direction within a period of one (1) month from the date of receipt of this order. However, it is observed that if the Opposite Party No.5 can be adjusted as against any available vacancy as an Associate Professor in the discipline of Chemistry, necessary action be taken in this regard.

9. With the aforesaid observations and directions, the Writ Petition stands disposed of.

—— o ——

2024 (I) ILR-CUT-288

M.S. RAMAN, J.

WPC (OAC) NO.1291 OF 2019

MANOJ KUMAR SAHOO ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

SERVICE LAW – Re-instatement – Principle of re-instatement in the event of honorable acquittal in criminal case vis-à-vis acquittal on benefit of doubt – Enumerated with reference to case laws. (Para 11)

Case Laws Relied on and Referred to :-

1. 2009 (Supp.-I) OLR 787 = (2010) 35 VST 42 (Ori) : Gupta Cables Private Limited V. ACST.
2. 2021 SCC OnLine Ori 679 = 2021 CrLJ 4755 : Thabir Sagar Vrs. State of Odisha.
3. 26 (1960) CLT 577 (SC) = Ranjit Singh Vrs. State of Pepsu.
4. (2021) 2 SCR 81: Opto Circuit India Ltd. Vrs. Axis Bank.
5. (1978) 1 SCC 405: Mohinder Singh Gill Vrs. The Chief Election Commissioner, New Delhi.
6. AIR 1952 SC 16: Vivian Bose, J. in Commissioner of Police Vrs. Gordhandas Bhanji.
7. (2022) 11 SCR 1136: State of Bihar Vrs. Shyama Nandan Mishra.
8. 2018 (II) OLR 327 (Ori): Basanta Kumar Sahoo Vrs. State of Odisha.
9. (2020) 12 SCR 351: Gurusimran Singh Narula Vrs. Union of India.
10. (1980) 4 SCC 162: Municipal Council, Ratlam Vrs. Shri Vardichan.
11. (2012) 10 SCR 994 : Ayaaubkhan Noorkhan Pathan Vrs. State of Maharashtra
12. AIR 1988 SC 1381: Sudha Devi Vrs. M.P. Narayanan.
13. AIR 2002 SC 1147: Mohd. Range Forest Officer Vrs. S. T. Hadimani.
14. AIR 1972 SC 330 : M/s. Bareilly Electricity Supply Co. Ltd. Vrs. The Workmen.
15. AIR 1981 SC 1298 : Needle Industries (India) Ltd. Vrs. N.I.N.I.H. Ltd.
16. AIR 1992 SC 700: Ramesh Kumar Vrs. Kesha Ram.
17. (2006) 6 SCC 94 : Standard Chartered Bank Vrs. Andhra Bank Financial Services Ltd.
18. (1924) 1 KB 256 : Rex Vrs. Sussex Justices.
19. 2023 LiveLaw (SC) 520 : Raman Kumar Vrs. Union of India.
20. (2021) 8 SCR 657 : Union of India Vrs. Methu Meda.
21. (2016) 8 SCC 471 = (2016) 7 SCR 445 : Avtar Singh Vrs. Union of India.

For Petitioner : M/s. Subhadutta Routray, Satya Prakash Nath, B.R. Pattanayak, Jagadish Biswal & Sakti Sekhar

For Opp.Parties: Mr. Sachidananda Nayak, ASC

JUDGMENT Date of Hearing:10.11.2023: Date of Judgment : 22.11.2023

M.S.RAMAN, J.

THE CHALLENGE:

Questioning the propriety of Order dated 15.05.2019 with regard to the prayer of the petitioner for re-engagement in the post of Junior Teacher on the ground no rules are framed by the Government or the Odisha Primary Education Programme Authority ("OPEPA", for short), the Original Application, being O.A. No.1291 (C) of 2019, was filed under Section 19 of the Administrative Tribunals Act, 1985, before the Odisha Administrative Tribunal, Cuttack Bench, Cuttack, seeking following relief(s):

> *"(i) Admit the original application;*
>
> *(ii) Call for the records;*
>
> *(iii) Quash the impugned Order No. 889/S.S.A/19, dated 15.05.2019 issued by the District Project Co-ordinator, Khordha, respondent No. 3 under Annexure-6 as well as the disengagement Order dated 17.08.2016 under Annexure-2;*
>
> *Further direction/directions be made to the respondents, to allow the applicant to continue in his former post and the consequential financial service benefits be extended in his favour.*
>
> *(iv) Further pass an appropriate order to regularize the service of the applicant considering the fact that the applicant was disengaged from his service without any of his fault;*
>
> *(v) Pass such other order/order and direction/directions as this Hon'ble Tribunal may deem fit and proper."*

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. 1291 (C) of 2019 has been re-registered as WPC (OAC) No.1291 of 2019.

THE FACTS:

2. The factual matrix as adumbrated by the petitioner reveals that he was initially engaged as untrained Sikshya Sahayak on 02.06.2011 by opposite party No.3-District Project Co-ordinator, Sarva Siksha Abhiyan in Lanjigarh Block on contractual basis on a fixed monthly honorarium of Rs.3,500/-. Consequent upon acquisition of Diploma in Elementary Education qualification in the year 2015, the petitioner became a trained Sikshya Sahayak and subsequently, Junior Teacher.

2.1. While continuing as such, as a sequel of false criminal case being foisted against him and arrested by the police in connection with FIR lodged in Lanjigarh Police Station vide Case No.56, dated 09.08.2016, alleging offence under Sections 341/354A/506/34, Indian Penal Code, 1860, read with Section 10 of the Protection of Children from Sexual Offences Act, 2012, the petitioner was disengaged by Order dated 17.08.2016 of the District Project Co-ordinator, Sarva Siksha Abhiyan, Kalahandi, Bhawanipatna.

2.2. Upon completion of investigation by the police, charge sheet was filed alleging offence under Section 341/354A of the Indian Penal Code read with Section 10 of the Protection of Children from Sexual Offences Act and thus, the petitioner stood trial before the Court of the Additional Sessions Judge-*cum*-Special Judge, Bhawanipatna, in C.T. Case No.110 of 2016 (POCSO)/TR No.37/2016. On conclusion of trial, the learned Additional Sessions Judge-cum-Special Judge, Bhawanipatna, vide Judgment dated 23.11.2017, concluded as follows:

> *"There are no iota of evidence against the accused persons to hold them guilty for the offences punishable under Section 354A/341/506/201 of Indian Penal Code read with Section 10 of the Protection of Children from Sexual Offences Act, 2012. Therefore, it can be safely concluded that the prosecution has miserably failed to establish its case against the accused persons beyond all reasonable doubt, as a result of which the accused persons are entitled to an order of acquittal and, accordingly, they are not found guilty of the offences under Section 354A/341/506/201 of Indian Penal Code read with Section 10 of Protection of Children from Sexual Offences Act and they are acquitted therefrom under Section 235(1) of the Code of Criminal Procedure. The accused persons be discharged from their bail bonds and set at liberty forthwith."*

2.3. After delivery of aforesaid Judgment of acquittal, the petitioner approached the District Project Co-ordinator to re-engage him in the post of Junior Teacher of Champadeipur Upper Primary School under Lanjigarh Block by filing representation on 19.12.2017. The said Project Co-ordinator-opposite party No. 3 sought for legal opinion of Public Prosecutor, Kalahandi, Bhawanipatna regarding re-engagement of the petitioner, who was disengaged on being arrested by the police in connection

with the false criminal case alleging offences under Sections 341/354A/506/34, Indian Penal Code read with Section 10 of the Protection of Children from Sexual Offences Act, consequent upon his acquittal in the trial. The opinion of the Public Prosecutor runs as follows:

> *"Office of the Public Prosecutor,*
> *Kalahandi at Bhawanipatna*
>
> *Letter No. 46(P)* *Dated. 21.04.2018*
>
> *To*
> *The District Project Co-Ordinator,*
> *RTE-SSA, Kalahandi*
>
> *Sub: Legal opinion regarding re-engagement of Sri Manoj Kumar Sahu, Junior Teacher, who has been disengaged due to a criminal case instituted against him in C.T. Case No. 110/2016.*
>
> *Sir,*
>
> *In reference, to your Letter No.701, Dt. 15.03.2018 for the above cited subject, I am to state that on perusal of the judgment in C.T. Case No.110/2016 it transpires that Sri Manoj Kumar Sahu, Junior Teacher has faced a criminal trial for allegation of committing an offence under section 354(A)/341 r/w Section 10 of POCSO Act 2012. The above noted accused Junior Teacher faced a trial in the Court of the Special Judge-cum-A.D.J., Bhawanipatna.*
>
> *The Trial Court of Special Judge/A.D.J., Bhawanipatna framed charge against the accused person and examined 06 Nos. of prosecution witnesses. During the trial none of the prosecution witnesses have supported the case of the prosecution to bring home the charges against the accused person in order to prove his criminal liabilities beyond all reasonable doubt. In the result the accused person was not found guilty of the offence under Section 354(A)/341 r/w Section 10 of POCSO Act 2012 and was acquitted under Section 235(1), Cr.P.C. due to insufficient evidence.*
>
> *That though the above noted case was disposed of on 23.11.2017 but the State has not preferred any appeal against the order of the Special Judge-cum-Addl. Sessions Judge before the Honourable High Court of Odisha as there is no material available against the accused person to prefer an appeal till date. As Such the disengaged Junior Teacher may be re-engaged in his post of Junior Teacher.*
>
> *This is for your kind information and necessary action at your end.*
>
> *Yours faithfully*
>
> *Sd/- 21.04.2018*
> *Public Prosecutor, Kalahandi*
> *Bhawanipatna"*

2.4. While the matter stood so, the petitioner approached this Court by way of writ application bearing W.P.(C) No. 17963 of 2018, which came to be disposed of with the following direction vide Order dated 20.12.2018:

> *"Heard learned counsel for the petitioner.*
>
> *The petitioner has filed this writ petition seeking to quash the order of disengagement and further seeks for a direction to opposite parties to re-engage him in service with all service benefits after being acquittal from the criminal case.*

In course of hearing, learned counsel for the petitioner states that highlighting the grievance, the petitioner has made representation to opposite party No.3 vide Annexure-6, but no decision has yet been taken.

Considering the limited grievance of the petitioner, without expressing any opinion on the merits of the case, this Court disposes of the writ petition ***directing opposite party No.3 to take a decision on the representation filed by the petitioner*** *vide Annexure-6 and pass appropriate order in accordance with law within a period of three months from the date of production of certified copy this order."*

2.5. In order to comply with the aforesaid direction of this Court the case of the petitioner was taken up for consideration by the District Project Co-ordinator, Sarva Siksha Abhiyan, Kalahandi and, following observation is made vide Order No.889/SSA/19, dated 15.05.2019 (Annexure-6):

*"*** Pursuant to the liberty given in the aforesaid orders by the Hon'ble Court, the opposite party No.3 i.e. District Project Co-ordinator, SSA, Kalahandi examined the representation in consonance with law and available official documents and decided, to pass the following orders:*

1. That the petitioner in the writ petition had filed the writ petition seeking to quash the order of disengagement and further seeks for a direction to opposite parties to re-engage him in service with all service benefits after being acquittal from the criminal case.

2. That the DPC, SSA, Kalahandi had issued disengagement order with the approval of Collector-cum-CEO, ZP, Kalahandi vide his office order No. 2893/dated 17.08.2016 due to lodging of FIR against him vide Case No. 56 dated 09.08.2016 under Section 341/354-A/506/34, IPC r/w Section 8 of Protection of Children from Sexual Offences Act, 2012.

3. On verification of the record it is found that Hon'ble Additional Session Judge-cum-Special Judge, Bhawanipatna in the judgement of the CT Case No. 110 of 2016 (POSCO)/T.R. No. 37/2016 has pronounced his verdict at page 13 that,
*'*** as a result of which the accused persons are entitled to an order of acquittal and accordingly, they are found not guilty of the offences under Section 354(A)/341/506/201 of IPC read with Sec.10 of POSCO Act they are acquitted there from under Section 235(1) of the Cr.PC. The accused persons be discharged from their bail bonds and set at liberty forthwith.'*

4. Since the Hon'ble High Court of Odisha has passed order to take decision on the representation filed by the petitioner vide Annexure-6 in accordance with law and the petitioner being acquitted by the Court, has prayed for his re-engagement in his former post. ***The petitioner is a contractual employee and no such law/rules have been framed so far by Government/OPEPA regarding re-engagement of a disengaged contractual employee. So he may be re-engaged in his former post subject to receipt of clarification/instruction from the OPEPA/Government in S&ME Department, whichever is earlier.***

5. With this order the order of Hon'ble High Court of Orissa issued vide No.2 dated 20.12.2018 in W.P (C) No. 17963/2018 is complied herewith.

Sd/- 15.05.2019
District Project Co-ordinator,
SSA, Kalahandi"

2.6. Since said Order of the District Project Co-ordinator has not yet been given effect to, the petitioner craves direction to re-engage him in the post of Junior Teacher (Contractual), as he was found not guilty in the trial. Hence, the instant writ petition has been filed.

COUNTER AFFIDAVIT FILED BY THE OPPOSITE PARTY NO.3:

3. Justifying the action of disengaging the petitioner, on his arrest by the police on 10.08.2016,being arraigned in the criminal case, the opposite party No.3 asserted that as the petitioner was Junior Teacher (Contractual), instead of suspension as in vogue for regular Government employee, he was disengaged by Order dated 17.08.2016 with effect from 10.08.2016.

3.1. It is the stand of the opposite party No.3 that the very involvement of the petitioner, a teacher, in a criminal case under the Protection of Children from Sexual Offences Act, 2012, justifies disengagement and non-reinstatement.

ARGUMENTS ADVANCED BY RESPECTIVE COUNSEL FOR THE PARTIES:

4. In reply to the averments and contents of the writ petition, counter affidavit has been filed by the opposite party No.3. Sri Jagdish Biswal, learned Advocate insisted for disposal of this matter, since the present case involves livelihood of the petitioner. To this, Sri Sachidananda Nayak, learned Additional Standing Counsel raised no objection. On the consent of the counsel for both sides, and pleadings having been exchanged between parties, this Court proceeded for final hearing at the stage of admission. Therefore, the matter was heard for final disposal.

5. This Court heard Sri Jagdish Biswal, learned Advocate appearing for the petitioner and Sri Sachidananda Nayak, learned Additional Standing Counsel for the opposite parties.

6. It is urged by Sri Jagdish Biswal, learned counsel for the petitioner that the impugned Order dated 15.05.2019 of District Project Co-ordinator-opposite party No.3 (Annexure-6) is anomalous inasmuch as on the one hand he concluded by holding that "The petitioner is a contractual employee and no such law/rules have been framed so far by Government/OPEPA regarding re-engagement of a disengaged contractual employee" and in the same breath said opposite party sought for clarification in order to accommodate the petitioner by stating "So he may be re-engaged in his former post subject to receipt of clarification/instruction from the OPEPA/Government in School & Mass Education Department, whichever is earlier".

6.1. It is pertinent to mention here that in a similar case bearing W.P.(C) No. 8354 of 2016, this Court was pleased to quash the order of rejection passed by the District Project Co-ordinator and has also issued direction for re-engagement of the petitioner therein.

6.2. With vehemence, Sri Jagadish Biswal, Advocate stemming on the decision of this Court vide Order dated 26.09.2016 passed in the matter of *Sri Mohan Charan Prusty Vrs. State of Odisha & Others, W.P.(C) No.8354 of 2016*, submitted that in the aforesaid writ application the issue involved was the same as in this instant case,

as the petitioner in the referred writ application was a Junior Teacher (Contractual) and subsequently he was disengaged from service on the basis of a criminal case initiated against him. After examination of witnesses, the trial ended up in acquittal of the petitioner, and thereafter he preferred the aforesaid writ application in which this Court was pleased to pass an Order on 26.09.2016 directing the opposite parties to re-engage the petitioner therein. Thus, drawing parity, he advocated for extending identical relief to the present petitioner.

6.3. Sri Jagadish Biswal, learned Advocate for the petitioner further placed that the petitioner is held to be not guilty of the charged offences in the trial after examination of witnesses and taking into consideration material particulars. As a consequence thereof, he was acquitted in the criminal trial bearing C.T. Case No. 110 of 2016 (POCSO)/T.R. No. 37/2016 vide Judgment dated 23.11.2017 delivered by the Additional Session Judge-cum-Special Judge, Bhawanipatna. The District Project Co-ordinator, Sarva Siksha Abhiyan, Kalahandi at Bhawanipatna having sought for legal opinion, the learned Public Prosecutor, Bhawanipatna opined that no appeal against said Judgment of Additional Session Judge-cum-Special Judge has been preferred. Considering such aspect, vide Order dated 15.05.2019 the District Project Co-ordinator-opposite party No.3, being directed by this Court in the Order dated 20.12.2018 in W.P.(C) No.17963 of 2018 for taking decision on the representation of the petitioner, instead of directing for re-engagement in the post of Junior Teacher (Contractual), he should not have indicated "subject to receipt of clarification/instruction from the OPEPA/Government in School and Mass Education Department, whichever is earlier".

6.4. It is further contended that even though the Project Co-ordinator, Sarva Siksha Abhiyan, Kalahandi at Bhawanipatna, has directed that the petitioner "may be re-engaged in his former post", as yet nothing needful has been done by the competent authority and the petitioner has not been re-engaged. For no fault of the petitioner and for false criminal case being foisted against him, he is now without employment and, thereby he is deprived of his livelihood.

6.5. Referring to Rule 12(2) of the Odisha Civil Services (Classification, Control and Appeal) Rules, 1962, which provides that "a Government servant who is detained in custody whether on a criminal charge or otherwise, for a period exceeding forty-eight hours shall be deemed to have been suspended with effect from the date of detention by an order of the appointing authority and shall remain under suspension until further orders", Sri Jagadish Biswal, learned Advocate contended that the petitioner, being Junior Teacher (Contractual), should have been treated in the like manner as Government servant.

7. *Per contra*, Sri Sachidananda Nayak, learned Additional Standing Counsel, justifying the Order of the District Project Co-ordinator-opposite party No.3 with reference to counter-affidavit filed by said opposite party argued that there is no infirmity in the Order impugned so as to warrant interference.

7.1. Sri Sachidananda Nayak, learned Additional Standing Counsel laid stress on paragraph 10 of the counter affidavit of the opposite party No.3, content of which is reproduced herein below:

> *"That it is humbly submitted that the very same issue regard to reinstatement after acquittal in criminal case of Sikshya Sahayak has already been decided by this Hon'ble Court, wherein this Hon'ble Court held that once the Sikshya Sahayak involved in any criminal case, his service will be stand terminated and therefore the authority after due consideration has passed an order by rejecting the representation of the petitioner for his reinstatement. Furthermore it is also well settled principle of law that reinstatement is not permissible in respect of temporary or contractual employees and in the case in hand the petitioner who was involved in criminal case under POCSO Act and being a teacher the petitioner is not liable to be reinstated as a teacher."*

7.2. Sri Sachidananda Nayak, learned counsel for the opposite parties made the submission that it does find mentioned in the agreement of Sikshya Sahayak that one can be removed from his/her engagement by giving 30 days' prior notice, if he/she violates the conditions stipulated in the agreement or he/she is considered unsuitable later on by the authority on the basis of adverse report of the Village Education Committee. Nevertheless, in case of involvement in criminal case, there is no such condition in the agreement to remove the contractual employee by giving 30 days' notice. In such case, action can be taken against the accused as per the recommendation of the Police and the Court of law, which has been followed in the present case.

7.3. Thus, Sri Sachidananda Nayak, learned Additional Standing Counsel contended that it is apt to terminate the contractual engagement once the petitioner is entangled in a criminal case and he cannot be equated with the Government servant so as to be extended with the similar protection as contained in the Odisha Civil Services (Classification, Control and Appeal) Rules.

DISCUSSIONS AND ANALYSIS:

8. It is gathered from the pleadings and arguments and submissions that the petitioner, while working as Junior Teacher (Contractual), was disengaged during the pendency of criminal trial bearing C.T. Case No. 110 of 2016 (POCSO)/T.R. No. 37/2016 before the Additional Session Judge-cum-Special Judge, Bhawanipatna. After the conclusion of trial and in the Judgment dated 23.11.2017 delivered, being found not guilty, the petitioner was acquitted. Therefore, he approached the authority concerned for re-engage him in his post of Junior Teacher. Since nothing tangible could be done so far, he approached this Court in W.P.(C) No.17963 of 2018 which came to be disposed of on 20.12.2018, with the following observation:

> *"*** The petitioner has filed this writ petition seeking to quash the order of disengagement and further seeks for a direction to opposite parties to re-engage him in service with all service benefits after being acquittal from the criminal case.*
>
> *In course of hearing, learned counsel for the petitioner states that highlighting the grievance, the petitioner has made representation to opposite party No.3 vide Annexure-6, but no decision has yet been taken.*

Considering the limited grievance of the petitioner, without expressing any opinion on the merits of the case, this Court disposes of ***the writ petition directing opposite party No.3 to take a decision on the representation filed by the petitioner vide Annexure-6 and pass appropriate order in accordance with law*** *within a period of three months from the date of production of certified copy of this order."*

8.1. Perusal of impugned Order dated 15.05.2019 vide Annexure-6, it seems that the District Project Co-ordinator-opposite party No.3 has, in order to comply aforesaid direction of this Court, observed, after noticing the factual aspect of the matter, that the petitioner is entitled to be re-engaged despite no law/rule with respect to engagement of contractual employee, who is disengaged in connection with criminal case instituted against him and acquitted subsequently. At paragraph 4 of said order passed by the opposite party No.3 it is explicitly directed that "he may be re-engaged in his former post". However, he has gone further even though there was no direction from this Court for obtaining "clarification/instruction from the OPEPA/Government in School and Mass Education, Department". When the opposite party No.3 was specifically directed by this Court to "take a decision on the representation filed by the petitioner", without taking recourse to variation of the said Order dated 20.12.2018 passed in W.P.(C) No.17963 of 2018, said opposite party could not have transgressed his authority by interdicting on his own by stating "subject to receipt of clarification/instruction from the OPEPA/Government in School and Mass Education Department, whichever is earlier".

8.2. The record is silent as to whether the Order dated 15.05.2019 of the District Project Co-ordinator-opposite party No.3 has given effect to. Sri Sachidananda Nayak, learned Additional Standing Counsel candidly conceded by referring to paragraph 5 of the counter affidavit that "the petitioner may be re-engaged in his former post subject to receipt of clarification/instruction from the higher quarters". At this stage Sri Jagadish Biswal pointed out that since the impugned Order has been stated to have been passed in compliance of direction of this Court vide Order dated 20.12.2018 passed in W.P.(C) No.17963 of 2018, the direction was to the opposite party No.3 to take a decision on the representation of the petitioner, but said direction was not to consult any higher authority. True it is. Therefore, this Court is at loss to understand as to why the clear-cut decision of the opposite party No.3 has not yet been carried to its logical end.

9. Reading of counter affidavit does not transpire that the opposite party No.3 has stuck to the reason ascribed in the Order dated 15.05.2019 impugned. This is so, because the said opposite party, taking note of acquittal of the petitioner from the criminal case instituted against him in the trial, directed for re-engagement of the petitioner in his former post, i.e., Junior Teacher (Contractual), but as it appears from the counter affidavit he has not stood by his own direction. It appears he has taken contrary stand which is reflected at paragraphs 5, 10 and 11 of said affidavit:

*"5. *** In obedience to the Order dated 20.12.2018 passed by this Hon'ble Court, this deponent passed an Office Order dated 15.05.2019 wherein it is stated that* ***the petitioner***

> ***may be re-engaged in his former post subject to receipt of clarification/instruction from the higher quarters.***
> ***
> *10. *** Furthermore it is also well settled principle of law that reinstatement is not permissible in respect of temporary or contractual employees and in the case in hand the petitioner who was involved in a criminal case under POCSO Act and* ***being a teacher the petitioner is not liable to be reinstated as a teacher.***
>
> *11. That, it is humbly submitted that the disengagement of the petitioner is not illegal and arbitrary nor it contravenes the term and conditions of the engagement orders also nor against the settled position of law."*

9.1. It is reiterated that the said contents as affirmed by the opposite party No.3 in counter affidavit has been stated ignoring the fact that in the meantime trial has been concluded and the petitioner has already been found not guilty. Therefore, there is no scope for the opposite party No.3 to say that merely because the petitioner was involved in a criminal case, the disengagement of the petitioner was not illegal. Nonetheless, the opposite party No.3, being satisfied with the factual aspect of the case, in consideration of representation, directed for re-engagement of the petitioner.

9.2. It is highly deplorable when the opposite party No.3 while swearing counter affidavit has not taken care to bear in mind the decision already taken in the facts and circumstances of the case. Piquant situation now arises when the opposite party No.3 through Additional Standing Counsel argued that re-engagement of the contractual or temporary employees is impermissible even though it is on record that his own order has not been given effect to while stating that he has taken decision in compliance of direction contained in the Order dated 20.12.2018 passed in W.P.(C) No.17963 of 2018 of this Court. Noteworthy here that the opposite party Nos.1, 2 and 4 have not filed any response in the matter.

9.3. This Court in the case of Gupta Cables Private Limited *Vrs. ACST, 2009 (Supp.-I) OLR 787 = (2010) 35 VST 42 (Ori)* held that the impugned order must speak for itself and no additional ground can be taken in the counter affidavit where the order impugned is under challenge.

9.4. An affidavit is an affirmation of truth. It is a willing declaration made in writing, signed by a deponent and accompanied by an oath to prove the veracity of its contents. In India, the law on affidavits is governed by Order XIX of the Civil Procedure Code, 1908. Further, every High Court, in furtherance of its own requirements from an affidavit, has framed its own Rules. The very essence of an affidavit lies in the fact that the person deposing the same, affirms on oath that all the representations made in the affidavit are true and correct to the best of his knowledge. While it is permissible that if the knowledge is not personal, it can be gathered from other sources (provided details of the sources are mentioned), it is in flagrant violation of rule of law to execute an affidavit without having any knowledge of the averments made therein. Courts rely heavily on affidavits and their

ensuing probative value for the smooth administration of justice. Noting the importance of an Affidavit, courts have strongly deprecated the practice of affidavits being sworn by someone who has no knowledge of the facts or who has no means of achieving said knowledge. *Vide, Thabir Sagar Vrs. State of Odisha, 2021 SCC OnLine Ori 679 = 2021 CrLJ 4755*.

9.5. In the case of *Ranjit Singh Vrs. State of Pepsu, 26 (1960) CLT 577 (SC) = AIR 1959 SC 843* it has been succinctly stated that when there is no question of fact to be examined or determined no affidavit is needed. As soon as there emerges a fact into which the Court feels it should enquire the necessity for an affidavit arises. As per Oaths Act the High Court or its officers are authorised to administer the oath and as the deponent is stating facts as evidence before the Court he has to make the oath or affirmation and is bound to state the truth. Whenever in a court of law a person binds himself on oath to state the truth he is bound to state the truth and he cannot be heard to say that he should not have gone into the witness box or should not have made an affidavit. Whenever a man makes a statement in Court on oath he is bound to state the truth and if he does not, he makes himself liable under the provisions of Section 193 of the Indian Penal Code. The very sanctity of the oath requires that a person put on oath must state the truth.

9.6. Following excerpt from *Opto Circuit India Ltd. Vrs. Axis Bank, (2021) 2 SCR 81* may be relevant in the present context:

> *"13.The action sought to be sustained should be with reference to the contents of the impugned order/communication and the same cannot be justified by improving the same through the contention raised in the objection statement or affidavit filed before the Court. This has been succinctly laid down by this Court in the case of Mohinder Singh Gill Vrs. The Chief Election Commissioner, New Delhi, (1978) 1 SCC 405 as follows:*
>
> *'8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Vivian Bose, J. in Commissioner of Police Vrs. Gordhandas Bhanji, AIR 1952 SC 16:*
>
> *'Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to effect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.*
>
> *Orders are not like old wine becoming better as they grow older:' ***"*

9.7. Therefore, validity of an order by a statutory functionary/authority must be judged by the reasons mentioned therein and supplementary reasons in the shape of affidavits must be excluded. Taking cue from the above, it must be said unequivocally that the State must not be allowed to bring in additional explanation

to justify their actions when those are conspicuous by their absence, in the Government decision. See, *State of Bihar Vrs. Shyama Nandan Mishra, (2022) 11 SCR 1136.*

9.8. In *Basanta Kumar Sahoo Vrs. State of Odisha, 2018 (II) OLR 327 (Ori)* this Court has observed that the opposite parties cannot justify their action by assigning reasons in the counter affidavit, in absence of any reasons placed on record in its proper perspective.

9.9. It may be of significance as enunciated in *Gurusimran Singh Narula Vrs. Union of India, (2020) 12 SCR 351* with respect to affirmative action to make the remedy effective. Following is the observation contained in said Judgment:

> *"38. Justice V.R. Krishna Iyer had elaborately dealt the above principle in Municipal Council, Ratlam Vrs. Shri Vardichan, (1980) 4 SCC 162. The above case was a case where Municipal Council Ratlam was entrusted with certain duties to the public which was sought to be enforced by the residents through Section 133 Cr.P.C. where Magistrate issued certain directions to the Municipal Corporation which came to be challenged in this Court. Justice Krishna Iyer quoting Benjamin Bisraiely, in paragraph 9 of the judgment stated:*
>
> *'9. *** 'All power is a trust— that we are accountable for its exercise— that, from the people, and for the people, all springs, and all must exist.' Discretion becomes a duty when the beneficiary brings home the circumstances for its benign exercise.'*
>
> *39. With regard to judicial process, important observations were made by this Court in the above case that affirmative action taken in the judicial process is to make remedy effective failing which the right becomes sterile. In paragraph 16 of the judgment, following observations have been made:*
>
> *'16. *** **The nature of the judicial process is not purely adjudicatory nor is it functionally that of an umpire only. Affirmative action to make the remedy effective is of the essence of the right which otherwise becomes sterile.** ***' "*

9.10. The Hon'ble Supreme Court of India has discussed the effect and consequences of affidavit in the case of *Ayaaubkhan Noorkhan Pathan Vrs. State of Maharashtra, (2012) 10 SCR 994* in the following manner:

> *"31. Affidavit.— whether evidence within the meaning of Section 3 of the Evidence Act, 1872:*
>
> *It is a settled legal proposition that an affidavit is not evidence within the meaning of Section 3 of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act'). Affidavits are therefore, not included within the purview of the definition of 'evidence' as has been given in Section 3 of the Evidence Act, and the same can be used as 'evidence' only if, for sufficient reasons, the Court passes an order under Order XIX of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC'). Thus, the filing of an affidavit of one's own statement, in one's own favour, cannot be regarded as sufficient evidence for any Court or Tribunal, on the basis of which it can come to a conclusion as regards a particular fact situation. (Vide: Sudha Devi Vrs. M.P. Narayanan, AIR 1988 SC 1381; and Range Forest Officer Vrs. S. T. Hadimani, AIR 2002 SC 1147).*
>
> *32. While examining a case under the provisions of the Industrial Disputes Act, 1947, this Court, in M/s. Bareilly Electricity Supply Co. Ltd. Vrs. The Workmen, AIR 1972 SC 330, considered the application of Order XIX, Rules 1 and 2 CPC, and observed as under:*

*'But the application of principles of natural justice does not imply that what is not evidence, can be acted upon. On the other hand, what it means is that no material can be relied upon to establish a contested fact which are not spoken to by the persons who are competent to speak about them and are subject to cross-examination by the party against whom they are sought to be used. When a document is produced in a Court or a Tribunal, the question that naturally arises is: is it a genuine document, what are its contents and are the statements contained therein true. *** If a letter or other document is produced to establish some fact which is relevant to the inquiry, the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact. This is both in accordance with the principles of natural justice as also according to the procedure under O. 19 of the Code and the Evidence Act, both of which incorporate the general principles.'*

33. In Needle Industries (India) Ltd. Vrs. N.I.N.I.H. Ltd., AIR 1981 SC 1298, this Court considered a case under the Indian Companies Act, and observed that, 'it is generally unsatisfactory to record a finding involving grave consequences with respect to a person, on the basis of affidavits and documents alone, without asking that person to submit to cross-examination'. However, the conduct of the parties may be an important factor, with regard to determining whether they showed their willingness to get the said issue determined on the basis of affidavits, correspondence and other documents, on the basis of which proper and necessary inferences can safely and legitimately be drawn.

34. In Ramesh Kumar Vrs. Kesha Ram, AIR 1992 SC 700, this Court considered the scope of application of the provisions of O. XIX, Rr. 1 and 2 CPC in a Rent Control matter, observing as under:

'The Court may also treat any affidavit filed in support of the pleadings itself as one under the said provisions and call upon the opposite side to traverse it. The Court, if it finds that having regard to the nature of the allegations, it is necessary to record oral evidence tested by oral cross-examination, may have recourse to that procedure.'

35. In Standard Chartered Bank Vrs. Andhra Bank Financial Services Ltd., (2006) 6 SCC 94, this Court while dealing with a case under the provisions of Companies Act, 1956, while considering complex issues regarding the Markets, Exchanges and Securities, and the procedure to be followed by special Tribunals, held as under:

*'While it may be true that the Special Court has been given a certain amount of latitude in the matter of procedure, it surely cannot fly away from established legal principles while deciding the cases before it. As to what inference arises from a document, is always a matter of evidence unless the document is self-explanatory. *** In the absence of any such explanation, it was not open to the Special Court to come up with its own explanations and decide the fate of the suit on the basis of its inference based on such assumed explanations.'*

36. Therefore, affidavits in the light of the aforesaid discussion are not considered to be evidence, within the meaning of Section 3 of the Evidence Act. However, in a case where the deponent is available for cross-examination, and opportunity is given to the other side to cross-examine him, the same can be relied upon. Such view, stands fully affirmed particularly, in view of the amended provisions of Order XVIII, Rules 4 & 5 CPC. In certain other circumstances, in order to avoid technicalities of procedure, the legislature, or a court/tribunal, can even lay down a procedure to meet the requirement of compliance with the principles of natural justice, and thus, the case will be examined in the light of those statutory rules etc. as framed by the aforementioned authorities."

9.11. With the above perspective, when the merit of instant matter is examined, further reasons justifying disengagement of the petitioner merely because he was dragged into net of the criminal case by way of counter affidavit in contradiction to

the direction contained in the deponent's impugned order that the petitioner is required to be re-engaged in his former post, i.e., Junior Teacher (Contractual) cannot hold water.

10. It is next considered that the case of similarly circumstanced person, who was working as Junior Teacher at Borandi New Primary School at Borandi, P.O.: Sodaranga, via: Kotpad in the District of Koraput, has been considered for re-engagement in the case of Sri Mohan Charan Prusty Vrs. State of Odisha, W.P.(C) No.8354 of 2016.

10.1. This Court in the said case, being Sri Mohan Charan Prusty Vrs. State of Odisha, W.P.(C) No.8354 of 2016, disposed of vide Order dated 26.09.2016, directed as follows:

> *"This petition challenges the order dtd. 22.04.2015 passed by the District Project Coordinator, RTE-SSA, Koraput, vide Annexure-5, disengaging the petitioner from the post of Junior Teacher.*
>
> *Heard Mr. S.K. Samal, learned counsel for the petitioner and Mr. Bisoi, learned counsel for the School and Mass Education Department.*
>
> *The matter has suffered several adjournments at the behest of the learned Standing Counsel for the School and Mass Education. Today learned Standing Counsel submits that he has not received any instruction.*
>
> *As it would be evident from the impugned order, the petitioner was disengaged from the post of Jr. Teacher w.e.f. from 28.02.2015 since he was arrested in connection with Kotpad P.S. Case No. 39 of 2015 dtd.27.02.2015.*
>
> *Learned counsel for the petitioner submits that the petitioner is acquitted from the said case by the learned Sessions Judge-cum-Special Judge, Koraput in T.R.No. 15 of 2015. An additional affidavit has been filed by the petitioner stating therein that no appeal has been filed against the order of conviction.*
>
> *Since the petitioner has been acquitted in the criminal case, the order passed, vide Annexure-5, is quashed. Opposite party No.2 is directed to engage the petitioner forthwith.*
>
> *The writ petition is allowed."*

10.2. It is submitted at the Bar that pursuant to aforesaid Order, the petitioner in W.P.(C) No.8354 of 2016 has been accorded engagement, while in the case of present petitioner, in spite of clear-cut direction of the District Project Co-ordinator, Sarva Siksha Abhiyan, Kalahandi at Bhawanipatna to re-engage him in former post vide Order dated 15.05.2019, till date the same has not been complied with. Though the opposite party No.3 has filed counter affidavit, he has not disputed nor denied the fact of giving engagement to Sri Mohan Charan Prusty. Since the direction contained in Order dated 15.05.2019 of the opposite party No.3 has not been taken to its logical end in its true letter and spirit, the statement in the said Order that "With this order the order of High Court of Orissa issued *vide* No.2 dated 20.12.2018 in W.P.(C) No.17963/2018 is complied herewith" becomes redundant.

10.3. It is manifest on perusal of record that the opposite party No.3, though was directed to consider the representation of the petitioner vide Order dated 20.12.2018 in W.P.(C) 17963 of 2018, his Order dated 15.05.2019 stated to have complied with

direction of this Court, till date no engagement has been given to the petitioner. The opposite party No.3 has also not whispered a single word in his counter affidavit in this regard. Therefore, in effect, there is no compliance of Order dated 20.12.2018 passed in W.P.(C) No.17963 of 2018.

10.4. Needless to observe that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. It is but trite that what is important is not what was actually done, but what might appear to have been done. This doctrinaire has its trace found as stated by Lord Hewart, the then Lord Chief Justice of England in the case of Rex Vrs. Sussex Justices, (1924) 1 KB 256; and religiously followed by different Courts on very many occasions. This principle "Justice should not only be done, but should manifestly and undoubtedly be seen to be done" is well-known legal maxim that underscores the importance of not only ensuring the substance of justice but also making sure that the process is transparent and perceivably fair; and avoids appearance of bias, impropriety, or undue influence. This is essential for upholding the integrity of the legal system. This principle has been recognized as one of the facets of the principles of natural justice.

10.5. In the context of regularization of service when the Chief Commissioner of Income Tax, in the case of *Raman Kumar Vrs. Union of India, 2023 LiveLaw (SC) 520*, has himself found that 65 persons were entitled to be regularized, held that the act of regularizing the services of only 35 employees and not regularizing the services of other employees, is patently discriminatory and violative of Article 14 of the Constitution of India, notwithstanding the fact that before the High Court, an affidavit was filed stating therein that the services of the appellants could not be regularized since the posts were not available.

10.6. Taking cue from the above, it can safely be said that the Order dated 15.05.2019 of the District Project Co-ordinator, Sarva Siksha Abhiyan, Kalahandi at Bhawanipatna, the opposite party No.3, is required to be given effect to.

CONCLUSION:

11. The Hon'ble Supreme Court of India in the case of *Union of India Vrs. Methu Meda, (2021) 8 SCR 657* reiterated the principle of reinstatement in service in the event of honourable acquittal in criminal case vis-à-vis cases of acquittal on benefit of doubt in the following lines:

> *"17. The law with regard to the effect and consequence of the acquittal, concealment of criminal case on appointments, etc. has been settled in the case of Avtar Singh (supra) [Avtar Singh Vrs. Union of India, (2016) 8 SCC 471 = (2016) 7 SCR 445], wherein a three-Judge Bench of this Court decided, as thus:*
>
> *'38. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of the aforesaid discussion, we summarize our conclusion thus:*
>
> *38.1 Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.*

38.2 While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.

38.3 The employer shall take into consideration the Government orders/ instructions/ rules, applicable to the employee, at the time of taking the decision.

38.4 In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/ verification form and such fact later comes to knowledge of employer, any of the following recourse appropriate to the case may be adopted:

38.4.1 In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.

38.4.2 Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee. 38.4.3 If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.

38.5 In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.

38.6 In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion may appoint the candidate subject to decision of such case.

38.7 In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.

38.8 If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.

38.9 In case the employee is confirmed in service, holding Departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.

38.10 For determining suppression or false information attestation/ verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

38.11 Before a person is held guilty of suppressio veri or suggestio falsi, knowledge of the fact must be attributable to him.'

***

22. As discussed hereinabove, the law is well-settled. If a person is acquitted giving him the benefit of doubt, from the charge of an offence involving moral turpitude or because the witnesses turned hostile, it would not automatically entitle him for the employment, that too

in disciplined force. ***The employer is having a right to consider his candidature in terms of the circulars issued by the Screening Committee****. The mere disclosure of the offences alleged and the result of the trial is not sufficient.* ***In the said situation, the employer cannot be compelled to give appointment to the candidate****. Both the Single Bench and the Division Bench of the High Court have not considered the said legal position, as discussed above in the orders impugned. Therefore, the impugned orders passed by the learned Single Judge of the High Court in Writ Petition No. 3897 of 2013 and Division Bench in Writ Appeal No. 1090 of 2013 are not sustainable in law, as discussed hereinabove."*

12. In view of the above discussion on factual merit of the matter and given legal position, for the reasons stated in the foregoing paragraphs, it would suffice to say that as the opposite party No.3 has already taken a decision, while complying with the direction of this Court vide Order dated 20.12.2018 in W.P.(C) No.17963 of 2018, keeping in view that the petitioner has been acquitted in the criminal case being CT Case No.110 of 2016 (POCSO)/TR No.37/2016 by Additional Sessions Judge-cum-Special Judge, Bhawanipatna, vide Judgment dated 23.11.2017, against which no appeal has been preferred by the Government, to re-engage the petitioner in his former post of Junior Teacher, this Court is of the opinion that the opposite party No.3, viz. the District Project Co-ordinator, Sarva Siksha Abhiyan, Kalahandi at Bhawanipatna is required to ensure adherence of his Order dated 15.05.2019. Added to this, as the opposite party Nos.1, 2 and 4 have not filed counter affidavit disputing said direction of the opposite party No.3, the Order dated 15.05.2019 of the opposite party No.3 stands.

13. Therefore, this Court does not find it proper to exercise power under Article 226/227 of the Constitution of India to issue writ in the nature of mandamus to the opposite party No.3, but for observing that the opposite party No.3 may take steps to enforce his own Order dated 15.05.2019 *vide* Annexure-6 to the writ petition.

13.1. So far as further prayer for regularization of service with consequential financial and service benefits is concerned, liberty is reserved to the petitioner for approaching appropriate authority.

13.2. In the result, the writ petition is disposed of in the above terms, to the extent of observation made supra, without any order as to costs.

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2024 (I) ILR-CUT-304

S.K. MISHRA, J.

W.P.(C) NO.30945 OF 2023

NILU AGRAWAL @DAYA RAM AGRAWAL .....Petitioner

-V-

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

ESSENTIAL COMMODITIES ACT, 1955 – Section 6a, 6c r/w order 18 of Odisha Rice Paddy Procurement and Custom Milling of Rice Order, 2016 – Petitioner is a bhaga chassi petitioner's paddy seized and confiscated – Petitioner made appeal U/s. 6(c) of the Act before the Appellate Authority – Appeal rejected on the ground of wrong forum with a liberty to file appeal U/o. 18 of the 2016 Order – Whether appeal U/o. 18 is maintainable? – Held, No – Since the paddy of the petitioner has been confiscated U/s. 6-A of the Act and the petitioner is not a dealer or miller or custom miller but a bhaga chassi, the only remedy available to the petitioner for redressal of his grievance is to prefer an appeal as per sec 6(c) of the Act. (Para 11)

For Petitioner : Mr. S.N. Mishra
For Opp.Parties : Mr. T.K. Pattanaik, ASC

JUDGMENT Date of Hearing & Judgment : 20.11.2023

S.K. MISHRA, J.

The Petitioner, who claims to be a Bhag Chasi, has preferred the Writ Petition challenging the order dated 20th May, 2023, passed by the Additional District & Sessions Judge, Nuapada in F.A.O. No.03/03 of 2021-2022 under Section 6-C of the Essential Commodities Act, 1955, vide which the said Appeal of the Petitioner was dismissed on the ground of approaching the wrong forum. However, liberty was granted to the Petitioner to prefer an Appeal before the Appellate Authority in terms of Order 18 of the Odisha Rice and Paddy Procurement and Custom Milling of Rice Order, 2016, shortly, hereinafter "the Order, 2016".

2. The case of the Petitioner is that, one Rama Krushna Panda is the owner of Plot Nos.820, 829, 842, 843, 854 and 985 under Khata No.170 in Bartansil Mouza, PS: Boden, Dist: Nuapada. Due to his personal problem, he had given the cultivation right to the Petitioner as Bhag Chasi on 01.03.2020 for a period of one year. After cultivation of the said land, the Petitioner collected the paddy and stored in his house. While the paddy was loaded in the vehicle, the Opposite Party No.3, without any basis, raided and took the paddy to the godown of one M/s. R.K. Khemka Rice Mill, Tukla. The Opposite Party No.3, without any verification and enquiry, seized the paddy, which was cultivated by the Petitioner. During the relevant time, as the Petitioner was not present in his house, he could not submit any valid document towards such possession of the paddy. After the seizure of paddy, the Petitioner was issued with a Show Cause Notice dated 10th December, 2020 by the Collector & District Magistrate, Nuapada (Opposite Party No.2), wherein he was directed to file his reply by 18th December, 2020. Pursuant to the said notice, the Petitioner filed his reply stating therein about the points in his favour. A specific stand was taken in the said Reply that he has been authorized by the original land owner to cultivate his land and apportion the usufructs. The Petitioner also submitted the agreement made between him and the land owner to substantiate the said stand taken before the

Opposite Party No.3. However, a case was initiated against the Petitioner under Section 6-A of the Essential Commodities Act, 1955, shortly, hereinafter, "the Act, 1955", which was registered as Misc. Case No.07 of 2020. Pursuant to the same, notice was issued to the Petitioner on 26.11.2020 intimating him to appear before the Opposite Party No.2, the Collector & District Magistrate, Nuapada, on 04.12.2020 with supporting documents, if any. On the said date, the Petitioner appeared before the Opposite Party No.2 and produced the agreement entered into by him with the land owner. However, the Opposite Party No.2 erroneously came to a conclusion that the Petitioner is neither a farmer nor authorised to produce the paddy and the documents produced by the Petitioner is fabricated . While holding so, it was observed as follows:

> *"(i) Q.299.44 of paddy found in his presence without valid documents.*
>
> *(ii) No document produced as required during the time of seizure.*
>
> *(iii) For contravention of Cl.5(1) of Food Policy for the year 2020-21 and Cl.3(2) of Odisha Rice and Paddy Procurement and Custom Milling of Rice Order, 2016,* ***seized paddy liable to be confiscated****."* ***(Emphasis supplied)***

3. Pursuant to the same, the Opposite Party No.2, on the very same day, issued Show Cause Notice under Section 6-B of the Act, 1955 as to why the seized paddy shall not be confiscated to the State and the case registered against the petitioner was posted to 24.12.2020 for hearing. On the said date both the parties were present along with their supporting documents. The Opposite Party No.2 passed an order on the very same day holding that the Petitioner is not the registered farmer and he has hoarded huge quantities of paddy by purchasing the same from the farmers in below Minimum Support Price (MSP) fixed by the Government. Accordingly, the seized paddy was confiscated in exercise of power conferred under Section-6-A of the Act, 1955.

4. Being aggrieved by the order dated 24.12.2020, the Petitioner preferred an Appeal under Section 6-C of the Act, 1955 before the Court of the Additional District & Sessions Judge, Nuapada, which was registered as F.A.O. No.03/03 of 2021-2022. The Court below dismissed the said Appeal of the Petitioner on the ground that the Petitioner has approached the wrong forum. However, liberty was granted to the Petitioner (Appellant before the Court below) to file Appeal before the appropriate authority under Order-18 (wrongly mentioned as Section-18) of the Odisha Rice and Paddy Procurement and Custom Milling of Rice Order, 2016.

5. Being aggrieved by the order of confiscation dated 24.12.2020 passed under Section-6-A of the Act, 1955, the Petitioner approached this Court in W.P.(C) No.23379 of 2023. Since this Court was of the view that instead of confiscation order dated 24.12.2020 passed under Section 6-A proceeding, the Petitioner ought to have challenged the order passed in F.A.O. No.03/03 of 2021-2022, the Petitioner withdrew the said Writ Petition with liberty to file better application. Accordingly, the said Writ Petition was disposed of on 01.08.2023 giving liberty to the Petitioner, as prayed for. Thereafter, the present Writ Petition has been preferred against the

order dated 20th May, 2023 passed in F.A.O. No.03/03 of 2021-2022 on the ground that though the Court below has authority to act as Appellate Authority under Section 6-C of the Act, 1955, but erroneously the impugned order was passed with an observation that the Petitioner approached the wrong forum and should have preferred an Appeal in terms of the provision prescribed under Order 18 of the Order, 2016.

6. The specific stand of the Petitioner before this Court is that, he is not a dealer or miller or custom miller. The said provision of the Order, 2016, as quoted in the impugned order by the Court below, permits the dealer or miller or custom miller to prefer an appeal. For ready reference, Order 18 of the Odisha Rice and Paddy Procurement and Custom Milling of Rice Order, 2016 is quoted below:

> *"**18. Appeal**: Any dealer or Miller or Custom Miller aggrieved by the order passed by the Collector or his authorized officer or any Enforcement Officer authorized under this Order, may prefer appeal to the Secretary for redressal."*

7. A further stand has also been taken in the Writ Petition that since the paddy has been confiscated by the Opposite Party No.2, the Petitioner has rightly approached under Section 6-C of the Act, 1955 the Court below. For ready reference, Section 6-C of the said Act is extracted below:

> *"6-C. Appeal.—(1) **Any person aggrieved by an order of confiscation under section 6A may, within one month from the date of the communication to him of such order, appeal to any judicial authority appointed by the State Government concerned and the judicial authority shall, after giving an opportunity to the appellant to be heard, pass such order as it may think fit, confirming, modifying or annulling the order appealed against**.*
>
> *(2) Where an order under section 6A is modified or annulled by such judicial authority, or where in a prosecution instituted for the contravention of the order in respect of which an order of confiscation has been made under section 6A, the person concerned is acquitted, and in either case it is not possible for any reason to [return the essential commodity seized], [such persons shall, except as provided by sub-section (3) of section 6A, be paid] the price therefore [as if the essential commodity,] had been sold to the Government with reasonable interest calculated from the day of the seizure of [the essential commodity] 7[and such price shall be determined—*
>
> *(i) in the case of food grains, edible oilseeds or edible oils, in accordance with the provisions of sub-section (3-B) of section 3;*
>
> *(ii) in the case of sugar, in accordance with the provisions of subsection (3C) of section 3 ; and*
>
> *(iii) in the case of any other essential commodity, in accordance with the provisions of subsection (3) of section 3.]"* ***(Emphasis supplied)***

8. In view of such stand taken in the Writ Petition, this Court vide order dated 10.10.2023 directed the State Counsel to take instruction in the said regard. Paragraphs-3 to 6 of the said order dated 10.10.2023 are reproduced below:

> *"3. Mr. Mishra, learned Counsel for the Petitioner submits, the Petitioner is a Bhag Chasi, who has entered into an agreement with the land lord as at Annexure-1. After cultivation, the Petitioner collected the paddy. When the paddy was loaded in the vehicle to be taken to the house of the Petitioner, the Opposite Party No.3, without any basis, raided the same and took the paddy to the godown of one M/s. R.K. Khemka Rice Mill.*

4. He further submits, though his client rightly approached the Court below by preferring an Appeal under Section 6C of the Essential Commodities Act, 1955, the Court below, vide the impugned order dated 20.05.2023, disposed of the said Appeal with an observation that the said Appeal preferred by the Petitioner under Section 6C of the Essential Commodities Act, 1955 is not maintainable, giving liberty to the Petitioner to prefer an Appeal before the appropriate authority in terms of Order -18 (wrongly typed as Section-18 in the impugned order) of the Odisha Rice and Paddy Procurement and Custom Milling of Rice Order, 2016.

5. Mr. Mishra further submits, the Petitioner being a Bhag Chasi does not come under the purview of the provision prescribed under Order 18 which permits any Dealer or Miller or Costumer to prefer an Appeal in terms of the said provision.

6. Mr. Katikia prays for a short adjournment to examine the point raised by the learned Counsel for the Petitioner so also to take instruction from the authority concerned."

9. On being so directed, though the matter got listed on 17.10.2023, on prayer of the learned Counsel for the State, further time was allowed and the matter got adjourned, permitting the State Counsel to take instruction unfailingly before the next date. Pursuant to the said order, when the matter is listed today permitting the State Counsel to communicate the instruction in terms of the previous orders dated 10.10.2023 and 17.10.2023, Mr. Pattnaik, learned Additional Standing Counsel for the State/Opposite Parties with all fairness submits, though instruction could not be obtained, since the paddy seized has already been confiscated in a 6-A proceeding, the remedy available to the aggrieved party is to prefer an appeal under Section 6-C of the Act, 1955 . The Petitioner had rightly approached the Court of Additional District & Sessions Judge, Nuapada by preferring an appeal in terms of Section 6-C of the Act, 1955. Mr. Pattanaik further submits, the Court below should not have passed the impugned order on the ground of approaching the wrong forum by the Petitioner, when the Court below has authority to decide the said Appeal, it being competent to do so in terms of the Section 6-C of the Act, 1955.

10. Learned Counsel for the Petitioner also submits, since the paddy of the Petitioner was confiscated in a proceeding initiated under Section 6-A of the Act, 1955, the only remedy available to the Petitioner is to prefer an Appeal in terms of Section 6-C of the Act, 1955 and the Petitioner being a Bhag Chasi and not being a dealer or miller or custom miller, the order passed by the Court below, vide which Appeal preferred by his client was dismissed, is misconceived.

11. In view of the above, this Court is of the view that since the paddy of the Petitioner has been confiscated in a 6-A proceeding, in view of the provision under Section 6-C of the Act, 1955, even though the Petitioner is a "Bhag Chasi" as claimed by him, the only remedy available to the Petitioner for redressal of his grievance is to prefer an Appeal against the said confiscation order. Rightly the Petitioner had approached the Court below, challenging the said order passed in a 6-A proceeding and the impugned order deserves to be quashed.

12. Accordingly, the order dated 20th May, 2023 passed in F.A.O. No.03/03 of 2021-2022, as at Annexure-7, is set aside and the matter is remitted back to the

Court below to hear the said Appeal, preferred by the present Petitioner under Section 6-C of the Act, 1955, afresh and decide the same on merit giving due opportunity of hearing to the Petitioner (Appellant before the Court below) in terms of Section 6-C of the Act, 1955.

13. At this Stage, learned Counsel for the Petitioner submits, since the paddy has been confiscated, direction be given to the Court below to expedite the hearing of the said Appeal and dispose of the same within a time frame.

14. In view of the said submission made, it is directed that the Court below shall do well to deal with and dispose of F.A.O. No.03/03 of 2021-2022 within two months from the date of production of the certified copy of this Judgment.

15. Accordingly, the Writ Petition stands disposed of. However, no order as to cost.

—— o ——

2024 (I) ILR-CUT-309

SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 8476 OF 2015

HARIDHAN DEY .....Petitioner

-V-

ADDL. DIST. MAGISTRATE, BALASORE & ORS. ..... Opp.Parties

CONSTITUTION OF INDIA, 1950 – Article 226 r/w Arms Act, 1959 – Sections 17(3)(b), 18, 21 r/w Rule 107 of Arms Rule – The petitioner filed the writ application challenging the order of suspension of Arms Licence issued in his favour – Whether writ petition is maintainable ? – Held, No – In view of alternative remedy available U/s. 18 of the Act r/w Rule 107 of Arms Rule, present writ petition is not maintainable.

(Para 12)

For Petitioner : Mr. A.A. Mishra

For Opp.Parties : Mr. S.N.Pattnaik, AGA & Mr. Debasish Samal

JUDGMENT Date of Judgment: 04.12.2023

S.K.MISHRA, J.

1. This Writ Petition has been preferred challenging the Order dated 09.07.2014 passed by the Collector & District Magistrate, Balasore, vide which the Arms Licence bearing No.3275/BLS issued in favour of Petitioner-Haridhan Dey was suspended till finalisation of civil case/criminal dispute among the brothers, which are subjudice before various Courts. It was also ordered to keep the Gun (Rifle bearing No. L 16994 by BSA) in safe custody either at Police Station Level or

District Armoury Level. The said order was passed invoking Section 17(3)(b) read with Section 21 of Arms Act, 1959, shortly, "the Act, 1959".

2. The brief background facts, which led to filing of the Writ Petition, are that the Petitioner and the Opposite Party No.3 are brothers, being sons of Late Suresh Chandra Dey, who died in the year 2010 leaving behind four sons and three daughters. The Petitioner is running a hotel business so also the other brother, namely, Niranjan Dey. Mr. Manoranjan Dey, who is one of the sons of late Suresh Chandra Dey, is in the profession of TV repairing works and the Opposite Party No.3-Satyaranjan is a lawyer by profession. It is alleged that Petitioner's brother-Opposite Party No.3 is influential and powerful. Under the cover of advocacy, he makes people believe that he is very powerful. His say has a value before the officials too including the Addl. District Magistrate & Inspector In-Charge, who are Opposite Party Nos. 1 and 2 respectively. Taking advantage of the position, the Opposite Party No.3 threatens the villagers and wishes to get his work done.

It is further case of the Petitioner that some disputes arose between him and his brother (Opposite Party No.3) regarding properties left by their father Late Suresh Chandra Dey, for which his other brother, namely, Satyaranjan Dey, has filed a Civil Suit and now the matter is subjudice, besides before this Court in W.P.(C) No.15821 of 2010.

The case of the Petitioner is that there being a threat to his life and property, he applied for Gun licence before the competent Authority to possess a Gun. The Additional District Magistrate, Balasore, by Order dated 11.02.1995 in I.A. No.2 of 1995, accorded permission to the Petitioner to purchase a Gun of .22 bore. Being so accorded, the Petitioner purchased the Gun from one Brajamohan Sahu, a licensee. The same was inspected by the Officer In-Charge of the Judicial Section and Executive Magistrate on 15.10.1998. Thereafter, time to time, the licence was being renewed. Finally, by Order dated 27.10.2013, arms licence to possess the .22 bore rifle was renewed up to 17.05.2016. It is further case of the Petitioner that earlier he was possessing another rifle of .12 bore, which he sold later on. At present, he owns only one rifle.

3. When the matter was stood thus, the Petitioner received a letter from the Sub-Inspector of Police to surrender the rifle on 17.08.2013 as the Municipal Election was scheduled to be held on 12/13 of September, 2013. In obedience to such requisition, the Petitioner deposited the Gun/rifle with the Sub-Inspector on 31.08.2013.

Soon after the election was over, the Petitioner approached the Opposite Party No.2 to return the Gun, but on some plea or other, the matter was postponed. Thereafter, the Petitioner received a notice to Show-Cause dated 12.11.2013 from the Additional District Magistrate as to why the licence to possess the Gun shall not be cancelled. Then, the Petitioner came to know that his brother (present Opposite Party No. 3) lodged a complaint before the Additional District Magistrate on

05.09.2013 against him on frivolous grounds, based on which the said Show-Cause Notice has been issued to him.

In the said Show-Cause Notice, there was a mention that the Petitioner is involved in a Sessions Case being 52 of 2013 and Civil Suit No.282 of 2010. That apart, there was an allegation that the Petitioner and his brother, namely, Manoranjan Dey have threatened to kill the Opposite Party No.3.

On being so noticed, the Petitioner submitted a detailed reply on 31.01.2014 delineating therein his stand to return the said Gun so also continuance of licence in his favour issued by the Authority concerned. Thereafter, the Petitioner wrote to the concerned Inspector In-Charge to return the Gun for cleaning, as it requires so once in every 6 months. Unfortunately, the Inspector In-Charge refused to receive the letter. Thereafter, without any further enquiry, the Collector and District Magistrate, Balasore, issued the impugned letter dated 09.07.2014 and ordered that the Gun in question be kept in custody of police, after suspending the licence. Since the said letter dated 09.07.2014 disclosed that the Collector and District Magistrate,Balasore, while issuing notice, relied upon the report of the Inspector In-Charge, Town Police Station, Balasore, the Petitioner made an application under the Right to Information Act, 2005 to know the contents of the said report, as the same was submitted behind his back.

The said report being supplied to him vide letter dated 21.03.2015 by the Public Information Officer, Collectorate, Balasore, it came to the notice of the Petitioner that it has been disclosed in the said report that there is likely hood of breach of peace in view of pendency of P.S. Case No.218 of 2010 and Civil Suit No.282 of 2010. But, no overt act or use of the Gun of the Petitioner was mentioned in the said report. As a consequence of the said report, the Inspector In-Charge seized the Gun and kept the same in his custody.

4. It is further case of the Petitioner that the decision of the authority to suspend his licence so also seized the Gun is bad in the eye of law as the same was taken without considering the submissions made by him, in response to the Show-Cause Notice. Accordingly, a prayer has been made to quash the Order dated 09.07.2014, as at Annexure-5, and direct the Opposite Party No.2 to return the Gun to the Petitioner.

5. Since there is a pleading in the body of the Writ Petition as to pendency of W.P.(C) No.15821 of 2010 before this Court, without disclosing therein as to what is the subject matter of challenge in the Writ Petition, in order to ascertain the same, a search being made through the official website of this Court, it is ascertained that the said Writ Petition i.e. 15821 of 2010, has been disposed of since 25.08.2016. The Writ Petition is pertaining to issue regarding appointment of receiver in F.A.O. Nos.109 and 115 of 2010, pending in the Court of District Judge, Balasore-Bhadrak and the same has been disposed of with the following observation/direction:

" **25.08.2016**

> The petitioner in this writ application seeks quashment of the common order dated 09.09.2010 passed by the learned District Judge, Balasore-Bhadrak in FAO No. 109 and 115 of 2010 in the matter of appointment of receiver.
>
> Heard learned counsel for the parties. Perused the order.
>
> It is submitted by the learned counsel for the parties that despite the order of the learned District Judge making an arrangement in so far as running of the shop of Mahi Mistana Bhandara is concerned, the same has not been carried out in view of the interim order of this Court passed on 17.09.2010 maintaining status quo with regard to the possession of the said disputed shop room.
>
> The suit is of the year 2010 and that is also still pending when by now there has been lapse of about six years by now.
>
> In the above state of affairs that has been prevailing since the time of filing of the suit as on today and in view of the submission of the learned counsel for the parties, the present writ application is disposed of with a direction to the trial court to complete the trial within a period of eight month from the date of communication of the order or production of its certified copy whichever is earlier with continuance of the order of status quo, till then keeping it open for the parties to move for any interim arrangement with regard to the said shop room thereafter in case situation so demands.
>
> The writ application is accordingly disposed of."

6. The Inspector In-Charge, who has been arrayed as Opposite Party No.2 to this Writ Petition, has filed a Counter delineating therein that the Petitioner, who was holding a fire arm vide license No.3275 dated 07.05.1995 issued by the Arms Magistrate, Balasore to possess one .22 bore rifle No.L-16994 made-BSA, was authorized to keep 25 to 100 quantity of ammunitions, being a permanent inhabitant of village Damodarpur.

It has further been stated that the Petitioner is running a Hotel-cum-Sweets Stall at Motiganj Bazar of Balasore town. Following a family dispute between the Petitioner and his brother Satya Ranjan Dey, a criminal case was registered vide Balasore Town P.S. Case No.218 dated 17.09.2010 under Sections 294, 323, 324, 379, 506 and 307/34 of the IPC on the report of Satya Ranjan Dey. The said case was the outcome of the civil dispute amongst the brothers regarding partition of paternal property, for which a Civil Suit vide C.S. No.282 of 2010 is pending before the Court of Civil Judge. After due investigation, the above criminal case ended in charge sheet against the Petitioner and his brother Manoranjan Dey. The criminal case as well as Civil Suit are pending before the concerned Courts.

That apart, reiterating the facts stated in the Writ Petition so also denying the allegations made therein, it has further been stated in the Counter that the Petitioner had never approached the Police ventilating his grievance for threat to his life or any apprehension to the said effect. A stand has also been taken in the Counter that while Urban Body Election of Balasore Municipal Council was processed, the A.D.M.-Cum-Arms Magistrate, Balasore, vide letter dated 12.09.2013 asked the IIC, Town PS, Balasore to conduct enquiry and submit a factual report. In terms of the said direction of the Licensing Authority, the IIC, Town P.S., conducted an enquiry and submitted a report vide letter dated 19.10.2013.

Based on the Enquiry Report, the A.D.M.-Cum-Arms Magistrate, Balasore, vide letter dated 12.11.2013 directed the IIC to seize the arms of the Petitioner and keep it in police custody. Upon direction Order dated 09.07.2014 of the Collector & District Magistrate, Balasore, the IIC, Town P.S. ensured the deposit of said rifle of the Petitioner in the District Armoury for safe custody in terms of Section 17(3)(b) read with Section 21 of the Arms Act, 1959.

7. Though the private Opposite Party No.3, being noticed, has already rendered appearance in this case, no Counter has been filed till date by the Opposite Party No.3. However, Mr. Samal, learned Counsel for the Opposite Party No.3, hands up the photocopy of the judgment dated 04.08.2016 passed in Sessions Trial No.52/261 of 2013-2011 by the 2nd Additional Sessions Judge, Balasore and submits, the present Petitioner, who is one of the accused persons in the said trial, has been convicted and being aggrieved by the said judgment, the Petitioner has preferred Criminal Appeal No.414 of 2016, which is now pending for adjudication.

That apart, Mr. Samal submits, the Civil Suit as to apportion of the immovable property of Late Suresh Chandra Dey being decreed, an Appeal is pending against the judgment and decree before the Appellate Court. He further submits, as per the latest instruction received from his client, still the Petitioner is terrorising his client. Accordingly, Mr. Samal vehemently opposes the prayer made in the Writ Petition to direct the IIC to return the Gun.

8. In view of the pleadings so also submission made by the learned Counsel for the Parties, this Court thinks it appropriate to extract below the contents of the impugned order dated 09.07.2014.

> " After careful consideration of allegation petition filed by Shri Satyaranjan Dey son of Late Suresh Chandra Dey of Vill: Damodarpur, P.S. Town, Dist. Balasore and **gone through the enquiry report of I.I.C. Town Police Station, Balasore along with show cause reply and application dated 31.01.2014 of Shri Haridhan Dey**, the Arms Licence bearing No.3275/BLS issued in favour of Shri Haridhan Dey is **hereby suspended till finalization of the Court Cases due to Civil case/Criminal dispute among the brothers which is subjudice before the Hon'ble Court** and gun (Refle bearing No. L 16994 by BSA) which has been kept in the Town Police Station, Balasore are to be finally kept in safe custody either at Police Station Level or District Armoury Level as per Section 17(3)(b) read with Section 21 of Arms Act,1959.
>
> This Order will take immediate effect." **(Emphasis supplied)**

9. Admittedly, Section 18 of the Arms Act, 1959 provides, any person aggrieved by an order of the licensing Authority refusing to grant a licence or varying the conditions of a licence or by an order of the licensing Authority or the Authority to whom the licensing Authority is subordinate, suspending or revoking a licence may prefer an appeal against that order to such authority and within such period as may be prescribed. The provisions under Sections 17, 18 and 21 of the Arms Act, 1959, being relevant to the present lis, are extracted below:

" 17. Variation, suspension and revocation of licences.—(1) The licensing authority may vary the conditions subject to which a licence has been granted except such of them as have been prescribed and may for that purpose require the licence-holder by notice in writing to deliver-up the licence to it within such time as may specified in the notice.

(2) The licensing authority may, on the application of the holder of a licence, also vary the conditions of the licence except such of them as have been prescribed.

(3) **The licensing authority may by order in writing suspend a licence for such period as it thinks fit or revoke a licence,—**

(a) if the licensing authority is satisfied that the holder of the licence is prohibited by this Act or by any other law for the time being in force, from acquiring, having in his possession or carrying any arms or ammunition, or is of unsound mind, or is for any reason unfit for a licence under this Act; or

(b) **if the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the licence; or**

(c) if the licence was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the licence or any other person on his behalf at the time of applying for it; or

(d) if any of the conditions of the licence has been contravened; or

(e) if the holder of the licence has failed to comply with a notice under sub-section (1) requiring him to deliver-up the licence.

(4) The licensing authority may also revoke a licence on the application of the holder thereof.

(5) Where the licensing authority makes an order varying a licence under sub-section (1) **or an order suspending or revoking a licence under sub-section (3), it shall record in writing the reasons therefor and furnish to the holder of the licence on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement.**

(6) The authority to whom the licensing authority is subordinate may by order in writing suspend or revoke a licence on any ground on which it may be suspended or revoked by the licensing authority; and the foregoing provisions of this section shall, as far as may be, apply in relation to the suspension or revocation of a licence by such authority.

(7) A court convicting the holder of a licence of any offence under this Act or the rules made thereunder may also suspend or revoke the licence:

Provided that if the conviction is set aside on appeal or otherwise, the suspension or revocation shall become void.

(8) **An order of suspension or revocation under subsection (7) may also be made by an appellate court or by the High Court when exercising its powers of revision.**

(9) The Central Government may, by order in the Official Gazette, suspend or revoke or direct any licensing authority to suspend or revoke all or any licences granted under this Act throughout India or any part thereof.

(10) On the suspension or revocation of a licence under this section the holder thereof shall without delay surrender the licence to the authority by whom it has been suspended or revoked or to such other authority as may be specified in this behalf in the order of suspension or revocation.

21. Deposit of arms, etc., on possession ceasing to be lawful.—(1) **Any person having in his possession any arms or ammunition the possession whereof has**, in consequence of the expiration of the duration of a licence or **of the suspension or revocation of a licence** or by the issue of a notification under section 4 or by any reason whatever, ceased to be lawful, shall without unnecessary delay deposit the same either with the officer in charge of the

nearest police station or subject to such conditions as may be prescribed, with a licensed dealer or where such person is a member of the armed forces of the Union, in a unit armoury.

Explanation.—In this sub-section "unit armoury" includes an armoury in a ship or establishment of the Indian Navy.

(2) Where arms or ammunition have or has been deposited under sub-section (1), the depositor or in the case of his death, his legal representative, shall, at any time before the expiry of such period as may be prescribed, be entitled—

(a) to receive back anything so deposited on his becoming entitled by virtue of this Act or any other law for the time being in force to have the same in his possession, or

(b) to dispose, or authorise the disposal, of anything so deposited by sale or otherwise to any person entitled by virtue of this Act or any other law for the time being in force to have, or not prohibited by this Act or such other law from having, the same in his possession and to receive the proceeds of any such disposal:

Provided that nothing in this sub-section shall be deemed to authorise the return or disposal of anything of which confiscation has been directed under section 32.

(3) All things deposited and not received back or disposed of under sub-section (2) within the period therein referred to shall be forfeited to Government by order of the district magistrate:

Provided that in the case of suspension of a licence no such forfeiture shall be ordered in respect of a thing covered by the licence during the period of suspension.

(4) Before making an order under sub-section (3) the district magistrate shall, by notice in writing to be served upon the depositor or in the case of his death, upon his legal representative, in the prescribed manner, require him to show cause within thirty days from the service of the notice why the things specified in the notice should not be forfeited.

(5) After considering the cause, if any, shown by the depositor or, as the case may be, his legal representative, the district magistrate shall pass such order as he thinks fit.

(6) The Government may at any time return to the depositor or his legal representative things forfeited to it or the proceeds of disposal thereof wholly or in part.

18. Appeals.—(1) Any person aggrieved by an order of the licensing authority refusing to grant a licence or varying the conditions of a licence or by an order of the licensing authority or the authority to whom the licensing authority is subordinate, **suspending or revoking a licence** may prefer an appeal against that order to such authority (hereinafter referred to as the appellate authority) and within such period as may be prescribed:

Provided that no appeal shall lie against any order made by, or under the direction of, the Government.

(2) No appeal shall be admitted if it is preferred after the expiry of the period prescribed therefor:

Provided that an appeal may be admitted after the expiry of the period prescribed therefor if the appellant satisfies the appellate authority that he had sufficient cause for not preferring the appeal within that period.

(3) The period prescribed for an appeal shall be computed in accordance with the provisions of the Indian Limitation Act, 1908 (9 of 1908), with respect to the computation of periods of limitation thereunder.

(4) Every appeal under this section shall be made by a petition in writing and shall be accompanied by a brief statement of the reasons for the order appealed against where such statement has been furnished to the appellant and by such fee as may be prescribed.

(5) In disposing of an appeal the appellate authority shall follow such procedure as may be prescribed:

Provided that no appeal shall be disposed of unless the appellant has been given a reasonable opportunity of being heard.

(6) The order appealed against shall, unless the appellate authority conditionally or unconditionally directs otherwise, be in force pending the disposal of the appeal against such order.

(7) Every order of the appellate authority confirming, modifying or reversing the order appealed against shall be final." **(Emphasis supplied)**

10. Similarly, Rules 107 and 105 of the Arms Rules, 2016, which deal with provisions of Appeal and Appellate Authority, are extracted below:

"107. Appeal against order of licensing authority or an authority suspending or revoking a licence under sub-section (6) of section 17 of the Act.- In any case, in which an authority issues an order –

(i) Refusing to grant or renew a license or to give a "no objection certificate" for such grant or renewal; or

(ii) varying any condition of a license or **suspending or revoking a license under sub-section (1), or subsection (3) or sub-section (6) of section 17**, the person aggrieved by such order may, within thirty days from the date of issue of the order, any subject to the proviso to sub-section (2) of section 18, prefer an appeal against that order, to be concerned appellate authority.

"**105. Appellate authorities.-** (1) the appellate authority to whom an appeal shall lie against an order of the licensing or other authority specified in column (1) of the table below, shall be that specified in the corresponding entry in column (2) thereof:-

TABLE

Authority	Appellate Authority
(1)	(2)
(a) **District Magistrate**	**Commissioner of the Division or any other equivalent post or in any state in which there is no post of Commissioner of a Division, the State Government (or any officer authorized by the State Government.**
(b) Commissioner of Police	State Government
(c) Officer empowered by the Central Government in a Union Territory	Administrator/Lt. Governor of the Union Territory
(d) Head of Indian Mission	Central Government
(e) Other Specially empowered officer	Authority that empowered

(2) For the purpose of sub-section (6) of section 17, the licensing authority shall be deemed to be subordinate to the appellate authority.

(3) All licensing authorities shall work under the direction and control of their respective appellate authorities**."** **(Emphasis supplied)**

11. As is revealed from the impugned order dated 09.07.2014, as at Annexure-5, the Collector and District Magistrate, being the Licensing Authority, suspended the licence of the Petitioner till finalization of the Court cases after taking into consideration the Enquiry Report submitted by the Inspector In-Charge, Town Police Station, Balasore, so also Show Cause Reply and application dated 31.01.2014 of the

Petitioner. Hence, this Court is of the view the stand of the Petitioner that before passing of the impugned order, the Authority concerned did not take into consideration his Show Cause Reply is incorrect.

That apart, Sub-Section (5) of Section 17 of the Act, 1959 mandates that the Licensing Authority, while suspending or revoking a licence under Sub-Section (3), shall record in writing the reasons there for and furnish to the holder of the licence on demand, a brief statement of the same, unless the Licensing Authority is of the opinion that it will not be in the public interest to furnish such statement. As is revealed from the impugned order of suspend, as has been extracted above, the Licensing Authority has recorded the reasons to do so in terms of Sub-Section (5) of Section 17 of the Act, 1959. Further, though it is obligatory on the part of the Licensing Authority to furnish a brief statement of the reasons to do so, the same is subject to the licensee demands so and furnishing of brief statement is not automatic. It is not the case of the Petitioner that he asked for a brief statement of the reasons to suspend the Gun licence and it was not supplied to him. Hence, this Court is of the view that there is no illegality or perversity in the impugned order dated 09.07.2014 (Annexure-5).

12. This Court is also of the view that in view of alternative remedy available under Section 18 of the Arms Act, 1959 read with Rule 107 of Arms Rules 2016, the present Writ Petition directly preferred before this Court, bypassing the alternative and efficacious remedy available under the Arms Act, 1959, so also Rules, 2016 made there under, is not maintainable.

13. Further, as is revealed from the photocopy judgment dated 04.08.2016 passed in Sessions Trial No.52/261 of 2013-2011, the 2nd Additional Sessions Judge, Balasore, on assessment of the evidence on record, came to the conclusion that though the Petitioner and his brother, namely, Manoranjan Dey are found not guilty for commission of the offences punishable under Sections 307/323/294/379/ 506/34 of the Indian Penal Code, but found the accused persons guilty for commission of offence punishable under Section 324/34 of the Indian Panel Code and convicted both of them under Section 235(1) of the Cr.P.C. Apart from the same, in view of the serious allegation made by the Opposite Party No.3 as to threat to his life at the instance of the Petitioner so also conviction of the Petitioner in the aforesaid case and pendency of the appeal against the said order of conviction, this Court is not inclined to entertain the prayer made in the Writ Petition at this stage.

14. Accordingly, the Writ Petition stands dismissed.

15. Since the order of suspension of Gun licence is conditional, needless to mention here that dismissal of the Writ Petition will not be a bar for the Petitioner to approach the appropriate forum, at appropriate stage, in accordance with various provisions of Arms Act, 1959, for revocation of the suspension order so also return of Gun, as prayed in the present Writ Petition.

16. The photocopy of the judgment dated 04.08.2016 passed by the 2nd Addl. Sessions Judge, Balasore in Sessions Trial No.52/261 of 2013-2011 filed in the Court, be kept on record.

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2024 (I) ILR-CUT-318

SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 40510 OF 2023

EAST COAST RAILWAYS, KHORDA & ORS. .....Petitioners

-V-

M/s. VAISHNODEVI CONSTRUCTION, CUTTACK .....Opp.Party

ARBITRATION & CONCILIATION ACT, 1996 – Section 36(2) r/w Section 187 of Railways Act, 1989 – The warrant of attachment was issued to attach movable properties of Railway Authority in Execution Case – The properties like Xerox machine, Sofa, Computer, CPU, Voltas AC, etc., were seized by the executing Court – The petitioner challenged the same on the ground of restriction provided U/s. 187 of the Act – It was pleaded that, the order of attachment cannot be made without previous sanction of the Central Govt. – Whether the seized article comes U/s. 187 of the 1989 Act ? – Held, No. (Para 9)

For Petitioners : Mr. S.S.Kashyap

For Opp.Party : --

JUDGMENT Date of Judgment : 12.12.2023

S.K.MISHRA, J.

1. This Writ Petition has been preferred challenging the order dated 05.09.2023 passed in ARBP No.19 of 2017, vide which though the Court below allowed the petition dated 12.07.2023 filed by the Petitioner under Section-36 of the Arbitration & Conciliation Act,1996, but imposed the following conditions:

> "In view of the above discussions, the petition dtd. 12.07.2023 filed by the petitioner u/s 36(2) of the Arbitration and Conciliation Act for stay of operation of award dtd. 30.05.2017 and stay of further proceedings in ARBP Execution Case No.198/2018 is allowed **subject to deposit of the entire award amount along with the accrued interest from the date of award till the date of filing of this case by the petitioner**. The aforesaid amount shall be deposited before the Registrar, Civil Courts, Cuttack, who in turn shall keep the same in fixed deposit with any nationalized bank, renewable at regular intervals and shall not release the same without the order of this Court. **Most importantly, the petitioner is also allowed and directed to move for release of attached property after deposit of above amount.** Put up on 31.10.2023 for bearing of the main case."
>
> **(Emphasis Supplied)**

2. As is ascertained from the documents appended to the Writ Petition, the arbitral award was passed way back on 30.05.2017. Though the present petitioner i.e. East Coast Railway, preferred an application under Section 34 of the Act, 1996, challenging the said award, did not move any application for stay of the operation of the impugned award in ARBP No.19 of 2017.

3. However, warrant of attachment dated 17.07.2023 being issued to attach movable properties of Railway Authority in Execution Case No.198 of 2018 and properties being attached, the Petitioner/Railway Authority moved an application under Section 36 of the Act, 1996, on 12.07.2023. The seizure list discloses that Xerox Machine, Sofa, Computer, CPU, Voltas A.C. etc. 13 articles, were seized by the Executing Court. The application was dealt with by the Court below and disposed of on 05.09.2023 imposing the conditions to stay operation of the arbitral award dated 30.05.2017 so also stay of further proceeding in ARBP Execution No.198 of 2018, as has been extracted above.

4. Mr. Kashyap, learned CGC drawing attention of this Court to Section 36 of the Act, 1996, submits, though the Court below has discretion to impose condition to stay the arbitral award, while doing so, it has to assign reasons to be record in writing. But the Court below has failed to do so while passing the impugned order.

5. Mr. Kashyap further draws attention of this Court to Section 187 of the Railways Act, 1989 and submits, in view of such restriction imposed under the said Section, the attachment cannot be without previous sanction of the Central Government.

6. In view of such submission made by Mr. Kashyap, it is apt to reproduce below Section 36 of the Arbitration & Conciliation Act, 1996 so also Section 187 of the Railways Act, 1989.

> **"Section 36. Enforcement** - (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.
>
> (2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), **on a separate application made for that purpose.**
>
> (3) **Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:**
>
> Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908)]
>
> [Provided further that where the Court is satisfied that a *prima facie* case is made out that, -
>
> (a) the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award, was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

Explanation. - For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016).]"

(Emphasis Supplied)

"187. Restriction on execution against railway property. – (1) **No rolling stock, machinery, plant, tools, fittings, materials or effects used or provided by a railway administration for the purpose of traffic on its railway, or of its stations or workshops,** shall be liable to be taken in execution of any decree or order of any court or of any local authority or person having by law the power to attach or distrain property or otherwise to cause property to be taken in execution, without the pervious sanction of the Central Government.

2) **Nothing in sub-section (1) shall be construed to affect the authority of any court to attach the earnings of a railway in execution of a decree or order**."

(Emphasis Supplied)

7. Though the learned Counsel for the Petitioner submits that no reason has been assigned while passing the said order in terms of sub-Section 3 in Section 36 of the Act, 1996, as it seems from contents of the impugned order, the learned Counsel representing the present Petitioner, filed a memo before the Court below undertaking therein to deposit the entire amount as directed by the Court while allowing the application for stay and also undertook to bear the cost of release of the properties , which have already been attached in the execution proceeding. The relevant portion of the impugned order is extracted below:-

"05.09.2023 xxxxxxx On the other hand, the learned counsel for the OP has as such not filed any written objection and only submitted that even if the petition is allowed, the same shall be allowed with a direction of depositing of 100% of amount along with interest awarded in favour of the OP and they have no objection if the attached property is released. It is forthcoming that the OP/ the decree holder has not received any money till date but attachment order passed in Arbitration Execution 198/2018 has already been executed. **Furthermore, one memo has also been filed by the petitioner that he undertakes to deposit the amount as directed by the Court while allowing the present application and also the petitioner shall undertake to bear the cost of release of attached property. The present case has been filed on 06.09.2017. Therefore, the award amount would include the principal amount and the interest accrued thereon till the date of filing of the present case."** **(Emphasis Supplied)**

8. Mr. Kashyap drawing attention of this Court the seizure list, at page 71, further submits, in view of the restriction under Section-187 of The Railways Act, 1989, the Court below was not justified to attach the said movable properties of the Railway without previous sanction of the Central Government.

9. A query being made, Mr. Kashyap fails to meet the said query as to whether such a stand was taken before the Court below. That apart, the petition dated 12.07.2023, which was allowed by the Court below vide order dated 05.09.2023, subject to fulfilling the conditions imposed by the said order, has also not been disclosed in the writ petition to ascertain as to what was the ground taken in the said

petition to substantiate the prayer made before the Court below for stay. That apart, the seized articles, as has been detailed in the seizure list, do not include any of the articles, as has been detailed under Section-187 of the Railways Act, 1989.

10. In view of the above so also the conduct of the Petitioner-Railways, this Court is of the view that there is no infirmity or illegality in the impugned order passed by the Court below to impose such condition, while staying the operation of the arbitral award so also execution proceeding.

11. Accordingly, the Writ Petition stands dismissed.

12. At this juncture, Mr. Kashyap, learned CGC, orally prays for a direction to the Court below to expedite the hearing of the 34 Application filed by the Petitioner and conclude the same within a stipulated time frame.

13. Since no such prayer has been made to the said effect and the Writ Petition has been dismissed, this Court is not inclined to pass such an order at this stage.

14. However, it is open for the Petitioner to move an application to the said effect before the Court below assigning reasons to pray so. If such an application is moved, the Court below shall do well to deal with and dispose of the same in accordance with law.

15. Since this Writ Petition is dismissed at the stage of admission by passing a reasoned order, Registry is directed to communicate a copy of this order to the Court below.

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2024 (I) ILR-CUT-321

G. SATAPATHY, J.

F.A.O. NO. 399 OF 2023

SUDHIR KUMAR ROUT ……Appellant

-V-

STATE OF ODISHA & ORS. ……Respondents

ODISHA EDUCATION ACT, 1969 – Section 24-C r/w Section 151 of the CPC – Petitioner challenges the order of Learned Education Tribunal passed in an interlocutory application for intervention – Whether an appeal would lie against such order? – Held, No – An interlocutory order does not decide the lis finally, no appeal would lie against such order. (Para 7)

Case Laws Relied on and Referred to :-

1. AIR 1992 SC 96 : Union of India & Ors Vs. Deoki Nandan Aggarwal.
2. AIR 2002 SC 3240 : Union of India & Anr Vs. Hansoli Devi & Ors.
3. AIR 2001 SC 883 : ERMC Mine Planning and Design Institute Limited Vs. Union of India & Anr.

4. 2010(II) OLR 85 : Management of D.A.V. Public School, Chandrasekharpur Vs. State Government of Orissa.
5. AIR 1981 SC 1786 : Shah Babulal Khimji Vs. Jayaben D.Kania & Anr.
6. (2012) 8 SCC 384 : Vidur Impex and Traders Private Limited & Ors. Vs.Tosh Apartments Private Limited & Ors.

For Appellant : Mr. S.K. Das
For Respondents: Mr. M.K. Khuntia, AGA, Mr.D.K. Mohapatra

JUDGMENT Date of Hearing : 02.11.2023 : Date of Judgment: 20.12.2023

G. SATAPATHY, J.

1. Instant appeal stated to be filed U/S 24-C of the Odisha Education Act, 1969 (in short "the Act") seeks for quashing of order passed on 02.09.2022 by the learned Presiding Officer, State Education Tribunal, Bhubaneswar (SET) in G.I.A Case No. 106 of 2020 allowing the intervener-petitioner(R-5) to be arrayed as a party "OP No.5" in the said proceeding and consequently, refusing to review such order by way of another order passed on 04.08.2023.

2. Shorn of unnecessary details, the facts in precise are the appellant was appointed as a Lecturer in History in Abhimanyu Samanta Singhar College, Balia and he joined in service on 27.04.1992 and his post was approved by the Director on 12.11.2012 and the appellant being the senior most Lecturer of the College was allowed to function as the Principal- in-charge-cum-Secretary of the College by an order of approval of Director passed on 12.01.2017, but due to institution of W.P.(C) No. 22530 of 2012 by the Principal of said College challenging the separation of Degree College and Junior College, the appellant could not function as Principal-in-charge of the Degree College. However, on disposal of the writ petition on 08.04.2016, the appellant was once again approved as a Principal-in-charge-cum-Secretary of College by the order of Director passed on 02.08.2019. While the matter stood thus, due to some unverified allegation, the Regional Director caused an enquiry behind the back of the appellant and directed withdrawal of Grain-in-Aid (GIA) of the appellant by an order passed on 29.10.2020 which is the subject matter of challenge in GIA Case No.106 of 2020 and accordingly, the learned State Educational Tribunal (in short "SET") granted interim stay of operation of the impugned order passed on 29.10.2020 of Regional Director of Education, Odisha and during the pendency of GIA case, the State Government brought a guideline for appointment of Principal-in-charge and Head of the Department of Aided College to fix the inter-se seniority amongst the Lecturer in Block Grant Institution on the basis of their date of birth, but not on the basis of their date of joining and since there are other staff who are senior to him(appellant) in age, but joined later in service, the appellant challenged the aforesaid guideline in W.P.(C) No. 33716 of 2020 to allow him to continue as Principal-in-charge, but despite the interim order passed in the writ petition, the State Government passed order on 19.01.2021 to remove the appellant from the post of Principal and allowed OP No. 5 to function as Principal-in-charge notwithstanding to the fact that OP No.5 is not the immediate junior to the

appellant, rather one Pravakar Jena was his immediate junior. Accordingly, the appellant filed Contempt Petition in CONTC No. 573 of 2021 and when notice was issued in the contempt petition, the State Government voluntarily restored the appellant to the post of Principal on 30.06.2021, but OP No.5(R-5) taking advantage of his illegal continuance as Principal of the Institution has filed an intervention application in GIA Case No. 106 of 2020 which was allowed by the P.O., SET and therefore, the appellant is before this Court in this appeal.

3. Mr. S.K. Das, learned counsel for the appellant has submitted that although R-5 is not a necessary party, but the learned P.O., SET has passed order allowing him to intervene in the GIA case as OP No.5, but the fact remains that no opportunity of hearing was provided to the appellant and the impugned order was passed without hearing the appellant and OP No.4 the Governing Body of the College and thereby, the impugned order allowing the intervention application of OP No.5 is unsustainable in the eye of law. Mr. Das has further submitted that when the impugned order came to the knowledge of the appellant, he filed a review application which was also rejected by the P.O. SET vide Annexure-15 by holding that the Tribunal lacks jurisdiction to review its own order. On the aforesaid submissions, Mr.Das has prayed to allow the appeal by quashing the impugned orders of the Tribunal.

In reply, Mr.Khuntia, learned AGA appearing for R-1 to 3, however, by supporting the impugned order has submitted that since no prejudice is caused to the appellant by addition of R-5 as a party to the GIA case, the present appeal being unmerited is liable to be dismissed. Mr. D.K. Mohapatra, learned counsel appearing for O.P. No.5-cum-Intervener by taking this Court through intervention petition and the objection of the appellant to such intervention petition has submitted that the impugned order does not suffer from any illegality or infirmity and thereby, calls for no interference. Further, Mr.D.Mohapatra, while vehemently opposing the prayer of the appellant has submitted that since R-5 being a necessary party to the proceeding, his impletion in GIA case cannot be questioned and accordingly, he has prayed to dismiss the appeal. Since none has appeared for R-4 in the Tribunal, it was not heard by the Tribunal and therefore, the present appeal was taken up without issuing notice to R-4.

4. In the course of argument, an important question of maintainability of the present appeal against the impugned orders arose, but Mr. S.K. Das by relying upon the provision of Section 24-C of the Act and some decisions has submitted that the impugned order is not an interlocutory order so as to bar an appeal from order. On the other hand, Mr. M.K. Khuntia, learned AGA by relying upon the order passed on 04.12.2018 by a Division Bench of this Court in W.A. No. 424 of 2018 has submitted that the impugned order is an interlocutory order and thereby, appeal against such interlocutory order is not maintainable. Further, Mr. Mohapatra has submitted that the impugned order being an interlocutory order, appeal against such interlocutory order is not maintainable.

5. After having considered the rival submissions upon perusal of record, this Court at the inception considers it appropriate to deal with the preliminary objection as to the maintainability of the appeal. For answering the issue of maintainability of the appeal, this Court considers it apt to refer to the provision contained in Section 24-C of the Act which reads as under:

> *"**24-C. Appeal to High Court**- any person aggrieved by an order or decision or judgment of the Tribunal may prefer an appeal before the High Court within a period of sixty day's from the date of such order or decision or judgment."*

As noticed above, the word "order", or "decision" or "judgment" has been referred to in Section 24-C of the Act, but it is contended on behalf of the appellant that the aforesaid three words individually has not been defined either under the Act or under the Odisha Education (Tribunal) Rules, 1977 (in short "the Rules"). Further, it is advanced on behalf of the appellant that Section 24-B (5) of the Act stipulates that the Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908, (in short, "CPC"), but Rule 26 of the Rules provides that the Tribunal may exercise inherent powers for the ends of justice as contemplated under Sections 151, 152 and 153 of the CPC and therefore, the definition as provided for judgment or decision or order of CPC has no application in the present case in hand. Although it is contended on behalf of the appellant that the provisions of CPC except the provision contained in Section 151 to 153 of the CPC has no application to the Act, but this Court cannot countenance or accept the aforesaid contention as advanced for the appellant inasmuch as no provisions contained in the Act or Rules has been brought to the notice of the Court to exclude the applicability of CPC to the Act, more particularly in absence of any provision contrary to the Act. Additionally, the provisions as couched in Rule 26 of the Rules confers powers on the Tribunal to exercise inherent powers for the ends of justice as contemplated U/Ss. 151 to 153 of the CPC and there is no ambiguity in use of power U/S. 151 of the CPC which starts with a non-obstante clause with regard to exercise of inherent power by the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of process of the Court. Hence, this Court is of the conscious view that the provision of Section 151 of the CPC can be used for the ends of justice.

6. It is, however, contended on behalf of the appellant that the words used in Section 24-C of the Act denote that all the orders of the Tribunal are appealable one, but it appears to the Court that the very use of word "order" or "decision" or "judgment" in Section 24-C of the Act has to be considered in a pragmatic and realistic manner. Obviously, the word "order" has not been defined in the Act, but the word "order" has been defined in CPC as the formal expression of any decision of a Civil Court which is not a decree. It is of course true that the Tribunal is not a Civil Court, but it has been provided with statutory powers U/S. 151 of the CPC and thereby, the definition as provided in order can be considered while interpreting the provision of Section 24-C of the Act which provides that any person aggrieved by an

order or decision or judgment of the Tribunal may prefer an appeal before the High Court within the statutory period. It cannot be disputed that there must be an end to the litigation, but if we stretch the meaning of "order" as used in Sec.24-C of the Act to all the orders to be appealable one, there would be multiplicity of proceedings which is contrary to the intention of the law. Further, the very use of word "order" in the aforesaid section along with the word "decision" or "judgment" in alternative itself denote the meaning of final order, but the same must not include the interlocutory order which is not appealable one. Learned counsel for the appellant has of course relied upon paragraph-14 of the decision in ***Union of India and another v. Deoki Nandan Aggarwal; AIR 1992 SC 96***, but the same appears to be not applicable to the case at hand since this Court is not reading down any provision of the Act or Rules, rather it is considered by this Court that the provision of Section 24-C of the Act and Rule 26 of the Rules are plain and unambiguous and it confers power on the Court to exercise inherent jurisdiction U/s. 151 of the CPC for the ends of justice or to prevent abuse of process of Court. Further, since this Court is not interpreting any provision of the Act or Rules, the decision as relied on by the appellant in ***Union of India and another v. Hansoli Devi and others; AIR 2002 SC 3240*** is of no avail for the appellant. Moreover, the decision relied on by the appellant in ***ERMC Mine Planning and Design Institute Limited v. Union of India and another; AIR 2001 SC 883*** being on the point of intra Court appeal has no application in this case since the appellant herein challenges the order passed by the Tribunal allowing intervention application of the intervener.

7. Further, the learned counsel for the appellant has albeit relied upon the decision in the ***Management of D.A.V. Public School, Chandrasekharpur v. State Government of Orissa; 2010(II) OLR 85***, whereas the learned AGA has relied upon order passed on 04.12.2018 by a Division Bench of this Court in W.A. No. 424 of 2018 wherein a Division Bench while distinguishing the decision in ***Management of D.A.V. Public School(supra)*** by relying upon the decision of a three Judge Bench of Apex Court in ***Shah Babulal Khimji v. Jayaben D.Kania and another; AIR 1981 SC 1786*** has held that the order passed by the learned Single Judge in not granting any interim order in favour of the appellant being an interlocutory order is not appealable one. What is an interlocutory order has not been defined precisely in CPC or in this Act, but it logically means that any order which is not a final order and thereby, an interlocutory order does not decide the lis finally, however, orders deciding the right and liability affecting substantially the parties may be an appealable one notwithstanding to the fact that it was passed during the pendency of the proceeding which is in very essence provided in Section 104 of the CPC and Order 43 Rule 1 of the CPC. However, Section 105 of the CPC lays down that save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction. In this case, the appellant challenges the order passed by the Tribunal allowing the intervention application appears to be an interlocutory order and thereby, no appeal would lie against such order.

8. Even on merits, accepting but not admitting the contention of the appellant that the impugned order is an appealable one, it has to satisfy the provision of Section 24-C of the Act which starts with the sentence "any person aggrieved by an order or decision or judgment of the Tribunal may prefer an appeal", but the appellant has failed to demonstrate as to how he was aggrieved by the impugned order which never decides the lis between the parties, rather it has allowed the intervener to contest the case which is in the interest of public policy that there should be an end to the litigation. Had the intervener being not impleaded as a party, he would have come with another proceeding before the Tribunal. Besides, it appears from the impugned order that after removal of the applicant as a officiating Principal-in-charge, he had challenged the same before the Tribunal in GIA Case No. 106 of 2020 and the intervener was working in the post of Principal-in-charge-cum-Secretary of Abhimanyu Samanta Singhar Degree College, but according to the applicant the appointment of intervener has no legal basis, however, the learned Tribunal finding the intervener to have subsisting interest in the lis in GIA Case No. 106 of 2020 has allowed the intervention application by the impugned order. A careful perusal of the impugned order would no where go to disclose about the final decision in the lis nor it decides the right and liability conclusively affecting the applicant (Appellant) and by the impugned order, the intervener who is Respondent No.5 herein has been allowed to contest the proceeding. Further, the appellant could not reasonably demonstrate as to how prejudice is caused to him by mere adding the intervener as a party to the GIA case by the Tribunal. Further, the appellant has also preferred an application before the Tribunal to recall the order on the ground that he was absent at the time of hearing of the intervention application, but that too, was rejected by the Tribunal. The sequence of events described in the facts of the case would go to disclose that the impugned order does not suffer any infirmity; rather the same is otherwise in consonance with the public policy to put an end to the litigation by adjudicating the interse dispute between the parties. This Court, however, has failed to understand as to why the applicant is aggrieved by mere adding of the intervener as a party to the proceeding before the Tribunal since the admitted facts disclose about keeping the intervener to the post earlier held by the appellant who can scrupulously pursue the litigation before the Tribunal to get his right adjudicated. In ***Vidur Impex and Traders Private Limited and others v. Tosh Apartments Private Limited and others; (2012) 8 SCC 384***, the Apex Court has held that the Court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as plaintiff or defendant or whose presence before the Court is necessary for effective and complete adjudication of the issues involved in the suit.

9. In view of the discussions made hereinabove coupled with conspectus of the sequence of events and on going through the materials placed on record together with the impugned orders, this Court does not persuade itself to hold the impugned orders to be illegal or arbitrary.

10. In the result, the FAO sans any merit stands dismissed on contest, but in the circumstance there is no order as to costs.

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2024 (I) ILR-CUT-327

CHITTARANJAN DASH, J.

CRLMC NO. 4712 OF 2023

INDU TIWARI ….Petitioner

-V-

STATE OF ODISHA ….Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 167(2)(A)(I) r/w S.36-A(1)(4) of the NDPS Act – The default bail was granted to the petitioner on 30.09.2023 directing to furnish bail bond of Rupees one lakh with two solvent sureties – The petitioner could furnish the bail bond only on 04.10.2023 – Investigating agency submitted the charge sheet on 03.10.2023 – The Learned Court below decline to accept the bail bond furnished by the petitioner on the ground that the prosecuting agency submitted final P.R before submission of the Bail bond by the Petitioner – Whether the order of Learned Trial Court suffers from any infirmity? – Held, No – The petitioner forfeits his indefeasible right on his own accord having failed to exercise the same within a period reasonably expected to avail – This court finds, no illegality said to have been committed by the Learned Court below. (Paras 10 -13)

Case Laws Relied on and Referred to :-

1. (2021) 81 OCR (SC) 548: M. Ravindram vs. The Intelligence Officers, Directorate of Revenue Intelligence
2. (2017) 68 OCR (SC) 1 : Rakesh Kumar Pal vs. State of Assam
3. (1994) 5 ACC 10 : Sanjay Dutt vs. State through CBI
4. (2012) 12 SCC-1: Sayed Mohd. Ahmad Kazmi vs. State (Govt. of NCT of Delhi) & Others
5. (2014) 59 OCR (SC) 226:Union of India, through CBI vs. Nirala Yadav @ Raja Ram Yadav @ Dipak Yadav
6. (1995) Supp.(3) SCC 221 : State of M.P. vs. Rustam
7. (2021) 82 OCR (SC) 630 : Fakhrey Alam vs. The State of Uttar Pradesh
8. (1994) 4 SCC 602 : Hitendra Bishnu vs. State of Maharashtra
9. (2001) 5 SCC 453 : Uday Mohanlal Acharya vs. State of Maharashtra
10. (2016) 1 OLR-145 : Subodh @ Subodha Mondal vs. State of Orissa

For Petitioner : Mr. Amulya Ratna Panda
For Opp.Party : Mr. Bijaya Kumar Ragada, AGA

ORDER Date of Order: 10.11.2023

CHITTARANJAN DASH, J.

1. By means of this application the Petitioner seeks indulgence of this Court to quash the impugned order dated 05.10.2023 passed by the learned Sessions Judge,

Cuttack in 2(a)CC No.69 of 2023. In the impugned order, the learned court below declined to accept the bail bond furnished by the Petitioner pursuant to the grant of bail under Section 167(2), Cr.P.C. on the failure of the Petitioner to comply the terms and conditions of bail by the time the charge sheet was submitted.

2. The background facts of the case are that, on 03.04.2023 at about 7.30 AM while the Excise Officials were performing patrolling duty, got reliable information about illegal transportation of ganja in a Maruti Suzuki Desire Car bearing Registration No.OD-02-AJ-6012. After following the official formalities, the patrolling party proceeded to the spot and having come across the vehicle, they detained the same and found three persons including the driver got down from the said car. They disclosed their names and identity. On search of the vehicle, the excise staff found two Jari (Polythene) packets containing 100 kgs. of ganja in each packet. On being asked, the suspects could not provide any document in support of the possession/transporting of ganja. Accordingly, the excise officials seized the vehicle as well as the contraband articles in presence of the witnesses and upon maintaining all official formalities forwarded the accused persons to the court concerned in the offences under Section 20(b)(ii)C of the N.D.P.S. Act.

3. Since the prosecuting agency failed to submit the Final P.R. within the statutory period of 180 days, the accused-Petitioner moved the learned Court below under Section 167(2), Cr.P.C. read with Section 36-A(1)(4) of the N.D.P.S. Act for her default Bail on 30.09.2023, i.e. on 181 days of her arrest.

4. On the prayer of the Petitioner, the learned court below, i.e. Sessions Judge-cum-Special Judge, Cuttack pleased to allow the default Bail of the Petitioner on the terms and conditions mentioned therein, inter alia, directing to furnish bail bond of Rupees one lakh with two solvent sureties. After passing of the order granting bail on 30thNovember, 2023, the Petitioner could furnish the bail bond only on 04.10.2023 whereas investigating agency submitted the charge sheet on 03.10.2023. Consequently, the learned court below having heard the parties, declined to accept the bail bond furnished by the Petitioner pursuant to granting of default bail order dated 30.09.2023 on the ground that the prosecuting agency submitted Final P.R. on 03.10.2023, i.e. before submission of the Bail Bond by the Petitioner after the order of granting bail.

5. Learned counsel for the Petitioner submitted that the learned trial court rightly allowed the prayer for default bail of the Petitioner, but committed illegality by not accepting the bail bond furnished by the Petitioner pursuant to the grant of bail. It is further submitted by the learned counsel for the Petitioner that the learned court below erred in law, more particularly in connection with the matter which relates to the fundamental right of the accused, as provided under Article 21 of the Constitution of India. He also submitted that the provision in Clause-A (ii) of the proviso read with the Explanation (i) to section 167(2), Cr.P.C. mandates that if the accused is prepared to and does furnish bail bond, ought to have been accepted and

accordingly in absence of any stipulation as to the time for furnishing the bail bond, denial of the court to accept the same is per se illegal. Learned counsel for the Petitioner also filed his written note of submission, wherein he referred to the decisions ***(1) M. Ravindram vs. The Intelligence Officers, Directorate of Revenue Intelligence reported in (2021) 81 OCR (SC) 548; (2) Rakesh Kumar Pal vs. State of Assam, reported in (2017) 68 OCR (SC) 1; (3) Sanjay Dutt vs. State through CBI, reported in (1994) 5 ACC 10; (4) Sayed Mohd. Ahmad Kazmi vs. State (Govt. of NCT of Delhi) & Others, reported in (2012) 12 SCC page-1; (5) Union of India, through CBI vs. Nirala Yadav @ Raja Ram Yadav @ Dipak Yadav, (2014) 59 OCR (SC) 226; (6) State of M.P. vs. Rustam, (1995) Supp.(3) SCC 221; (7) Fakhrey Alam vs. The State of Uttar Pradesh, (2021) 82 OCR (SC) 630; (8) Hitendra Bishnu vs. State of Maharashtra, (1994) 4 SCC 602; (9) Uday Mohanlal Acharya vs. State of Maharashtra, (2001) 5 SCC 453; & (10) Subodh @ Subodha Mondal vs. State of Orissa, (2016) 1 OLR-145***.

6. Learned Addl. Govt. Advocate on the contrary vehemently opposed the bail application and submitted that the impugned order is in accordance with law and in consonance with the mandate issued by the Apex Court as well as this Court in the matter of ***Sumanta Sabara & Anr. vs. State of Odisha, reported in (2022) 86 OCR-667***.

7. Before adverting to the merit of the application, it is worth to see the relevant provision enumerated under Section 167(2) Cr.P.C., which reads as follows :-

> "(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that-
>
> (a) 1 the Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody under this paragraph for a total period exceeding,-
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> (i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;
>
> (ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub- section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]
>
> (b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;
>
> (c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorize detention in the custody of the police. 1
>
> Explanation I.- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail;]. 2 Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of

> the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be.] [Provided further that in case of a woman under eighteen years of age, the detention shall be authorized to be in the custody of a remand home or recognized social institution.]"

8. Perusal of the impugned order reveals that the learned court below referred to the decision in the matter of ***Uday Mohanlal Acharya vrs. State of Maharashtra, reported in 2001(II) OLR (SC)-290***, wherein the Apex Court having referred to the cases in the matter of ***M. Ravindran vrs. The Intelligence Officer, Directorate of Revenue Intelligence, reported in (2021) 81 OCR (SC)-548*** and several other decisions passed by the Apex Court itself earlier in the matter of ***Sanjay Dutt vrs. State, 1994 SCC (5) 410*** and ***Hitendra Vishnu Thakur and Others vrs. State of Maharashtra and Others, AIR 1994 SC 2623***, held as hereunder –

> "The right accruing under proviso to Sec.167(2) of the Code cannot be said to have been availed of by mere making of an application for bail expressing therein willingness to furnish bail, but on furnishing bail bond as required under clause(1)(ii) of proviso read with Explanation-I to Sec.167(2) of the Code."
>
> In interpreting the language in explanation-I to the proviso to Section 167(2) Cr.P.C., the Apex Court further held as follows :
>
> "It is in this sense it can be stated that if after expiry of the period, an application for being released on bail is filed, and the accused offers to furnish the bail and thereby avail of his indefeasible right and then an order of bail is passed on certain terms and conditions but the accused fails to furnish the bail, and at that point of time a challan is filed, then possibly it can be said that the right of the accused stood extinguished. xx xx xx"

9. Having regard to the facts in the present case, the citations referred to by the learned counsel for the Petitioner in the matter of ***Rakesh Kumar Pal vs. State of Assam, reported in (2017) 68 OCR (SC) 1*** and ***Subodh @ Subodha Mondal vs. State of Orissa, (2016) 1 OLR-145*** are well distinguishable and have no application in the facts and circumstances appearing herein. As far as the decisions in the matter of ***M. Ravindran vrs. The Intelligence Officer, Directorate of Revenue Intelligence, reported in (2021) 81 OCR (SC)-548*** and ***Sanjay Dutt vrs. State, 1994 SCC (5) 410 and Hitendra Vishnu Thakur and Others vrs. State of Maharashtra and Others, AIR 1994 SC 2623***, the Apex Court has held the indefeasible right exercised U/s 167(2) shall be extinguished if the bail bond is not furnished soon after the order granting bail is not filed as under intervened by the furnishing final form–

> "13. It is true that Explanation I to Section 167(2), CrPC provides that the accused shall be detained in custody so long as he does not furnish bail. However, as mentioned supra, the majority opinion in Uday Mohanlal Acharya expressly clarified that Explanation I to Section 167(2) applies oly to those situations where the accused has availed of his right to default bail and undertaken to furnish bail as directed by the Court, but has subsequently failed to comply with the terms and conditions of the bail order within the time prescribed by the Court. We find ourselves in agreement with the view of the majority. In such a scenario, if the prosecution subsequently files a charge-sheet, it can be said that the accused has forfeited his right to bail under Section 167(2), CrPC. Explanation I is only a safeguard to ensure that the accused is not immediately released from custody without complying with the bail order."

10. This Court in the matter of ***Sumanta Sabara & Anr. vs. State of Odisha, (2022) 86 OCR – 667*** followed the same and also held as under –

> "It is true that though no time limit was specified for furnishing of bail bond, but then non-stipulation of time cannot mean that the same can be kept indefinitely open to allow the accused persons to comply with the conditions of the order at their own sweet will or will nullify the effect of the charge-sheet being submitted in the meantime. It is therefore, imperative that if an order for default bail is passed, it is in the interest of the accused to act with promptitude and diligence. In the case at hand, the bail bond was sought to be furnished on 11.10.2021, i.e. four days after the order of default bail was passed and charge-sheet had also been submitted. This is, therefore, a case where the Court granted default bail, but the accused failed to abide by the terms and conditions imposed therein and since in the meantime, charge-sheet had been submitted, the so called indefeasible right granted, but not actually exercised, stood extinguished in view of the ratio of the cases referred above."

11. In the case at hand, admittedly the default bail was granted to the accused under Section 167(2)(a)(i) of the Cr.P.C. read with Section 36-A(1)(4) of the NDPS Act on 30.09.2023, but the bail bond was furnished four days thereafter on 04.10.2023, whereas the prosecuting agency filed the Final Prosecution Report on 03.10.2023 (a day before furnishing of bail bond by the Petitioner). Therefore, the indefeasible right granted to the petitioner could not be exercised actually and that got extinguished in view of the ratio enunciated by the Apex Court referred to above.

12. Adhering to the ratio enunciated in the matter of **M. Ravindran** (Supra), it can very well be said that the Petitioner though moved for the default bail was neither ready nor willing to furnish the bail bond as mandated in the relevant provision except at his convenience. The ground set forth in the application that 01.10.2023 and 02.10.2023 were holidays and therefore the Petitioner furnished the bail bond on 04.10.2023 is far from truth as holidays do not stand as hindrance in furnishing bail bond. Further, the Petitioner did not furnish it on 03.10.2023, i.e. immediately on the next day of the holidays that tell tale vouch safes that there was complete absence of readiness and willingness on the part of the Petitioner to furnish the bail bond.

13. This Court in the facts and circumstances of the case, therefore, of the view that the Petitioner forfeits his indefeasible right on his own accord having failed to exercise the same within a period reasonably expected to avail. This Court finds no illegality to have been committed by the learned court below in declining to accept the bail bond furnished by the accused Petitioner and, therefore, the impugned order suffers no infirmity and hence, requires no interference.

14. The CRLMC being devoid of merit stands dismissed.

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2024 (I) ILR-CUT-332

CHITTARANJAN DASH, J.

CRLMC NO. 4118 OF 2023

ANNAPURNA BEHERA & ANR. ….Petitioners

-V-

STATE OF ODISHA & ORS. ….Opp.Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Section 216 – The petitioner challenges the order of Learned Trial Court who alter the charges excluding the offence U/s. 120-B of IPC – Whether the parties in either sides have any right to interfere in bringing the alteration/addition in the charges? – Held, No – It is the absolute prerogative of the court to bring such alteration or addition before conclusion of the trial. (Paras 6-9)

Case Laws Relied on and Referred to :-

1. (2017) 3 SCC 347:P. Kartikalakshmi vs. Sri Ganesh & another
2. Criminal Appeal No.1127 of 2009 :CBI vs. Karimullah Osan Khan
3. MANU/SC/0642/2013: (2013) 7 SCC 256:Jasvinder Saini and Ors. v. State (Govt. of NCT of Delhi)
4. MANU/PR/0025/1943: AIR 1943 pc 192:Thakur Shah v. Emperor
5. MANU/SC/0119/1953: AIR 1954 SC 266:Harihar Chakravarty v. State of West Bengal

For Petitioners : Mr. Tusar Kumar Mishra
For Opp.Parties : Mr. B.K. Ragada, AGA

ORDER Date of Order : 13.11.2023

CHITTARANJAN DASH, J.

1. Heard learned counsel for the Petitioners and the State.

2. By means of the present application, the Petitioners seek indulgence of this Court with the prayer to set aside the order dated 02.06.2023 passed by the learned First Additional Sessions Judge, Puri in S.T. No.11/33 of 2019/2018 arising out of G.R. Case No.447 of 2017 corresponding to Puri Town P.S. Case No.3 of 2017.

3. The background facts of the case are that the Opp. Parties/accused persons are facing trial for commission of the offence under Sections 302/324/307/34, I.P.C. After completion of the investigation, Charge-Sheet was submitted in the case against the accused persons for the offences under Sections 324/307/302/120-B/201/34, I.P.C. and Section 25 & 27 of Arms Act, keeping the investigation open. The learned S.D.J.M., Puri took cognizance of the said offences, and the case was later committed to the court of the sessions and was transferred to the court of 3rd Addl. Sessions Judge, Puri. The learned 3rd Addl. Sessions Judge, Puri while framing the charge, found the offences to be under Sections 302/307/324/201/34, I.P.C. and Sections 25(1-A) & 27 of the Arms Act made out and framed charges excluding the offence U/s. 120-B IPC.

4. According to Mr. Mishra, the learned counsel for the Petitioners, as many as 18 witnesses have been examined so far in the case except the informant. He further submits that the witnesses have deposed a criminal conspiracy to have been hatched

between the accused persons, whereas the court did not frame charge against the accused persons in the offence under Section 120-B, I.P.C. He further submitted that law mandates that once it is brought to the notice of the court as to any material available for bringing an alternation in the charge, the court ought to have acted there upon.

5. Learned AGA Mr. Ragada, on the contrary vehemently opposed the aforesaid contentions of the learned counsel for the Petitioners and contended that the matter has been set at rest by pronouncements of the Apex Court besides the law being clear in the issue and the parties in either sides have no right to interfere in bringing the alternation / addition in the charge and it is the absolute prerogative of the court either suo motu or if brought to its notice, to bring such alternation or addition before conclusion of the trial.

6. Perusal of the case record reveals that, on a motion moved from the side of the prosecution to that effect, the learned court declined to accept the prayer, inter alia, on the ground that *"..In the present case 16 witnesses have been examined so far. Most of them have turned hostile. The informant has not been examined yet. After going through the evidence of the witnesses, I am of the opinion that there is no sufficient material yet available on record to add Section 120(B) of the I.P.C. to the charges framed earlier. So in my opinion the petition filed by the learned Addl. P.P. is premature and is accordingly rejected. However, it is observed that if subsequently sufficient material is brought on record in that regard, the learned Addl. P.P. is at liberty to renew his prayer. With these observations, the petition is disposed of."*

7. In the matter of ***P. Kartikalakshmi vs. Sri Ganesh & another (2017) 3 SCC 347***, the Apex Court has held as under –

> "6. Having heard the learned counsel for the respective parties, we find force in the submission of the learned Senior Counsel for Respondent 1. Section 216 CrPC empowers the Court to alter or add any charge at any time before the judgment is pronounced. It is now well settled that the power vested in the Court is exclusive to the Court and there is no right in any party to seek for such addition or alteration by filing any application as a matter of right. It may be that if there was an omission in the framing of the charge and if it comes to the knowledge of the Court trying the offence, the power is always vested in the Court, as provided under Section 216 CrPC to either alter or add the charge and that such power is available with the Court at any time before the judgment is pronounced. It is an enabling provision for the Court to exercise its power under certain contingencies which comes to its notice or brought to its notice. In such a situation, if it comes to the knowledge of the Court that a necessity has arisen for the charge to be altered or added, it may do so on its own and no order need to be passed for that purpose. After such alteration or addition when the final decision is rendered, it will be open for the parties to work out their remedies in accordance with law.
>
> 7. We were taken through sections 221 and 222 CrPC in this context. In the light of the facts involved in this case, we are only concerned with Section 216 CrPC. We, therefore, do not propose to examine the implications of the other provisions to the case on hand. We wish to confine ourselves to the invocation of Section 216 and rest with that. In the light of our conclusion that the power of invocation of Section 216 CrPC is exclusively confined with the

Court as an enabling provision for the purpose of alteration or addition of any charge at any time before pronouncement of the judgment, we make it clear that no party, neither de facto complainant nor the accused or for that matter the prosecution has any vested right to seek any addition or alteration of charge, because it is not provided under Section 216 CrPC. If such a course to be adopted by the parties is allowed, then it will be well-nigh impossible for the criminal court to conclude its proceedings and the concept of speedy trial will get jeopardized."

8. Further, in the case of ***CBI vs. Karimullah Osan Khan, (in Criminal Appeal No.1127 of 2009 decided on 04.03.2014***) the Apex Court held as under –

"12. This Court in ***Jasvinder Saini and Ors. v. State (Government of NCT of Delhi) MANU/SC/0642/2013: (2013) 7 SCC 256***, had an occasion to examine the scope of Section 216 of the Code of Criminal Procedure and held as follows :

11. ….. the court's power to alter or add any charge is unrestrained provided such addition and/or alteration is made before the judgment is pronounced. Sub-sections (2) to (5) of Section 216 deal with the procedure to be followed once the court decides to alter or add any charge. Section 217 of the Code deals with the recall of witnesses when the charge is altered or added by the court after commencement of the trial. There can, in the light of the above, be no doubt about the competence of the court to add or alter a charge at any time before the judgment. The circumstances in which such addition or alteration may be made are not, however, stipulated in Section 216. It is all the same trite that the question of any such addition or alternation would generally arise either because the court finds the charge already framed to be defective for any reason or because such addition is considered necessary after the commencement of the trial having regard to the evidence that may come before the court.

12. In the case at hand the evidence assembled in the course of the investigation and presented to the trial court was not found sufficient to call for framing a charge under Section 302 Indian Penal Code…

13. The Privy Council, as early as in **Thakur Shah v. Emperor,** *MANU/PR/0025/1943: AIR 1943 pc 192*, spoke on alteration or addition of charges as follows:

The alteration or addition is always, of course, subject to the limitation that no court should be taken by reason of which the accused may be prejudiced either because he is not fully aware of the charge made or is not given full opportunity of meeting it and putting forward any defence open to him on the charge finally preferred.

14. Section 216 Code of Criminal Procedure gives considerable powers to the Trial Court, that is, even after the completion of evidence, arguments heard and the judgment reserved, it can alter and add any charge, subject to the conditions mentioned therein. The expressions "at any time" and before the "judgment is pronounced" would indicate that the power is very wide and can be exercised, in appropriate cases, in the interest of justice, but at the same time, the Courts should also see that its orders would not cause any prejudice to the accused.

15. Section 216 Code of Criminal Procedure confers jurisdiction on all Courts, including the designated Courts, to alter or add to any charge framed earlier, at any time before the judgment is pronounced and Sub-sections (2) to (5) prescribe the procedure which has to be followed after that addition or alteration. Needless to say, the Courts can exercise the power of addition or modification of charges under Section 216 Code of Criminal Procedure, only when there exists some material before the Court, which has some connection or link with the charges sought to be amended, added or modified. In other words, alteration or addition of a charge must be for an offence made out by the evidence recorded during the course of trial before the Court.

(See Harihar Chakravarty v. State of West Bengal, MANU/SC/0119/1953: AIR 1954 SC 266. Merely because the charges are altered after conclusion of the trial, that itself will not lead to

the conclusion that it has resulted in prejudice to the accused because sufficient safeguards have been built in Section 216 Code of Criminal Procedure and other related provisions.)"

9. Coming back to the case in hand, this Court finds force in the submissions of the learned AGA. In the backdrop of the principles enunciated as above, the submissions advanced by Mr. Mishra insisting for an interference to direct the learned court to alter the charge stands abrogated, more so for the reason that in the impugned order, the learned court below has categorically held that the prayer made from the side of the Addl. P.P. is premature and in case subsequently sufficient material is brought on record, liberty has been given to the Addl. P.P. to renew his prayer.

10. In that view of the matter, this Court finds no illegality committed by the learned court below. The impugned order, therefore, suffers no infirmity and requires no interference. The CRLMC is dismissed accordingly.

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2024 (I) ILR-CUT-335

CHITTARANJAN DASH, J

R.S.A. NO.384 OF 2018

LINGARAJ ROUT & ORS. ……Appellants

-V-

M.D, ORISSA INDUSTRIAL INFRASTRUCTURE DEVELOPMENT CORPN. LTD, BBSR & ORS. ……. Respondents

(A) PROPERTY LAW – The plaintiffs claimed their right of occupancy over the suit land on the basis of Hata patta – The Hata patta is an un-registered document – Whether title can be accrued on the basis of Hata patta? – Held, No – The genuineness of the Hata patta could have been proved, if it would have been produced in consonance with provisions contained in Section 17(1)(d) of the Registration Act and Section 6(i) of the Transfer of Property Act.

(B) ADVERSE POSSESSION – Principles of adverse possession – Enumerated with reference to case laws.

(C) REGISTRATION ACT, 1908 – Section 17(1)(d) r/w Section 6(i) of Transfer of Property Act – Hata patta – Whether it is mandatory to registered a Hata patta? – Held, Yes – The conveyance of title through a written instrument of any immovable property must be registered.

(D) INDIAN EVIDENCE ACT, 1872 – Section 91 – Evidentiary value of an unregistered Hata patta – Discussed. (Paras 28-29)

Case Laws Relied on and Referred to :-

1. 2009 (I) CLR page-1100 : State of Odisha Vs. Harapriya Bisoi.
2. (2014) 1 SCC 669 : Gurudwara Sahib Vs. Gram Panchyat Village Sirthal & Anr.

3. (2019) 8 SCC 729: Ravindra Kaur Grewal & Ors. Vs. Manjit Kaur & Ors.
4. AIR 1955 SC 328 : Sri Sita Maharani & Ors. Vs. Cheddi Mahato & Ors.
5. AIR 1964 Patna, page 1 : Ram Nath Mandal & Ors. V. Jojan Mandal & Ors.
6. AIR 1957 SC 314 : 1957 SCR 195 : P. Lakshmi Reddy Vs. L. Lakshmi Reddy.
7. (1933) 61 IA 78 :1934 All LJ 153 (PC) : Secy. of State for India in Council Vs. Debendra Lal Khan.
8. (1995) 2 SCC 543: AIR 1995 SC 895 : Annasaheb Bapusaheb Patil Vs. Balwant.
9. Vol.33 (1991) O.J.D.154 (Civil) :Champa Bati Bewa @ Kabi & Ors. Vs. Kanhu Mallik & Ors.

For Appellants :Mr. V. Mohapatra
For Respondents:Mr. Avijit Patnaik, Mr. Shashanka Patra, ASC
Mr. P.K. Rath, Sr. Adv.& Mr. A.P. Bose.
Mr. Lalit Mishra (for the Intervener)

JUDGMENT Date of Judgment: 11.12.2023

CHITTARANJAN DASH, J.

1. This appeal is directed against the judgment and decree dated 19th May, 2018 and 25th May 2018 respectively passed by the learned Additional District Judge, Bhubaneswar in R.F.A. No.43 of 2015 arising out of the judgment and decree dated 16th April, 2015 and 29th April, 2015 respectively passed by the learned Civil Judge (Senior Division), Bhubaneswar in Title Civil Suit No.648 of 2001, whereby the suit of the Plaintiffs was dismissed.

2. For the sake of convenience, the parties arrayed in the RSA are addressed in the manner they have been arrayed in the original Civil Suit No.648 of 2001, i.e. the Appellants as "Plaintiffs" and Respondents as "Defendants".

3. The property, which is the subject matter of dispute, relates to Plot No. 64 measuring an area of Ac.5.76 decimals under Khata No. 303 of the Settlement of the year 1931 corresponds to Plot No.65 measuring Ac.6.28 decimals under Khata No.472 of the settlement for the year 1973 which ultimately corresponds to plot No.65 measuring Ac.6.28 decimals of land under Khata No.612 of the settlement for the year 1988 of mouza Chandrasekharpur, more fully described in the schedule of the plaint.

4. The case of the Plaintiffs' in short is that, Raja Madhusudan Dev of Patia (Bhubaneswar) was the owner in possession of the suit schedule land during settlement operation 1920-21. The ancestors of the Plaintiffs obtained Hata Patta in respect of the suit land measuring Ac.5.76 decimals from Raja Madhusudan Dev in the year 1929, reclaimed the same by clearing the bushes and also cleared some adjacent area and made the same fit for cultivation and for plantation of fruit bearing trees and remained in possession of an area Ac.6.28 decimals. In the settlement ROR for the year 1931 the suit land stood recorded in the name of Raja Sahab under separate Plot No.64 against Sabik Khata No.303 with kisam 'Jhati Jungle'.

5. In the year 1931, Raja of Kanika purchased the estate of Patia at an auction and became landlord in respect of land in dispute. As the fathers of the Plaintiffs were in possession of said Sabik Plot No.64, having an area of land measuring Ac.5.76 decimals as the lessees thereof, they also continued to be in possession of

the same as tenants under Raja of Kanika and paid rent in respect of their leasehold land to the Raja of Kanika. It is further pleaded that the fathers of the Plaintiffs while clearing the small bushes existing in the land, which they had taken on lease from the Raja of Patia, cleared some more land containing small bushes, and when the estate of Patia was purchased in auction by the Raja of Kanika, it was found the lands under possession of the fathers of the Plaintiffs was an extent of land measuring Ac.6.28 decimals. Accordingly, Ac.6.28 decimals of land was again settled by the Raja of Kanika in favour of the fathers of the Plaintiffs and a separate Khata No.303/19 was prepared in favour of Banchhanidhi Rout and others, and accordingly rent was paid to the landlord. The estates was vested in the State Government and the landlord had submitted Ekapadia to the Anchal Sasan mentioning the names of the fathers of the Plaintiffs for the said area of Ac.6.28 decimals of land and accordingly the lessee paid rent to the Government (Anchal Sasan) for the period from 1953 to 1957.

6. It is further pleaded by the Plaintiffs that the Settlement Authorities without preparing a separate Khata either in the names of the fathers of the Plaintiffs or in the names of the Plaintiffs, prepared Settlement Record of Rights of the year 1973 in the name of Govt. of Orissa with notes of possession in the name of Biswambar Rout and others in the remarks column, to the extent of land measuring Ac.6.28 decimals, in Rakhita Khata No.472, Plot No.65.

7. After the death of the forefathers, the Plaintiffs succeeded to the suit properties, remained in possession by cultivating the agricultural land and enjoying the fruits of the valuable trees like Mangoes and Jack fruits. Although the fathers of the Plaintiffs and then the Plaintiffs were / are in possession of the suit properties since 1929 and although the Plaintiffs had perfected their title over the suit properties both as lessees and/or by way of adverse possession, the Settlement Authorities without preparing Record of Rights in the names of the Plaintiffs, prepared the same in the name of Defendant No.1 – Managing Director, Orissa Industrial Infrastructure Development Corporation, Bhubaneswar with note of forcible possession of the Plaintiffs in the remarks column thereof on the ground that Defendant No.2 (State) had granted lease of the suit property in favour of Defendant No.1, whereas the actual delivery of possession has not been given in favour of Defendant No.1, and the Plaintiffs are still in cultivable possession of the suit properties.

8. It is the specific case of the Plaintiffs that they are in possession of the suit properties and being the settled Rayat have acquired the occupancy right over the same and at no point of time the Defendants possessed any portion of the suit properties. According to the Plaintiffs, the occupancy right held by them through their fathers has not been affected by the vesting of the estate during the period when the Orissa Estate Abolition Act came into force. However, taking advantage of wrong recording of the ROR as the Defendant Nos.1 and 2 threatened to disturb the possession of the Plaintiffs in the year 2000, they were constrained to file the suit for

declaration of their occupancy right over the suit property, permanent injunction against Defendant Nos.1 and 2 and to declare the Registered Lease Deed No.825, dtd 23.01.1982 executed by Defendant No.2 in favour of Defendant No.1 as illegal and invalid document along with other reliefs in due compliance with the statutory notice required to be served under Section 80 of the CPC.

9. The Defendants contested the case by filing their written statements. The plea of the Defendants is by and large identical. The Defendants in their written statements challenged the suit on the ground of its maintainability, lack of cause of action, limitation and also traversed the allegations and assertion made in the plaint. The Defendants took the plea that the suit has not been properly valued and that the suit plot bearing No.65 does not corresponds to the Plot No.64 prepared by the settlement authority allegedly in the year 1931 in favour of the fathers of the Plaintiffs even though the Defendants admitted that Raja of Patia was the ex-proprietor and by virtue of an auction sale the Raja of Kanika became the proprietor of the same.

10. The specific case of the Defendants is that the suit land was originally "Jhati Jungle" and after vesting of the same under Section 3 of the OEA Act, the suit land became free from all encumbrances and accordingly during the settlement of the year 1973 the ROR was prepared in the name of Government under "Rakhit status". The Defendants also took the plea that neither the Raja of Patia had leased out the suit property in favour of the fathers of the Plaintiffs nor executed any Hata patta and the Raja of Kanika has not accepted any rent and has not submitted any 'Ekpadia' in respect of the suit property in favour of the fathers of the Plaintiffs. The Defendants also took the plea that neither the predecessors of the Plaintiffs nor the Plaintiffs themselves were and/or are in possession over the suit property in any manner whatsoever and as such they have not acquired any occupancy right or title over the same or by way of adverse possession.

11. According to the Defendants the suit land being Government land notified vide G.A. Department order dated 21st February 1981 for the land measuring Ac.231.79 decimals including the suit land was allotted in favour of IPICOL for industrial activities and accordingly lease deed was executed in favour of IDCO vide dated 23rd January, 1982 and the possession of the same was delivered. After formation of the IDCO the suit property was transferred to Defendant No.1 and possession was also delivered, and while the Defendant No.1 was owner in possession over the suit property along with other undisputed properties, the suit land got recorded in the name of IDCO vide Khata No.612 in the year 1988-89. While the Defendant No.1 being the owner in possession in respect of the suit property, an area measuring Ac.0.399 decimals out of the suit land was allotted to Defendant No.3 against Plot Nos.7/2 and 7/5 vide letter dated 18th February, 2008 and accordingly the lease deed was registered on 29th January, 2009 and the possession of the same was delivered to Defendant No.3 on 28th August, 2009, and Defendant No. 3 is in possession over his allotted land as owner thereof. The

Defendant Nos.1, 2, 3, 4 and 6 have also taken the plea that the suit is liable to be dismissed for having not adhered to the mandatory provision enumerated under Section 80 of the CPC complying with the notice under Section 80 CPC. The Defendants, therefore, claimed for dismissal of the suit.

12. The learned Civil Judge, Senior Division, Bhubaneswar having gone through the divergent pleadings of the parties, framed the following nine issues:

> "(i) Is the suit maintainable ?
>
> (ii) Whether there is any cause of action to file the suit?
>
> (iii) Whether the suit is barred by limitation?
>
> (iv) Whether the suit is dismissed due to non-compliance of the provision of Section 80 CPC?
>
> (v) Whether the Plaintiffs have acquired occupancy right over the suit land and accordingly have got right, title, interest and possession over the same?
>
> (vi) Whether the Plaintiffs have perfected their title over the suit land by way of adverse possession?
>
> (vii) Whether the registered lease deed No. 825 dtd 23.01.1982 is illegal and void?
>
> (viii) Whether the plaintiffs are entitled for a decree of permanent injunction against the defendants in respect of the suit land?
>
> (ix) To what other reliefs, the Plaintiffs are entitled?"

13. After formulating the issues, the parties adduced documentary and oral evidence where, the Plaintiffs examined three witnesses. The Plaintiffs also produced seven numbers of documents vide Ext.1 to Ext.9. On the other hand, as many as four witnesses examined on behalf of the Defendants, and the Defendant No.1, Defendant No.3, Defendant No. 2 & Defendant Nos.4 to 6 have produced separate documents vide Ext.A to Ext.P, Ext.A-1 to F-1/C & Ext.A-2 toA-2/2 respectively.

14. The learned Civil Judge while answering the vital issue nos. (v), (vi) and (vii) held that "as the Hata Patta vide Ext.7 is not a registered document, the same cannot form the basis of induction of tenancy of the fathers of the Plaintiffs in the year 1929 in the suit properties and that as Ext.1, ROR of the year 1931 discloses that suit plot No.64 under Khata No.303 stood recorded in the name of Madhusudan Dev status as 'Anabadi' as an intermediary interest and the kisam was "Jhati Jungle", the plea of the Plaintiffs that they were in cultivation possession is not acceptable. The learned Trial court also observed that the Plaintiffs failed to prove that Raja of Kanika submitted Ekpadia in respect of the suit land in favour of the fathers of the Plaintiffs."

15. The learned Civil Judge while answering the issue of adverse possession claimed by the Plaintiffs observed that mere noting of forcible possession of the predecessors of the Plaintiffs in Ext.2 and Ext.3, in absence of cogent evidence as required under the law of adverse possession, cannot establish that by such possession, if any, the Plaintiffs have acquired title over the suit land and that, as the claim of the Plaintiffs that their fathers were being in permissive possession, the Plaintiffs cannot claim the title by way of adverse possession and that the Plaintiffs

failed to discharge the burden to prove the plea of adverse possession. Accordingly, the learned Civil Judge held that the Plaintiffs failed to establish their title over the suit properties either being the occupancy of tenants or through adverse possession and further held that the registered lease deed dtd. 08.12.1981 cannot be held as illegal and invalid. Accordingly, the learned Civil Judge decided the other issues against the Plaintiffs, and dismissed the suit vide Judgment dated 16th April 2015 and decree dated 29th April 2015.

First Appeal

16. Being aggrieved with the findings recorded by the learned Civil Judge, Senior Division, Bhubaneswar, the Plaintiffs preferred RFA No.43 of 2015 before the learned District Judge, Khurda at Bhubaneswar, who later transferred the Appeal to the court of learned Additional District Judge, Bhubaneswar for disposal.

17. Learned Additional District Judge heard the above Appeal and after analyzing the materials on record in detail, agreed to the reasons given by the learned Trial Court and confirmed the judgment and decree dated 16th April 2015 and 29th April 2015 respectively passed by the learned Trial Court in Civil Suit No.648 of 2001.

Second Appeal - the impugned Judgment

18. Being aggrieved by the findings recorded by the First Appellate Court, the unsuccessful Appellants/Plaintiffs preferred the present RSA No.384 of 2018. Initially, the appellants in the memorandum of appeal proposed to frame the following questions of law for consideration.

> A. Whether the learned Courts below have failed to draw proper inference in accordance with the settled principles of law on the basis of the proved facts?
>
> B. Whether the learned Courts below committed gross error in law and fact in not considering the oral evidence of the PWs, so also the documentary evidence of the Plaintiffs?
>
> C. Whether the Hata Patta (Ext.7) issued by the ex-intermediary in favour of the family of the Plaintiffs, the Notice (Ext.6) issued by the Tahasildar, Cuttack indicating therein that the trees standing on the suit properties are under the self cultivation of the plaintiffs, the "munda cheque" (Ext.5) issued by the Asst. Settlement Officer on dated 12th May, 1969, settlement ROR (Ext.2 and Ext.3) prepared in the year 1973 and 1988 and the orders passed by the Settlement authorities on contest in Objection Case No.3099 (Ext.8), the learned Courts below committed error in facts and law that the Plaintiffs were tenants under the ex-intermediary in respect of the suit land and continued as such under the State Government even after vesting of the estate and thereby they became deemed tenants under the State Government ?
>
> D. Whether the learned court below failed to appreciate that the Hata Patta (Ext.7), issued by the ex-intermediary in favour of the family of the Plaintiffs, the Notice (Ext.6), issued by the Tahasildar, Cuttack specifically indicating therein that the trees standing on the suit properties are under the self cultivation of the Plaintiffs, the "munda cheque" (Ext.5) issued by the Asst. Settlement Officer on dated 12.05.1969 in favour of the Plaintiffs, Settlement ROR (Ext. 2 and 3) prepared in the year 1973 and 1988 and the

orders passed by the settlement authorities on contest in Objection Case No.3099 (Ext.8) clearly proves the continuous and uninterrupted possession of the plaintiffs over the suit properties for more than the period prescribed under the statute and thereby they have acquired righty of occupancy in respect of the suit land under section 23, 24 and 234 of the Orissa Tenancy Act, 1913 which is bad and illegal and liable to be set aside?

E. Whether on the face of uninterrupted hostile admitted possession of the Plaintiffs over the suit land more than the prescribed period with the knowledge of the defendants, the learned Courts below ought to have held that the Plaintiffs have perfected their title over the suit properties by way of adverse possession more so when the Defendants No.2, 4, 5 and 6 did not file written statement and other defendants did not denying the pleading to that effect in the plaint?

F. Whether the learned court below ought to have held that in view of the law settled by the Hon'ble High Court in the decisions reported in Vol.57 (1984) C.L.T. Page-1 (F.B), 1986 (II) OLR-391 and 2008 (II) OLR-834, the Plaintiffs by virtue of their long possession have acquired right of occupancy in respect of the suit land under Sections 23, 24 and 234 of the Orissa Tenancy Act,1913.

G. Whether the defendant Nos. 4 to 6 being the custodian having not produced the Tenancy Ledger to substantiate their plea that the ex-intermediary did not submit Ekapadia in respect of the suit properties in favour of the family of the Plaintiffs and also not offering any explanation for not producing the same, the Courts below ought to have drawn adverse inference against them more so when they have not filed written statement denying the possession and tenancy of the Plaintiffs which is bad and illegal and liable to set aside?

H. Whether the learned court below failed to appreciate that the non filing of written statement by the defendant no.4 to 6 amounts to admission of the plaint case and as such the oral evidence of DW-1 is not admissible without any pleading to that effect.

I. Whether the learned courts below failed to appreciate that the defendants having not taken any step for recovery of possession of the suit land from the Plaintiffs within the period prescribed under the Limitation Act, 1963 and the Orissa Tenancy Act, 1993, the plaintiffs perfected their title and possession over the suit land and they cannot be evicted there form;

J. Whether the learned courts below failed to appreciate that 1973 ROR and 1988 ROR showing entry of possession of the Plaintiffs over the suit land is evidence of the fact of possession and the presumption under Section 13 of the Survey and Settlement Act, 1958 is available to them.

K. Whether the learned Courts below committed gross error in fact and law in coming to conclusion that the notice (Ext.6) of the Tahasildar, Cuttack cannot establish the factum of possession by the fathers of the Plaintiffs over the suit land for agricultural purpose?

L. Whether on the face of the 1973 and 1988 ROR and the order passed in Objection Case No.3099 (Ext.8), without delivery of possession, no right, title and interest accrued in favour of the defendant no.1 and 3 on the basis of incomplete and void lease deed?

M. Whether the ratio decided in the decisions reported in **2009 (I) CLR page-1100 : State of Odisha v. Harapriya Bisoi** is applicable to the facts of the suit when there is no pleading or evidence to the effect that the valuation of the suit land in the year 1929 was more than Rs.100/-?

N. Whether the learned Courts below erred in holding that the Hata Patta is not legible and when it has been written and who signed it and for what purpose, in as much as the defendants no.4 to 6 have not denied execution of the said Hata Patta in favour of the family of the Plaintiffs by the ex-intermediary?

O. Whether the Hata Patta which is more than thirty years old document must be proved by the person by whom it has been issued or the scribe or any other person who has seen issuance of the Hata Patta ?

P. Whether the Tenancy Ledger and the "Ekpadia" in respect of the suit land though available with the respondents, having not been produced in the case, adverse inference has to be drawn against the Defendants more so when the Plaintiffs have proved their possession and tenancy through Exts.2, 3, 5, 6 and 8?

19. Considering the rival pleadings in the plaint, questions proposed in the Appeal and going through the evidence of the parties, this Court vide order dated 30.01.2019 while admitting the Appeal found the questions enumerated in Paragraph-P in the RSA to be the substantial question required to be answered herein. However, having regard to the contentions of the Plaintiffs raised before the learned courts below in the suit and subsequent assertions made in the RSA, the following substantial question that requires determination is :

"Whether the findings of the learned courts below declining to grant the relief to the Plaintiffs with regard to right of occupancy over the suit land and declaration of their right, title and interest over the same adverse to the true owner, i.e. the government is sustainable in the eye of law?"

Arguments of the Parties.

20. Heard Mr. V. Mohapatra, learned counsel for the Appellants and Mr. P.K. Rath, learned Counsel for the respondents.

The learned Counsel for the Appellants submitted the written note of arguments besides his oral submissions. According to the learned Counsel, the Plaintiffs/appellants adduced best evidence both in oral and documents in order to discharge their burden to prove the occupancy right so also in alternative the title acquired through adverse possession in respect of the suit schedule properties. Learned Counsel argued that notice of Anchala Adhikari (Ext.6), the Settlement ROR prepared in the year 1973 & 1988, Ext.2 and Ext.3, the order dated 02.05.1983, Ext.8, the Amin Report dated 06.04.1983, Ext.9, unequivocally proves presumption of hostile possession of the Plaintiffs over the suit land U/s.13 of the Survey and Settlement Act,1958 and proves the possession of the Plaintiffs over the suit land since 1956 in continuity and uninterruptedly with the knowledge of the Defendants and as such they have perfected their title by adverse possession. Accordingly, the learned Counsel further argued that the findings of the learned Trial Court and the Appellate Court arriving at the conclusion that the Plaintiffs are not in adverse possession of the suit land is not sustainable in fact and law, and the judgment in the case of ***Gurudwara Sahib -vrs- Gram Panchyat Village Sirthal & another*** reported in ***(2014) 1 SCC 669***, relied upon by the learned Appellate Court is no more the good law in view of the decision of the Hon'ble Supreme Court reported in ***Ravindra Kaur Grewal & others -vrs.- Manjit Kaur & others reported in (2019) 8***

SCC 729. The learned Counsel further argued that since delivery of possession of the properties in question has not been actually made in favour of Defendant no.1, the Lease Deed No.825 dated 23.01.1982 is illegal and void.

21. Per contra, the learned Counsel for the respondents argued that the courts below have rightly dismissed the Suit and R.F.A on the basis of the evidence on record. Learned counsels for the Defendants vehemently opposed the contentions raised by the learned Counsel for the Appellants and submitted that the Plaintiffs having claimed the possession by way of right of occupancy acquired through grant of 'Hata Patta' created by the ex-land lord and further failed to prove the submission of Ekpadia by the Ex-Proprietor showing their fathers as tenants rather acquiesced to the ROR finally published in favour of the Government since the year 1931 and failed to substantiate such right granted in the name of their fathers and also failed to prove the possession over the same pursuant to the commencement of the Orissa Estate Abolition Act and vesting of the land of the estate on the Government free from all encumbrances thereby looses all the characteristics of occupancy right as well as by way of adverse possession. Learned counsels submitted that the impugned judgments and decree passed by the learned courts below being in consonance with the evidence led by the parties have rightly been declined to grant the reliefs in favour of the Plaintiffs and the same require no interference.

Findings

22. Considering the averments made in the plaint as well as written notes of submission and scrutinizing the materials on record, it can be safely said that the claim of the Plaintiffs rests on the basis of Occupancy tenancy and in alternative through adverse possession.

23. It is the case of the Plaintiffs that the Raja Patia Madhusudan Dev in 1929 had leased out the suit land to their fathers and accordingly issued Hatta Patta (Ext.7) and they possessed the same by cultivating for agricultural purposes and that though in the year 1931 Settlement the suit land stood recorded in the name of Raja of Patia with kisam "Anabadi", but the possession of the fathers of the plaintiffs has been reflected in the remarks column. Subsequently, the suit land was purchased by Raja of Kanika in an auction sale, and the fathers of the Plaintiffs used to possess the suit property as tenants under Raja of Kanika and that at the time of vesting, Raja of Kanika submitted Ekpadia and accordingly the tenancy ledger was opened in respect of the suit land in the names of the fathers of the Plaintiffs and they continued to possess the same, paid rent and that they occupied the land under tenancy right and continued as such and their right was not affected by the vesting under the Orissa Estate Abolition Act,1951.

24. In order to substantiate the claim, the Plaintiffs besides the oral evidence adduced through three witnesses, made attempt to prove the 'Hatapatta' (Ext.7) claimed to have been issued in favour of the fathers of the Plaintiffs by the Ex-landlord under Ext.7 though under objection. Further, the Plaintiffs filed the certified

copy of ROR in respect to Khata No.303 for the year 1931 under Ext.1, the certified copy of the ROR of Khata No.472 of the settlement authority for the year 1973-74 under Ext.2, the certified copy of ROR of Khata No.612 of the settlement for the year 1988 under Ext.3. The notice issued by the Anchal Adhikari bearing No.153, dated 9.6.1953 in Misc. Case No.32 of 1955-56 under Ext.6 and the certified copy of the order dated 02.05.1983 passed by the Assistant Settlement Officer in objection Case No.3099 under Ext.8.

25. Admittedly, Ext.7 – the Hata Patta upon which the Plaintiffs claimed their right of occupancy over the suit land in question, is an un-registered document. Though Ext.7 is not legible to know the contents and as to who issued the same in whose favour, but keeping in view the pleadings of the Plaintiffs, let me discuss as to whether the same would be helpful for the claim of the Plaintiffs. Though the Plaintiffs claimed that in the year 1929 the Raja of Patia Madhusudan Dev had leased out the property to their fathers for agricultural purpose, except the said alleged Hata Patta, no other document has been filed by the Plaintiffs to substantiate the plea. It is the case of the Plaintiffs that at the time of obtaining Hata Patta, the suit property was full of small bushes and in the 1931 Settlement ROR, the said property was recorded as "JHATI JUNGLE" in separate Plot No.64 under Khata No.303 (Anabadi), and they cleared and made it fit for cultivation and for plantation of fruit bearing trees. Nothing could be brought in evidence to support the above pleadings.

26. The Supreme Court vide order dtd.20.04.2009 in ***Civil Appeal No.2656 of 2009 (Arising out of SLP (C) No.10223 of 2007)*** *in* ***State of Orissa -vrs- Harapriya Bisoi*****,** observed in Para-23 as under;

> "…. the 'Hatpatta' on the basis of which Kamala Devi has claimed her title is un unregistered document. Section-107 of the Transfer of Property Act, 1882(in short the T.P Act) read with Section 17 of the Indian Registration Act, (in short the 'Registration Act') mandates that the conveyance of title through a written instrument of any immovable property worth more than Rs.100 for a period of one year or more must be registered. If such an instrument is not registered then Section 49 of the Registration Act read with Section 91 of the Indian Evidence Act,1872 (in short the 'Evidence Act') precludes the adducing of any further evidence of the terms and contents of such a document. [See Sri Sita Maharani v. Chhedi Mahto (AIR 1955 SC 328).

27. Besides the above, there is also a further requirement of registration of the instrument of conveyance / agricultural lease under Sections 15 and 16 of the Orissa Tenancy Act, 1913 (in short the 'Tenancy Act').

28. This court in ***W.P(C) No.4649 of 2005 State -vrs- Baidyanath Jena***, have stated in Para.14 as under –

> "…the Hatpatta relied upon being non-registered one, is inadmissible in view of the dictum of the Apex Court in **Sri Sita Maharani and others v. Cheddi Mahato and others, AIR 1955 SC 328 and in Ram Nath Mandal and Journal Board of Revenue, Odisha 2022 (II) 61 others v. Jojan Mandal and others, AIR 1964 Patna (FB)1**."

29. None registration of the alleged Hata Patta (Ext.7), however, can be referred for collateral purposes. In this context, PW-2 in his evidence during cross examination stated that he has not seen the rent receipts and further he cannot say the amount of rent and even the salami. He also admitted that he cannot say about the terms and conditions of Ext.7. In any case, the genuineness of the Hata Patta could have been proved, if it would have been produced in consonance with the provisions contained in Section 17(1)(d) of the Registration Act, 1908 and Section 6(i) of the Transfer of Property Act, 1982. But, the Plaintiffs have failed to prove the existence of the document in order to enable the courts to assess the evidentiary values of such Hata Patta procuring the same as mandated under Section-91 of the Evidence Act. It is settled law that, lease of any agricultural land for more than one year or from year to year basis with the fixed rate of rent must be compulsorily registered and absence of registration under the Registration Act will not pass the title. Therefore, in the instant case the evidence having not laid by the Plaintiffs to prove the document, no tenancy can be said to have been created the assertions of the Defendants that the land got vested in the Government free from all encumbrances has to be accepted. Assuming, for the sake of argument that the Ex-intermediary inducted the forefathers of the Plaintiffs as tenants is genuine, the fact that same is an unregistered document being an inadmissible document in evidence in view of the decision reported in ***AIR 1955 SC page 328 (Sita Maharani v. Chhedi Mahato and AIR 1964 Patna, page 1 Ram Nath Mandal and others v. Jojan Mandal and others)*****,** the same is of no avail to the Plaintiffs.

30. Hence, on a careful analysis of the evidence adduced from the side of the Plaintiffs, it is held that the induction of tenancy of the fathers of the Plaintiffs in the year 1929 in the suit properties on the basis of Ext.7 is held not proved.

31. The next claim of the Plaintiffs is that during the year 1931, the Raja of Kanika purchased the suit land in an auction, but the Plaintiffs' forefathers continued in possession, raised seasonal crops, enjoyed usufructs and also enjoyed fruits from mango and jack-fruit trees standing thereon. As admitted by the Plaintiffs and upon perusal of Ext.1, it is found that Suit Plot No.64 under Khata No.303 stood recorded in the name of Madhusudan Dev with status 'Anabadi' as an intermediary interest and the kisam was "Jhati Jungle". Ext.1 does not disclose the possession of the forefathers of the Plaintiffs. The Plaintiffs further claimed that, at the time of vesting as their forefathers were in possession of the suit land, they have acquired occupancy right. In support of their claim, they relied upon the notice issued by the Anchal Adhikari, Cuttack in Misc.Case No.32/1955-56 vide Ext.6. On perusal of Ext.6 it reveals that the said notice was issued to the fathers of the Plaintiffs admittedly for their forcible possession over some mango and jack-fruit trees standing over the said plot.

32. In the matter of ***State of Orissa & Ors. Vs. Harapriya Bisoi : 2009 (I) CLR SC page 1100***, the Apex Court also held as follows :-

> "Possession of a tenant under an intermediary on the date of vesting of the land under the Abolition Act so as to give the tenant the benefit of continuity of tenure under Section 8(1) of the said Act would have to be in the status of a raiyat actually cultivating the land."

In this context, it is apt to refer the relevant paragraphs in the decision in the matter of ***State of Orissa & Ors. Vs. Harapriya Bisoi (supra)*** as under :-

> "**26.** By virtue of Section 8, any person who immediately before the vesting of an estate in the State Government was in possession of any holding as a tenant under an intermediary, would on and from the date of the vesting, be deemed to be a tenant of the State Government. The words "holding as a tenant" mean the "raiyat" and not any other class of tenant: reference in this regard may be drawn to the definition of "holding" in the Orissa Tenancy Act, 1913: "3. (8) 'holding' means a parcel or parcels of land held by a raiyat and forming the subject of a separate tenancy;" Section 8 thus confers protection only on the "raiyat" i.e. the actual tiller of the soil.
>
> **27.** Significantly, a "lease" and "lessee" on the one hand are defined separately from the "raiyat" under the Act. Thus, the mere execution of a lease by the intermediary in favour of a person would not confer the status of a "raiyat" on the lessee nor would protect the possession of such lessee under Section 8. In fact, a "lease" would amount to a transfer of an interest of the intermediary in the land to the lessee. In such a situation, far from being a tenant protected under Section 8, the lessee would in fact step into the shoes 12 Page 13 of the intermediary with his interest being liable for confiscation and his entitlement limited to compensation from the State.
>
> **28.** On the other hand, for protection under Section 8, one has to be a raiyat cultivating the land directly and having the rights of occupancy under the tenancy laws of the State. Thus, a "lessee" who is not actually cultivating the land i.e. who is not a "raiyat", would not be within the protection of Section 8 of the Act. Section 2(h) of the Act in its residuary part states that "intermediary" would cover all owners or holders of interest in land between the raiyat and the State."

33. In the instant case, it is admitted and proved that the kisam of the suit land was recorded as Anabadi and Jhati Jungle, i.e. forest land. The plea of the Plaintiffs that their forefathers reclaimed the suit land and were in cultivable possession has not been proved at all. Further, though it is claimed that the forefathers were paying rent to the landlord, i.e. Raja of Kanika, no rent receipt has been proved to that effect. The evidence of PWs-1, 2 and 3 regarding possession of the suit land are contradictory to each other and the same being not formidable cannot be accepted. Further, Ext.6 relied upon by the Plaintiffs is the notice in Misc. Case No.32/1955-56, reveals that the forefathers were in illegal possession of the mango and jack-fruit trees that negatives the plea of the Plaintiffs that their forefathers were possessing the suit land for agricultural purposes. Essentially, therefore, there is no material as to submission of Ekpadia by Raja of Kanika in favour of the forefathers of the Plaintiffs. The Plaintiffs also failed to produce the tenancy ledger for the relevant period. DW-4, the R.I of the G.A. Department has categorically stated that on his personal verification he found that no Ekpadia has been submitted in respect of the suit land. Hence, the claim of cultivation in the suit land by the forefathers of the Plaintiffs till the date of vesting has no leg to stand, more so when the land is described in the Revenue records (Ext.1) as 'Jhati Jungle' and also as Anabadi, i.e. non-cultivable land.

34. If at all the evidence of PWs -1 and 2 is acceptable that the suit land was cultivated by their forefathers, in the light of the views expressed by the Apex Court in the decision ***State of Orissa & Ors. Vs. Harapriya Biso (supra)***, the aforesaid evidence, without further details, has to be construed as wholly unacceptable proof of cultivation of the suit land by the Plaintiffs' predecessors on the date of vesting of the land under the provisions of the Estate Abolition Act. It is the settled principle of law that "what is relevant under Section 8(1) of the Abolition Act is to confer the benefit of continuity of tenure to the tenant is possession as well as cultivation of the land as on the date of vesting." No specific evidence in this regard has been laid by the Plaintiffs except a bald and omnibus claim that the land was cultivated by their forefathers. The Plaintiffs, therefore, utterly failed to prove the possession and cultivation of the Suit land by them as on the date of vesting.

35. Hence, on careful analysis of the evidence adduced from the side of the Plaintiffs and keeping in view of the dictum in the matter of ***State of Orissa & Ors. Vs. Harapriya Biso (supra)***, it is found that the Plaintiffs have measurably failed to establish the plea of occupancy right over the suit land and as such they cannot be said to have acquired right by way of occupancy right.

36. The next issue as framed by the learned Trial Court is "Whether the Plaintiffs have perfected their title over the suit land by way of adverse possession." On perusal of the impugned judgments of the learned Trial Court and learned First Appellate Court, both of them have answered the same against the Plaintiffs.

37. In the plaint, the Plaintiffs have alternatively pleaded that their predecessors and after them they themselves have been possessing the suit land as of right for more than the statutory period and thereby they have acquired title over the suit land by way of adverse possession. The Learned Counsel Mr. Mohapatra strenuously argued that the documents such as notice issued by the Anchala Adhikari (Ext.6), the Settlement ROR prepared in the year 1973 & 1988 under Ext.2 and Ext.3, the order dated 02.05.1983, Ext.8, the Amin Report dated 06.04.1983 and Ext.9 proves presumption of hostile possession of the Plaintiffs over the suit land since 1956 and they have perfected their title on the suit land by adverse possession.

38. Admittedly, in the instant case, the Plaintiffs claimed their right over the government land on the basis of the aforesaid documents. The principle of adverse possession has been defined by the ***Privy Council in Perry v. Clissold*** in the following terms:

> "It cannot be disputed that a person in possession of land in the assumed character of the owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the statute of Limitation applicable to the case, his right is forever extinguished and the possessory owner acquires an absolute title."

39. The Supreme Court in catena of decisions have observed the following principles.

"Possession must be open, clear, continuous and hostile to the claim or possession of the other party; all three classic requirements must coexist- nec vi, i.e., adequate in continuity; nec clam, i.e., adequate in publicity; and nec precario, i.e., adverse to a competitor, in denial of title and knowledge;

(a) In ***Radhamoni Debi v. Collector of Khulna***, the Privy Council held that -

"The possession required must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor."

(b) Further, in the matter of Council ***Maharaja Sri Chandra Nandi v. Baijnath Jugal Kishore***, it was observed that -

"It is sufficient that the possession should be overt and without any attempt at concealment, so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening."

(c) In ***Parsinni v. Sukhil***, it was held that :

"Party claiming adverse possession must prove that his possession must be 'nec vi, nec clam, nec precario' i.e. peaceful, open and continuous. The possession must be adequate, in continuity, in publicity and in extent to show that their possession is adverse to the true owner."

(d) In ***Karnataka Board of Wakf v. Govt. of India***, it was held:-

"It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period."

(e) In a recent case of ***M Siddiq (D) through LRs v. Mahant Suresh Das & Ors.*** (five-Judges Bench), it is reiterated that :

"A person who sets up a plea of adverse possession must establish both possession which is peaceful, open and continuous - possession which meets the requirement of being 'nec vi nec claim and nec precario'. To substantiate a plea of adverse possession, the character of the possession must be adequate in continuity and in the public because the possession has to be to the knowledge of the true owner in order for it to be adverse. These requirements have to be duly established first by adequate pleadings and second by leading sufficient evidence."

40. In ***Thakur Kishan Singh v. Arvind Kumar*** (two-Judges Bench), the Apex Court held as under –

"5. A possession of a co-owner or of a licensee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for howsoever length of time does not result in converting the permissive possession into adverse possession…"

41. In ***Gaya Prasad Dikshit v. Dr. Nirmal Chander and Anr***. (two-Judges Bench), the Apex Court held as under :

"1. …It is not merely unauthorised possession on termination of his licence that enables the licensee to claim title by adverse possession but there must be some overt act on the part of the licensee to show that he is claiming adverse title. It is possible that the licensor may not file an action for the purpose of recovering possession of the premises from the licensee after

terminating his licence but that by itself cannot enable the licensee to claim title by adverse possession. There must be some overt act on the part of the licensee indicating assertion of hostile title. Mere continuance of unauthorised possession even for a period of more than 12 years is not enough."

In **Karnataka Board of Wakf (supra),** it was observed :-

"…Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature…"

42. In ***Chatti Konati Rao v. Palle Venkata Subba Rao*** (two-Judges Bench), the Apex Court held as follows :

"15. Animus possidendi as is well known is a requisite ingredient of adverse possession. Mere possession does not ripen into possessory title until the possessor holds the property adverse to the title of the true owner for the said purpose. The person who claims adverse possession is required to establish the date on which he came in possession, nature of possession, the factum of possession, knowledge to the true owner, duration of possession and that possession was open and undisturbed…"

43. The prior position of law as set out in ***Gurudwara Sahab v. Gram Panchayat Village Sirthala*** (two-Judges Bench) was that the plea of adverse possession can be used only as a shield by the Defendant and not as a sword by the Plaintiff. However, the position of law enunciated therein was changed later by the decision of the Supreme Court in the matter of ***Ravinder Kaur Grewal & others v. Manjit Kaur & others***, wherein the Court held as under –

"…Title or interest is acquired it can be used as a sword by the plaintiff as well as a shield by the defendant within ken of Article 65 of the Act and any person who has perfected title by way of adverse possession, can file a suit for restoration of possession in case of dispossession…"

44. In ***State of Rajasthan v. Harphool Singh*** (two-Judge Bench), it was held by the Apex Court as under:

"12. So far as the question of perfection of title by adverse possession and that too in respect of public property is concerned, the question requires to be considered more seriously and effectively for the reason that it ultimately involves destruction of right/title of the State to immovable property and conferring upon a third-party encroacher title where he had none."

45. Further, the Apex Court in ***Mandal Revenue Officer v. Goundla Venkaiah*** (two-Judges Bench) held as follows:

"…It is our considered view that where an encroacher, illegal occupant or land grabber of public property raises a plea that he has perfected title by adverse possession, the court is duty-bound to act with greater seriousness, care and circumspection. Any laxity in this regard may result in destruction of right/title of the State to immovable property and give an upper hand to the encroachers, unauthorised occupants or land grabbers."

46. In the case of ***V. Rajeshwari v. T.C. Saravanabava*** (two-Judges Bench), the Apex Court held as under:

"…A plea not properly raised in the pleadings or in issues at the stage of the trial, would not be permitted to be raised for the first time at the stage of appeal…"

47. In the matter of ***Harphool Singh (supra)***, the Apex Court observed as under:

> "12. So far as the question of perfection of title by adverse possession and that too in respect of public property is concerned, the question requires to be considered more seriously and effectively for the reason that it ultimately involves destruction of right/title of the State to immovable property and conferring upon a third-party encroacher title where he had none. The decision in] adverted to the ordinary classical requirement - that it ***P. Lakshmi Reddy v. L. Lakshmi Reddy [AIR 1957 SC 314 : 1957 SCR 195*** should be nec vi, nec clam, nec precario — that is the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. It was also observed therein that whatever may be the animus or intention of a person wanting to acquire title by adverse possession, his adverse possession cannot commence until he obtains actual possession with the required animus. In the decision reported in ***Secy. of State for India in Council v. Debendra Lal Khan [(1933) 61 IA 78 : 1934 All LJ 153 (PC)]*** strongly relied on for the respondents, the Court laid down further that it is sufficient that the possession be overt and without any attempt at concealment so that the person against whom time is running, ought if he exercises due vigilance, to be aware of what is happening and if the rights of the Crown have been openly usurped it cannot be heard to plead that the fact was not brought to its notice. In ***Annasaheb Bapusaheb Patil v. Balwant [(1995) 2 SCC 543: AIR 1995 SC 895]*** it was observed that a claim of adverse possession being a hostile assertion involving expressly or impliedly in denial of title of the true owner, the burden is always on the person who asserts such a claim to prove by clear and unequivocal evidence that his possession was hostile to the real owner and in deciding such claim, the courts must 27 have regard to the animus of the person doing those acts." (*Emphasis supplied*)

48. In the instant case, admittedly the Plaintiffs on the basis of adverse possession seek to be declared the owners over the suit land belonging to the Government. Hence, in view of the authoritative decisions of the Apex Court as held above, the claim of the Plaintiffs is to be taken "more seriously". It is admitted that the suit land belongs to Government, hence the burden of proof once shifted, it is for the Plaintiffs to establish their possession to be openly hostile to the rights of the Government. Since the Plaintiffs are trying to defeat the rights of the true owner, it is for them to clearly plead and establish all such facts necessary to establish their case.

49. The Plaintiffs produced the certified copies of ROR of the year 1973 (Ext.2) and ROR of the year 1988 (Ext.3). Ext.2 reveals that the suit property is recorded as "UNNATA YOJANA JOGYA" and in the remarks column thereof as to an endorsement that the ancestors of the Plaintiffs are enjoying 27 mango and one jack-fruit trees standing thereon. Further, Ext.3 reveals that the suit property is recorded in favour of Defendant No.1 and the kisam thereof is Gharabari-2 with notes of "forcible possession" in respect of 27 mango trees and one jack-fruit tree standing over the said property by the Plaintiffs and their forefathers. As discussed, no such plea has been propounded specifically by the Plaintiffs in the plaint with regard to the requirements of adverse possession. The evidence of Plaintiffs' witnesses does not in any manner establish the factum of the Plaintiffs having ever claimed the possession hostile to that of the true owner, i.e. the State. Ext.2 and Ext.3 simply disclose with regard to the illegal possession in respect to some trees claimed to have been planted by the forefathers of the Plaintiffs standing for a long period. PWs.-1, 2 and 3 have not stated specifically the age of the trees planted by their forefathers on the suit land, rather the evidence is that their forefathers were in

cultivable possession. In essence, it can very well be said that the Plaintiffs are not clear as to the manner of acquisition of the suit property by their forefathers. At one hand they claim that they were/are owners of the land on the basis of Hata patta, and on the other hand they pleaded adverse possession, which is self- contradictory. It is a matter of record that Ext.6, the notice bearing No.153 dated 09.06.1955 issued by the Anchal Adhikari, Cuttack in Misc. Case No.32/1955-1956 addressed to the forefathers of the Plaintiffs candidly showing that they were forcibly collecting the usufructs of mango and jack- fruit trees standing over the Anabadi lands and directed not to collect the same in future, which was never challenged by the Plaintiffs in any proceeding against the said notice, which substantially proves that their forefathers were in illegal possession of the trees too. On a careful analysis, therefore, the testimonies upon which the Plaintiffs seek to place reliance on their long-term possession over the land in question, are not of such a nature to satisfy the requirement of a "more serious and effective" one.

50. Thus, mere possession of some trees for a long period, in absence of specific pleadings as to an adverse possession or possession by authentic means leads to inconsistency evidence brought through the witnesses that does not translate into either right claimed by the Plaintiffs.

51. It is needless to mention here that, the relief claimed in the plaint is not clear as to whether the Plaintiffs claim right, title and interest over the suit land as occupancy Rayats or by adverse possession.

52. It is held by this Court in the case ***of Champa Bati Bewa @ Kabi and others Vs. Kanhu Mallik and others***, reported in ***Vol.33 (1991) O.J.D.154 (Civil)***, an occupancy right cannot be claimed by way of adverse possession. It necessarily infers that the requirements for claim of title as an occupancy Rayat and that of adverse possession are not one and the same, and in fact are mutually opposite.

53. In view of the discussions made in the foregoing paragraphs, the substantial questions in this Appeal are answered in negative, and as such the Appeal fails. The impugned judgments of the learned courts below stand confirmed. In consequence, the Lease granted in favour of the Defendants is held valid.

54. The Appeal being devoid of merit stands dismissed. Parties are to bear their respective cost of litigation.

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2024 (I) ILR-CUT-351

SIBO SANKAR MISHRA, J.

W.P.(C) NO.9786 OF 2022

Dr. (RETD.) ASHOK KUMAR PANDA ……Petitioner

.V.

STATE OF ORISSA & ORS. ……Opp.Parties

PENSION – Claim of interest on the delay payment – Held, the petitioner was made to suffer for more than a decade under the bureaucratic rigmarole – A direction was given to Opposite Parties to pay interest @6% within one month on the delay payment of retiremental dues.

(Para-15)

Case Laws Relied on and Referred to :-

1. (2014) 8 SCC 894 : D.D.Tewari(dead) through LR Vs.Uttar Haryana Bijli Vitran Nigam Limited & Ors.
2. (2022) 4 SCC 627 : Dr. A.Selvaraj Vs. C.B.M College & Ors.

For Petitioner : Mr. S.K.Mishra, Sr. Advocate, Mr. J.Pradhan, Mr. P.S.Mohanty, Mr. S.K.Sethi
For Opp.Parties: Mr. H.M.Dhal, AGA.

JUDGMENT Date of Hearing: 25.09.2023: Date of Judgment : 29.09.2023

SIBO SANKAR MISHRA, J.

1. In the present Writ Petition, Petitioner is seeking mandate to the Opposite Parties for payment of his retiremental dues along with interest @12% per annum for the delay so caused in making good the payment of pension and gratuity dues within time.

2. On 24.11.1975, the Petitioner was appointed as Leave Training Reserved Medical Officer (ATRMO) in the rank of Assistant Surgeon after undergoing the rigors of recruitment process conducted by the Odisha Public Service Commission (OPSC). He continued in different positions during the span of his unblemished career. Eventually after retaining the age of superannuation he demitted office on 31.01.2012.

3. After the Petitioner retired from the service on 31.01.2012 he has been running from the pillar to post to get his retiremental dues. However, Petitioner's file has been shuttling from one authority to other without any positive yield. It appears, due to the confusion in the name of the Petitioner with another Medical Officer, the payment appears to be delayed. A letter dated 07.04.2016 addressed by the Opposite Party No.4 to 5, it is admitted that one Ashok Kumar Panda son of Upendra Chandra Panda having GPF Account No. 19377PH(O) has indeed availed house building advance. He has been confused with the Petitioner and therefore, an amount to the tune of Rs.1,32,298/- sought to be realized from the Petitioner as an advance availed towards house building loans during his service. That is the reason cited for not making the dues good.

4. Despite flagging the apparent error of confusion of name and the GPG Account number, the Petitioner was not paid the dues and was forced to run from one Office to another. Therefore, the Petitioner had filed the Writ Petition being W.P.(C) No.17954 of 2019, which was disposed of by this Court vide its order dated 17.10.2019. Learned Single Judge of this Court directed the Opposite Party to hear out the Petitioner and addressed his grievances within a period of two months.

5. Pursuance to the direction of this Court although the Petitioner was paid the dues but had to again shuttle between the Office of the Opposite Parties and the Treasury for real remittance.

6. On the conspectus of the aforementioned facts scenario, the counsel appearing for both the Parties have made the statement before this Court that the payment dues to the Petitioner has already been made good.

7. Heard Mr. S.K.Mishra, learned Senior Counsel for the Petitioner and Mr.H.M. Dhal, learned Additional Government Advocate.

8. Mr. Mishra learned Senior Counsel for the Petitioner submits that the delay in the payment of retiremental dues is admittedly attributable to the Opposite Parties alone. Therefore, the Petitioner is entitled to interest on the delayed payment.

9. To buttress his argument, he relies upon the judgment of the apex Court reported in ***(2014) 8 SCC 894*** in the case of ***D.D. Tewari (dead) through legal representatives versus Uttar Haryana Bijli Vitran Nigam Limited and Others***. In the said case the Hon'ble apex Court owing to the delayed payment of retiremental benefit awarded interest at 9%. The relevant part of the said judgment reads as follows:-

> "6. It is an undisputed fact that the appellant retired from service on attaining the age of superannuation on 31-10-2006 and the order of the learned Single Judge after adverting to the relevant facts and the legal position has given a direction to the respondent employer to pay the erroneously withheld pensionary benefits and the gratuity amount to the legal representatives of the deceased employee without awarding interest for which the appellant is legally entitled, therefore, this Court has to exercise its appellate jurisdiction as there is a miscarriage of justice in denying the interest to be paid or payable by the employer from the date of the entitlement of the deceased employee till the date of payment as per the aforesaid legal principle laid down by this Court in the judgment referred to supra. We have to award interest at the rate of 9% per annum both on the amount of pension due and the gratuity amount which are to be paid by the respondent."

10. Similarly Mr. Mishra, learned Senior Counsel for the Petitioner also relied upon another judgment reported in ***(2022) 4 SCC 627*** in the case of ***Dr. A. Selvaraj versus C.B.M. College and others***. The facts of that case is also similar to the effect that delayed payment was attributable to the Opposite Parties, therefore, it would bear interest as such interest was award. The relevant part of the judgment reads as under:-

> "10. Having heard the learned counsel for the respective parties, we are of the opinion that as there was a delay in making the payment of retirement benefits and settling the dues for which the appellant employee is not at all responsible, he is entitled to the interest on the delayed payment. Even the Division Bench of the High Court has also observed in the impugned judgment and order that the appellant is entitled to the interest on the delayed payment. However, there is an inter se dispute between the Secretary, Management and the Government as to who is responsible for the delay in making the payment to the appellant and therefore, he has been denied the interest on delayed payment though entitled to.
>
> 13. In view of the above discussion and for the reasons stated above, the present appeal succeeds. The impugned judgment and order passed by the Division Bench of the High Court

> and that of the learned Single Judge denying the interest on delayed payment of retirement benefits to the appellant is hereby quashed and set aside. The Management/Trustees/College are hereby directed to pay the interest on the delayed payment of retirement benefits to the appellant, from the date of retirement till the actual payment was made, subject to the final decision that may be taken by the Government on the objections to the enquiry report that may be filed by the former Secretary and/or the College/Management/Trustees to recover the same from the person, who, ultimately is held to be responsible for the delay."

11. From the contour of the aforementioned judgment and facts of the case, it is clear that the Petitioner is entitled for interest on the delayed payment. In this case the Petitioner was made to suffer for more than a decade under the bureaucratic rigmarole. This is an apparent case of mistaken identity being created at the end of Opposite Parties. One Dr. Askok Kumar Panda son of Upendra Chandra Panda MS (ENT) having G.P.F. Account No. 19377PH(O) has been confused with the present Petitioner, who is also named Dr. Ashok Kumar Panda son of late Purna Chandra Panda, who has G.P.F. Account No.26711MJ(O). Admittedly dues to this confusion being created in the department, the Petitioner has been denied the retiremental dues.

12. Mr. Dhal, learned Additional Government Advocate submits that after the confusion being sorted out, the payments due to him has been remitted to the Petitioner, however no interest is liable to be paid as the mistake was bona fide and no mala fide could be imputed.

13. Mr. Mishra, learned Senior Counsel for the Petitioner however contended that his prayer regarding the payment of interest on the delay has not been addressed.

14. Therefore, the limited grievance of the Petitioner regarding his entitlement to the interest accrued on the delayed payment to the retiremental dues deserves to be allowed in the light of the judgment cited (supra).

15. Accordingly, the Writ Petition is allowed with a direction to the Opposite Parties to pay interest @6% within one month on the delayed payment of retiremental dues. The Petitioner is directed to calculate the dues within a week and submit the same to the Opposite Parties. The Petitioner is entitled to the interest on the delayed payment from the date of his entitlement to the retiremental benefit till the date of real payment is made. If the payment of interest as directed by this order is not made within one month from the date of submission of calculation by the Petitioner. However, the interest shall accrued @12% on the default amount from the expiry of one month granted to the Opposite Parties to make good the payment.

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2024 (I) ILR-CUT-355

SIBO SANKAR MISHRA,J.

W.P.(C) NO. 28666 OF 2022

BIMBADHAR MALLICK …. Petitioner

-V-

STATE OF ODISHA & ORS. …..Opp.Parties

SERVICE LAW – Disciplinary Proceeding – Delay in completion – The petitioner filed as many as three writ petitions and three contempt proceedings challenging the delay in conducting the proceeding – The proceeding eventually quashed by the Hon'ble High Court in the writ application – Even after disposal of writ application resulting quash of departmental proceeding, the Authority continued the proceeding and imposed the major punishment of removal from service – Whether the penalty is sustainable?– Held, No – The conduct of Opposite Party No.3 in this case is no doubt contumacious but this Court is desisting from passing any aggravated panel order, rather chooses to put the entire dispute to a quitous – Therefore, the Writ Petition is allowed by setting at nought the impugned order of removal – Needless to say that as a corollary, the Petitioner is entitled to all the consequential relief, accordingly the same is allowed.

For Petitioner : Mr. S. Roy, Mr. S. Satapathy
For Opp.Parties: Mr. H.M.Dhal, AGA

JUDGMENT Date of Hearing: 25.09.2023: Date of Judgment : 29.09.2023

SIBO SANKAR MISHRA, J.

1. This matter was extensively heard on 08.09.2023 and the following order was passed on that day:-

> "1. Heard learned counsel for the Parties.
>
> 2. The Petitioner challenges the order dated 17.11.2021 passed by the Chief District Medical Officer, Paralakhemundi-Opposite Party No.3. In the said order, the Opposite Party No.3 has passed the following order:-
>
> "Now, therefore, after careful consideration of the charges, written statement of defence of the delinquent officer, findings of the inquiry officer, the representation on the notice issued under rule 15 (10) (i) (a), the representation on the notice issued under rule 15 (10) (i) (b) of OCS (CC & A) Rules, 1962 the Disciplinary Authority have been pleased to award the following penalties.
>
> (i) Removal from service which shall not be a disqualification for future employment with effect from 09.10.2013 under the Rule 72(2) of Orissa Service Code and 13(4) of the Orissa Leave Rules-1966 as per Sub-Rule (viii) of Rule-13 under provisions of Rule-15 of OCS (CC&A) Rules, 1962. His absence period from 24-08-2008 to 09-10-2013 which is more than 5 years will be treated as unauthorized absence from duty."
>
> 3. The Petitioner has now been removed from the service with effect from 09.10.2013 under Rule 72(2) of Orissa Service Code and 13(4) of the Orissa Leave Rules, 1966. The said impugned order is the culmination of a departmental proceeding initiated against the Petitioner on 14.01.2015. The Petitioner initially approached the Odisha Administrative

Tribunal, Cuttack challenging the delayed conclusion of the departmental proceeding initiated on 14.01.2015. The learned Tribunal after hearing both the parties passed the following order on 19.04.2018 in O.A. No.770(C) of 2018.

"The grievance of the applicant is that a Departmental Proceeding was initiated against him and 2nd show-cause notice was issued vide letter No.2435 dtd.06.04.16 issued by the C.D.M.O., Gajapati and the applicant has submitted show-cause reply to the C.D.M.O., Gajpati vide Annexure-8 dtd.04.05.16. But till date, no final order has been passed in the department Proceeding as the result of which, he has been denied with the service benefits.

Learned counsel for the applicant submitted that he will be satisfied if a copy of the paper book is sent to Resp.no.1 with direction to treat the same as representation of the applicant, consider and pass appropriate order regarding disposal of the Department proceeding within the time stipulated by the Tribunal.

Learned Standing counsel has no objection to such course of action if orders are passed without going into the merit of the case.

Considering the submission of both the sides and without going into the merit of the case, a copy of the paper book be forwarded to Resp.no.1 at the cost of the applicant with a direction to treat the same as representation of the applicant, consider and pass appropriate orders thereon regarding disposal of the Departmental Proceeding pending him as he has already submitted reply to the 2nd show-cause notice dtd.04.05.16, within a period of two months from the date of receipt of a copy of this order and convey the result thereon to the applicant soon thereafter. Accordingly, the O.A. is disposed of. Send copies."

Since the order dated 19.04.2018 passed by the learned Tribunal was not complied with, the Petitioner again filed separate Writ Petitions before this Court as by that time the Tribunal was already abolished. The learned Single Judge on 25.08.2020 disposed of the Writ Petition vide W.P.(C) No.18896 of 2020 by passing the order, which reads as follows:-

"Considering the long pendency of the disciplinary proceeding, this Court directs the Disciplinary Authority to conclude the disciplinary proceeding involving the petitioner as expeditiously as possible preferably within a period of three months from the date of communication of a copy of this order along with copy of the writ petition by the petitioner. Failure of which, it shall be construed to be deliberate violation of Court's order."

4. Unfortunately, even the aforementioned order of the learned Single Judge dated 25.08.2020 was not complied with, therefore, the Petitioner filed Contempt Petition bearing CONTC No.6163 of 2020. While dealing with the Contempt Proceeding, the learned Single Judge of this Court on 12.01.2021 passed the following order:-

"Considering the submission made and as this Court finds, no purpose will be served in issuing notice in such matter, the Contempt Petition stands disposed of with direction to the Opposite Party-contemnor to work out the direction of this Court dated 25.08.2020 issued in W.P.(C) No.18896 of 2020, if not worked out in the meantime, within a period of one month from the date of service of a copy of this order by the petitioner, provided there is no legal impediment otherwise. It is made clear that in the event the order of this Court is not worked out within the time stipulated hereinabove, it will be construed to be deliberate violation of this Court's order."

5.The order dated 12.01.2021 was duly communicated by the Petitioner vide his letter dated 17.01.2021 to the Chief District Medical Officer, Paralakhemundi. Despite communication of series of orders to the Opposite Party No.3, the Opposite Party No.3 did not comply with any of those orders. Therefore the Petitioner was forced to file again a substantive Writ Petition bearing W.P.(C) No.11677 of 2021. The said Writ Petition was disposed of by the learned Single Judge passing a very detailed and exhaustive order thereby quashing the departmental proceeding for unexplained and prolong delay in its conclusion. It is relevant to re-produce the entire order dated 07.04.2021, which reads as follows:-

"The writ petition involves the following prayer:

"It is therefore prayed that this Hon'ble Court may graciously be pleased to admit the writ petition and issue Rule "NISI" to the Opp. Parties to show cause as to ;

(i) Why the non-disposal of the proceeding initiated against the petitioner vide Memorandum dated 14.01.2015 under Annexure-2 as per the order passed by this Hon'ble Court under Annexure-6 will not be declared as illegal; and

(ii) Why the proceeding initiated vide Memorandum dated 14.01.2015 will not be treated to have been lapsed in view of the order passed by this Hon'ble Court under Annexure-8; and

(iii) Why the Opp. Parties will not be directed to allow the petitioner to resume his duty by treating the period of leave as extra ordinary leave; And if the Opp. Parties do not show cause then the Rule be made absolute by issuing appropriate writ/writs and any other order as deem fit be passed;

And for this act of kindness, the petitioner shall as in duty bound ever pray."

In the first round of litigation, i.e. in W.P.(C) No.18896 of 2020, disposal of the application considering that the petitioner got superannuated in the meantime, this Court by order dated 25.8.2020 passed the following order:

"W.P.(C) No.18896 of 2020

02. 25.08.2020 Heard leaned counsel for the petitioner and learned counsel for the State.

This Writ Petition involves a serious allegation of sexual harassment at work place and based on the final report of the Internal Committee and dependent on the recommendation of the Internal Committee, the present Writ Petition is filed.

Pending consideration of the Writ Petition, it is alleged that after the findings of the Internal Committee, as usual, an inquiry involving the Departmental Proceeding has been initiated against the petitioner on 09.12.2018 and on which date itself, an Enquiry Officer was also appointed. This Court taking serious note of non-progress in the inquiry involving such an important issue, call for explanation from the opposite party Nos.1 and 2 within a period of two weeks.

List this matter on 22.03.2021. The copy of the response be filed before this Court in the meantime and one copy of the same also be supplied on the learned counsel for the petitioner indicating the persons responsible for not showing any progress in the Disciplinary Proceeding involving such serious allegation."

In spite of the aforesaid order, the proceeding could not be concluded. Petitioner was thus constrained to file CONTC No.6163 of 2020. This contempt petition was disposed of on 12.01.2021 again providing further time of one month from the date of service of copy to conclude the Disciplinary Proceeding involving the petitioner. The order dated 12.01.2021 involving CONTC No.6163 of 2020 reads as follows:

"**CONTC No.6163 of 2020**

02. 12.01.2021 This matter is taken up through Video Conferencing mode. Heard learned counsel for the petitioner.

This Contempt Petition is filed alleging violation of this Court's order dated 25.08.2020 passed in W.P.(C) No.18896 of 2020.

Considering the submission made and as this Court finds, no purpose will be served in issuing notice in such matter, the Contempt Petition stands disposed of with direction to the Opposite Party-contemnor to work out the direction of this Court dated 25.08.2020 issued in W.P.(C) No.18896 of 2020, if not worked out in the meantime, within a period of one month from the date of service of a copy of this order by the petitioner, provided there is no legal impediment otherwise. It is made clear that in the event the order of this Court is not worked out within the time stipulated hereinabove, it will be construed to be deliberate violation of this Court's order.

This Court finds in spite of time stipulation and repeated orders, the Disciplinary Proceeding is not being concluded. Even there is no application of extension of time as a minimum curtsey by the Competent Authority as of now. This Court taking serious note of the objection on the allegation raised by the petitioner involving inaction of the Disciplinary Authority and further as considerable time passed in the meantime, directs provided the Disciplinary Proceeding is already concluded in the meantime, the Disciplinary Proceeding involving the petitioner to be treated to have been closed. It is noted here that the Disciplinary Proceeding was commenced on 14.01.2015, for the decision of the Hon'ble apex Court, no Disciplinary 4 Proceeding shall be allowed to continue for such long time. Such inaction amounts to greater prejudice to the employees.

For the inaction of the Disciplinary Authority in spite of repeated directions and no timely conclusion of the Disciplinary Authority, if the Authority is faced with any financial short fall, if so advise, the Competent Authority may initiate a proceeding such officer(s) responsible for non-disposal of Departmental Proceeding in appropriate time and recover the amount involved therein from such officer(s) but however involving the Disciplinary Proceeding. As restrictions due to the COVID-19 situation are continuing, learned counsel for the parties may utilize the soft copy of this order available in the High Court's website or print out thereof at par with certified copies in the manner prescribed, vide Court's Notice No.4587, dated 25th March, 2020."

6. Even after closing the departmental proceeding by the detailed aforementioned judicial order, the Opposite Party No.3 by clearly disobeying the order of this Court proceeded with the departmental proceeding. Therefore, the Petitioner has to file repeated proceedings before this Court and filed 3rd Writ Petition being W.P.(C) No.26715 of 2021, which was disposed of with a direction to consider the representation filed by the Petitioner for closing the departmental proceeding in view of the order dated 07.04.2021 passed in W.P.(C) No.11677 of 2021. Subsequently the Petitioner had also to file a Contempt Petition being CONTC No.2755 of 2022. While dealing with the said Contempt Petition, the learned Single Judge again directed to comply with the previous order of this Court dated 17.09.2021 passed in W.P.(C) No.26715 of 2021.

7. In this process the Petitioner had to file as many as three Writ Petitions and three Contempt Proceedings challenging the delayed in departmental proceeding, which was eventually quashed by the learned Single Judge by order dated 07.04.2021 in W.P.(C) No.11677 of 2021. Despite the aforementioned series of orders, the Opposite Party No.3 went ahead with the departmental proceeding and eventually imposed a major penalty on the Petitioner by removing him from service, which is now the subject matter of this Petition. This conduct of the Opposite Party No.3 has given to understand that the same is directly in contravention to the series of orders passed by this Court.

8. It is at this stage, learned counsel for the State seeks to obtain instruction and sought an adjournment. In the interest of justice, matter is adjourned to 22.09.2023 to enable the learned State Counsel to obtain instruction and address argument.

9. Copy of this order be supplied to the learned counsel for the State."

2. This matter has been taken up today for further hearing.

3. Heard Mr. S. Roy, learned counsel for the Petitioner and Mr. H.M. Dhal, learned Additional Government Advocate.

4. Mr. Dhal, learned Additional Government Advocate fairly submits that the conduct of the Opposite Party No.3 is indefensible in the present case, however that might have happened due to sheer oversight.

5. The dictum of a constitutional court cannot be taken for a ride by an Executive Authority. The conduct of Opposite Party No.3 in this case is no doubt contumacious but this Court is desisting from passing any aggravated panel order, rather chooses to put the entire dispute to a quitous. Therefore, the Writ Petition is allowed by setting at nought the impugned order dated 17.11.2021 passed by the Opposite Party No.3 and consequentially the award of punishment of removal from service passed against the Petitioner is set aside. Needless to say that as a corollary, the Petitioner is entitled to all the consequential relief, accordingly the same is allowed.

6. The Writ Petition is allowed.

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2024 (I) ILR-CUT-359

A.C. BEHERA, J.

S.A. NO.174 OF 1986

RADHA MOHAN NANDA ……Appellant

-V-

MADHUSUDAN SARANGI
(SINCE DEAD) BY HIS LRs & ORS. ……Respondents

TRANSFER OF PROPERTY ACT, 1882 – Section 44 and 54 – The vendor has alienated the properties exceeding her share in the suit plot– Whether such transfer is valid? – Held, No –Any transfer made by one of the Co-owners shall remain valid to the extent of the share of the transferor. (Paras 23-25)

Case Laws Relied on and Referred to :-

1. AIR 1973(SC) 2451 : Gorakh Nath dubey Vs. Hari Narayan singh & Ors.
2. 1974(1) CWR 222 : Gana Nath Sahu & Ors. Vs. Smt. Bulli Sahu & Ors.

For Appellant : Mr. D.P. Mohanty
For Respondents: None

JUDGMENT Date of Hearing: 21.11.2023: Date of Judgment: 21.12.2023

A.C.BEHERA, J.

1. This Second Appeal has been preferred against the reversing judgment.

2. The Appellant in this Second Appeal was the defendant No.2 in the suit vide O.S. No.48/311 of 1981/1976-I and he was the respondent No.1 in the First Appeal vide T.A. No.20/98 of 1981.

3. The predecessor of the respondent Nos.1(a) to 1(d) in this Second Appeal i.e. Madhusudan Sarangi was the sole plaintiff in the suit vide O.S. No.48/311 of 1981/1976-I and he was the appellant in the First Appeal vide T.A. No.20/98 of 1981.

The respondent Nos.2 to 10 in this Second Appeal were the defendant Nos.3 to 10 in the suit vide O.S. No.48/311 of 1981/1976-I and they were the respondent Nos.2 to 9 in the First Appeal vide T.A. No.20/98 of 1981.

The predecessor of the respondent Nos.10 to 15 in this Second Appeal i.e. Banalata Debi alias Nilamani Debi was the defendant No.11 in the suit vide O.S. No.48/311 of 1981/1976-I and after her death, the respondent Nos.10 to 15 were substituted in her place as defendant Nos.11 (Ka) to 11 (Cha) and they were the respondent Nos.10 to 15 in the First Appeal vide T.A. No.20/98 of 1981.

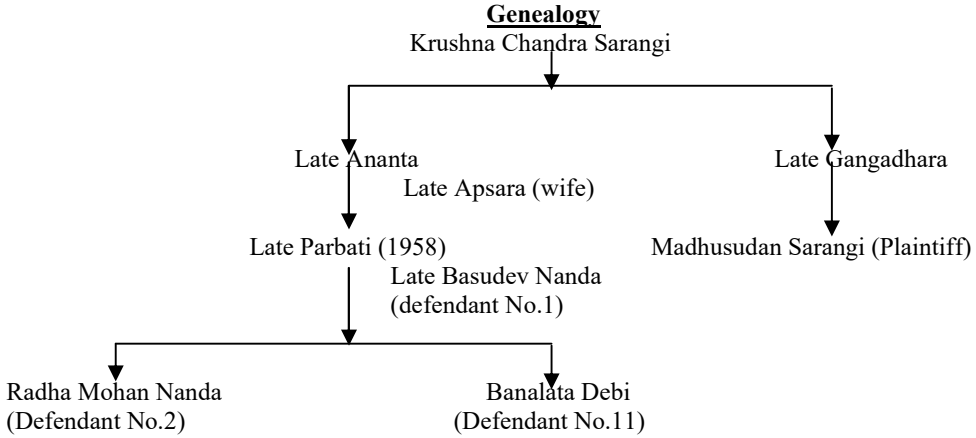
4. The suit of the plaintiff {Madhusudan Sarangi, the predecessor of the respondent Nos.1(a) to 1(d) of the Second Appeal} vide O.S. No.48/311 of 1981/1976-I was a suit for declaration and permanent injunction.

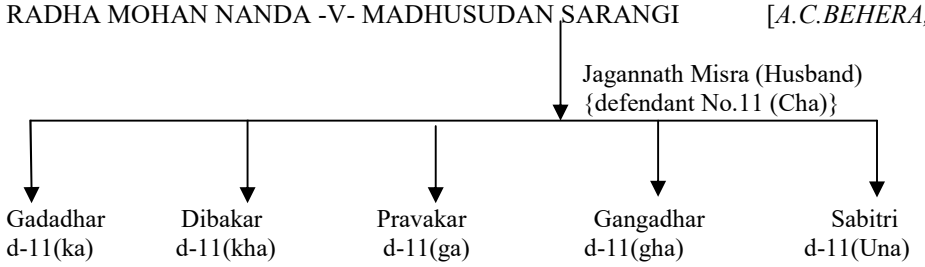
The properties described in schedule "Ka" of the plaint vide Khata No.39 Plot No.390 measuring an area of Ac.1.40 decimals out of Ac.2.28 decimals in Mouza Raigurupur in the district of Puri are the suit properties.

5. According to the plaintiff, Krushna Chandra Sarangi was their common ancestor. The said Krushna Chandra Sarangi died leaving behind his two sons i.e. Ananta and Gangadhar. The first son of Krushna i.e. Ananta Sarangi died leaving behind his widow Apsara Sarangi and one daughter, namely, Parbati Sarangi. Apsara Sarangi died leaving behind her only daughter Parbati Sarangi. Parbati died leaving behind her husband Basudev Nanda (defendant No.1), her son Radha Mohan Nanda (defendant No.2) and her daughter Banalata Debi @ Nilamani Debi (defendant No.11). Banalata Debi (defendant No.11) died leaving behind her five children and husband i.e. defendant Nos.11 (Ka) to 11 (Cha).

The second son of Krushna Chandra Sarangi i.e. Gangadhar Sarangi died leaving behind his only son Madhusudan Sarangi (plaintiff).

6. In order to have better appreciation and so also for an easy understanding and as well as for an instant reference, the family pedigree of the plaintiff as stated above by the plaintiff in his plaint is depicted hereunder:-





7. According to the plaintiff, the suit Plot No.390 under Khata No.39 in Mouza Raigurupur comprises an area of Ac.4.89 decimals. It was originally belonged to Krushna Chandra Sarangi. After the death of Krushna Chandra Sarangi, all the properties of Plot No.390 devolved upon his two sons i.e. Ananta and Gangadhar. So, Ananta had half share and Gangadhar had half share over the properties covered under Plot No.390 left by Krushna Chandra Sarangi.

After the death of Ananta, Apsara and Gangadhara, the properties covered under Plot No.390 i.e. Ac.4.89 decimals were partitioned on dated 30.11.1943 between the above two branches i.e. between the successors of the branch of Ananta and Gangadhara. In that partition, Apsara and Parbati were allotted Ac.2.28 decimals from the eastern side of Plot No.390 and the plaintiff was allotted Ac.2.61 decimals from the western side of that Plot No.390. Accordingly, the plaintiff-Madhusudan Sarangi was in possession of western side Ac.2.61 decimals of Plot No.390 being the owner thereof. He (plaintiff) was also possessing the eastern side properties of that Plot No.390 being a bhag tenant under defendant Nos.1 & 2 i.e. under Basudev Nanda and Radha Mohan Nanda (those are the husband and son of Parbati). Because, they (defendant Nos.1 & 2) were residing in Puri town. The defendant No.11 (Banalata Debi @ Nilamani Debi daughter of Parbati) was residing in her husband's house at Biraharekrushnapur and both the places i.e. Puri town and Biraharekrushnapur are far away from the suit properties.

8. The further case of the plaintiff was that, there was also partition between defendant Nos.1, 2 & 11, in which, western side Ac.1.40 decimals out of Ac.2.28 decimals of suit Plot No.390 had fallen into the share of Banalata (defendant No.11), which is the subject matter of the suit. The plaintiff had been cultivating the aforesaid land of Banalata (defendant No.11) i.e. Ac.1.40 decimals in Plot No.390 as bhag tenant under defendant No.11 (Banalata) and for remaining Ac.0.88 decimals as bhag tenant under defendant Nos.1 & 2. For which, the defendant No.11 sold that Ac.1.40 decimals to the plaintiff for a consideration amount of Rs.1500/- through registered sale deed dated 28.05.1974 vide Ext.1. Accordingly, since the date of purchase i.e. since 28.05.1974, the plaintiff has been possessing the same exclusively being the owner thereof, but when the defendant Nos.3 to 10 created disturbances in the possession of the plaintiff on the same as per the instigation of defendant No.2, then the plaintiff was compelled to approach the Civil Court by filing the suit vide O.S. No.48/311 of 1981/1976-I against the defendants praying for declaration of his title over the suit properties and for permanent injunction against

the defendants in order to restrain the defendants permanently from creating any sort of disturbances in the possession of the plaintiff over the suit properties.

9. During the pendency of the suit, when the defendant No.11 expired, for which, her successors i.e. defendant Nos.11 (Ka) to 11 (Cha) were substituted in her place. Likewise during the pendency of the suit, the defendant No.1-Basudev Nanda expired leaving behind defendant No.2 as his successor.

10. Out of all the defendants, except the defendant Nos.1, 2 and 11, other defendants were set ex parte.

The defendant Nos.1 & 2 had contested the suit of the plaintiff by filing their joint written statement after taking their stands inter alia therein that, even during life time of defendant No.11 (Banalata), she was not cultivating the suit properties, but the suit properties were cultivating by them (defendant Nos.1 & 2). After the death of Banalata (defendant No.11), the defendant Nos.1 & 2 have become the owners over the suit properties and they are possessing the same. Because, the defendant No.11 (Banalata) had not exercised her any right of possession over the suit properties at any point of time. Further, case of the defendant Nos.1 & 2 was that, the suit properties were vested in the State due to abolition of intermediary system and after abolition of the intermediary system, the suit properties were settled in the name of the defendant No.1 under Sections 6 & 7 of the O.E.A. Act as per the application of the defendant No.1 and in which, the defendant No.11 had not raised any objection. Therefore, the suit properties have been recorded in the name of the defendant No.1 exclusively as the owner of the same. The plaintiff was not at all a bhag tenant in respect of the suit properties under the defendant No.11. Though, the plaintiff had filed an application under Section 15 of the O.L.R. Act vide O.L.R. Case No.901 of 1974 projecting him as the bhag tenant over the suit properties under the defendant No.11, to which, the defendant No.2 had contested and the said O.L.R. Case under Section 15 of the O.L.R. Act vide O.L.R. Case No.901 of 1974 of the plaintiff was dismissed. Therefore, the sale of the suit properties made by the defendant No.11 in favour of the plaintiff on dated 28.05.1974 is invalid under law.

11. The LRs. of the defendant No.11 i.e. defendant No.11 (Ka) to 11 (Uan) filed their joint written statement denying the averments made by the plaintiff in his plaint by taking their stands that, Banalata (defendant No.11) was a Pardanasin lady. So, the plaintiff has obtained the sale deed dated 28.05.1974 in respect of the suit properties from Banalata alias Nilamani (defendant No.11) by practicing fraud. For which, the suit of the plaintiff is liable to be dismissed.

12. Basing upon the aforesaid pleadings and matters in controversies between the parties, the Trial Court had framed altogether 9 (Nine) number of issues in the suit vide O.S. No.48/311 of 1981/1976-I and the said issues are:-

Issue

1. Is the suit maintainable?

2. Is there any cause of action for the suit?
3. Is the suit barred by limitation?
4. Is the suit property valued?
5. Has the defendant No.11 been ousted from the suit land?
6. Is the sale in favour of the plaintiff genuine and for consideration?
7. To what relief, if any, is the plaintiff entitled?
8. Is the sale deed dtd.25.5.74 valid one due to absence of notice U/s 22 Hindu Succession Act?
9. Whether the plaintiff has right, title and interest over the suit property?

13. In order to substantiate the aforesaid reliefs sought for by the plaintiff against the defendants, he (plaintiff) examined four (4) witnesses from his side including him as P.W.3 and relied upon the documents vide Exts.1 & 2 on his behalf. But, on the contrary, the defendant No.2 examined three (3) witnesses on his behalf including him as D.W.1 and relied upon series of documents from his side vide Exts.A to F.

14. After conclusion of hearing and on perusal of the materials, documents and evidence available on Record, the Trial Court answered all the issues except issue Nos.6 & 7 against the plaintiff without answering issue Nos.3 & 4, as the said two issues were not pressed by the parties.

15. Basing upon the findings and observations made by the Trial Court in issue Nos.1, 2, 5, 6, 7, 8 & 9, the Trial Court dismissed the suit of the plaintiff vide O.S. No.48/311 of 1981/1976-I on contest against the defendants including the defendant No.2 without cost vide its judgment and decree assigning the reasons that, the defendant No.11 (Banalata @ Nilamani) was not ousted from the suit properties at any point of time and the sale deed vide Ext.1 dated 28.05.1974 executed by defendant No.11 (Banalata) in favour of the plaintiff in respect of the suit properties would not confer any title on him (plaintiff) due to non-partition of all the properties covered under Plot No.390 including the suit properties, for which, the plaintiff has no right, title and interest over the suit properties.

16. On being dissatisfied with the aforesaid judgment and decree of the dismissal of the suit of the plaintiff vide O.S. No.48/311 of 1981/1976-I passed by the Trial Court, he (plaintiff) challenged the same by preferring the First Appeal vide T.A. No.20/98 of 1981 being the appellant against the defendants by arraying them (defendants) as Respondents.

17. After hearing from both the sides, the First Appellate Court allowed the First Appeal vide T.A. No.20/98 of 1981 vide its judgment and decree dated 09.05.1986 and 17.05.1986 respectively and set aside the judgment and decree of dismissal of the suit vide O.S. No.48/311 of 1981/1976-I passed by the Trial Court.

18. On being aggrieved with the aforesaid judgment and decree dated 09.05.1986 and 17.05.1986 respectively passed in T.A. No.20/98 of 1981 by the First Appellate Court, the defendant No.2 (Radhamohan, who was the respondent No.1 in the First Appeal) challenged the same by preferring this Second Appeal

being the Appellant against the successors of the plaintiff and also arraying the other defendants as Respondents.

19. This Appeal has been admitted on formulation of the following substantial questions of law:-

> *(i) Whether the suit properties are the joint and undivided properties of the defendant Nos.1, 2 & 11 having 1/3rd share each and whether the defendant No.11 had transferred more than her 1/3rd share over the suit properties through the sale deed vide Ext.1 and whether the alienation made by the defendant No.11 in excess of her share from the suit properties is bad under law?*
>
> *(ii) Whether it was obligatory on the part of the plaintiff to file the suit in respect of the entire properties and whether it is open for the Appellant (defendant No.2) to file a regular suit for setting aside the sale deed vide Ext.1 in favour of the plaintiff?*
>
> *(iii) Whether the First Appellate Court has committed error in decreeing the suit of the plaintiff, when it was found that, the plaintiff has no exclusive title to the whole of the suit land?*
>
> *(iv) Whether the suit of the plaintiff in this nature was not maintainable under law and whether it was the duty of the plaintiff to approach the civil court by filing the suit for partition as a purchaser for an undivided share from the suit properties?*

20. I have already heard from the learned counsel for the Appellant only, as none participated from the side of the Respondents in the hearing of the Second Appeal.

21. On appreciation of oral and documentary evidence as well as the pleadings of the parties, it is the similar findings of both the Courts of fact i.e. Trial Court and the First Appellate Court that, all the properties of suit Plot No.390 including the suit properties under Khata No.39 were originally belonged to Krushna Chandra Sarangi. The total area of suit Plot No.390 is Ac.4.89 decimals. The suit properties are part of the properties of Plot No.390. After the death of Krushna Chandra Sarangi, all the properties of suit Plot No.390 i.e. Ac.4.89 decimals including the suit properties devolved upon his two sons i.e. Ananta and Gangadhar. Accordingly, Ananta's branch has half share and Gangadhar's branch has half share in the properties of suit Plot No.390. All the properties of suit Plot No.390 including the suit properties have/had not been partitioned between the members of the aforesaid two branches in any manner as yet through any metes and bounds partition. As such all the properties covered under suit Plot No.390 including the suit properties are the joint and undivided properties of the members of the aforesaid two branches. The plaintiff belongs to branch of Gangadhar. The defendant Nos.1, 2 along with 11 (Ka) to 11 (Cha) belong to the branch of Ananta. The defendant No.11 was not ousted from the suit properties at any point of time. For which, the defendant No.11 had a definite share over the joint and undivided properties of suit Plot No.390 including the suit properties.

22. As per the findings of the Trial Court and the First Appellate Court, when the defendant No.11 is the co-owner with the defendant Nos.1 & 2 and the plaintiff over the entire Ac. 4.89 decimals of properties of suit Plot No.390 including the suit

properties, for which, as per law, the possession of one co-owner in the joint and undivided properties shall be treated as his/her possession on behalf of his/her other co-sharers.

Therefore, when it is the specific/definite findings of the Trial Court as well as the First Appellate Court on appreciation of the pleadings as well as oral and documentary evidence of both the sides that, the defendant No.11 has alienated Ac.1.40 decimals of land from the suit Plot No.390 to the plaintiff on dated 28.05.1974 by executing and registering the sale deed vide Ext.1, then at this juncture, it can be held that, the defendant No.11 has alienated her joint and undivided interest in suit Plot No.390 in favour of the plaintiff by executing and registering the sale deed vide Ext.1.

23. As the defendant No.11 had definite share in the properties covered under the suit plot No.390 and she (defendant No.11) has alienated Ac.1.40 decimals from the suit plot No.390 in favour of the plaintiff, for which, after setting aside the judgment and decree of the dismissal of the suit passed by the Trial Court, the First Appellate Court held that, when, the defendant No.11 has alienated the properties exceeding her share in suit Plot No.390 in favour of the plaintiff through the sale deed vide Ext.1, then in order to challenge such alienation, the defendant No.2 along with his other co-sharers have the right to file a separate suit, but such alienation made by the defendant No.11 through the sale deed vide Ext.1 cannot be declared as invalid in the suit at hand and left the parties to agitate the question of validation of the sale deed vide Ext.1 or otherwise in the competent Civil Court by filing another suit.

24. It is admitted case of the parties that, the total area of the suit plot No.390 under Khata No.39 is Ac.4.89 decimals, in which, the share of Ananta's branch is half share and the share of Gangadhar's branch is half.

Therefore, approximately Ac.2.45 decimals out of Ac.4.89 decimals is coming to the share of each branch. There are three successors in the branch of Ananta i.e. defendant Nos.1, 2 & 11. Therefore, the share of defendant No.11 comes to less than one acre. But, through the sale deed vide Ext.1, the defendant No.11 has alienated the suit properties i.e. Ac.1.40 decimals from Plot No.390 to the plaintiff, which is more than one acre.

25. It is the settled propositions of law that, any transfer made by one of the co-owners shall remain valid to the extent of the share of the transferor, but not beyond that.

On this aspect, the propositions of law has already been clarified in the ratio of the following decisions:-

> *(i)* ***AIR 1973 (SC) 2451— Gorakh Nath Dubey Vrs. Hari Narayan Singh and others, 1974(1) CWR— 222—— Gana Nath Sahu and another Vrs. Smt. Bulli Sahu and others— Section 486 of the T.P. Act, 1882—Section 54 and 44****—Transfer of property more than transferors interest in lands jointly held with others is not invalid in toto. It would be valid and operative to the extent of the transferor's interest in the lands. Any alienation made in excess of power to transfer would be to the extent of the excess of power is void.*

(ii) ***116 (2013) CLT 209— Page 209—Paragraph 11—Manoj Kumar Nayak & another Vrs. Guna Mohanty & others—T.P. Act, 1882—Section 54—Sale of joint property****—It is well settled that transfer by one of the co-owners remains valid to the extent of the share of the transferor.*

26. Here in this suit at hand, when it is established above that, the suit Plot No.390 was the joint and undivided properties of the co-owners (co-sharers) thereof i.e. plaintiff, defendant No.1, 2 & 11 and the defendant No.11 had a share on the suit Plot No.390 to the extent of less than one acre and when the defendant No.11 has alienated more than one acre i.e. Ac.1.40 decimals from Plot No.390 to the plaintiff through the sale deed dated 28.05.1974 vide Ext.1, which is in excess of her share (more than her share) therein, then, at this juncture, in view of the principles of law enunciated in the ratio of the aforesaid decisions of Apex Court and Hon'ble Courts, the alienation made by her (defendant No.11) through sale deed vide Ext.1 shall remain valid only to the extent of her share in suit Plot No.390 and the alienation made by her (defendant No.11) in excess of her share in Plot No.390 shall be invalid under law. But, the entire sale deed vide Ext.1 cannot be invalid under law. Because, that sale deed shall remain valid in respect of alienation by the defendant No.11 in favour of the plaintiff only to the extent of her share in Plot No.390, but not beyond that.

27. Now, it will be seen, whether the judgment and decree passed by the First Appellate Court in favour of the plaintiff decreeing the entire suit vide O.S. No.48/311 of 1981/1976-I in respect of all the prayers of the plaintiff i.e. prayer for declaration of title and permanent injunction against all the defendants including defendant Nos.1, 2 & 11 can be sustainable under law.

28. In the plaint, the plaintiff has prayed for declaration of his title over the suit properties i.e. over Ac.1.40 decimals of suit Plot No.390 out of Ac.2.28 decimals and also has prayed for permanent injunction against the defendants restraining them (defendants) from interfering into his peaceful possession over the suit properties.

29. When it is held that, all the properties of suit Plot No.390 i.e. Ac.4.89 decimals were the joint and undivided properties of the plaintiff, defendant Nos.1, 2 & 11 and the said properties including suit properties have not been divided between them through any metes and bounds partition and when as per law, the plaintiff and the defendant No. 2 have their definite interest/share over the suit properties, then at this juncture, it is not at all possible under law to declare the exclusive right, title and interest of the plaintiff over the suit properties i.e. over Ac.1.40 decimals out of Ac.4.89 decimals in suit Plot No.390.

When undisputedly the plaintiff is a co-owner with the defendant No.2 in the suit properties and he (plaintiff) has purchased the share of defendant No.11 in suit Plot No.390, for which, the defendant No.2 cannot be injuncted permanently from coming into the suit properties.

Therefore, the judgment and decree passed by the First Appellate Court fully setting aside the judgment and decree of the Trial Court cannot be sustainable

under law. Because, the plaintiff is not the exclusive owner over the suit properties, for which, he (plaintiff) cannot be entitled to get the decree of declaration of his exclusive title over the suit properties.

So, as per the discussions and observations made above, when it is held that, the plaintiff is a co-owner over the suit properties in respect of his own share as well as in respect of the share of the defendant No.11 after purchasing the share of defendant No.11 through sale deed vide Ext.1, then at this juncture, the plaintiff is entitled for the decree of declaration of joint ownership of him along with the defendant No.2 (Appellant in the Second Appeal) over the suit properties.

30. As the defendant No.11 has alienated her share from the suit Plot No.390 in favour of the plaintiff, for which, her successors i.e. defendant No.11 (Ka) to 11 (Cha) have no interest in the suit properties. Likewise, the defendant No.3 to 10 being the strangers to the suit properties, they (defendant Nos.3 to 10) have also no interest in the same.

Therefore, the plaintiff is entitled for the decree of permanent injunction only against the defendant Nos.3 to 11 (Cha), but not against the defendant No.2 (Radha Mohan Nanda).

31. On the basis of the aforesaid findings and observations, the judgment and decree passed by the First Appellate Court in T.A. No.20/98 of 1981 cannot be sustainable in full, but the same is liable to be modified by interfering with the same through this Second Appeal filed by the Appellant (defendant No.2). So, there is some merit in the Second Appeal of Appellant. The same will succeed in part.

32. In the result the Second Appeal filed by the Appellant is allowed in part.

The judgment and decree dated 09.05.1986 and 17.05.1986 respectively passed in T.A. No.20/98 of 1981 by the First Appellate Court fully setting aside the judgment and decree of the dismissal of the suit vide O.S. No.48/311 of 1981/1976-I passed by the Trial Court is set aside in part and the same is modified as follows:-

The suit be and the same vide O.S. No.48/311 of 1981/1976-I filed by the plaintiff-Madhusudan Sarangi is decreed in part on contest against the defendant Nos.1, 2 & 11 (Ka) to 11 (Cha) and ex parte against rest other defendants but without cost.

The joint right, title and interest of the plaintiff along with the defendant No.2 over the suit properties are declared.

The defendant Nos.3 to 11 (Cha) are injuncted permanently from interfering into the joint possession of the plaintiff and defendant No.2 over the suit properties.

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2024 (I) ILR-CUT-368

A.C. BEHERA, J.

S.A. NO.110 OF 1987

NATABAR SAHU (DEAD) & ANR. .....Appellants

.V.

DHANESWAR MOHARANA & ORS. .....Respondents

(A) TRANSFER OF PROPERTY ACT, 1882 – Section 106 – Unregistered lease deed – The Appellant claimed permanent tenancy in the suit properties under the plaintiff /the original owner through an unregistered lease agreement– Whether such claim acceptable under law? – Held, No – In absence of registration, the tenancy was monthly as per law and their tenancy/lease was terminable on the issuance of 15 days' notice by the plaintiff. (Para 8)

(B) NOTICE – What is the effect/impact of a notice under section 106 of the T.P Act? – Discussed with reference to case law.

Case Laws Relied on and Referred to :-

1. 2007(1) CCC 493(Mad) : Thanapal Vs.Sakunthala.
2. 2012(II) CCC 574(Bombay) : Dasrao S/o Ramrao Bokli & Ors. Vs. Ganpat S/o Valhoba Ghisadi & Ors.
3. 2015 (3) CCC 483 Delhi : Deluxe Dentelles Pvt. Ltd & Anr. Vs. Ishpinder Kochhar.
4. 2016 (II) OLR (SC) 633 & 2016 (II) CLR (S.C) 658 : (M/s.) Park Street Properties (Pvt. Ltd). Vs. Dipak Kumar Singh & Anr.
5. AIR 1968 (SC) 794 : Delhi Motor Co. & Ors. Vs. U.A.Basrurkar (dead) by his LRs and Ors.
6. AIR 2000 (Orissa) 153 (Para 6) : Andhra Pradesh Handloom Weavers Cooperative Society Ltd.,Hyderabad Vs. K.Venkateswar Rao & Anr.
7. AIR 1988 (SC) 1470 : Burmah Shell oil Distributing now known as Bharat Petroleum Corporation Ltd. Vs. Khaja Midhat Noor & Ors.
8. AIR 2001 (SC) 1696 : Samir Mukherjee Vs. Davinder K. Bajaj & Ors.
9. 33 (1991) OJD (Civil) 154 : Champa Bati Bewa Vs. Kanhu Mallik & Ors.
10. 2010 (II) CLR (SC) 60 : Dinesh Kumar Vs. Yusuf Ali.
11. 2015 (Supp-II) OLR 319 : M/s. Sadhana Ausadhalaya, DACCA & Anr. Vs. Tapasi Roy.

For Appellants : Mr. A.P. Bose

For Respondents: Mr. D. Mohapatra

JUDGMENT Date of Hearing:22.11.2023 : Date of Judgment : 21.12.2023

A.C. BEHERA, J.

1. This 2nd Appeal has been preferred against the reversing Judgment.

2. The respondent No.1 of this 2nd Appeal was the sole plaintiff in the suit vide O.S. No.156/511 of 1983/80-1 and he was the respondent No.1 in the 1st Appeal vide T.A. No.12/22 of 1986/84.

The appellant and the respondent No.2 of this 2nd Appeal were the defendants in the suit vide O.S. No.156/511 of 1983/80-1 and they were the respondents in the 1st Appeal vide T.A. No.12/22 of 1986/84.

The suit of the sole plaintiff (who is the respondent No.1 in this 2nd Appeal) before the trial court vide O.S. No.156/511 of 1983/80-1 was a suit for eviction and recovery of arrear rents with interest.

The case of the plaintiff against the defendants was that, he (plaintiff) is the adopted son of Pitei Bewa. The suit properties were originally belonged to Pitei Bewa. The said Pitei Bewa had let out the suit properties to one Damodar Kundu on dated 08.12.1954 on annual rent basis. The said Damodar Kundu was using the suit properties by installing a rice huller machine after making necessary constructions for the same on payment of annual rent of Rs.40 to Pitei Bewa. Thereafter, Damodar Kundu transferred that Huller Rice machine and the structures for the same on the suit properties to the defendants on 01.05.1963 and intimated such transfer of huller machine and the structures for the same to the owner Pitei Bewa. Subsequent thereto, on dated 28.06.1963, there was an unregistered agreement vide Ext.A between Pitei Bewa and the defendants concerning the letting out of the suit properties in favour of the defendants on annual rent basis. But the said Pitei Bewa died leaving behind the plaintiff as her sole successor. After the death of Pitei Bewa, the suit properties devolved upon the plaintiff and accordingly, plaintiff became the exclusive owner over the suit properties and the defendants became the tenants of the suit properties under the plaintiff. In the year 1972, disturbances created between the plaintiff and defendants concerning the payment of rents of the suit properties by the defendants. For which, their such dispute was referred to the Local Panchayat. In the Panchayat, it was decided on 26.11.1972 vide Ext.B that, the defendants will continue as tenants in respect of the suit properties under the plaintiff on payment of annual rent of Rs.145/- to the plaintiff and accordingly, the defendants paid the rent of the suit properties to the plaintiff till 25.1.1976 and thereafter, the defendants defaulted in paying the rent. For which, the plaintiff told the defendants to vacate the suit premises after clearing the arrear rents and issued an advocate notice to the defendants for vacation of the same. After receiving the advocate notice of the plaintiff, the defendant No.1 alone replied to the plaintiff stating that, he (defendant No.1) is a permanent tenant over the suit properties. So, without getting anyway, the plaintiff approached the civil court by filing the suit vide O.S. No.156/511 of 1983/80-1 against the defendants praying for eviction of the defendants from the suit properties and also prayed for realization of the arrear rents of the suit properties with interest.

3. Having been noticed from the court in the suit, both the defendants filed their written statements separately and independently taking their stands identically.

According to the stands of the defendant No.1, as per the terms and conditions of the agreement dated 28.06.1963 vide Ext.A and the decision in Panchayat on dated 26.11.1972 vide Ext.B, he (defendant No.1) will not be evicted from the suit properties till the rice huller is in running condition and the payment of rent is made. According to him (defendant No.1), since the rice huller is in running condition on the suit properties and he (defendant No.1) is remitting the rents, to

which, the plaintiff is not receiving, for which, he (defendant No.1) is not liable to be evicted from the suit properties.

The specific plea/stand of the defendant No.1 is that, he has purchased the share in the rice huller and the structure on the suit properties from the defendant No.2, for which, there was no necessity to implead the defendant No.2. So, the suit of the plaintiff is bad for misjoinder of parties. When the plaintiff is refusing to receive the rent of the suit properties inspite of sending the same to him, so he (plaintiff) cannot say that, the defendant No.1 is a defaulter in paying the arrear rents of the suit properties to the plaintiff. The defendant No.2 also supported the aforesaid pleadings of the defendant No.1 admitting about the transfer of his share in the Rice huller machine and the structures for the same in favour of the defendant No.1. So, both the defendants claimed for dismissal of the suit of the plaintiff with cost.

4. Basing upon the aforesaid pleadings and matters in controversies between the parties altogether 9 numbers of issues were framed by the trial court and the said issues are:

(1)Is the suit maintainable in law?
(2)Has the plaintiff cause of action?
(3)Is the suit bad for misjoinder of the parties? & is defendant No.2 necessary party?
(4)Is the suit bad for doctrine of estoppel and has the defendant incurred 1 ½ lakh of rupees on the suit property?
(5) Is the defendant a conditional tenant, as such liable to be evicted with notice?
(6) Was there any arrear of rent as claimed up on defendant?
(7) Has the plaintiff refused the payment of rent remitted?
(8) Is the plaintiff entitled to evict the defendant?
(9)To what relief, if any, the plaintiff is entitled?

5. In order to substantiate the aforesaid reliefs sought for by the plaintiff against the defendants, he (plaintiff) examined himself as P.W.1 and relied upon series of documents on his behalf vide Ext.1 to 10.

On the contrary, the defendants examined 2 witnesses from their side including the defendant No.1 as D.W.2 and relied upon several documents vide Ext.A to K on their behalf.

After conclusion of hearing and on perusal of the materials, documents and evidence available in the record, the trial court answered issue numbers 1 and 2 in favour of the plaintiff and answered issue Nos.3,5,6,7,8 and 9 against the plaintiff and in favour of the defendants without answering issue No.4, as the same was not pressed by the parties.

On the basis of the findings and observations made by the trial court in the aforesaid issues, the trial court decreed the suit of the plaintiff vide O.S. No.156/511 of 1983/80-1 in part on contest against the defendants and declared that, the plaintiff is entitled to recover the claimed amount i.e. Rs.435/- from the defendants towards arrear rents of the suit properties and refused the prayer of the plaintiff for eviction of the defendants from the suit properties by assigning the reasons that, when there

is clear indications in the agreement vide Ext.A and in the decision of the Panchayat vide Ext.B that, the defendants will not be evicted from the suit properties till the Rice huller machine on the suit properties is in running condition and rent is paid at the stipulated rate to the plaintiff, then, the defendants are the contingent tenant on the suit properties under the plaintiff and when the plaintiff is refusing to receive the rents remitted by the defendants, then, at this juncture, it cannot be held that, the defendants have defaulted in paying the rents and when the defendants have invested heavily by making constructions on the suit properties and they have put machineries and other fixtures on the suit properties and when their tenancy is based upon the above condition, then, it cannot be held that, the tenancy of the defendants under the plaintiff in respect of the suit properties is a tenancy at will and when the Rice huller machine on the suit properties is in running condition, then, the plaintiff is not entitled for the decree of eviction against the defendants.

On being dissatisfied with the aforesaid Judgment and decree passed by the trial court in O.S. No.156/511 of 1983/80-1, he (plaintiff) challenged the same by preferring the 1st Appeal vide T.A. No.12/22 of 1986/84 being the appellant against the defendants by arraying them (defendants) as respondents.

After hearing from both the sides, the 1st Appellate Court allowed the said 1st Appeal of the plaintiff and passed the Judgment and Decree of the 1st Appeal vide T.A. No.12/22 of 1986/84 and set aside to the Judgment and Decree of the trial court passed in O.S. No.156/511 of 1983/80-1 and decreed the suit vide O.S. No.156/511 of 1983/80-1 of the plaintiff in full on contest against the defendants and directed the defendants to vacate the suit land lock, stock and barrel within one month from the date of decree, failing which, the plaintiff-appellant shall be at liberty to evict them (defendants) through due process of law and also directed the defendants (respondents in the 1st Appeal) to remit the rent for the period from 25.01.1976 up to the date of their eviction as per the terms as embodied in Exts.B (Panchyat Patra) and both the defendants are jointly and severally liable for the arrear rents assigning the reasons that, as the defendants are claiming their tenancy permanently over the suit properties till the running of the rice huller thereon on the basis of the Exts.A and B, for which, the Exts.A and B were compulsorily registerable, but the said Exts.A and B have not been registered, for which, as per law, the defendants were monthly tenant at will under the plaintiff in respect of the suit properties and when the plaintiff issued notice to the defendants requesting them (defendants) to vacate the suit properties, then, the defendants should have vacated the same and due to non-vacation of the same, the defendants are liable to be evicted therefrom on payment of arrear rents and other charges to the plaintiff.

On being aggrieved with the aforesaid Judgment and decree passed by the 1st Appeal in T.A. No.12/22 of 1986/84 against the defendants for their eviction from the suit properties making them liable for payment of arrear rents since 25.01.1976 till their vacation, the defendant No.1 challenged the same by preferring this 2nd Appeal being the appellant against the plaintiff by arraying him (plaintiff)

as respondent No.1 and also arraying the defendant No.2 as proforma respondent No.2.

When during the pendency of this 2nd Appeal, the appellant (defendant No.1) and the respondent No.2 (defendant No.2) expired, then their respective LRs have been substituted in their places.

6. This 2nd Appeal has been admitted on formulation of the following substantial questions of law, that is:

Substantial questions of law.

1. Whether the 1st Appellate Court has committed a serious error in law holding that, the defendant No.1 (appellant) is only a tenant at will on the ground of non-registration of the lease agreement vide Ext.A and the Panchayat Patra vide Ext.B.

2. When, it has been indicated in the contents of Exts.A and B that, the lease of the defendants under the plaintiff shall subsist till the defendants continue to operate their rice huller and when admittedly the defendants are running rice huller on the suit properties without defaulting in payment of the house rent then, whether the lower appellate court is right in reversing the Judgment and Decree of the trial court, i.e. the refusal to the prayer of eviction of the plaintiff against the defendants?

7. I have already heard from the learned counsels of both the sides.

It is the undisputed case of the parties that, the tenancy of the defendants under the original land owner i.e. Pitei Bewa in respect of the suit properties was created on the basis of an unregistered lease agreement vide Ext.A dated 28.06.1963, wherein it was indicated that, as long as the rice huller will be running, the defendants (tenants) shall continue their tenancy on the same on payment of annual rent i.e. Rs.40/-. Subsequent thereto, there was a Panchayat Patra vide Ext.B on dated 26.11.1972, wherein only the annual rent of the suit properties was enhanced from Rs.40/- to Rs.145/-. It is also the undisputed case of the parties that, both the documents i.e. agreement and Panchayat Patra vide Exts.A and B are unregistered. The plaintiff had issued a notice under Section 106 of the T.P. Act vide Ext.2 to the defendants requesting them to vacate the suit properties after clearing the arrear rents, and after receiving that Ext.2, the defendant No.1 had replied as per Ext.8 claiming his permanent tenancy over the suit properties on the basis of the conditions indicated in Ext.A and as well as on the basis of purchasing the share of the defendant No.2 in the huller machine as per Ext.K. The defendant No.2 had refused to receive the notice under Section 106 of the T.P. Act of the plaintiff as per Ext.6. The above lease between the parties in respect of the suit properties as per the unregistered agreement vide Ext.A was not for any agricultural or manufacturing purpose.

According to the pleadings of the plaintiff, due to the issuance of notice under Section 106 of the T.P. Act vide Ext.2 by him (plaintiff) to the defendants, he (plaintiff) is not at all interested for the continuation of the tenancy of the defendants in the suit properties further and he (plaintiff) himself will use the suit properties for his own purpose being the landlord of the suit properties.

It is the case of the defendant No.1, as per his pleadings that, at present, he is the sole tenant of the suit properties under the plaintiff and his tenancy is a permanent tenancy on payment of annual rent and his tenancy in the suit properties under the plaintiff shall continue till the running of his rice huller on the suit properties and when his rice huller is in running condition and he is remitting the rents of the suit properties to the plaintiff, to which, the plaintiff is not accepting, for which, he (defendant No.1) can never be evicted from the suit properties and he will continue his tenancy in the suit properties under the plaintiff permanently i.e. till the running of his rice huller thereon and the issuance of the notice under Section 106 of the T.P. Act by the plaintiff to him (defendant No.1) for the vacation of the suit properties cannot bring any adverse affect on him in-respect of his permanent tenancy.

The aforesaid pleadings of the defendant No.1 is clearly and unambiguously going to show that, his tenancy on the basis of the unregistered lease agreement vide Ext.A and Panchayat Patra vide Ext.B in respect of the suit properties was for more than a year.

Now, it will be seen, whether the aforesaid basis of claim of permanent tenancy of the defendant No.1 in the suit properties under the plaintiff through an unregistered lease agreement vide Ext.A till the running of the rice huller therein exceeding a year was compulsorily registerable or not?

8. On that aspect, the propositions of law has already been clarified in the ratio of the following decisions:

(I) 2007 (1) CCC 493 (Mad)—Thanapal Vs. Sakunthala.

"T.P. Act, 1882—Section 106—Unregistered lease deed—Though lease amount was payable annually, if it was not for the purpose of agricultural or manufacturing, it should be construed only as monthly lease—Respondent was inducted tenant on monthly rent of Rs.3/- payable annually—Lease deed was unregistered—Notice determining lease giving 15 days time was valid—Impugned order holding notice invalid and dismissing the suit was liable to be set aside and suit was liable to be decreed."

(II) 2012 (II) CCC 574 (Bombay)—Dasrao S/o Ramrao Bokli & Others Vs. Ganpat S/o Valhoba Ghisadi & Others.

"T.P. Act, 1882-Sections-106 & 107—A lease of immovable property from year to year or for a term of exceeding a year can be made only by registered instrument, otherwise said lease deemed to be a monthly lease terminable by 15 days clear notice."

(III) 2015 (3) CCC 483 Delhi—Deluxe Dentelles Pvt. Ltd & Anr.Vs. Ishpinder Kochhar.

"T.P. Act, 1882-Sections-106 & 107—A lease created for a period of more than one year by unregistered document will be deemed to be lease on month to month basis"

(IV) 2016 (II) OLR (SC) 633 & 2016 (II) CLR (S.C) 658—(M/s.) Park Street Properties (Pvt. Ltd). Vs. Dipak Kumar Singh & Another.

"T.P. Act, 1882—Sections-106 & 107—In absence of registration of a document, monthly tenancy is deemed to have been created, terminable by Section 106 of the T.P. Act, 1882."

(V) AIR 1968 (SC) 794—Delhi Motor Co. and Other Vs. U.A. Basrurkar (dead) by his LRs and Others

"T.P. Act, 1882—Sections-105,106 & 107 read with Registration Act, 1908. Section-17—Lease evidenced by unregistered document—Lease held to be one for a period exceeding one year—Registration is compulsory under Section 17 of the Registration Act—Rights under lease cannot be enforced."

(VI)AIR 2000 (Orissa) 153 (Para 6)—Andhra Pradesh Handloom Weavers Cooperative Society Ltd., Hyderabad Vs. K. Venkateswar Rao & Another.
AIR 1988 (SC) 1470—Burmah Shell oil Distributing now known as Bharat Petroleum Corporation Ltd. Vs. Khaja Midhat Noor & Others.
AIR 2001 (SC) 1696—Samir Mukherjee Vs. Davinder K.Bajaj & Others.

"T.P. Act, 1882, Section 106 read with Section Registration Act, 1908—Section 17—Lease deed for more than one year—Not registered—Amounts to monthly lease."

Here in this suit at hand, when the defendant No.1 himself is claiming tenancy in the suit properties since 28.06.1963 permanently till the running of the rice huller thereon on payment of annual rent on the basis of two unregistered documents i.e. lease agreement and Panchayat Patra vide Exts.A and B, then, at this juncture, in view of the principles of law enunciated by the Hon'ble Courts and Apex Court in the ratio of the aforesaid decisions, both the documents vide Exts. A and B relied upon by the defendants in respect of their claim of permanent tenancy in the suit properties on payment of annual rent were compulsorily registerable and in absence of registration of Exts.A & B, the tenancy of the defendants under the plaintiff in respect of the suit premises was monthly as per law and their tenancy/lease was terminable on the issuance of 15 days notice by the plaintiff under Section 106 of the T.P. Act, 1882.

9. When, as per the discussions and observations made above, it is held that, on the basis of Exts. A and B, tenancy/lease of the defendants under the plaintiff in respect of the suit premises was monthly and the same was terminable at the will of the plaintiff (landlord) on issuance of 15 days notice under Section 106 of the T.P. Act and when the plaintiff had issued such notice under Section 106 of the T.P. Act vide Ext.2 to the defendants requesting them to vacate the suit properties after clearing the arrear rents, then, as per law, since the date of receiving the notice vide Ext.2 under Section 106 of the T.P. Act of the plaintiff, by the defendants, both the defendants including the defendant No.1 had no authority under law to retain the suit properties for their use without vacating the same in favour of the plaintiff.

10. Now, it will be seen, what is the affect/impact of a notice under Section 106 of the T.P. Act like Ext.2 in the suit at hand as per law.

(I) 33 (1991) OJD (Civil) 154—Champa Bati Bewa Vs. Kanhu Mallik and Others (Para 9)

"T.P. Act, 1882—Sections 105 & 106—Status of a tenant on notice to quit is that of a trespasser."

(II) 2019 (2) Civil Court Cases 93 Delhi—T.P. Act, 1882—Section 106—A person who has no right to continue in the tenanted premises, as tenancy of tenant stands terminated, decree for possession has to be passed.

(III) 2010 (II) CLR (SC) 60—Dinesh Kumar Vs. Yusuf Ali.

"T.P. Act, 1882—Section 106—The landlord is the best judge of his needs."

(IV) 2015 (Supp-II) OLR 319—M/s. Sadhana Ausadhalaya, DACCA & Anr. Vs. Tapasi Roy (Para 7).

"T.P. Act, 1882—Section 106—Law does not mandate that, in the case of termination of tenancy by serving notice under Section 106 of the Act any such ground is the requirement to be stated in support of such termination."

11. Undisputedly, the plaintiff is the landlord and the defendants are the tenants and when as per law, the landlord is called as the master as well as the husband of his own land and when as per article 300 A of the constitution of India, the property right of a landlord has been elevated to human right from constitutional right and when a lease of immovable property through an agreement for more than a year (when such lease is other than agriculture or manufacturing purpose) is compulsorily registerable as per law and when due to want of registration, that unregistered lease agreement like Ext.A shall be treated as monthly lease terminable under Section 106 of the T.P. Act at the instance of the landlord and when in this suit at hand, in spite of issuance of notice under Section 106 of the T.P. Act vide Ext.2, none of the defendants including the defendant No.1 vacated the suit properties and when as per law, the landlord is the best judge of his needs to direct the tenants for vacation of the tenanted properties/premises and when as per law, the status of a tenant after quit notice under Section 106 of the T.P. Act is that of a trespasser and when after the quit notice, the tenants has no right to continue in the tenanted properties/premises and in that situation, the landlord is entitled for the decree of possession against the tenants and when in this suit at hand, the 1st Appellate Court has decreed the suit of the plaintiff (landlord) in full against the defendants after setting aside the part Judgment and decree passed by the trial court in O.S. No.156/511 of 1983/80-1 directing the defendants to vacate the suit land locked, stocked and barreled within one month with a direction to pay the arrear rents thereof to the plaintiff since 25.01.1976 till their vacation from the suit properties/premises, then, at this juncture, the Judgment and decree passed by the 1st Appellate Court reversing the Judgment and decree passed by the trial court cannot be held as erroneous in any manner. For which, the question of interfering with the same through this 2nd Appeal filed by the appellant does not arise.

12. Therefore, the appeal filed by the appellant (defendant No.1) must fail.

In the result, the 2nd Appeal filed by the appellant (defendant No.1) is dismissed on contest, but without cost.

The Judgment and decree passed by the 1st Appellate Court in T.A. No.12/22 of 1986/84 reversing the Judgment and decree of the trial court passed in O.S. No.156/511 of 1983/80-1 are hereby confirmed.

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2024 (I) ILR-CUT-376

A.C. BEHERA, J.

R.S.A. NO. 447 OF 2015

JOGENDRA PATEL .....Appellant

-V-

FANIBHUSAN PATEL .....Respondent

(A) CODE OF CIVIL PROCEDURE, 1908 – ORDER XX RULE 5 – Finding on all issues – Duty of trial Court – Explain. (Paras 18-19)

(B) CODE OF CIVIL PROCEDURE, 1908 – Section 96 – Power, duties and obligations of the first Appellate Court – Discussed. (Para 22)

Case Laws Relied on and Referred to :-

1. AIR 2001 (S.C.) 2171 : Madhukar & Ors. Vrs. Sangram & Ors.
2. 2011 (II) OLR (S.C.) 90 : B.M.Narayana Gowda Vrs. Santhamma & Ors.
3. 2015 (I) CLR 752 : Rama Chandra Patra & Ors. Vrs. Raghunath Jew & Ors.
4. 2022 Live Law (S.C.) 802 : Moreshar Yadaorao Mahajan Vrs. Vyankatesh Sitaram Bhedi & Ors.
5. AIR 1973 (Patna) 389 : Ram Padarath Singh Vrs. Baidyanath Prasad & Ors.
6. AIR 1959 (Orissa) 132, 25 (1959) CLT 119 : Sashimukhi Dasiani Vrs. Brundaban Das & Ors.
7. AIR 1955 (Hyderabad) 268 : Ahmed Ali & Ors. Vrs. Shaik Ahme
8. AIR 1953 (Travamcore-cochin) 118 : Kesavan Janardhan Plappalli and others Vrs. Narayanan Janardhanan Plappalli & Ors.
9. 2016 (I) Civil Court Case 61 (Uttarakhand) : Kanti Ballabh Satyawali Vrs. Rewadhar Satyawali & Ors.
10. AIR 1985 (S.C) 736 : M/s. Fomento Resorts and Hotels Ltd. Vrs. Gustavo Ranato Da Cruz Pinto & Ors.
11. 2023 (3) CCC 87 (Rajsthan) : Umar Khan (Deceased) Vrs.Sumer Khan (Now deceased)
12. 2021 (3) CCC 212 (S.C.) : Manjula & Ors. Vrs. Shyamsundar & Ors.
13. 113 (2012) CLT 373 : Smt. Sushila Devi Kedia & Ors. Vrs. Gyanendra Kumar Ray & Ors.
14. 2012 (I) CLR 177 : Chakradhar Bhutia (Dead) by his LRs. Harshamani Bhutia & Ors.
15. AIR 2001 (S.C.) 2171 : Madhukar & Ors. Vrs. Sangram & Ors.
16. 2011 (II) OLR (S.C.) 90 : B.M. Narayana Gowda Vrs. Shanthamma(D) by LRs. & Ors.
17. 2015 (I) CLR 752 : Ram Chandra Patra (Dead) after him, his LRs. Chittaranjan Patra & Ors. Vrs. Raghunath Jew & Ors.
18. 2023 (II) OLR (S.C.) 328 & (2023) 3 SCC 61 (S.C.) : Dheeraj Singh & Ors. Vrs. Greater Noida Industrial Development Authority & Ors.
19. (2001) 4 SCC 756 : Madhukar & Ors. Vrs. Sangram & Ors.

For Appellant : Mr. S.S.Das, Sr.Advocate.

For Respondent: Mr.P.K.Sutar.

JUDGMENT Date of Hearing : 23.11.2023: Date of Judgment : 21.12.2023

A.C.BEHERA, J.

1. This Second Appeal has been preferred against the confirming judgment.

2. The Appellant in this Second Appeal was the sole plaintiff in the suit vide C.S. No.20 of 2012 and he was the appellant in the First Appeal vide R.F.A. No.06 of 2014.

The Respondent in this Second Appeal was the defendant in the suit vide C.S. No.20 of 2012 and he was the Respondent in the First Appeal vide R.F.A. No.06 of 2014.

The suit of the plaintiff vide C.S. No.20 of 2012 was a suit for declaration of title and permanent injunction.

3. As per the averments made by the plaintiff in his plaint, the properties described in Schedule-A of the plaint vide Khata No.172 Plot No.5101 Ac.0.53 decimals & Plot No.5034/6116 Ac.0.06 decimals in total Ac0.59 decimals in mouza Darlipali under the jurisdiction of Bhasma police station in the District of Sundargarh has been recorded in his name i.e. in the name of plaintiff and he (plaintiff) had/has been possessing the same being the exclusive owner thereof on payment of land revenue to the Government. The defendant has no manner of right, title, interest and possession over the same. Though, the defendant has no manner of right, title, interest and possession over the suit properties, but, when, on dated 04.09.2012, he (defendant) threatened him (plaintiff) to evict him (plaintiff) forcibly from the suit properties, then, he (plaintiff) approached the civil court by filing the suit vide C.S. No.20 of 2012 against the defendant praying for declaration of his title over the suit properties and to injunct the defendant permanently from interfering into his peaceful possession over the suit properties, inalternative for recovery of possession, if he (plaintiff) is found to be dispossessed forcibly from the suit properties by the defendant during the pendency of the suit.

4. Having been noticed from the Court in C.S. No.20 of 2012 filed by the plaintiff, the defendant contested the suit of the plaintiff by filing his written statement denying the averments made by the plaintiff in his plaint by stating that, the suit properties belongs to him (defendant) and the said properties have been recorded in his name i.e. in the name of the defendant. The name of his father is Jogendra Patel. In sabik settlement, the suit properties were recorded in the name of his father i.e. Jogendra Patel. The suit properties have never been transferred either by his father or by him (defendant) to the plaintiff at any point of time in any manner. The suit properties are under his possession since the time of his father. As the name of the plaintiff is similar with the name of his father and as the name of the plaintiff is Jogendra Patel and the father's name of the defendant is Jogendra Patel, for which, by taking the advantage of the similarity of the name of plaintiff with the father's name of the defendant, he (plaintiff) had managed to record the suit properties wrongly in his name in the Hal settlement. When, such fact about the wrong recording of the suit properties in the name of the plaintiff came to the knowledge of the defendant, he (defendant) filed a mutation case before the local Tahasildar for deletion of the name of the plaintiff and for recording of the same in his name i.e. in the name of the defendant. Then after making due enquiry, the

Tahasildar mutated the suit properties into his name i.e. into the name of the defendant and prepared the mutated R.o.R. of the suit properties in the name of the defendant after deleting the name of the plaintiff. For which, the plaintiff has no right, title and interest in the suit properties. Therefore, the suit of the plaintiff is liable to be dismissed.

5. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether six (6) numbers of issues were framed by the Trial Court and the said issues are:-

Issues

(i) *Whether the suit is maintainable?*
(ii) *Whether there is any cause of action to bring this suit?*
(iii) *Whether the plaintiff has right, title and interest over the suit schedule property?*
(iv) *Whether the plaintiff is entitled to get permanent injunction against the defendant with respect to the suit schedule land?*
(v) *Whether the suit is bad for non-joinder of necessary parties?*
(vi) *Whether the plaintiff is entitled to get any other reliefs as prayed for?*

6. In order to substantiate the aforesaid reliefs sought for by the plaintiff, he (plaintiff) examined himself as P.W.1 and relied upon two documents vide Exts.1 & 2.

7. On the contrary, the defendant examined four witnesses from his side including him as D.W.1 and exhibited series of documents vide Exts.A to A/19 to C on his behalf.

8. After conclusion of hearing and on perusal of the materials, documents and evidence available on Record, the Trial Court dismissed the suit of the plaintiff vide C.S. No.20 of 2012 on contest against the defendant vide its judgment and decree dated 13.01.2014 and 18.01.2014 respectively answering only one issue i.e. issue No.V out of six issues assigning the sole reason that, as during trial of the suit, the plaintiff as well as defendant deposed that, the suit scheduled land has been acquired by the Government i.e. N.T.P.C., for which, in the suit at hand, Government is a necessary party, but the Government has not been made as a party, for which, the suit is bad for non-joinder of necessary party i.e. the Government. For which, the suit of the plaintiff is not maintainable and for such reason, by answering the issue No.V only, the Trial Court dismissed the suit of the plaintiff on contest against the defendant.

9. On being dissatisfied with the aforesaid judgment and decree of dismissal of the suit of the plaintiff vide C.S. No.20 of 2012, he (plaintiff) challenged the same by preferring the First Appeal vide R.F.A. No.06 of 2014 being the appellant against the defendant by arraying him (defendant) as respondent.

10. After hearing from both the sides, the First Appellate Court dismissed the First Appeal of the plaintiff vide R.F.A. No.06 of 2014 concurring the findings and observations made by the Trial Court in C.S. No. 20 of 2012 only in respect of issue

No.V without touching/answering any other issues like the Trial Court vide its judgment and decree dated 14.08.2015 and 27.08.2015 respectively.

11. On being aggrieved with the aforesaid judgment and decree of the dismissal of the First Appeal vide R.F.A. No.06 of 2014 of the plaintiff, he (plaintiff) challenged the same by preferring this Second Appeal being the appellant against the defendant by arraying him (defendant) as Respondent.

12. This Second Appeal has been admitted on formulation of the following substantial question of law i.e. :-

> *(i) Whether the Courts below are correct in their approach by dismissing the suit as well as appeal on the ground that, the suit is defeated by non-joinder of necessary parties, when the defendant has not filed written statement raising such defence as to non-joinder of necessary parties?*

13. I have already heard from the learned counsels of both the sides.

14. In order to assail the impugned judgments and decrees of the Trial Court and as well as First Appellate Court, the learned counsel for the Appellant (plaintiff) relied upon the following decisions:-

> ***(i) AIR 2001 (S.C.) 2171—Madhukar and others Vrs. Sangram and others***
>
> ***(ii) 2011 (II) OLR (S.C.) 90—B.M.Narayana Gowda Vrs. Santhamma and another***
>
> ***(iii) 2015 (I) CLR 752—Rama Chandra Patra & others Vrs. Raghunath Jew and others***

15. On the contrary, in support of the impugned judgments and decrees of the Trial Court and First Appellate Court, the learned counsel for the Respondent (defendant) relied upon the following decision:-

> ***(i) 2022 Live Law (S.C.) 802—Moreshar Yadaorao Mahajan Vrs. Vyankatesh Sitaram Bhedi and others.***

16. On reference to the judgments and decrees of the Trial Court and First Appellate Court passed in C.S. No.20 of 2012 and R.F.A. No.06 of 2014 respectively, it was the undisputed arguments of the learned counsels of both the sides that, the Trial Court has dismissed the suit of the plaintiff vide C.S. No.20 of 2012 on contest against the defendant answering only one issue i.e. issue No.V without answering other five issues holding that, the suit of the plaintiff is not maintainable without the impletion of Government as party and the First Appellate Court has also dismissed the First Appeal accepting the above findings and observations made by the Trial Court in respect of only one issue i.e. issue No.V without touching/discussing/answering the other five issues.

17. It is the mandatory directions of Order 20 Rule 5 of the CPC to all the Trial Courts to decide all the issues at the time of passing judgments and decrees in the suits instead of disposing of the suits answering any of the technical issue.

18. On this aspect, the propositions of law has already been clarified by the Hon'ble Courts and Apex Court in the ratio of the following decisions:-

(i) ***AIR 1973 (Patna) 389—Ram Padarath Singh Vrs. Baidyanath Prasad & other—Paragraph 16***—The Trial Court should pronounce its opinion on all issues so as to avoid a remand, if the Appellate Court differs from the Trial Court.

(ii) ***AIR 1959 (Orissa) 132, 25 (1959) CLT 119— Sashimukhi Dasiani Vrs. Brundaban Das and others—Paragraph 21—CPC, 1908—Order 20 Rule 5***—Finding on all issues—Duty of Trial Court—

It is the duty of the Trial Judge to record a finding on all the issues though according to his decision on some of the issues the findings on other issues might not be necessary for disposal of the case.

(iii) ***AIR 1955 (Hyderabad) 268—Ahmed Ali and others Vrs. Shaik Ahme & AIR 1953 (Travamcore-cochin) 118—Kesavan Janardhan Plappalli and others Vrs. Narayanan Janardhanan Plappalli and other—CPC, 1908—Order 20 Rule 5***—It is the duty of the Trial Courts to give their findings on all issues raised between the parties in order to avoid remands.

(iv) ***2016 (I) Civil Court Case 61 (Uttarakhand)—Kanti Ballabh Satyawali Vrs. Rewadhar Satyawali & others—CPC, 1908-Order 20 Rule 5***—Issues framed—Parties leading evidence—Trial Court to give its decision on all issues not withstanding that, suit may be decided on the basis of one technical issues.

(v) ***AIR 1985 (S.C.) 736—M/s. Fomento Resorts and Hotels Ltd. Vrs. Gustavo Ranato Da Cruz Pinto and others—Paragraph 27—CPC, 1908—Order 20 Rule 5***—Judgments should be on all points not on single point—

When dealing with any matter dispose of all the points and not merely rests its decision on one single point.

19. In view of the clarified propositions of law enunciated in the ratio of the above decisions of the Hon'ble Courts and Apex Court, it is the lawful duty of the Trial Court to pass the judgment and decree in a suit by recording its finding on all the issues instead of disposing of the suit recording its finding only on one issue or some of the issues.

20. Here in this suit at hand, when the Trial Court has passed the judgment and decree in the suit of the plaintiff vide C.S. No.20 of 2012 dismissing that suit by recording its finding only on one issue i.e. issue No.V without answering other five issues, then at this juncture, the judgment and decree of the Trial Court cannot be sustainable under law.

21. Now it will be seen, when like this suit at hand, the Trial Court passes the judgment and decree in the suit by recording its finding only on one issue, then in an Appeal against the same like the First Appellate Court of this matter vide R.F.A. No.06 of 2014, what should have been the duties of the First Appellate Court.

22. The powers, duties and obligations of the First Appellate Court have already been clarified by the Hon'ble Courts and Apex Court in the ratio of the following decisions:-

(i) ***2023 (3) CCC 87 (Rajsthan)—Umar Khan (Deceased) Vrs. Sumer Khan (Now deceased)—Paragraphs 10 and 13.9—CPC, 1908—Section 96—First Appeal—Continuation of Suit***—First Appeal is always treated as continuation of Civil Suit—Virtually, First Appeal is a re-hearing of civil suit and whole case is open for reconsideration.

(ii) ***2021 (3) CCC 212 (S.C.)—Manjula and others Vrs. Shyamsundar and others—CPC, 1908—Section 96—First Appeal—Scope and Ambit***—First Appellate Court's jurisdiction involves rehearing of appeal on questions of law as well as fact—First Appeal is a valuable right, and, at that stage, all questions of fact and law decided by the Trial Court are open for re-consideration.

(iii) ***113 (2012) CLT 373—Smt. Sushila Devi Kedia & Ors. Vrs. Gyanendra Kumar Ray & Others—Paragraph-4—CPC, 1908—Section 96***—The First Appellate Court being the final court of fact is to analyze all the materials available on record and appreciate the same.

(iv) ***2012 (I) CLR 177— Chakradhar Bhutia (Dead) by his LRs. Harshamani Bhutia and others—Paragraph-4—CPC, 1908—Section 96 read with Order 20 Rule 5—Duty of the First Appellate Court***—The First Appeal is a valuable right and the parties have a right to be heard both on questions of law and facts and the judgment in the First Appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings.

(v) ***AIR 2001 (S.C.) 2171—Madhukar & others Vrs. Sangram & others—Paragraphs 5, 7 & 8—CPC, 1908—Section 97—First Appeal is a valuable right***—It is duty of Court to deal with all issues and evidence led by parties before recording finding.

(vi) ***2011 (II) OLR (S.C.) 90—B.M. Narayana Gowda Vrs. Shanthamma (D) by LRs. and another—CPC, 1908—Section 96—First Appeal***—First Appeal is a valuable right of the Appellant and therein all questions of fact and law decided by Trial Court are open for reconsideration.

(vii) ***2015 (I) CLR 752—Ram Chandra Patra (Dead) after him, his LRs. Chittaranjan Patra & others Vrs. Raghunath Jew and others—CPC, 1908—Section 96—Appeal against the decree against the Original Court***—

First Appeal is a valuable right of the parties and unless restricted by Law, the whole case is there is open for rehearing both on questions of fact and law.

23. Here in this matter at hand, although, the Trial Court had dismissed the suit vide C.S. No.20 of 2012 by recording its findings only on one issue i.e. Issue No.V without answering other five issues, then as per the above dictums of Hon'ble Courts and Apex Court, it was the duties and obligations of the First Appellate Court to dispose of the First Appeal vide R.F.A. No.06 of 2014 recording its findings on all the six issues without limiting its findings on the same and one issue vide issue No.V like the Trial Court. But, the First Appellate Court has not done so. For which, the judgment and decree of the First Appellate Court passed in R.F.A. No.06 of 2014 cannot be sustainable under law like the judgment and decree of the Trial Court.

24. As per the discussions and observations made above, when it is held that, the judgments and decrees of the Trial Court and First Appellate Court vide C.S. No.20 of 2012 and R.F.A. No.06 of 2014 are not sustainable under law for the reasons assigned above due to non-answering all the issues, then at this juncture and under these circumstances, what shall be the duties of this Second Appellate Court in deciding this Second Appeal.

25. This aspect has already been clarified by the Apex Court in the ratio of the following decisions in the like nature cases :-

2023 (II) OLR (S.C.) 328 & (2023) 3 SCC 61 (S.C.)—Dheeraj Singh & others Vrs. Greater Noida Industrial Development Authority & others—Paragraph-20 and (2001) 4 SCC 756—Madhukar & others Vrs. Sangram & others——CPC, 1908—Order 4 Rule 22 & Order 41 Rule 23—

The First Appellate Court has duty to record its findings qua all the issues raised before it and in cases, where the High Court as a First Appellate Court fails to do same, the matter must be remanded to the same Court again for fresh adjudication.

26. When, the Trial Court and the First Appellate Court, while passing the judgments and decrees in the suit and First Appeal, the said both the Courts have not discharged their duties and obligations lawfully by not recording their findings on all the issues, then at this juncture, by applying the principles of law enunciated in the ratio of the above decisions of the Apex Court, I am of the considered opinion that, the matter is fit for remand to the Trial Court for fresh adjudication as per law impleadig the State/Government as a party to the same.

So, there is justification under law for making interference with the judgments and decrees passed by the Trial Court and the First Appellate Court in the suit and First Appeal vide C.S. No.20 of 2012 and R.F.A. no.06 of 2014 respectively through this Second Appeal filed by the Appellant (plaintiff). As such, there is merit in the Appeal of the Appellant. The same is to be allowed in part.

27. In the result, the Appeal filed by the Appellant (plaintiff) is allowed in part on contest, but without cost.

The judgments and decrees passed by the Trial Court in C.S. No.20 of 2012 and as well as by the First Appellate Court in R.F.A. No.06 of 2014 both are set aside.

The matter vide C.S. No.20 of 2012 is remitted/remanded back to the Trial Court for its fresh adjudication according to law impleading the State/Government as defendant and to dispose of the suit vide C.S. No.20 of 2012 finally within a period of six months hence positively taking into account the pleadings along with oral and documentary evidence of the parties adduced during fresh trial.

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