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Smt. Madhumita Panda, Advocate

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2024 (II) ILR-CUT-1099

CHAKRADHARI SHARAN SINGH, C.J & M.S. RAMAN, J.

W.P.(C) NO. 561 OF 2005

UNION OF INDIA & ANR. ….Petitioners

-V-

KAILASH CHANDRA MOHAPATRA ….Opp.Party

ADMINISTRATIVE TRIBUNAL ACT, 1985 – Section 27 – Whether the Tribunal could go beyond the terms of the order passed in original application while exercising the power U/s. 27 of the Act? – Held, No – The Tribunal had become functus officio on the issue of the claim of the party in miscellaneous application after disposal of the original application.

Case Laws Relied on and Referred to :-

1. 2022 SCC OnLine SC 1327 : State of Maharashtra & Anr. Vs. Ms. Madhuri Maruti Vidhate
2. 2021 SCC OnLine SC 1264 : Secretary to Govt., Department of Education v. Bheemesh Alias Bheemappa
3. (2020) 7 SCC 617 : N.C. Santhosh Vs. State of Karnataka and Others

For Petitioners : Mr. Bhabani Shankar Rayaguru, C.G.C.

For Opp.Party : Mr. Susanta Sekhar Mohapatra

JUDGMENT Date of Judgment : 20.03.2024

CHAKRADHARI SHARAN SINGH, C.J.

The Union of India, in the present writ petition filed under Article 226 of the Construction of India, has questioned the sustainability of an order dated 04.03.2004 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack (in short, 'Tribunal') in O.A. No. 607 of 2001 whereby the Tribunal has directed the petitioners to provide the opposite party compassionate appointment in 'Group-D' post.

2. We have heard learned counsel for the petitioners and learned Central Government Counsel for the opposite party.

3. The facts, relevant for the present adjudication are not at all in dispute. The opposite party's father was working as a 'Mali' under the Aviation Research Centre (ARC), Charbatia when he met a premature death on 16.09.1990. The mother of the opposite party made an application thereafter for appointment on compassionate ground of her son, who is the opposite party herein, on 16.11.1990. The opposite party's mother was informed later by the department that the request for a compassionate appointment was being processed. On 25.11.1991, the ARC Headquarters returned the said application dated 16.11.1990 to the mother of the opposite party asking her to send the application for compassionate appointment with due recommendation, as and when a vacancy would arise at ARC, Charbatia. Petitioner No. 2 thereafter issued a letter to the opposite party stating that his

appointment would be considered subject to the availability of a suitable vacancy at the ARC, Charbatia. Subsequently, another letter was issued by the Section Officer, ARC, Charbatia to the opposite party to positively furnish certain information by 13.10.1992, in the attached format for further action.

4. It is the case of the opposite party that when four vacant posts of cooks were available, the opposite party was called to face the interview. He, however, could not be selected. Subsequently, in the year 1996, the opposite party was again called for a physical test for consideration of his appointment on compassionate ground to the post of Aircraft Assistant. However, because of an interim order passed by the Tribunal in a different case i.e. M.A. No. 269 of 1996 arising out of O.A. No.349 of 1995, the recruitment process was stayed. Later, the said interim order was vacated on 25.01.1999. The opposite party approached the Tribunal by filing O.A. No.76 of 1997 seeking a direction to consider his case for appointment on compassionate ground against the post of Aircraft Assistant. The said application was disposed of by the Tribunal by an order dated 25.05.2000 asking the Department to consider his case for appointment to the post of Aircraft Assistant within 60 days from the date of receipt of the order, after taking into account the performance of the opposite party in the test. It is also not in dispute that there was an interim order passed by this Court in O.J.C No.1495 of 1999 against the aforesaid order dated 25.01.1999. Resultantly, the recruitment process for the said post remained stayed. It appears that the opposite party had approached the Tribunal by filing M.A. No. 544 of 2000 alleging disobedience of the order passed by the Tribunal on 25.05.2000. The said O.J.C No.1495 of 1999 stood disposed of by an order dated 21.11.2000. On 30.08.2001 the opposite party was intimated that he could not be selected for the post of Aircraft Assistant.

5. Apparently, thus, from the date of death of the opposite party's father in 1990 the opposite party could not be given an appointment on compassionate ground till 30.08.2001 since he could not be selected for the post of Aircraft Assistant and was not found fit for appointment against the post of Aircraft Assistant.

6. This led to the filing of another original application by the opposite party before the Tribunal giving rise to O.A. No.607 of 2001 seeking quashing of the said communication dated 30.08.2001. The Tribunal disposed of the said O.A. No.607 of 2001 by an order dated 15.05.2002. The Tribunal noted in its order that the opposite party was not found suitable for the post of Aircraft Assistant and thereafter he was given an offer for the post of cook and again he was not found suitable for the post. He was also given an offer for employment as Safaiwala/Sweeper but the opposite party did not agree to the said offer. It appears from the said order that the learned Additional Standing Counsel informed the Tribunal that the opposite party would be given an offer of employment within a period of one month. The opposite party also informed the Tribunal that he was ready to take employment if that was suitably offered i.e. the post of Gardner/Mali/Peon or any such similar post. In that background,

taking into account the respective stands of the parties before the Tribunal, the Tribunal disposed of the Original Application requesting the learned Additional Standing Counsel to exercise his good offices to resolve the problem outside the Court as expeditiously as possible.

7. In 2003, the respondent/opposite party filed M.A. No.597 of 2003 in the aforesaid O.A. No. 607 of 2001 before the Tribunal alleging disobedience of its order dated 15.05.2002. The Tribunal, taking into account the statements made by the opposite party in M.A. No.597 of 2003, disposed of the same by an order dated 04.03.2004 in the following terms:

> *"Despite the aforesaid repeated orders dated 15.5.02 (rendered in O.A.No.607/01) Respondents have not cared to provide a Gr.D employment to the Appellant as yet; for which the Applicant has filed the present M.A. No.597/03 in this disposed of matter of O.A. No.607/01. In the objection filed by the Respondents in MA No.597/03 it has been disclosed that only 5% vacancies have been ear-marked for providing compassionate appointment and therefore, the Respondents have not been able to provide an employment on compassionate ground to the applicant in Gr.D post. Cause of action in the present case having arisen long before the imposition of 5% condition, such an objection is not sustainable and the Respondents are bound down by their own undertakings given repeatedly and as a consequence, the Respondents are hereby directed to provide a compassionate employment (even in a Gr.D post) to the Applicant and, in the particular circumstances of the case, a time limit of ninety days is hereby fixed; by which time, the Respondents should provide a compassionate appointment to the Applicant in Gr.D post so that he can save himself/his family from starvation. M.A. No.597/03 is accordingly disposed of."* (underscored for emphasis)

8. In the wake of above-noted facts, the said order of the Tribunal dated 04.03.2004 is under challenge in the present writ petition.

9. There is another aspect of the matter which deserves to be noted at this juncture. The present writ petition was taken up on 24.02.2005 when the following interim order was passed:

> "**Misc. Case No.494 of 2005**
>
> Heard.
>
> As an interim measure, the order dated 04.03.2004 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.607 of 2001 (Annexure-7) shall remain stayed pending disposal of the writ application.
>
> Misc. Case is disposed of.
>
> However, if he so likes, the opposite party is at liberty to file application for variation of this order after his appearance."

10. It was clearly observed in the said order that the opposite party would be at liberty to file an application for variation of the said interim order after his appearance. It is the case of the opposite party that the order requiring the petitioners to file requisites for issuance of notice was not complied with by the them and the opposite party received notice much later, in 2022.

11. Assailing the impugned order passed by the Tribunal, learned Central Government Counsel appearing on behalf of the petitioners have argued that while entertaining miscellaneous application filed primarily for implementation of an order of the Tribunal, the Tribunal could not have issued further directions beyond the directions issued in O.A. No.607 of 2001, which were required to be implemented. He has, further, submitted that the appointment of the opp.party on compassionate ground cannot be claimed as a matter of right. He contends that opposite-party's application for appointment on compassionate ground was duly considered and it is manifest from the admitted facts that he could not be given such appointment as he was not found fit. With the lapse of time i.e. more than 10 years after the date of death of the father of the opposite party, the opposite-party's case for appointment on compassionate ground, which is for providing immediate succor to the family of an employee who dies in harness leaving his/her family in penury, had lost its purpose since he could sustain himself in the meanwhile.

12. Learned counsel appearing on behalf of the petitioners has relied upon the Supreme Court's decision in case of ***State of Maharashtra & Anr Vs. Ms. Madhuri Maruti Vidhate*** reported in ***2022 SCC OnLine SC 1327, Secretary to Govt., Department of Education v. Bheemesh Alias Bheemappa***, reported in ***2021 SCC OnLine SC 1264*** and ***N.C. Santhosh Vs. State of Karnataka and Others*** reported in ***(2020) 7 SCC 617***. He has submitted that since compassionate appointment is an exception to normal rule of recruitment, and is not a matter of right, and the consideration for appointment on compassionate ground is to enable the family to tide over the sudden crisis, the opposite party cannot be extended the benefit at this distance of time. It is further argued that in view of ratio of decisions referred to, it is the norm, which prevails on the date of consideration of application, would be the basis for consideration of claim for compassionate appointment.

13. Learned counsel for the opposite party on the contrary has drawn the Court's attention to the statement made in paragraph 6 of the rejoinder filed on behalf of the petitioners-Union of India to the counter affidavit filed on behalf of the opposite party that it is an admitted fact that cases of various other applicants were pending for compassionate appointment and a list was prepared in which the name of the opposite party figured at serial No.2.

14. It is evident from the facts noted above that the opposite party's claim for grant of compassionate appointment before the Tribunal in O.A. No.607 of 2001 was decided by an order dated 04.03.2004 that the applicant would be given an offer of employment within a period of one month. While disposing of the case, the Tribunal had observed that the Additional Standing Counsel should exercise his good offices to resolve the problem outside the Court as expeditiously as possible. There was no direction issued by the Tribunal to appoint the opposite party on compassionate basis. In a proceeding for implementation of the said order filed by the respondent/opposite party giving rise to M.A. No. 597 of 2003, the Tribunal

passed the aforesaid order directing the petitioners to provide compassionate appointment to the applicant. Apparently, the Tribunal went beyond the scope of the initial order passed dated 15.05.2002 in O.A. No.607 of 2001. In our opinion, the order of the Tribunal deserves to be interfered with on the said ground alone.

15. Section 27 of the Administrative Tribunals Act, 1985 provides for execution of the orders of the Tribunal which reads as under:

> "27. Execution of orders of a Tribunal.—Subject to the other provisions of this Act and the rules, 2 [the order of a Tribunal finally disposing of an application or an appeal shall be final and shall not be called in question in any court (including a High Court) and such order] shall be executed in the same manner in which any final order of the nature referred to in clause (a) of sub-section (2) of section 20 (whether or not such final order had actually been made) in respect of the grievance to which the application relates would have been executed."

16. We reiterate at this juncture that the Tribunal ought not to have gone beyond the terms of the order dated 15.05.2002 passed in O.A. No.607 of 2001 while exercising the power under Section 27 of the Act for execution of the said order. The impugned order deserves to be set aside on this score alone.

17. The Tribunal had become functus officio on the issue of the claim of the opposite party for compassionate appointment after having disposed of O.A. No.607 of 2001 by the said order dated 15.05.2002 and it could not have proceeded further in the said matter except for exercise of power under Section 27 of the Act for execution of the order dated 15.05.2002. Further, we are of the view that the Supreme Court's decisions relied upon by learned Central Government Counsel for the petitioners are not applicable in the facts and circumstances of the present case as have been noted above.

18. The impugned order dated 04.03.2004 passed in O.A. No. 607 of 2001 is accordingly set aside being beyond jurisdiction. In any event, no purpose will be served by considering the opposite party's case for compassionate appointment at this juncture, 26 years after the death of the employee, when the opposite party has attained the age of 54 years.

19. With the aforesaid observations, the writ petition is allowed. The impugned order dated 04.03.2004 passed by the Tribunal in O.A. No.607 of 2001 is hereby set aside.

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2024 (II) ILR-CUT-1103

CHAKRADHARI SHARAN SINGH, C.J & S.K.SAHOO, J.

W.P(C) NOS. 2530 OF 2024 & 24358 OF 2022

M/s. SATYAM CASTINGS PVT. LTD, CUTTACK ……Petitioner

-V-

DY.DIRECTOR, DGGI, BHUBANESWAR & ANR. .…….Opp.Parties

AND

W.P(C) NO. 24358 OF 2022

M/s.SATYAM CASTINGS (P) LTD, CUTTACK -V- Sr.INT.OFFR,DG OF GST, BBSR & ANR.

(A) CENTRAL GOODS AND SERVICE TAX ACT, 2017 – Section 6(2)(b) – There is no ambiguity in the language of Section 6(2)(b) – The relevant fact to be borne in mind is the subject matter of the proceeding – If the subject matter of the proceeding is entirely different, there is no bar to the maintainability of the proceeding – What is barred is the initiation of the proceeding on the same subject matter by the proper officer. (Paras 20, 21)

(B) CENTRAL GOODS AND SERVICE TAX ACT, 2017 – Section 6(2)(b) – "Subject matter" – Meaning – Held, the expression subject matter can be equated with word "Cause of action" as mentioned/defined in Civil Procedure Code.

Case Laws Relied on and Referred to :-

1. W.P.(C) No.158 of 2020 (23.03.2021) : Anurag Suri v. The Directorate General of Goods and Services Tax Intelligence & Ors.
2. M.A.T. No.1595 of 2022 (Calcutta High Court dtd.30.09.2022) : M/s. R.P.Buildcon Pvt. Ltd & Anr. v. Superintendent, CGST & CX, Circle-II, Group-10 & Ors.
3. (2021) (10)TMI 1223 : M/s.Indo International Tobacco Ltd.& Ors. v. Additional DGGI &Ors.
4. (2022) 94 GST 137 (Orissa) : Mitambini Mishra v. Union of India & Ors.
5. W.P.(C) No.20996 of 2022 (18.11.2022) : Muna Pani v. State of Odisha & Ors.
6. A.I.R.1970 SC 987 : Vallabh Das v. Madan Lal & Ors.

For Petitioners : Mr. U.C. Behera.

For Opp.Parties: Mr. T.K.Satapathy, Sr. Standing Counsel (CGST)
Mr. Sunil Mishra, Standing Counsel (CT and GST)

JUDGMENT Date of Judgment : 05.04.2024

CHAKRADHARI SHARAN SINGH, C.J.

Since both the writ applications are based on same set of facts and pleadings on record, they have been heard together and they are being disposed of by the present common order and judgment.

2. We have heard Mr. U.C. Behura, learned counsel appearing on behalf of the petitioner and Mr. T.K. Satapathy, learned Senior Standing Counsel for the Opposite Party-Central Goods and Service Tax (CGST) and Mr. Sunil Mishra, learned Standing Counsel for the CT and GST.

3. The petitioner is a registered dealer under the Goods and Service Tax Act, 2017 (in short, 'GST Act') and is a private limited company registered under the Indian Companies Act. It is also registered as a medium scale industry for manufacture of caste iron products.

4. On 30.03.2022, the Senior Intelligence Officer, Directorate General of Goods and Service Tax, Zonal Unit, Bhubaneswar (opposite party No.1) along with

an investigation team had visited the petitioner's place of business and seized certain records and books of accounts available there, under Section 67 of the GST Act on the reasoning that those documents were relevant to the proceedings under the GST Act. It is the petitioner's case that opp.party No.1 had conducted the investigation and seized the records and accounts for the financial years 2017 to 2021-2022 and then issued summons under Section 70 of the CGST Act, fixing the date of personal appearance on 01.04.2022. It is also the petitioner's case that the accounts for the year 2021-2022 were called upon for verification, which were not available as the date fix of such returns for the financial year commencing 31.03.2021 were not due as on the said date. The purchase figures were not uploaded by the supplier(s) and annual returns would have been due on 30.09.2022 as per Sections 44 and 45 of the Act read with Rules 80 and 81 of the OGST/CGST Act and Rules.

5. Apart from the fact that responding to the said summons, the petitioner had attempted to appear through his counsel with an objection against issuance of summons which was not duly honoured by opposite party No.1, it is asserted by the petitioner that though again an objection against the said summons was sent through registered post, yet another summons was issued under Section 70 of the Act on 23.08.2022 directing the petitioner to appear and produce the required books of account fixing the date of appearance on 30.08.2022. The petitioner, admittedly, did not appear and again made an objection by registered post asserting that his initial preliminary objection was not given any heed to.

It is the petitioner's further case in W.P.(C) No.24358 of 2022 that as opposite party No.1 did not pass any order on the petitioner's response to the summons issued, even after a lapse of 15 days, he was not in a position to avail any remedy under the provisions of Section 107(1) of the CGST/OGST Act. With a plea that as the opposite party No.1 did not take any decision on the peittioner's legal objection to the summons issued to it, it was not left with any other alternative statutory remedy, it approached this Court by filing the writ application i.e. W.P.(C) No.24358 of 2022 putting to challenge the summons itself.

6. It is, precisely, the case of the petitioner that the action of opposite party No.1 is in violation of the circular issued by the Central Board of Excise and Customs dated 05.10.2018 whereby all the officers of the GST i.e. both the Central and the State Tax authorities are authorized to initiate intelligence based enforcement action against the tax payers irrespective of the administrative assignment of the tax payer to any authority. The authority which initiates such action is empowered to complete the process of investigation, issuance of show cause notice, adjudication, recovery, filing of appeal etc. arising out of such action. The said circular dated 05.10.2018 provides that if an officer of the Central Tax Authy. initiates intelligence based enforcement against a tax payer administratively assigned to the State Tax Authority, the Officers of the Central Tax Authority is required to transfer the case to its State Tax counterpart and would themselves state the case to its logical conclusion. Similar would be the position in case of intelligence

based enforcement action initiated by officers of the State Tax Authority against a tax payer administratively assigned to the Central State Tax Authority. Basing on the said circumstance and the provision under Section 6(2)(b) of the CGST/OGST Act, it was the petitioner's case in W.P.(C) No.24358 of 2022 that a verification proceeding being pending before the State Government, the Officers of the Central Tax Authority ought not to have initiated the proceedings with the issuance of the summons.

7. Reliance has been placed on behalf of the petitioner upon a coordinate Bench decision of this Court dated 23.03.2021 in W.P.(C) No.158 of 2020 (***Anurag Suri v. The Directorate General of Goods and Services Tax Intelligence and Other***) to support its case.

8. It is the specific case of opposite party No.2 in its counter filed in W.P.(C) No.24358 of 2022, apart from the jurisdictional competence behind issuance of notice, that the petitioner avoided to appear against the summons which he was legally duty bound to respond and take such plea as he is taking in the present proceeding before this Court. It has been stated that the petitioner took a plea that the CT Enforcement Range, Cuttack had initiated proceedings under Section 67 of the Act upto the year 2018-19 and they had seized all the books of accounts as per panchanama dated 24.07.2019 which matter was subjudice as on date.

9. It is the case of opposite party No.1, in its counter affidavit filed in W.P.(C) No.24358 of 2022 that the petitioner was running a business on the date of inspection i.e. 31.03.2021 and the inspection which was conducted by the CT & GST Authorities under Section 67 of the Act nearly twenty months ago on 24.07.2019. Relying on Section 67 of the CGST/OGST Act, it has been stated that suppression of any transaction concerning supply of goods/services or suppression of stock or goods can be a valid reason for initiation of the inspection. The transaction concerning supply of goods/services or the stock of goods on any a specific date is definitely not the same for any other date and the buyers and sellers involved in transactions may be different on each date and manner of maintenance of records on account of money transactions towards purchase/sale may be different in each day. Accordingly, citing an inspection conducted by a State Authority twenty months ago as a reason for dishonouring the summons is untenable in law which is to be looked as deliberate act of non-cooperation in the on going investigation.

10. Controverting the petitioner's stand citing pending proceedings by the State CT & GST under Section 67 of the Act and overlapping of tax periods in the pending case and present case as the ground to transfer the case to a State Authority, it is the case of opposite party No.2 that act of suppression referred to in Section 67 is transaction related and is different on any specific date. Accordingly, the summons relating to inspection under Section 67 cannot be claimed as the same event that had occurred twenty months back whereby certain documents were called

for relating to earlier period to find out more about the ongoing investigation. It has been reiterated that the inspections were conducted nearly twenty months ago and, accordingly, the issues are different, period of operation are different and the documents seized are different for the Central Government Authority (DGGI) and the State Authority (CT & GST) Enforcement. It has also been stated that the investigation initiated by the State CT & GST Authority pertains to M/s. Anamika Enterprises, GSTIN-21BQQPB8790R1Z0 which was one of the suppliers of the petitioner. Accordingly, the two investigations are entirely different as in the present investigation the DGGI is evaluating clandestine supply by the petitioner during the month of March 2022 and investigation by CT & GST is in reference to receipt of materials from one supplier i.e. M/s. Anamika Enterprises.

11. In the rejoinder to the counter affidavit, the petitioner has denied the averments made by the counter affidavit. According to the petitioner, the disputed summons covers the period of investigation, which is between the commencement of tax periods from July 2017 to April 2022, whereas the summons issued by the opposite party No.1 is regarding disputed materials available for verification as per the show cause-cum-demand notice is only for the month of March, 2022.

12. It has also been contended in the rejoinder affidavit that in the given case, where most of the materials were seized and retained by the State Enforcement Wing and intimated to the Central Investigation Wing during the course of investigation, any new materials discovered by central investigating concerning that should be transferred to the State Enforcement wing for reaching a logical conclusion by way of examination of both materials with seized books of accounts. The petitioner has also asserted that without awaiting a decision in the present writ application, the opposite party No.1 has issued demand-cum-show cause notice directing him to pay the demand with interest and penalty.

13. It is worthwhile mentioning at this juncture that the second writ petition i.e. W.P.(C) No.2530 of 2024 has been filed challenging the show cause-cum-demand notice dated 29.12.2023 issued by the opposite party No.1 pursuant to the summons issued to the petitioner which was subject matter of challenge in W.P.(C) No. 24358 of 2022.

14. Manifestly, the subsequent show cause-cum-demand notice dated 29.12.2023 is being challenged by the petitioner on the same ground which has been taken to question the summons with reference to the provisions under Section 6(2)(b) of the CGST/OGST Act.

15. Mr. Behura, learned counsel appearing on behalf of the petitioner, has submitted that on conjoint reading of Section 6(2)(b) of the GST Act and DO letter dated 05.10.2018 issued by the Central Board of Excise and Customs (‘CBEC’ for short), it can be easily culled out that both the investigation wings of the Centre and State are required to coordinate with each other so as to reach conclusive findings of fact regarding evasion of tax if made by a registered dealer, under the GST regime.

The same is to be determined under Section 73 or 74 of the CGST/OGST Act with interest and penalty, to be calculated in the manner prescribed under the Act and the rules that is to be counted from the due date of filing of return with the disclosure of turnover of purchase and sale with output tax liability for any tax period or tax periods. He has argued that since the State authorities are already proceeding against the petitioner for investigation for the tax period 01.07.2017 to 18.04.2022, the DGGI cannot conduct a parallel proceeding and investigation for the same tax period. It is his submission that the circular dated 05.10.2018 issued by the CBEC is nothing but a clarification to strike harmonious relationship between both the wings of the two departments. In support of his submissions, Mr. Behura has placed reliance on ***Anurag Suri*** (supra). He has also placed reliance on the Division Bench decision of Calcutta High Court dated 30.09.2022 in M.A.T. No.1595 of 2022 in the case of ***M/s. R. P. Buildcon Pvt. Ltd and another v. Superintendent, CGST & CX, Circle-II, Group-10 and others***. Reliance has also been placed by him on a decision of Delhi High Court in case of ***M/s. Indo International Tobacco Ltd. and others v. Additional DGGI and others, (2021) (10) TMI 1223.***

16. Mr. T.K. Satapathy, learned Senior Standing Counsel for the CGST has argued, *per contr*a, that the two investigations are on different issues. Whereas the DGGI was investigating clandestine supply by the petitioner during the month of March, 2022 only, investigation by the State CT and GST was with reference to receipt of materials from one supplier i.e. M/s. Anamika Enterprises. He has placed reliance on another coordinate Bench decision of this Court in case of ***Mitambini Mishra v. Union of India and others*** reported in ***(2022) 94 GST 137*** *(Orissa)* wherein the Bench declined to entertain the writ petition at the stage of issuance of show cause notice, with a liberty to respond to the said show cause notice.

17. Similarly, Mr. Sunil Mishra, learned Standing Counsel representing the State of Odisha (CT and GST), while supporting the stand taken on behalf of the DGGI, has argued that the State authority has issued summons to the petitioner on 24.07.2019 for production of books of accounts for the period July, 2017 to July, 2019. He has argued that the subject matter before the State authority is entirely different from the Central authority and, therefore, Section 6(2)(b) of the CGST/OGST Act shall have no application. He has also reiterated that the Central authority has issued show cause-cum-demand notice dated 29.12.2023, on the ground that the petitioner was engaged in clandestine clearance of taxable goods without issuance of any tax invoices. He has relied on a co-ordinate Bench decision of this Court dated 18.11.2022 passed in W.P.(C) No.20996 of 2022 in the case of ***Muna Pani v. State of Odisha and others*** to contend that the present writ petition at the premature stage of notice should not be entertained.

18. Before we address rival submissions advanced on behalf of the parties, we consider it proper to refer to the co-ordinate Bench decision of this Court in the case of ***Anurag Suri*** (supra) on which much reliance has been placed by learned counsel

for the petitioner. In the said case, in the counter affidavit filed on behalf of opposite party No.2, it was specifically stated that opposite party No.3 was not aware that the Central agency was seized with the matter. Paragraphs—10 to 12 of the said decision are being quoted herein below so as to distinguish the present case with that of ***Anurag Suri*** (supra):

> *"10. Opposite Party No.2 has itself set out in the counter affidavit the copy of the circular dated 5th October, 2018 issued by the CBEC which categorically states that if the officer of the Central tax authority initiates intelligence/enforcement action against a taxpayer, administratively assigned to a State tax authority, then the Central tax authority officers themselves have to further undertake the investigation and take the case to its logical conclusion and 'would not transfer the said case to its state tax counterpart'.*
>
> *11. The explanation in para 7.1 of the counter affidavit reads thus:-*
>
> *"Since no information was available with the Opposite Party No.3 with regard to initiation of action as to the input tax credit under Section 70 by the CGST Authority, upon receipt of intelligence the Opposite Party No.3 has proceeded to issue notice under Section 74 which is the provision which deals with the input tax credit wrongly availed of."*
>
> *12. In other words, the State authorities do not dispute that the circular dated 5th October, 2018 but claim not to have known that the Central tax authority was seized of the matter."*

The Division Bench noted that the period of enquiry as far as Central tax authority was concerned was only from July, 2017 to June, 2018 whereas Opposite Party No.3 had issued a show cause notice specific for March, 2018 and, thus, there was also an overlapping of the periods.

19. Section 6(2)(b) of the CGST Act, 2017 reads as under:

> *"**Section 6 - Authorisation of officers of State tax or Union territory tax as proper officer in certain circumstances.—***
> *(1) xxx xxx xxx*
> *(2) Subject to the conditions specified in the notification issued under sub-section (1)*
> *(a) xxx xxx xxx*
> *(b) where a proper officer under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act has initiated any proceedings on a subject matter, no proceedings shall be initiated by the proper officer under this Act on the same subject matter."*

20. There is no ambiguity in the language of Section 6(2)(b) of the CGST/OGST Act, which bars initiation of proceeding by a proper officer under CGST Act where a proper officer under the State Goods and Services Act or the Union territory Goods and Services Tax Act has initiated proceeding on a ***subject matter.***

21. The relevant fact to be borne in mind is the subject matter of the proceeding. If the subject matter of the proceeding is entirely different, there is no bar to the maintainability of the proceeding. What is barred is the initiation of the proceeding on the same subject matter by the proper officer. The words 'subject matter' can be equated with words 'cause of action'. The reason behind barring the initiation of proceeding on the same subject matter by the proper officer under the State Goods and Services Tax Act or the Union Territory Goods and Services Act seems to be

that the possibility of the final decision in the two proceedings being different cannot be totally ruled out which would create confusion. In the case of ***Vallabh Das v. Madan Lal and Ors.*** reported in ***A.I.R. 1970 SC 987,*** it is held that the expression 'subject matter' is not defined in the Civil Procedure Code. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said that the subject matter of the second suit is the same as that in the previous suit.

22. In the present case, the opposite parties have disputed that the proceedings initiated by the officer under the State GST Act and the show cause notice issued by the DGGI relate to the same "subject matter". It is the specific ground on behalf of opposite party No.1 that the Central GST authority had initiated investigation of suppression of transaction by the petitioner. The DGGI was investigating clandestine supply by the petitioner during the month of March, 2022 only whereas investigation by CT and GST was with reference to receipt of materials from one supplier i.e. M/s. Anamika Enterprises.

23. Be that as it may, in view the nature of the order which we intend to pass in the present matter, we refrain ourselves from recording any definite opinion at this stage that the impugned show cause notice issued by the DGGI is barred or not by virtue of operation of Section 6(2)(b) of the CGST/OGST, Act considering the dispute raised in this regard on behalf of opposite parties No.1 and 2. We see no reason why the petitioner did not respond to the summons issued by the DGGI taking a plea that it was barred by Section 6(2)(b) of the CGST/OGST Act. Further, in the present case, a show cause-cum-demand notice has already been issued on 29.12.2023. Such being the position, we decline to interfere in the present matter. The petitioner shall have the liberty to respond to the said show cause-cum-demand notice dated 29.12.2023 and take appropriate recourse to the provisions of the CGST Act. Since we have refrained ourselves from expressing any definite opinion as to whether the case of the petitioner is covered by Section 6(2)(b) of the CGST/OGST Act, it would be open for petitioner to take the said plea before the appropriate forum in appropriate proceeding.

24. These writ petitions are, accordingly, disposed of with the liberty as aforesaid.

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2024 (II) ILR-CUT-1110

CHAKRADHARI SHARAN SINGH, C.J & S.S.MISHRA, J.

W.A. NO. 3103 OF 2023

Dr. PANKAJ KUMAR PARHI ……Appellant

-V-

NIVA NAYAK & ORS. ……Respondents

(A) CONSTITUTION OF INDIA, 1950 – Article 226 – Selection process for the Associate Professor in Department of Chemistry – Whether the Court in exercising the power of Judicial Review can issue a mandamus directing the University to appoint respondent No. 1 as an Associate Professor against the view of constituted Selection Committee? – Held, No – The Court in exercise of power under Judicial Review does not interfere with selections made by expert bodies by re-assessing comparative merit of the candidate. (Paras 35-36)

(B) CONSTITUTION OF INDIA, 1950 – Article 226 – Orissa Civil Services (Reservation of Vacancies for Women in Public Services) Rules, 1994 – Rule 4 – Whether the Court exercising the power of Judicial Review can sit as an Appellate Authority over the decision of a duly constituted Selection Committee? – Held, No – Further, it is impermissible for the Court's exercising power of Judicial Review under Article 226 of the Constitution of India to hold a candidate suitable or otherwise, contrary to the opinion of a duly constituted Selection Committee. (Paras 21 & 31)

(C) SERVICE JURISPRUDENCE – Selection process and Appointment – "The rules of the game cannot be changed when the game has been played". (Para 35)

Case Laws Relied on and Referred to :-

1. (2008) 3 SCC 512 : K. Manjusree v. State of Andhra Pradesh & Anr.
2. (2022) 11 SCC 742 : Goa Public Service Commission v. Pankaj Rane & Ors.
3. (2020) 20 SCC 209 : Ramjit Singh Kardam and others v. Sanjeev Kumar & Ors.
4. AIR 1965 SC 491 : University of Mysore and Anr. v. C.D.Govinda Rao & Anr.
5. (1990) 1 SCC 305 : Dalpat Abasaheb Solunke & Ors. v. Dr B.S. Mahajan & Ors.
6. (2018) 15 SCC 796 : Union Public Service Commission v. M.Sathiya Priya.
7. 2023 SCC Online SC 344 : Tajvir Singh Sodhi v. State of Jammu & Kashmir.
8. 1994 Supp. (l) SCC 454 : C.P.Kalra v. Air India.
9. (1995) 3 SCC 486 : Madan Lal v. State of J&K.
10. AIR 2024 SC 135 : Dr. Premachandran Keezhoth v. Chancellor, Kanpur University.
11. 2023 SCC Online SC 167 : Sureshkumar Lalitkumar Patel & Ors. v. State of Gujarat & Ors.
12. (1990) 3 SCC 157 : N.T.Devin Katti & Ors. Vs. Karnataka Public Service Commission & Ors.
13. (1996) 6 SCC 282 : Secy. (Health) Deptt. of Health & F.W. & Anr. v. Dr. Anit Puri & Ors.
14. (2008) 2 SCC 119 : M.V.Thimmaiah & Ors. v. Union Public Service Commission & Ors.
15. (1994) 2 SCC 117 : Om Prakash Poplai & Rajesh Kumar Maheswari v. Delhi Stock Exchange Association Ltd. & Ors.
16. (2022) 1 SCC 294 : Mohd. Mustafa Vs. Union of India & Ors.

For Appellants : Mr. H.M.Dhal.

For Respondents : Mr. Sameer Kumar Das & Mr. Dayananda Mohapatra

JUDGMENT Date of Judgment : 31.07.2024

CHAKRADHARI SHARAN SINGH, C.J.

1. In the present intra-Court appeal, the appellant has put to challenge a judgment and order dated 05.12.2023 passed in W.P.(C) No. 21396 of 2023, whereby the learned

Single Judge has quashed the selection and appointment of the appellant as an Associate Professor, Post-Graduate Department of Chemistry, Fakir Mohan University and has further directed that the writ petitioner (respondent No.1) be appointed to the said post against which the appellant is working.

2. Facts of the case are not in dispute, the Fakir Mohan University (the 'University' for short) had come out with an advertisement inviting applications from the eligible candidates for various posts in the Post-Graduate Department of the University including two posts of Associate Professor in the Department of Chemistry. Indisputably, both the posts belonged to Unreserved (UR) category.

3. The Orissa Civil Services (Reservation of Vacancies for Women in Public Services) Rules, 1994 ('Reservation for Women Rules, 1994' for short) framed in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India provides for reservation for women candidates in States Civil Services and Posts, Rule 4 of which reads thus:-

> *"4.* ***Reservation.****-(1) The following percentage of vacancies out of the total vacancies arising in a year in any civil 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%* |
> | *Sportsman* | *0.33%* | *0.67%* | *1%* |
> | *Ex-Servicemen* | | *3%* | *3%* |
> | *General candidate* | *18.33%* | *36-67%* | *55%* |
>
> *(2) Notwithstanding anything contained in Sub-rule (1), reservation made in favour of women candidates in excess of 30% of the total vacancies in any civil services/posts, shall continue.*
>
> ***(3) 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."*
>
> (Emphasis supplied)

4. In accordance with the said Reservation Policy for Women, 1 post was shown in the advertisement reserved for Unreserved Women (UR-W) candidates.

5. It was mentioned in the said advertisement that in case of non-availability of suitable women candidates, the post shall be filled up by male candidates from the same category. The appellant and the respondent No.1 had applied, amongst others, in response to the said advertisement for the post of Associate Professor of Chemistry in the said category. The respondent No. 1 is a woman candidate, who

claimed reservation for her selection in terms of the Reservation for Women Rules, 1994. The eligible aspirants were called for interview. In the call letter for interview, it was mentioned that CCRs for last five years of the candidates must reach the University before the date of interview. It was also mentioned that the candidates might bring the CCRs in a sealed cover and submit then on the date of interview. It further provided that in the event the CCRs were not received in due time, no marks would be awarded against that head. Upon interview conducted by a Selection Committee, the appellant and respondent No.5 (both males) were found suitable for appointment against the two vacancies and accordingly their names were recommended for appointment. The selection Committee also reached at a conclusion that no woman candidate was found suitable and accordingly a male candidate was selected, apparently applying Sub-rule 3 of Rule 4 of the Reservation for Women Rules, 1994.

6. Based on the recommendation so made, the appellant joined as Associate Professor in Chemistry, in the University.

7. Respondent No.1 filed a writ petition bearing W.P.(C) No.19275 of 2021 challenging the selection and appointment of the appellant and the respondent No.5. A learned Single Judge of this Court disposed of the said writ petition by an order dated 09.09.2022 with an observation that the writ Court could not sit as a Super Selection Committee to decide as to whether respondent No.1 was suitable for appointment or not. The University was however directed to relook into the selection process as in the opinion of the learned Single Judge, the reservation of women candidates flows from the mandate of the Constitution, which must be strictly followed. Acting upon the above direction issued by the learned Single Judge of this Court on 09.09.2022, the University re-examined the case of respondent No.1 and communicated to her that there was no irregularity/indiscretion in the selection process, through a letter dated 19.04.2023 issued under the signature of the Registrar of the University. It was mentioned in the said communication that the Selection Committee had decided that the candidates, who secured 50% or more in aggregate, shall be considered for appointment and since respondent No.1 had not secured 50% of marks, she was not suitable. Accordingly, due to non-availability of suitable woman candidate, a male candidate was appointed against the post meant for UR-W category.

8. Assailing the said communication dated 19.04.2023, respondent No.1 filed a writ petition giving rise to W.P.(C) No.21396 of 2023. Respondent No.1 challenged the selection and appointment of the appellant as well as respondent No.5 with a direction to appoint her as an Associate Professor in the Department of Chemistry. The said writ petition came to be disposed of by the learned Single Judge by a judgment and order dated 05.12.2023. Learned Single Judge quashed the communication dated 19.04.2023 and held that respondent No.1 was suitable for appointment against the vacancy meant for UR-W category for the post of Associate

Professor in Chemistry and accordingly directed the University to appoint respondent No.1 in place of the appellant. The said decision of the learned Single Judge dated 05.12.2023 is under challenge in the present intra-Court appeal.

9. We consider it useful to quote hereinbelow the operative portion of the direction issued by the learned Single Judge, which reads thus:-

> *"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."*

10. It would be beneficial to take note of the gist of the pleadings in the writ proceeding seeking appointment of respondent No.1, in the wake of which, learned Single Judge deemed it fit to issue the mandamus as noted above:-

> *I. The respondent No.1 was allowed to appear at the interview because she was suitable for the post;*
>
> *II. In the counter affidavit filed on behalf of the University in the earlier writ proceeding i.e. W.P.(C) No.19275 of 2021, no stand was taken on behalf of the University that since respondent No.1 could not secure 50% of cut off marks, she was found unsuitable;*
>
> *III. One Dr. Suprava Nayak was also a candidate in terms of the advertisement for the post of Associate Professor in Chemistry had sought an information under the Right to Information Act ('RTI Act' for short) (Annexure-7 to W.P.(C) No.21396 of 2023). The information provided to her did not indicate anything about the cut off marks rather the same read as under:-*
>
> *"(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."*
> *Therefore, it was never the decision of the Selection Committee to fix a cut off marks of 50%, on which ground, the claim of respondent No.1 was rejected;*
>
> *IV. Respondent No.1 was not given required marks against her teaching experience as well as research publication. The Selection Board intentionally and deliberately awarded less marks in favour of the petitioner against teaching experience and research publication. Further, the Selection Committee did not award any marks towards CCRs Performance Appraisal Report while such marks were awarded in favour of the appellant and respondent No.5.*
>
> *V. There was no stipulation in the advertisement nor in the University Statute prescribing cut off marks for selection, stand taken by the University while rejecting the claim of respondent No.1 on the ground that she failed to secure 50% of the cut off marks was unjustified;*

VI. Following decisions of the Supreme Court were relied upon on behalf of respondent No.1 before the learned Single Judge in support of her case:

i. ***K. Manjusree v. State of Andhra Pradesh and another****, reported in* ***(2008) 3 SCC 512****;*

ii. ***Goa Public Service Commission v. Pankaj Rane and Others****, reported in* ***(2022) 11 SCC 742****; and*

iii. ***Ramjit Singh Kardam and others v. Sanjeev Kumar and others****, reported in* ***(2020) 20 SCC 209****;*

11. In the counter affidavit filed on behalf of the University, it was stated that the proceedings of the Selection Committee revealed that the Selection Committee was of the opinion that no woman candidate was found suitable and accordingly a male candidate was selected against UR-W category. It was stated, with reference to the information furnished under the RTI Act that the selected candidates had secured more than 50% in aggregate whereas respondent No.1 had secured 47% marks, which was less than 50% of the cut off fixed by the Selection Committee. A plea was also taken that in the absence of any specific Guidelines/Rules/Law, it was open for the Selection Committee to decide the modality and fix up the cut off marks keeping in view the interest of the academic excellence to teach at the level of Post-Graduation. As per the information furnished by the then Vice-Chancellor, who was the Chairman of the Selection Committee and the Resolution of the Selection Committee, it revealed that they acted upon the proceeding and thereafter they resolved to recommend the names of the selected candidates.

11.1. It is pertinent to note that a plea was also taken in the counter affidavit that with the enactment of Odisha University Amendment Act with effect from 04.09.2020, the Odisha Public Service Commission has been authorized to recommend the names of the teachers to be appointed in the faculties of the University and the University was no more authorised to make recommendations.

11.2. It appears to be an admitted fact that the University could not find any material from the proceedings of the Selection Committee that the Selection Committee had fixed 50% as the cut off marks. The then Vice-Chancellor of the University, who was the Chairman of the Selection Committee, was requested by the University to state the Bench Mark for holding a candidate suitable or unsuitable for a post. In response to the said communication, the then Vice-Chancellor and the Chairperson of the Selection Committee furnished following information (Annexure-A to the counter affidavit filed in W.P.(C) No.21396 of 2023):-

"xxx xxx xxx

1. In the Advertisement (No.Estt-11-164/2019/3860/FMU dt.10.07.2019) it was clearly mentioned that, "In case of non-availability of suitable women candidates, the post shall be filled up by male candidates from the same category."

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."

12. A counter affidavit was filed on behalf of the appellant also in the writ petition. It was the case of the appellant in his counter affidavit filed in opposition to the pleadings in the writ petition that the University had given a relook into the selection process in question and based on the information furnished by the then Vice-Chancellor of the University rightly rejected the claim of respondent No.1 on the ground that she was not found suitable having scored less than 50% marks in aggregate in the process of selection. He has submitted that the Selection Committee consisted of:-

I. The Vice Chancellor of the University.
II. Academic Nominee of the Vice-Chancellor.
III. Chairman of the P.G. Council.
IV. Chairman of the P.G. Council in absence of Head of the Department of the Chemistry.

12.1. The members of the Selection Committee were the experts in the subject and administration of the University. On the basis of their expertise in the subject and past experience, they had formulated a procedure to conduct the selection among the eligible candidates. The selection procedure was conducted in setting up a uniform standard for all persons. The method of selection was not only depended upon the career assessment but also upon several other factors for assessment of competence/suitability of a candidate against different attributes as under:-

	"HEADING	TOTAL MARKS
1.	General career	30
2.	Research Degree	20
3.	Teaching experience	10
4.	Ph.D. guidance	5
5.	Research publication	15
6.	Viva voce	15
7.	C.C.R./PAR	5
		100"

13. It would be pertinent to note that in the vague of the stand on behalf of respondent No.1 that she was not awarded marks against teaching experience as well as research publication, learned Single Judge had directed the University to provide the original records of the selection in question, which was perused. Learned Single Judge found that though the respondent had provided proof of teaching experience of 17 years, but the same was calculated at 10 years and accordingly she was awarded only 5 marks out of 10. Further, out of 10 marks provided for research publication of international journals, she was awarded only 3 marks and 1 mark for publication in 5 national journals. No mark was awarded against CCR appraisal in favour of respondent No.1.

14. From the impugned judgment and order passed by the learned Single Judge, it can be seen that as the learned Single Judge was not satisfied with award of marks against various attributes in respect of respondent No.1, learned Single Judge passed the following order on 18.10.2023:

"xxx xxx xxx

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 marks 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."

15. Relevant records were thereafter produced by the University in relation to award of marks in favour of candidates against research publication, teaching experience as well as CCR appraisal. Learned Single Judge noticed that there was no uniformity maintained by the Selection Board in awarding marks towards research publication, teaching experience as well as CCR appraisal. In the opinion of the learned Single Judge, thus, the Selection Board had conducted the selection in haphazard manner and awarded the marks in the absence of any fixed criteria. Learned Single Judge recorded in paragraph 8.10 of the impugned judgment and order as under:

"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."

16. Learned Single Judge reached a conclusion that rejection of the petitioner's claim on the ground that she had not secured required 50% cut off marks was not sustainable in the eye of law in view of the Supreme Court's decision in case of ***K. Manjusree*** (*supra*) and accordingly allowed the writ petition with the direction as has been quoted hereinabove.

17. Mr. H.M. Dhal, learned counsel appearing on behalf of the appellant, assailing the impugned judgment and order has submitted that there was admittedly no allegation of mala fide against the experts, who constituted the Selection Committee. The Selection Committee comprised of the experts, who found respondent No.1 unsuitable for the post of Associate Professor. Relying on the Supreme Court's decision in the case of ***University of Mysore and another v. C.D. Govinda Rao and another (AIR 1965 SC 491)*** and ***Dalpat Abasaheb Solunke and others v. Dr B.S. Mahajan and others***, reported in ***(1990) 1 SCC 305***, he has argued that whether a candidate is fit for a particular post or not can be decided by duly constituted Selection Committee having expertise on the subject. Relying on the Supreme Court's decision in case of ***Union Public Service Commission v. M. Sathiya Priya*** reported in ***(2018) 15 SCC 796***, he has argued that the jurisdiction to make selection vests in the Selection Committee and it is not open for the Courts to interfere in such matters except in cases whether the process of assessment is vitiated either on the ground of bias, mala fides or arbitrariness. Relying on another Supreme Court's decision in case of ***Tajvir Singh Sodhi v. State of Jammu & Kashmir*** reported in ***2023 SCC Online SC 344***, he has argued that it is not within the domain of the Courts, exercising the power of judicial review, to enter into the merits of a selection process, a task which is the prerogative of and is within the expert domain of a Selection committee, subject of course to a caveat that if there are proven allegations of malfeasance or violation of statutory rules, only in such cases of inherent arbitrariness, can the Courts intervene. He has argued that the Selection Committee was empowered to fix a cut off marks and has argued that the Supreme Court's decision in case of ***K. Manjusree*** (*supra*) has not rightly been applied by the learned Single Judge, which clearly lays down that where the Rules do not prescribe any procedure, the Selection Committee may also prescribe the minimum marks. Reliance has also been placed by him on the Supreme Court's decision in case of ***C.P. Kalra v. Air India*** reported in ***1994 Supp. (I) SCC 454***. He has further argued that in any event the learned Single Judge could not have reassessed and reevaluated the marks awarded by the Selection Committee. He has relied on Supreme Court's decision in case of ***Madan Lal v. State of J&K*** reported in ***(1995) 3 SCC 486*** to submit that quantum of marks to be awarded to the competing candidates is the function of the interview committee and the Courts do not act as Appellate body over the assessment made by such expert committee.

18. Assailing the finding of the learned Single Judge on the point of marks awarded to the petitioner against teaching experience, he has submitted that the finding of the learned Single Judge is contrary to the statute, inasmuch as, Clause-3 of the Statute provides that the years of service rendered beyond the eligibility criteria which is 8 years is to be reckoned towards teaching experience for awarding marks @ 0.5 marks for each completed years of service beyond the eligibility period. Therefore, 10 years service beyond the eligibility period had been taken into consideration and thus respondent No.1 was rightly awarded 5 marks for teaching

experience. On the point of marks awarded against research publication in favour of respondent No.1, who had 7 number of publications with 4 in International Journal and 3 in National Journal and was awarded 3 marks for publication in International Journal and 1 mark for National Journal and thus 4 marks towards research publication. On the contrary, the appellant had 54 number of publications which comprised of 52 publications in International Journal and 2 in National Journal. The appellant was awarded 6 marks for International Journal and 1 mark for publication in National Journal. The modality of awarding marks for Journals would show that the equal standards had been uniformly applied for all the candidates including respondent No.1 and the appellant. On the point of award of 0 marks for CCRs, learned counsel for the appellant has submitted that the finding recorded by the learned Single Judge is erroneous as it was clearly mentioned in the call letter that the in-service candidates should ensure that their CCRs for last 5 years are received by the Registrar of the University before the date of interview. Similarly, in the Call letter for interview also it was specifically mentioned that CCRs of the candidates should reach the University on or before the interview. It was also clearly mentioned that in the event CCRs were not received in due time, the marks would not be awarded against the said head. Accordingly, respondent No.1 was rightly not awarded any marks towards CCRs because the same were not available. He has submitted that reassessment of the merit of respondent No.1 done by the learned Single Judge in the impugned judgment and order is contrary to the Supreme Court's decision in case of ***Madan Lal*** (*supra*) wherein it has been specifically laid down that determination of quantum of marks is the function of the selection committee and not of the writ Court. Reliance has been placed on a Supreme Court's decision in case of ***Dr. Premachandran Keezhoth v. Chancellor, Kanpur University (AIR 2024 SC 135)*** to submit that the suitability of a candidate for appointment to a post is to be judged by the appointing authority and not by the Court unless the appointment is contrary to the statutory provisions. It has accordingly been submitted that the impugned judgment and order of the learned Single Judge is unsustainable and requires interference.

19. Mr. Sameer Kumar Das, learned counsel representing respondent No.1 has argued that the selection committee was under obligation to consider cases of eligible female candidates separately for selection against one UR-W vacancy. He has argued that there were four women eligible candidates available for the post of Associate Professor in Chemistry and, therefore, selection for the said post of ought to have been confined to them. Only in the event, there was no availability of a suitable women candidate, a male candidate could have been selected and appointed. He contends that the selection committee erroneously diluted the provisions of Rule 4 of the Reservation for Women Rules by placing the women candidates along with the male candidates for selection to adjudge the suitability, which is known the aim and object of the Reservation Rule for Women. Defending the impugned judgment passed by the learned Single Judge, he has submitted that the learned Single Judge

rightly held the selection of the appellant to be illegal with a direction for selection and appointment in favour of the respondent No.1 as she was the best amongst all eligible women candidates. He has argued that the plea that the selection committee had fixed 50% as the cut off marks for determining the suitability of a candidate. To test the authenticity and genuineness of the stand so taken, the learned Single Judge had called for the records of the selection committee. The learned Single Judge found that there was no such decision available in the minutes of the selection committee. Accordingly, the learned Single Judge rightly concluded that the letter of the former Vice-Chancellor cannot be treated as the decision of the selection committee. He has argued that upon reading of the said letter of the Vice-Chancellor dated 07.12.2022, no prudent person can arrive at a conclusion that the selection committee had fixed any cut off marks for selection.

20. He has argued that the learned Single Judge on scrutiny of original records of the selection process, noticed the discrepancies in awarding marks to the candidates and recorded its finding, which cannot be decided in a writ appeal with a limited scope of interference. He has relied on the Supreme Court's decision in ***Sureshkumar Lalitkumar Patel and others v. State of Gujarat and others*** reported in ***2023 SCC Online SC 167*** to contend that a candidate has a right to be considered for a post in accordance with law. A law which enables a candidate to get a post cannot be changed to facilitate another group of persons, since the candidate acquires the vested right to be considered in accordance with law. Reference has also been made in this regard to the Supreme Court's decision in the case of ***N.T. Devin Katti and others Vs. Karnataka Public Service Commission and others*** reported in ***(1990) 3 SCC 157*** in which the Supreme Court has held that fixation of cut off marks should have a rationale. He has, accordingly, argued that this writ appeal has no merit and deserves to be dismissed.

21. After having gone through the impugned judgment of the learned Single Judge, the materials available on record and considered the rival submissions on behalf of the parties as noted above, in our opinion, the following questions of seminal importance have emerged to be answered for adjudication in the present intra-court appeal:

> (i) Is it permissible for this Court exercising power of judicial review under Article 226 of the Constitution of India to hold a candidate suitable for a post who has been found to be not suitable by a duly constituted Selection Committee?
>
> (ii) Whether this Court exercising the power of judicial review can sit as an appellate authority over the decision of a duly constituted Selection Committee?
>
> (iii) Whether in exercise of power of judicial review, this Court after holding a candidate suitable for a post can issue a mandamus, in the facts and circumstances noted above, directing the University to appoint respondent no.1 as an Associate Professor?

22. The aforementioned questions are to be addressed in the wake of Rule 4 of the Reservation of Women Rules as quoted herein above which provides for reservation for women and stipulates that if in any year, vacancies reserved for a

particular category of women candidates remain unfilled due to "non availability of suitable women candidates" belonging to the respective category, the unfilled vacancies shall be filled by suitable male candidates of the same category. A duly constituted Selection Committee has found respondent no.1 unsuitable for the post of Associate Professor and applying sub-Rule 3 of Rule 4 of the Reservation of Women Rules, 1994 recommended appointment of the appellant for the post of Associate Professor in Chemistry.

23. In this background, it is to be determined as to whether the decision of a duly constituted Selection Committee of experts on the point of suitability or unsuitability of a candidate for a post of Associate Professor in University can be the subject matter of judicial review in the absence of any allegation of mala fide or breach of any mandatory statutory prescription. In the present case, the learned Single Judge by the impugned judgment has not only quashed the rejection of the petitioner's claim to be appointed as an Associate Professor but has held her suitable for selection and appointment against the vacancy meant for UR-Women category and has directed the University to provide her appointment to the said post.

24. The Supreme Court has consistently held that the decision of the academic authorities about the suitability of a candidate cannot normally be examined by the High Court under its writ jurisdiction.

25. In case of ***Dalpat Abasaheb Solunke*** (*supra*), the Supreme Court did not approve interference by the High Court in the matter of selection and appointment to the post of Chief Extension Education Officers based on a recommendation of a selection committee laying down the law in no uncertain terms that whether a candidate is fit for a particular post or not has to be decided by a duly constituted selection committee, which has the expertise on the subject. The Court does not have such expertise. Further, the decision of the selection committee can be interfered with only on limited grounds, such as illegality or patent material, irregularity in the constitution of the committee or its procedure vitiating the selection or proved malafides. It will be useful for the benefit of quick reference to reproduce paragraph 12 of the Supreme Court's decision in case of ***Dalpat Abasaheb Solunke*** (*supra*), which reads thus:

> *"12. It will thus appear that apart from the fact that the High Court has rolled the cases of the two appointees in one, though their appointments are not assailable on the same grounds, the court has also found it necessary to sit in appeal over the decision of the Selection Committee and to embark upon deciding the relative merits of the candidates. It is needless to emphasise that it is not the function of the court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc. It is not disputed that in the present case the University*

had constituted the Committee in due compliance with the relevant statutes. The Committee consisted of experts and it selected the candidates after going through all the relevant material before it. In sitting in appeal over the selection so made and in setting it aside on the ground of the so called comparative merits of the candidates as assessed by the court, the High Court went wrong and exceeded its jurisdiction.

26. In the case of ***Madanlal*** (*supra*), the Supreme Court has noted that assessment of merit of candidates in a process of selection remains in the exclusive domain of the expert committee to decide whether more marks should be assigned to the petitioners or the respondents concerned. The Supreme Court held "it cannot be the subject matter of an attack before us as whether not sitting as a Court of appeal over the assessment made by the committee……". (See paragraph 17)

27. The Supreme Court had noticed in case of ***Madanlal*** (*supra*) that there was not even a whisper in the petition about any personal bias of the members of the interview committee against the petitioners of that case and there was no allegation of any malafides on the part of the members of the interview committee. In the present case also, there is no allegation of any malafides or personal bias against the members of the Selection Committee.

28. In a recent decision in case of ***Tajvir Singh Sodhi*** (*supra*), the Supreme Court after having noticed the decisions in case of ***Dalpat Abasaheb Solunke*** (*supra*), ***Secy. (Health) Deptt. Of Health & F.W. and another v. Dr. Anit Puri and others; (1996) 6 SCC 282, M.V. Thimmaiah and others v. Union Public Service Commission and others; (2008) 2 SCC 119*** and ***Om Prakash Poplai and Rajesh Kumar Maheswari v. Delhi Stock Exchange Association Ltd. and others; (1994) 2 SCC 117***, has conclusively held that it is not within the domain of the Courts, exercising the power of judicial review, to enter into the merits of a selection process, a task which is the prerogative of and is within the expert domain of a selection committee, subject to a caveat that if there are proven allegations of malfeasance or violation of statutory rules, only in such cases of inherent arbitrariness, can the Courts intervene.

29. The Supreme Court emphasised that the Courts while exercising power of judicial review cannot step into the shoes of the selection committee or assume an appellate role to examine whether the marks awarded by the selection committee were excessive or not and no corresponding to their performance in such test. Paragraphs 66 and 67 of the decision in case of ***Tajvir Singh Sodhi*** (*supra*) read as under:

"66. Thus, the inexorable conclusion that can be drawn is that it is not within the domain of the Courts, exercising the power of judicial review, to enter into the merits of a selection process, a task which is the prerogative of and is within the expert domain of a Selection Committee, subject of course to a caveat that if there are proven allegations of malfeasance or violations of statutory rules, only in such cases of inherent arbitrariness, can the Courts intervene.

> *67. Thus, Courts while exercising the power of judicial review cannot step into the shoes of the Selection Committee or assume an appellate role to examine whether the marks awarded by the Selection Committee in the viva-voce are excessive and not corresponding to their performance in such test. The assessment and evaluation of the performance of candidates appearing before the Selection Committee/Interview Board should be best left to the members of the committee. In light of the position that a Court cannot sit in appeal against the decision taken pursuant to a reasonably sound selection process, the following grounds raised by the writ petitioners, which are based on an attack of subjective criteria employed by the selection board/interview panel in assessing the suitability of candidates, namely, (i) that the candidates who had done their post-graduation had been awarded 10 marks and in the viva-voce, such PG candidates had been granted either 18 marks or 20 marks out of 20. (ii) that although the writ petitioners had performed exceptionally well in the interview, the authorities had acted in an arbitrary manner while carrying out the selection process, would not hold any water."*

30. Similar view has been taken by the Supreme Court in the case of ***Dr. Premachandran Keezhoth*** (*supra*), while concluding that the suitability of a candidate for appointment to a post is to be judged by the appointing authority and not by the Court unless the appointment is contrary to the statutory rules/provisions.

31. In view of the aforesaid discussions with reference to the Supreme Court's decision, the questions framed in paragraph 21 of the present judgment are answered in negative. We, accordingly, conclude that:-

> (i) It is impermissible for the Court's exercising power of judicial review under Article 226 of the Constitution of India to hold a candidate suitable or otherwise, contrary to the opinion of a duly constituted selection committee.
>
> (ii) The Court's exercising power of judicial review cannot sit as an appellate authority over the decision of a duly constituted selection committee.
>
> (iii) A fortiori the Court exercising such power of judicial review cannot issue a mandamus, in the present facts and circumstances, directing the University to appointment respondent No.1 as an Associate Professor in Chemistry.

32. The learned Single Judge has interfered with the process of selection also on the ground that 50% of the cut-off marks to determine the suitability of a candidate was not fixed before initiation of process of selection and relying on the Supreme Court's decision in case of ***K. Manjusree*** (*supra*), the learned Single Judge concluded that the claim of respondent No.1 could not have been rejected on that ground. It is an admitted fact that there was no mention in the proceedings of the selection committee prescribing 50% as the cut-off marks for determination of suitability of a candidate. A plea was taken by the University in the counter affidavit that it was open for the selection committee to decide the modalities and fix up the cut-off marks keeping in view the interest of the academic excellence to teach at the level of Post-Graduation. The basis for the University to take the plea in the counter affidavit that 50% of the cut-off marks fixed, was a communication made by the Former Vince-Chancellor of the University, who was the Chairman of the selection committee who is said to have communicated based on her memory that the selection

committee had unanimously decided that the candidate who secures 50% or more marks in toto shall be considered as suitable for the post. The part of the relevant portion of the communication has been quoted hereinabove, which we reproduced again for reiteration:-

> "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."

The said communication of the former Vice-Chancellor of the University based on her memory about the proceedings of the selection committee is the only material based on which the University appears to have taken a plea that 50% was the cut-off marks fixed by the selection committee for determination of the suitability of a candidate and since respondent No.1 had not secured that much marks, she was not recommended against the post reserved for women. Evidently, there is no other basis to reach a conclusion that 50% was the cut-off marks fixed by the selection committee. The records of the selection committee which were perused by the learned Single Judge did not disclose fixation of the same cut-off marks."

33. In such view of the matter, the finding recorded by the learned Single Judge that 50% cut-off marks was fixed by the selection committee, in our opinion, is erroneous and not sustainable.

34. We reiterate that the stand of the University in the counter affidavit that 50% cut-off marks was fixed, was based on communication made by one of the members of the selection committee i.e. the former Vice-Chancellor, who was the Chairman of the selection committee.

35. In such view of the matter, the Supreme Court's decisions on the point that the rules of the game cannot be changed when the game has been played, as no application in the facts and circumstances of the case. We are rather of the view that as the original records of the selection committee do not exhibit fixation of 50% cut-off marks for determination of suitability, no such cut of marks was fixed by the selection committee. The selection committee consisting of experts evaluated suitability of the candidates including that of respondent No.1. In the opinion of the selection committee, the respondent no.1 was not found suitable for the post of Associate Professor to teach at the Post-Graduation level. This Court exercising power of judicial review cannot go into the assessment done by the selection committee of experts on the question of suitability of respondent No.1. There is no whisper of any allegation of bias or mala fides on the part of the members of the selection committee.

36. In case of ***Mohd. Mustafa Vs. Union of India and Others*** reported in ***(2022) 1 SCC 294*** also the Supreme Court has reiterated that the Court's in exercise of power under judicial review do not interfere with selections made by expert bodies by reassessing comparative merits of the candidates and interference with selections is restricted to decisions vitiated by bias, mala fides and contrary to

statutory provisions. (See paragraph-18). No infraction of in statutory provision in the process of selection was established in the writ proceeding.

37. Situated thus, we are of the view that the impugned judgment and order dated 05.12.2023 passed by the learned Single Judge in W.P.(C) No.21396 of 2023 requires interference as the same cannot be sustained. Accordingly, the said impugned judgment and order is set aside and the writ petition stands dismissed.

38. With the aforementioned observations, the writ appeal stands allowed. There shall be no order as to costs.

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2024 (II) ILR-CUT-1125

CHAKRADHARI SHARAN SINGH, C.J & MISS. S.RATHO, J.

W.A. NO. 1935 OF 2024

SMT. SMITARANI MOHANTY ……Appellant

-V-

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

ODISHA MUNICIPAL ACT, 1950 – Section 54(1) Second Proviso – No confidence motion was proposed to remove the chairperson without any notice to him – The same was challenged before the Hon'ble Court – The learned single Judge disposed of the writ application with a direction to fix a fresh meeting of the council on the motion in accordance with law with service of notice on the Chairperson – Intra Court appeal preferred on the ground of violation of Proviso (II) to Sec. 54(1) of the Act inasmuch as the 1st meeting had been fixed to 23.04.2024 and the 2nd meeting also fixed to a date which is within one calendar year of the 1st meeting – Held, Proviso (II) to sub-sec(1) of the Act of 1960 contains an embargo that a resolution regarding want of confidence in the Chairperson or the Vice-Chairperson shall not be moved more than once during a calendar year – The ground for intra court appeal found to be bereft of merit – Accordingly, dismissed.

(Paras 8,10,11)

For Appellants : Mr. Samir Kumar Mishra Sr. Adv. & Ms. P.Mohanty

For Respondent : Mr. Saswat Das, A.G.A. (Respondent Nos.1 to 4)
Mr. Milan Kanungo, Sr. Adv. & Mr. S.R.Mohanty, (Resp.No.5)

JUDGMENT Date of Judgment : 18.07.2024

SAVITRI RATHO, J.

This intra court appeal has been filed challenging a judgment dated 28.06.2024 passed by a learned Single Judge of this Court in W.P.(C) No.9712 of 2024 to the extent it directs the respondents-authorities to fix a fresh meeting of the

Phulbani Municipal Council (in short "*Council*") on the motion of no confidence in accordance with law.

2. The writ petition had been filed by the appellant, who is the Chairperson of Phulbani Municipality, challenging notice No. 674 dated 15.04.2024 issued by the Collector and District Magistrate, Kandhamal, Phulbani to the Councilors convening a meeting of the Council on 23.04.2024 at 10.00 AM, issued in terms of Sec. 54(2) of the Odisha Municipal Act, 1950 (in short the "*Act of 1950*"), on the no confidence motion proposed against her by 11 out of 13 Councillors of the said Council, to be presided over by the Addl. Collector (Revenue), Kandhamal primarily on the following grounds:-

> *(i) The meeting proposing the vote of no confidence was held in complete violation of the provisions of the Act as notice of the emotion was not brought to the knowledge of the Chairman.*
>
> *(ii) The resolution had not been passed in accordance with the procedure provided.*
>
> *(iii) The allegation leveled against the petitioner in the resolution was baseless.*
>
> *(iv) No notice of the proposed resolution and meeting had not been sent to the writ petitioner, which amounted to violation of principles of natural justice.*

3. The Councillors who had proposed the motion for no confidence had intervened in the writ petition through their counsel and opposed the writ petition stating that neither the Municipality Act nor the Rules prescribed for issuance of the notice of motion to the Chairperson and in absence of any such express provision, the question of observing the principles of natural justice by serving notice on the petitioner was not required.

4. The submissions made on behalf of the intervenors was supported by the learned State Counsel.

5. The learned Single Judge after referring to the provisions of Section 54 of the Orissa Municipal Act, has noticed that there is provision to give notice to all the Councillors but the Chairperson or Chairman is not included. Prior to the 2018 amendment to Orissa Municipal Act, the Chairman of the Council happened to be one of the Councilors and if in that context Section 54(2) would be read then notice of no confidence was to be served on the Chairperson in the capacity of a Councilor. After the 2018 amendment to the Act of 1950, the Chairperson was required to be elected directly by the people. But the Legislature, while amending the provisions of the Act and the Rules, consciously left the provisions under Section 54(2) not to include the Chairperson of the Municipality for service of notice. Referring to Section 54(2) of the Act of 1950 and the Rules 3 to 11 of the Odisha Municipal Rules, the learned Single Judge further held that as the motion proposed against the Chairperson, would have the effect of unseating him from his chair, so the rules of natural justice demanded that the notice was required to be served on the Chairperson along with the other Councilors, in terms of the Clause(c) of Sub-Section (2) of Section 54 before moving the motion. The impugned notice of the

Collector and District Magistrate dated 15.04.2024 under Annexure-1 series was ultimately set aside and the authorities were granted the freedom to fix a fresh meeting of the Council on the motion in accordance with law with service of notice to the Chairperson. The relevant portion of the judgment is extracted below :

> *"**10.** ..."Undoubtedly, the no confidence motion is: intended to remove the Chairperson and therefore the knowledge of the Chairperson about the proposal moved against him to remove from the Chair becomes important in this context. The right of the Chairperson is definitely affected by moving such a motion against him behind his back. The principles of natural justice demand that an opportunity of hearing should be granted to the party affected by the action. When the motion is proposed against the Chairperson to be decided in the proposed meeting the principle of natural justice demands intimation to the Chairperson of such motion initiated against him. For this, absence of statutory provision would not be a hurdle since the action .proposed to be taken is affecting his light of unseating him from the Chair. Therefore, in the demand of natural justice, this court is of the opinion that such notice is required to be served on the Chairperson before moving the motion along with other Councillors in terms of clause (c) of sub-Section (2) of Section 54.With such conclusion, this court sets aside the impugned notice of the Collector and District Magistrate dated 15th April, 2024 under Annexure 1 Series.*
>
> ***11.** It is made clear that the authorities concerned are free to fix fresh meeting of the Council on the motion, in accordance with law, with service of notice on the Chairperson."....*

6. Mr. Samir Kumar Mishra, learned Senior Counsel referring to the proviso (ii) to sub-section (1) of Section 54 of the Odisha Municipal Act, 1950 has submitted that the direction of the learned Single Judge to fix a fresh meeting is liable for interference as the earlier notice had been set aside due to lack of notice on the appellant and a meeting could not be convened within one calendar year. He has further submitted that pursuant to such direction of the learned Single Judge, a fresh notice has been issued fixing the meeting for deciding the motion of no confidence, which is in violation of the proviso (ii) to Section 54(1) of the Act inasmuch as the first meeting had been fixed to 23.04.2024 and the second meeting is fixed to a date which is within one calendar year of the first meeting.

7. Section 54 of the Act of 1950 is extracted below:-

> ***"54. Vote of no confidence against Chairperson or Vice-Chairperson***
>
> *(1) Where a meeting of the Municipality specially convened by the District Magistrate in that behalf a resolution is passed, supported by not less than two-third of the total number of Councillors recording want of confidence in the Chairperson or Vice-Chairperson the resolution along with the records of the proceedings at such meetings shall forthwith be forwarded to the State Government who shall publish the same in the Gazette and with effect from the date of passing of the resolution the person holding the office of Chairperson or Vice-Chairperson, as the case may be, shall be deemed to have vacated such office. In the event of both Chairperson and Vice-Chairperson vacating office the District Magistrate or his nominee shall discharge the responsibilities of the Chairperson till a new Chairperson is elected.*
>
> ***Provided that no such resolution recording want of confidence in the Chairperson or the Vice-Chairperson**-*
>
> *(i) shall be passed within two years from the date of his election or nomination, as the case may be; and*

(ii) ***shall be moved more than once during a calendar year****.*

(2) In convening a meeting under Sub-section (1) and in the conduct of business at such meeting the procedure shall be in accordance with the rules, made under this Act, subject however to the following provisions, namely:

(a) no such meeting shall be convened except on a requisition signed by at least one-third of the total number of Councillors along with a copy of the resolution of proposed to be moved at the meeting;

(b) the requisition shall be addressed to the District Magistrate;

(c) the District Magistrate shall, within 10 days of receipt of such requisition, fix the date, hour and place of such meeting and give notice of the same to all the Councillors holding office on the date of such notice along with a copy of the resolution and of the proposed resolution, at least three clear days before the date so fixed;

(d) the District Magistrate or if he is unable to attend, any Gazetted Officer above the rank to which the Executive Officer of the Municipal area belongs who is specially authorized by him in that behalf shall preside over, conduct and regulate the proceedings of the meeting;

(e) the voting at all such meetings shall be made in such manner as may be prescribed;

(f) no such meeting shall stand adjourned to a subsequent date and no item of business other than the resolution for recording want of confidence in the Chairperson or Vice-Chairperson, as the case may be, shall be taken up for consideration at the meeting;

(g) if the number of Councillors present at the meeting is less than two-thirds of the total number of Councillors the resolution stand annulled;

(h) if the resolution is passed at the meeting supported by the requisite number of Councillors as specified in Subsection (1) the Presiding Officer shall immediately forward the same in original along with the records of the proceedings to the State Government who shall forthwith publish the resolution in accordance with the provisions of Sub-section (1); and

(i) where any Gazetted Officer presides at the meeting he shall, without prejudice to the provisions of Clause (h) also send a copy of the resolution along with a copy of the proceedings to the District Magistrate for information and such action as may be necessary."

(Emphasis supplied)

8. Proviso (ii) to Sub-section (1) of Section 54 of the Act of 1960, thus contains an embargo that a resolution recording want of confidence in the Chairperson or the Vice-Chairperson shall not be moved more than once during a calendar year.

9. It would be apposite to mention that while issuing notice in W.P.(C) No.9712 of 2024, where the notice dated 15.04.2024 convening a meeting of the Council on 23.04.2024 had been challenged, the learned Single Judge had passed the following order:

> *"8. Upon hearing Mr.Mishra and Mr.Kanungo, it is directed in the interim that, no such meeting of the Municipality regarding "No Confidence Motion" shall be convened till 15th May, 2024."*

The aforesaid interim order has been extended on subsequent dates, till the writ application was finally disposed of and the notice convening the meeting on 23.04.2024 was set aside on 28.06.2024 by the learned Single Judge.

It is not disputed that no meeting has been held till date on the proposed motion of no confidence.

10. From the above sequence of events and orders passed in W.P.(C) No. 9712 of 2024, is it is apparent the proposed resolution for recording want of confidence in the Chairperson has not been moved as no meeting has been held pursuant to the notice dated 15.04.2024. So the question of moving the resolution more than once during a calendar year does not arise, as in effect the resolution has not been moved till date. That apart, no fresh resolution has been proposed by the Councilors and it is the earlier proposed resolution which is scheduled to be moved in the meeting. So the submission of the learned Senior Counsel that the judgment of the learned Single Judge is liable for interference for allowing the authorities to fix a fresh meeting as it is in violation of the second proviso (ii) to Section 54 (1) of the Act of 1950, is bereft of merit.

11. As we do not find any infirmity in judgment of the learned Single Judge, we find no merit in the writ appeal and accordingly dismiss the same.

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2024 (II) ILR-CUT-1129

ARINDAM SINHA, J & M.S.SAHOO, J.

W.P(C) NO. 5671 OF 2019

MANAGEMENT OF M/s. NAVA BHARAT VENTURES LTD. ……Petitioner

-V-

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

INDUSTRIAL DISPUTES ACT, 1947 – Section 2(S) – Workman – The Opp.Party No.3 was appointed as shift supervisor and he underwent training – At the time of joining in shift duty he was briefed by the reliever orally that the person on duty maintains 108 books manually during work period which later to be stored in computer format – The Opp.Party No. 3 also operates the Turbo Generator under the management – Whether the nature of work indicated to be that of a workman? – Held, No – Achieving operation of a machine on pre-determined parameter and logging the same & later uploading the data in the computer is nothing but work of a Supervisor, duly qualified.

Case Laws Relied on and Referred to :-

1. (2015) 4 SCC 270 : Pepsico India Holding Pvt. Ltd. Vrs. Krishna Kant Pandey.
2. 2002 SCC Online Del 1344 : Bellish India Ltd. Vrs. PO, Labour Court.
3. AIR 1984 SC 153 : D.P. Maheshwari v. Delhi Administration.
4. AIR 1988 SC 329 : National Engineering Industries v. Shri Shri Kishan Bhageria.
5. AIR 2011 SC 2532 : Devinder Singh v. Municipal Council.

For Petitioner : Mr. Shibashish Misra.

For Opp.Parties : Mr. S.N. Nayak, ASC (Opp.Party Nos. 1 & 2)
Mr. S.K. Rath (Opp. Party No. 3)

JUDGMENT Date of Hearing : 21.06, 03&22.07.2024 : Date of Judgment : 22.07.2024

ARINDAM SINHA, J.

1. The writ petition is up hearing on restoration. A co-ordinate Bench by order dated 13th April, 2023 in RVWPET no.411 of 2019 filed by petitioner, set aside earlier order dated 20th September, 2019 passed by another co-ordinate Bench, dismissing it.

2. Opposite party no.3 in the writ petition had his service terminated. There was conciliation and on failure, reference order dated 18th January, 2017 made. Schedule of the reference is reproduced below.

> *"Whether the termination of services of Sri Chinmaya Prasad Mishra, Ex-Supervisor w.e.f. 19.06.2015 by the management of M/s. Nava Bharat Ventures Ltd., At/PO: Kharagprasad, Dist-Dhenkanal is legal or justified ? If not, to what relief Sri Mishra is entitled?*

3. Mr. Misra, learned advocate appears on behalf of petitioner (management). Mr. Nayak, learned advocate, Additional Standing Counsel appears on behalf of opposite party nos.1 and 2. Mr. Rath, learned advocate appears on behalf of opposite party no.3.

4. On 3rd July, 2024 petitioner was heard. Mr. Misra had submitted, under challenge is order dated 26th July, 2018 made by the Labour Court. It is illegal as containing perversity of not being based on the evidence. Opposite party no.3 was engaged as supervisor. Under his client said opposite party was not a workman. Drawing attention to impugned award and in context of the reference vide said order dated 18th January, 2017 Mr. Misra had pointed out, first issue framed by the Labour Court was regarding the contention. Said Court held against his client by considering mainly evidence of Management Witness (MW) no.3. He submitted, said witness was working in same capacity as opposite party no.3. His evidence clearly shows the work was of supervisory nature. Thus the finding was contrary to the evidence relied upon. On query from Court he submitted, the review was allowed recalling order dated 20th September, 2019 dismissing the writ petition. By order dated 13th April, 2023, the co-ordinate Bench in allowing the review had found that award dated 30th March, 2019 of the Industrial Tribunal had not been looked into and so the recall. He referred to said award and submitted, it was made in respect of industrial dispute regarding one of five engineers, whose services were terminated by his client. Opposite party No.3 was another one of the five. He relied on paragraph-7 in said award to submit, facts in that case are similar to the case of opposite party no.3, if not same. There was, by said award, correct appreciation of the facts for clear finding that the terminated employee was in supervisory staff cadre drawing gross salary in excess of ₹10,000/- (rupees ten thousand) and therefore, came within the exclusion clause and thus not a workman within meaning of section 2(s) in Industrial Disputes Act, 1947. He also relied upon evidence on affidavit of MW No. 3, particularly para 3 and paras 14 to 18 of his deposition in cross-examination. On

further query he submitted, nature of work done by opposite party no.3 was not stated by him in his claim petition filed in the reference. As such, impugned award is also based on no evidence. He relied on judgment of the Supreme Court in **Pepsico India Holding Pvt. Ltd. Vrs. Krishna Kant Pandey**, reported in **(2015) 4 SCC 270**, paragraph-11 for interpretation on definition of workman. Mr. Misra then drew attention to page 78 being copy of 'safe work permit' dated 28th January, 2015. He submitted, the contractor reported that the job on the machine was completed in full. The document was signed by the supervisor, opposite party no.3.

5. Today Mr. Misra hands up judgment of a learned single Judge of the Delhi High Court in Bellish India Ltd. Vrs. PO, Labour Court available at 2002 SCC Online Del 1344. He submits, the Labour Court relied on paragraph 4 but the view supports his client's case.

6. Mr. Rath in opposing the writ petition refers us to impugned award. He submits, issue no.1 framed by the Labour Court was different from the issue framed by the Industrial Tribunal, answered by award dated 30th March, 2019. Hence, said award is not relevant for purpose of adjudicating this writ petition. He submits, his client in cross-examination stated in clear terms that he was operating turbo generator under the management. This was noted by the Labour Court in impugned award. Said Court went on say, the determinative factor is the nature of core duty of the concerned employee and not some works incidentally done by him. His client maintaining log book was incidental to his core duty of running the machine. The Labour Court being in possession of such evidence, burden shifted upon the management to demonstrate otherwise. The management miserably failed to discharge the burden. He relies on several decisions of the Supreme Court as well as of the learned single Judge in **Bellish India** (supra).

(i) Decisions of the Supreme Court -

(a) **D.P. Maheshwari v. Delhi Administration**, reported in **AIR 1984 SC 153**, the paragraph commencing at page-4 in Indian Kanoon print.

(b) **National Engineering Industries v. Shri Shri Kishan Bhageria**, reported in **AIR 1988 SC 329**, 2nd last paragraph in page 6 of Indian Kanoon print.

(c) **Devinder Singh v. Municipal Council**, reported in **AIR 2011 SC 2532**, paragraph-15 in Indian Kanoon print.

(ii) View taken by the learned single Judge in the High Court of Delhi in **Bellish India** (supra). Mr. Rath submits, paragraph-4 was relied upon by the Labour Court and he too relies upon the paragraph. The proposition is, mere fact that the workman was doing some supervisory or other work incidentally or a small fraction of that, it will not take the workman out of purview of the definition of workman under section 2(s) of Industrial Disputes Act, 1947.

7. Mr. Rath submits further, issue regarding his client being a workman was answered by the Labour Court in his favour. There should be no interference as it was upon hearing both sides and reasons given. The Labour Court went on to find on entitlement to relief. Clear violation of provisions in sections 25-N and 25-H were found. The writ petition is without merit and it should be dismissed.

8. The co-ordinate Bench, while recalling said earlier order dated 20th September, 2019 of another co-ordinate Bench disposing of the writ petition, to restore it for fresh hearing, gave reasons for the recall by its order dated 13th April, 2023. We reproduce below paragraphs 3 to 6 and 11 from the order.

> *"3. One of the issue raised in the Labour Court by the Management was whether opposite party no.3 was a 'workman' within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 (ID Act). This question was answered in favour of the workman and against the Management in the impugned award dated 26th July, 2018. The finding was rendered after discussion of the evidence led by the parties.*
>
> *4.* ***Meanwhile, another Engineer identically placed as Opposite Party No.3, raised a separate industrial dispute which happened to be referred in I.D. Case No.13 of 2015 to the Industrial Tribunal, Bhubaneswar. The Industrial Tribunal, on 30th March, 2019 rendered an award accepting the plea of the Management that the said Engineer was not a Workman within the meaning of Section 2(s) of the I.D. Act****.*
>
> *5.* ***Thus two diametrically opposite awards had been rendered on the same issue, one by the Labour Court and the other by the Industrial Tribunal****. Consequently, in W.P.(C) No.5671 of 2019 filed by the Management challenging the award dated 26th July 2018 in this Court, an additional affidavit was filed by the Management on 8th September, 2019 enclosing a copy of the award dated 30th March, 2019 of the Industrial Tribunal. The record of W.P.(C) No.5671 of 2019 reflects that such an additional affidavit was indeed filed.*
>
> *6. However, while passing the order dated 20th September, 2019 dismissing the writ petition, the Division Bench did not discuss the said award dated 30th March, 2019 of the Industrial Tribunal. This is the only ground on which review is sought. In other words, it is urged that the Division Bench failed to discuss a document which was on record in the writ petition which had a material bearing on the outcome of the case.*
>
> *7. xxx xxx xxx*
> *8. xxx xxx xxx*
> *9. xxx xxx xxx*
> *10. xxx xxx xxx*
>
> *11. Pursuant to an interlocutory order passed by this Court on 19th January, 2023 in this review petition, the Management has deposited a sum of Rs.20,15,636/- along with a calculation which has been asked to be kept in a fixed deposit with a nationalized Bank.* ***That amount will continue to remain in a fixed deposit during the pendency of the writ petition and appropriate orders in that regard would be passed at the time of disposal of W.P.(C) No.5671 of 2019****."* (Emphasis supplied)

The order was made by the Bench on contest, after hearing submissions made on behalf of opposite party no.3. Said opposite party accepted the order and it has became final.

9. The management contended that issue regarding opposite party No.1 in I.D. Case No.13 of 2015 (in respect of Sri Hrudananda Mohapatra) not being a workman was decided by the Industrial Tribunal on award dated 30th March, 2019. Contention is that said person was one of five supervisors, whose service was terminated by the management. Opposite party no.3 is another one of the five. Opposition to the reliance was on contention that the issues were different. We reproduce below issue no.2 from said award dated 30th March, 2019.

> *"2. Whether Sri Hrudananda Mohapatra, Ex-Asst. Engineer (Mech.), Nava Bharat Ventures Ltd., Dhenkanal is a workman as defined u/s 2(s) of the I.D. Act, 1947 ?"*

We also reproduce below issue no.1 from impugned award dated 26th July, 2018.

> *"1. Whether the 2nd party is coming under the definition of workman as defined U/s. 2(s) of ID Act, 1947?"*

We have no doubt in our mind the issues are same. By said award dated 30th March, 2019 the Industrial Tribunal found that the second party in the reference was not a workman. We reproduce below a passage from said award.

> *"The evidence, as discussed above, clearly indicates that the Second Party was appointed under the First Party in Supervisory Staff Cadre and was drawing a salary exceeding Rs.10,000/-per month.* ***Besides, W.W.1 has stated nothing in his examination in chief nor placed any document wherefrom an inference can be drawn regarding his nature of duties****. In absence of such evidence on record, it is hard to believe that being in the Supervisory Staff Cadre W.W.1 was discharging skilled/technical work involving machinery work under the First Party. Besides, in his evidence affidavit M.W.1 has stated to the effect that the Second Party in addition to taking independent decisions regarding setting of parameters for smooth operation of Boilers at the control room being present at the control room, was also supervising the duties of the technical hands supplied by the Service Providers such as M/s. Precision Engineering, which is supplying skilled man power for operational and preventing maintenance in Boilers, Turbine and Compressors of the Power Plant (O Units) of the Management at Kharag Prasad. Such evidence of M.W.1 has remained uncontroverted during his cross examination. More so, during his cross-examination M.W.1 has emphatically explained that initially the Second Party joined as Senior Supervisor (Mechanical) and also entrusted with the job of different kinds during his probation, accordingly he was working in the Furnace, Bricketing Section and also discharging field work as per the requirement of the Mechanical Department of the Plant. He has further clarified at that time that the Second Party was supervising the work of the respective Contractor, who was entrusted to do certain job in the Furnace with the help of contract labourers."*
>
> (Emphasis supplied)

10. Annexure-2 in the writ petition is statement of claim filed by opposite party no.3 claiming to be a workman. We reproduce below paragraphs-3 and 6 from it.

> *"3. That pursuant to my application and subsequent interviews, I was offered the post of "Trainee Supervisor in Unit-1, Captive Power Plant, M/s. Navabharat Ventures Ltd." of the 1st party management with terms and conditions specified therein.* ***After the training period of two years, I put into probation for another one year*** *and after successful completion of probation my job was confirm on 14th December, 2013. My last nomenclature of the job was SS-I (Supervisor). After confirmation of my job I have successfully worked at M/s. Navabharat Ventures Ltd. till 19th June, 2015.*
>
> *xxx xxx xxx*
>
> *6.* ***That, he was forced to sign some papers under the threat that if he doesn't budge, his career may be ruined****. Under duress he signed some papers drafted by the management and in return management handed over him a cheque of Rs.45,223/- only. He was forced to receive the same which he did under protest. He also appealed to one Mr. N.P. Patro, Vice President on the same day, but his request fell on deaf ears. The*

Workman further submitted that he is not falling under the non-obstante clause of Section 2 (oo) of the Industrial Disputes Act, 1947 and though the nomenclature of his job was Shift Supervisor-I, he did not supervise any sub-ordinates. His job profile that of an engineer. ***He actual operating the stream turbine with the help of one contract labourer-helper****. The disputant contended that he was Workman as defined under section 2(s) of the Industrial Disputes Act, 1947. Since neither the procedure of the Act was followed nor was he paid legitimate dues, his termination is bad in the eye of law."*

(Emphasis supplied)

11. Opposite party no.3 went on to file evidence on affidavit dated 11th January, 2018 in the Labour Court. In the affidavit he reiterated his statements in the claim petition. There is no dispute regarding his designation and that he underwent training. We reproduce below paragraphs-14 and 15 from his evidence on affidavit.

"14. The 1st party management also has retained the service of some of the junior workers who are still continuing in employment under the 1st party management and ***also some freshers have been given appointment in my place/department by the 1st party management****.*

15. Although I was designed as a supervisor but the nature of my duties are neither managerial nor supervisory in as much as I have not entrusted with any managerial power and do not exercise any independent power and authority. ***The nature of my work was operational, clerical and manual jobs for the company****. I am a workman as defined under section 2-S of the I.D. Act and have right to invoke the provisions of the Industrial Disputes Act, 1947."* (Emphasis supplied)

12. Opposite party No.3 was cross-examined. He deposed he had voluntarily applied to petitioner for the job. Prior to being appointed he was working in L&T as Site Engineer. He went on to admit he was issued letter of caution on explanation that it was because of his absence from duty. He asserted that he was operating the turbo generator under the management.

13. We have seen that opposite party no.3 alleged in his claim petition to have been actually operating 'stream' turbine with help of one contract labourer. In cross-examination he asserted to have been operating the turbo generator. It is clear that according to him he was engaged in operation of a machine. However, there is omission in his pleading and evidence on affidavit to assert any incidental other work of managerial or supervisory nature he was discharging under the management. He did say in his evidence on affidavit in paragraph-10 as reproduced below.

"10. During my tenure of service I have performed all my assigned duties very diligently and sincerely without any stigma."

14. In answering issue no.1 the Labour Court relied on deposition in cross-examination of management witnesses. The management was running negative case, of opposite party no.3 not being a workman. On query from Court Mr. Rath submits, the Labour Court correctly relied on cross-examination of MW no.1. We reproduce below passage from impugned award relied upon by Mr. Rath.

"The second party-MW No.1 during his cross-examination in clear term also stated that he was operating the Turbo Generator under the management."

15. We have given our careful consideration to reliance by the Labour Court on cross-examination of MW nos.1 and 3. MW no.3 said, usual practice is, at the time of joining in shift duty he is briefed by the reliever orally and the person on duty maintains log book manually during work period to be later stored in computer format. This does not indicate nature of work to be that of a workman. Achieving operation of a machine on pre-determined parameters and logging the same, to later upload the data in the computer is nothing but work of a supervisor, duly qualified. It cannot done by the machine driver or operator but by the supervisor. It is anything but indication of manual or physical work.

16. Apart from asserting he was working the machine opposite party no.3 did not adduce any other evidence regarding nature of his work nor incidental duties. At this stage Mr. Rath relies upon paragraph-16 from deposition dated 2nd June, 2018 of MW no.3, reproduced below.

> *"16. It is not a fact that the averments made under para-3 of my affidavit is completely false and rather I used to operate manually and through computer. According to the log book of work instruction we used to follow and perform our duty. It is a fact that the log book of work instruction different instructions being imparted to us regarding performance of our job. During our trainee we are already informed about such work instruction and standard operating process."*

This statement in the paragraph must be taken in context of the person in-charge of operation of a machine as following log book of work instruction, for operation of it. Mr. Misra had drawn attention to 'safe work permit' dated 28th January, 2015. It appears from the document, the contractor Uttam Kumar Sahoo had reported to the authority, job completed in full regarding oil generator work. Signature of the authority appearing in the document is that of opposite party no.3. This exercise of authority by opposite party no.3 can on no stretch of imagination be said to be performance by him of an incidental duty.

17. From our consideration of the evidence and materials that were there before the Labour Court we find no connection between them and reasons given by impugned award in answer to issue no.1. The affirmative answer in favour of opposite party no.3, saying he is a workman is not based on the evidence that was there in the Labour Court. There was no adjudication of assertion made by the workman regarding him operating a machine. It is not clear what machine he was actually operating. He did say he had help of a contract labourer in the operation. The Labour Court completely misdirected itself in answering the issue by purporting to rely on management witnesses, when there was no admission by them in favour of said opposite party.

18. In **D.P. Maheshwari** (supra) the Supreme Court found as a fact that the management therein had classified all their employees into three separate classes A, B and C. Class-A described as 'Managerial', Class-B described as 'Supervisory' and Class-C described as 'Other Staff'. Name of appellant before the Supreme Court was shown in Class-C. This significant fact caused interference by the Supreme Court, to

restore the reference, interrupted by challenge on contention that appellant was not a workman. In this case, as in the case of Sri Hrudananda Mohapatra (I.D. Case No.13 of 2015 dealt with on said award dated 13th March, 2019) opposite party no.3 neither pleaded nor adduced evidence regarding particulars in respect of his work nor about his incidental duties. As such, **D.P. Maheshwari** (supra) is of no aid to him.

19. Reliance on behalf of opposite party no.3 upon **National Engineering Industries** (supra) was on the paragraph (Indian kanoon print), reproduced below.

> *"In Burmah Shell Oil Storage & Distribution Co. of India v. Burmah Shell Management Staff Association & Ors., [1971] 2 S.C.R. 758, this Court observed that a workman must be held to be employed to do that work which is the main work he is required to do, even though he may be incidentally doing other types of work.* ***Therefore, in determining which of the employees in the various categories are covered by the definition of 'workman' one has to see what is the main or substantial work which he is employed to do****. In The Punjab Co-operative Bank Ltd. v. R.S. Bhatia (dead) through L.Rs., [1975] 4 S.C.C. 696 it was held that the accountant was supposed to sign the salary bills of the staff even while performing the duties of a clerk. That did not make the respondent employed in a managerial or administrative capacity. The workman was, therefore, in that context rightly held as a clerk."* (Emphasis supplied)

Omission of opposite party no.3 to plead particulars and adduce evidence in respect of main work done by him under the management results in inability for us to find what was the main or substantial work which he was employed to do. His explanation that allegation by the management pertains to incidental functions and duties performed by him is insufficient for us to find on his main or substantial work, as that of a workman.

20. Paragraph-15 in **Devinder Singh** (supra) was relied upon. The paragraph is reproduced below.

> *"Whenever an employer challenges the maintainability of industrial dispute on the ground that the employee is not a workman within the meaning of Section 2(s) of the Act, what the Labour Court/Industrial Tribunal is required to consider is whether the person is employed in an industry for hire or reward for doing manual, unskilled, skilled, operational, technical or clerical work in an industry. Once the test of employment for hire or reward for doing the specified type of work is satisfied, the employee would fall within the definition of 'workman'."*

Above declaration of law is for guidance. We have already said above that the Labour Court misdirected itself in considering and holding opposite party no.3 was a workman. Regarding **Bellish India Ltd**. (supra) we accept contention made on behalf of the management that view taken in paragraph-4 is in its favour. This is because in that case the management had alleged the workman used to sign on behalf of it for settlement and he was not merely performing clerical works. The learned single Judge found there was nothing on record to show that the management at any stage filed application or informed the Labour Court that the duties assigned to respondent were not the duties performed by him and there were other duties which respondent was performing. In this case the management had

maintained that opposite party no.3 was appointed as supervisor, got training, performed work of supervisor and adduced oral and documentary evidence in support thereof.

21. Impugned award is set aside and quashed. Mr. Misra prays for direction for refund of the deposit along with accruals. Here we must record that opposite party no.3 had withdrawn his application made under section 17-B. We reproduce below order dated 9th September, 2019 made by the co-ordinate Bench just prior to disposing of the writ petition on order dated 20th September, 2019, since recalled.

> *"This application has been filed by opposite party no.3 to direct the petitioner to pay the salary as provided under Section 17-B of the I.D. Act till disposal of the writ petition.*
>
> *Learned counsel appearing for opposite party no.3 prays for withdrawal of the I.A. No.7871 of 2019.*
>
> *Prayer is allowed.*
>
> *Accordingly the I.A. No.7871 of 2019 is dismissed as withdrawn."*

Withdrawal of the application resulted in dismissal thereof without liberty to file afresh. On 15th April, 2024 on behalf of the management offer of settlement was made. Reproduced below are paragraphs 1 and 3 from our order dated 15th April, 2024.

> *"1. Mr. Mishra, learned advocate appears on behalf of petitioner (management) and with reference to our order dated 27th March, 2024 submits, his client is agreeable to the deposit made by it and accruals be given to opposite party no.3, for the writ petition to be disposed of on settlement between the parties.*
>
> *xxx xxx xxx*
>
> *3. Mr. Rath, learned advocate appears on behalf of opposite party no.3 and submits, the review was allowed in directing deposit of back wages. If there is to be settlement something over and above must be given by the management.* ***Mr. Mishra submits, there was never any question of payment as relief under section 17-B in Industrial Disputes Act, 1947. I.A. no.7871 of 2019 seeking the relief was withdrawn by opposite party no.3 as per order dated 9th September, 2019****."* (Emphasis supplied)

Subsequent thereto opposite party no.3 filed another application under section 17-B. He then pressed for adjudication of it prior to adjudication of the writ petition. By our order dated 21st June, 2024 we said that we felt it fit to forthwith proceed with hearing of the writ petition instead of calling for objection on the second application for relief because, inter alia, that would prolong the pendency. In addition to reasons given in that order we note that as on the date for direction of deposit made by the co-ordinate Bench, there was no application pending under section 17-B. As such at that time and thereafter no question arose of disbursement of the amount deposited. Furthermore there was direction for the deposit to be dealt with at disposal of the writ petition. As aforesaid the order was accepted by opposite party no.3. Petitioner has succeeded and it is entitled to refund of the deposit, including the accruals. The Registrar will, on production of certified copy of this judgment, encash the deposit and accruals and disburse same to petitioner.

22. The writ petition and all pending applications are disposed of.

—o—

2024 (II) ILR-CUT-1138

ARINDAM SINHA, J & M.S. SAHOO, J.

MATA NO.161 OF 2024

DIPTIMOYA KANUNGO .....Appellant

-V-

PUJA ARCHANA PATTNAIK .....Respondent

HINDU MARRIAGE ACT, 1955 – Section 25 – Permanent alimony & maintenance – Relevant factors for determination – The learned Family Court directed permanent alimony of ₹6,00,000/-, the appellant/husband earning ₹15,000/- per month – Whether a person earning per month ₹15, 000/- can pay ₹6,00,000/- at a time? – Held, No – The pleadings and evidence of respondent does not provide basis for the direction of permanent alimony at ₹6,00,000/- – Court modified the impugned judgment to the extent of directing permanent alimony at ₹ 2,00,000/-.

Case Laws Relied on and Referred to :-

1. AIR 2005 SC 422 : Ramesh Chandra Rampratapji Daga vrs. Rameshwari Ramesh Chandra Daga.

For Appellant : Miss J. Kaur.
For Respondent : Mr. Chittaranjan Das.

JUDGMENT Date of Hearing & Judgment : 29.07.2024

ARINDAM SINHA, J.

1. Miss Kaur, learned advocate appears on behalf of appellant and submits, impugned judgment dated 3rd May, 2023 of the Family Court annulling the marriage be interfered with in appeal to extent of direction for payment of permanent alimony at ₹6,00,000/-. She submits, during trial her client suffered a brain stroke and became invalid thereafter. This prevented him from cross-examining respondent as also to adduce evidence. There was a Hindu marriage upon observance of customary rituals. Within a short time respondent left the matrimonial home. She submits, there was consummation of the marriage but her instructions are that the separation by annulment be made final.

2. Miss Kaur submits further, by way of application documents have been disclosed to show present condition of appellant to be in a vegetative state. The appeal has been filed through his mother.

3. Mr. Das, learned advocate appears on behalf of respondent. He submits, no interference is warranted.

4. Perused impugned judgment. It appears therefrom, the marriage was interpreted to be as voidable and declared to be nullity on basis of clause(a) under sub-section(1) in section 12, Hindu Marriage Act, 1955. We notice from impugned judgment, the marriage was solemnized on 28th June, 2017 and respondent's contention was accepted as because appellant did not cross-examine her nor adduced any evidence. Accordingly, the written statement was not acted upon by the Family Court.

5. Impugned judgment also dealt with the question of permanent alimony. Judgment of the Supreme Court in **Ramesh Chandra Rampratapji Daga vrs. Rameshwari Ramesh Chandra Daga**, reported in **AIR 2005 SC 422** was followed by the Family Court. It took cognizance as a fact that appellant, a graduate was working as Cameraman in Kalinga TV, Bhubaneswar, for salary of ₹15,000/- per month.

6. At trial respondent and her mother deposed as witnesses. Four documents was tendered. They are photocopies of respondent's identity card, marriage invitation cards, joint marriage photograph of the parties and Aadhar card of appellant's mother-in-law. There is not a single document issued by a doctor in respect of ailment, let alone on lunacy of appellant. On the contrary, appellant's service and earning was taken cognizance of as a fact.

7. We reproduce below paragraphs-3 to 8 from the petition of respondent.

> *"3.* ***That the defendant is servicing at Kalinga T.V. Center under KIIT University and drawing around 2,25000/- P.M****.*
>
> *4. That after marriage the plaintiff went to the house of the defendant but at the arrival of the plaintiff; the relation and parents of the defendant pass the comment regarding the Dowry to the plaintiff.*
>
> *5. That the reception of the defendant was held on 30.06.2017 at his residence but* ***on that reception ceremony some aged persons of the outsiders indicates regarding the infirmity of the defendants otherwise to say marriage has not been consummated*** *owing to the impotence of the Respondent.*
>
> *6.* ***That for the above reasons the consummation was not held*** *as the respondent was slept along with his mother without telling a single language to this plaintiff.*
>
> *7.* ***That on the next day morning the inhabitants indirectly discloses that the respondent is a Lunatic****, and advice to the plaintiff to take her own care.*
>
> *8. That on 5th July 2017 the day was Astamangala and as customs both the bride and bride groom will visit the House of Bride but on 4th July the Mother-in-Law and the Sister-in-Law play hide and seek with the plaintiff on the entire day and it is to mention here the Respondent neither visited the room of the plaintiff nor tell a single word to the plaintiff, and lastly at 10 P.M. on 4th July 2017 they allow the plaintiff to visit her paternal house with the condition that two sister-in laws of the plaintiff will accompany with her along with the defendant.*" (Emphasis supplied)

8. Respondent's pleading regarding the marriage not having been consummated is vague, to say the least. She alleged, some aged persons of the outsiders indicated regarding infirmity of appellant, to say that the marriage was not consummated. The reception was held on 30th June, 2017 and on next day morning the inhabitants indirectly disclosed that respondent is a lunatic and advised her to take her own care. Yet, thereafter she along with her husband and sister-in-law went to visit her paternal home on 'Astamangala' and returned to the matrimonial home. It was some time thereafter on 5th July, 2017 that she left. The civil proceeding appears to have been filed on 16th October, 2017.

9. We are not accepting the medical documents produced by appellant, regarding appellant's present vegetative state. However, we reproduce below description of appellant given as petitioner in the writ petition for judicial review, registered and numbered as RPFAM No.94 of 2024, later converted to matrimonial appeal (MATA No.161 of 2024).

> *"Sri Diptimoya Kanungo aged about 38 years, S/o- Late Bimal Kanungo, represented by Smt. Ranjita Kanungo, mother of Sri Diptimoya Kanungo, aged about 64 years, W/o- Late Bimal Kanungo At: House No.1639/1640, Mancheswar Vihar, PO: Mancheswar, P.S: Mancheswar, Bhubaneswar, District:Khordha, Odisha. .....Petitioner"*

The petition, to be read as memorandum of appeal, was filed by mother of appellant. We also reproduce below paragraphs-1 to 3 from our order dated 5th July 2024, when the parties were represented.

> *"1. Ms. Kaur, learned advocate appears on behalf of applicant, who was husband in the marriage annulled by judgment dated 3rd May, 2023 of the Family Court. She submits, the appeal was presented on reported delay of 261 days. Respondent has filed objection but it is on merits.*
>
> *2. Mr. Das, learned advocate appears on behalf of respondent and submits,* ***document being 'general assessment' dated 2nd November, 2023, relied upon by applicant, is doubtful as are all other medical documents disclosed. On query made he submits, his client did not approach the institute, who issued the document, for verification.***
>
> *3. Perused the application. It says, applicant suffered brain stroke and medical documents have been disclosed in the appeal papers, served to respondent. In view of aforesaid, we accept the cause shown. The delay is condoned and the appeal admitted. The application is disposed of"* (Emphasis supplied)

We do not have any demonstration that appellant is presently carrying on doing the job. Though we do not take subsequent documents disclosed by application to be additional evidence in the appeal but we find that direction for payment of permanent alimony at ₹6,00,000/- was not based on cogent evidence. This is because the Family Court accepted respondent's contention that appellant is a lunatic. The finding of lunacy in context of respondent's pleading militates against appellant successfully discharging responsibility of holding down a job to earn ₹15,000/- per month as found by the Family Court. In impugned judgment said Court recorded allegation of respondent (in her petition) that appellant was earning ₹2,25,000/- per month but went on to find at ₹15,000/- per month. Considering appellant does not challenge the annulment, in confining our adjudication to the direction for permanent alimony, we do not find evidence on record supports the direction or lends basis thereto. It is a separate question to be answered whether a person earning ₹15,000/- per month can at a time pay ₹6,00,000/-.

10. In **Ramesh Chandra Rampratapji Daga** (supra) facts were that two cross appeals were before the Supreme Court. Subject matter of the cross appeals were marriage of the parties, for both their second marriage. The man had married the woman on his first wife having died. He had children from his first marriage. The woman was earlier married and according to custom had been given a 'Chhor

Chithhi' to signify dissolution of the marriage. The document was shown to the man at the time of his second marriage. The marriage was solemnised and there was a daughter from it. Parties to their second marriage fell out. The Family Court granted the woman judicial separation and maintenance, for herself and the child. Said Court dismissed counter petition of the man seeking declaration that the marriage was null and void as the document 'Chhor Chithhi' did not amount to dissolution of marriage under sections 13 or 13-B in Hindu Marriage Act, 1955. The High Court reversed the judgment to declare the marriage null and void but did not interfere with the direction for maintenance. Hence, the cross appeals before the Supreme Court.

11. In dealing with the case, the Supreme Court dismissed the appeals. The Court declared that section 25 enabled the Court exercising jurisdiction under the Act, at the time of passing any decree or at any time subsequent thereto, to grant alimony or maintenance. The provision cannot be restricted when the Legislature had used such wide expression as 'either at the time of passing of any decree'. Hence, annulment of marriage would be a decree and covered by section 25.

12. In **Ramesh Chandra Rampratapji Daga** (supra) above was the declaration of law. The Supreme Court also did not interfere with maintenance directed in favour of the woman in the facts and circumstances where the marriage was admitted, there was a girl child and the woman had spent substantial time in the marriage declared null and void. In this case, as aforesaid, we have already found that pleadings and evidence of respondent does not provide basis for the direction of permanent alimony at ₹6,00,000/-. Nevertheless, in this case there is no dispute that the marriage was solemnised. Respondent did stay for a while in the matrimonial home. She left and filed for divorce. Appellant did not fully participate at trial, citing tragic circumstances leading to his mother filing the appeal on his behalf. We, by our order dated 5th July, 2024 had required appellant to deposit ₹2,00,000/- for purpose of passing order of stay of impugned judgment. The money was deposited and Registrar (Judicial) invested same in a short term interest bearing deposit, on direction to keep it renewed to credit of the appeal.

13. We modify impugned judgment to extent of directing permanent alimony at ₹2,00,000/-. On the modified decree being drawn up and completed, respondent may present the certified copy to Registrar (Judicial), who will encash the deposit and accruals. The aggregate be disbursed to respondent in execution, discharge and satisfaction of impugned judgment, as modified in appeal.

14. The appeal is allowed in part and accordingly disposed of. The decree be drawn up expeditiously.

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2024 (II) ILR-CUT-1141

D.DASH, J & V. NARASINGH, J.

W.P.(C) NO. 35990 OF 2023

MALAYA KUMAR GOSWAMI …..Petitioner

-V-

URBAN CO-OPERATIVE BANK LTD, CUTTACK & ANR. ……Opp.Parties

CONSTITUTION OF INDIA, 1950 – Article 226 – The petitioner seeks direction for enhancement of interest for the auction amount deposited with the Bank to 15% per annum instead of 5% – Whether the bank is liable to pay such high percentage of interest? – Held, Yes – Reason indicated. (Paras 9-11)

Case Laws Relied on and Referred to :-

1. (2016) 13 SCC 293 : Pragati Builders & Promoters &Ors. Vs. Ram Murty Pyara Lal & Ors.
2. 2024 SCC OnLine SC 559 : Govind Kumar Sharma & Anr. Vs. Bank of Baroda &Ors.

For Petitioner : Mr. R.K.Nayak.
For Opp.Parties : Mr. J.K.Mohanty.

ORDER Date of Order : 18.07.2024

BY THE BENCH

1. This matter is taken up through hybrid arrangement (virtual/physical) mode.

2. The Petitioner by filing this writ petition has invoked the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India, seeking a direction to the Opposite Party-Bank to pay interest at the rate of 15 % per annum over the amount which the Petitioner had deposited, as the successful auction purchaser which remained with the Bank for the period, along with the cost and expenses incurred for registration of the Sale Certificate and Mutation.

3. Learned counsel for the Petitioner submits that the Opposite Party-Bank has refunded the amount with interest at the rate of 5% per annum saying that it was the rate of interest that was prevailing for the fixed deposit for the period that the amount remained in their hands. He further submits that this Petitioner although has met necessary expenses for the registration of the Sale Certificate and thereafter, in getting the land mutated which were later on cancelled, in view of the settlement arrived at between the Borrower and the Bank, this Petitioner has not been paid those expenses when admittedly he has been deprived from enjoying the benefit of such documentation and those have now not even worth the paper written on. He further contended that Opposite Party-Bank in such peculiar facts and circumstances of the case ought not to have computed interest at the rate of 5% since it is not a case where the Petitioner has sought for the refund but he has been refunded with the amount in view of the settlement arrived at between the Borrower and the Opposite Party-Bank, and the Opposite Party-Bank ought to have taken all such care as regards the payment to be made to the Petitioner while settling the matter with the Borrower.

In support of his submission, he relies upon the decisions of the Apex Court in the case of **Pragati Builders & Promoters and others Vs. Ram Murty Pyara Lal and others** reported in **(2016) 13 SCC 293** and **Govind Kumar Sharma and another Vs. Bank of Baroda and others**, reported in **2024 SCC OnLine SC 559**.

4. Learned counsel for the Opposite Party-Bank submits that it was not at the instance of the Bank that the settlement has been arrived at between the Borrower and the Bank but as per the direction of this Court in seisin of W.P.(C) No.13288 of 2022 filed by the Borrower.

He further submitted that the Opposite Party-Bank had very well raised the issue as regards the creation of the third party interest over the property in question as reflected in order dated 26.04.2023 and despite that when the direction has been given to the Opposite Party-Bank to handover the property as well as the records to the Borrower who was the Petitioner therein, the Opposite Party-Bank has carried out the same. In this connection he has invited out attention to the averments taken in the counter affidavit. He also submits that the Opposite Party-Bank having enjoyed the amount deposited by the Petitioner for the particular period what benefit would have been given to a person keeping the said amount in fixed deposit with the Bank for such period, has been extended to the Petitioner. He for the purpose has relied on the circular dated 08.12.2022 which has been annexed to the counter. He, therefore, submits that the Opposite Party-Bank is not liable to pay the expenses met by the Petitioner for registration of the Sale Certificate and other action taken by him in pursuance of the same.

5. Keeping in view the submissions made we have carefully perused the documents annexed.

6. Brief facts germane for just adjudication is that one Satyajit Brahma being the borrower had approached this Court by filing W.P(C) No.13288 of 2022 in challenging the action of the Opposite Party-Bank in putting the property to auction sale without following the provisions contained in the SARFAESI Act and Security Interest Rules.

By order dated 24.06.2022, this Court had directed for maintenance of the status quo in respect of the said property while further observing that the Petitioner therein may tender to the Bank, draft of Rs.16,01,000/- the sale price offered by the successful bidder towards the total outstanding liability of around Rs.12,80,000/-.

The Opposite Party-Bank then having received the amount had placed before this Court that in the meantime the property in question having been sold in auction, third party interest over the same has been created. It appears that the Opposite Party-Bank however by then had not delivered the possession of the property to the auction purchaser (the Petitioner before us). This Court while disposing of the writ petition on 26.04.2023 has made the observations and directions as under;

> "6. Since the petitioner has already deposited the entire amount, the opposite party-bank is directed to hand over the property as well as the records to the petitioner, so that he will be free from all encumbrances. So far as cancellation of the sale certificate is concerned, the bank has to sort out the same by requesting the sub-registrar to cancel the certificate issued in favour of the auction purchaser, in accordance with law. The entire exercise shall be completed within fifteen days hence."

7. On going through the writ petition filed by the Borrower numbered as W.P.(C) No.13288 of 2022; it is evident that present Petitioner as the auction purchaser was not made a party. However, the fact remains that after passing of the said order and consequential actions having been carried out, all those being within full knowledge of the Petitioner, he has not taken any step in the matter either to get the order recalled in asserting his claim qua Opposite Party-Bank and for settling all his claims. The Petitioner even thereafter has not initiated any other proceeding even though that order had been brought to his notice by the Bank.

The Petitioner only after receiving his deposited amount from the Bank along with interest at the rate of 5% per annum, complains as regards non-payment of higher rate of interest and the expenses met for the purpose of registration of the Sale Certificate and Mutation etc from the Bank.

8. In the facts and circumstances as also the position as it stands; we are of the view that the Petitioner having not challenged the order dated 26.04.2023 passed by this Court in W.P.(C) No.13288 of 2022, its too late in the day for him to raise any further grievance with regard to the payment of the expenses met by him for the purpose of effectuating the auction which having been knocked down in his favour have been cancelled by virtue of the order of this Court from the Bank.

However, we find that the Opposite Party-Bank in the present case has strictly gone as per the circular in computing the interest payable to the Petitioner that would have been payable to a depositor, had he kept the money in the fixed deposit for the said period.

9. In the given case, we however find that the Petitioner had participated in the auction pursuant to the notice published and the Opposite Party-Bank does not have any complaint against the Petitioner in not fulfilling his part of the obligations in finally obtaining the Sale Certificate and getting it registered. Therefore in our view, the case of the Petitioner ought not to have been treated by the Bank at par with an ordinary depositor, keeping the money in fixed deposit for that period in getting the benefit thereof.

The Opposite Party-Bank ought to have taken the above aspect into consideration while computing the interest on the amount deposited by the Petitioner for onward payment.

10. On careful reading of the decisions (supra), we find that the fact and circumstance of the present case as above stated are quite distinguishable from those of the cited cases.

11. In that view of the matter, we dispose of this writ petition directing the Opposite Party-Bank, as an equitable measure, to compute the interest over the deposited amount of the Petitioner at the rate of 6.25% per annum which is the highest rate of interest as per the circular for fixed deposit placed by the Opposite Party-Bank. The balance interest at such enhanced rate be paid within four weeks of receipt/production of this order.

While parting, we, however, feel it proper to place that since here the Bank has refused to act under the Sale Certificate by virtue of the order of the Court and the Petitioner has not derived any benefit whatsoever thereunder on account of the intervention of the Court and the purpose of obtaining the Sale Certificate stood nullified from its inception, the Petitioner would be at liberty to seek refund of the Stamp Duty if paid for the Sale Certificate for the registration from the State banking upon the provision contained in Section 49(3)(d) of the Indian Stamp Act, 1899 for its consideration in accordance with law.

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2024 (II) ILR-CUT-1145

D. DASH. J & V. NARASINGH. J.

JCRLA. NO. 127 OF 2023

SIMANCHAL ADHIKARI ……Appellant

-V-

STATE OF ORISSA ……Respondent

(A) INDIAN EVIDENCE ACT, 1872 – Section 27 – How much of information received from accused may be proved – Prosecution relies upon the circumstances as to the recovery of knife pursuant to the statement of the accused while in police custody from the place which was known to him by leading the police and other witnesses to the place – P.W-10, independent witness in support of the same – Stated to have not known as to from which place the accused brought out the knife – Also says, not seen the knife and simply been told by the police that the knife was recovered – His evidence is not at all up-to the mark – The said evidence does not satisfy the test required for admissibility U/s. 27 of the Evidence Act. (Para 10)

(B) CRIMINAL TRIAL – The appellant convicted for commission of an offence U/s. 302 of IPC – The prosecution has not piloted any direct evidence to connect the accused with the commission of the offence – The case is based on circumstantial evidence – The circumstances as have emerged in evidence being linked up, do not complete the chain leading to an irresistible conclusion regarding the guilt of the accused – Effect of – Held, the conviction and order of sentence set aside.

(Para 11)

For Appellant : Ms. P.Naidu

For Respondent : Mr. S.K. Nayak, A.G.A

JUDGMENT Date of Hearing : 06.05.2024 : Date of Judgment : 01.07.2024

D.DASH. J.

The Appellant, by filing this Appeal, from inside the jail, has called in question the judgment of conviction and order of sentence dated 07.08.2023 passed

by the learned Additional Sessions Judge, Berhampur in S.T. Case No.107 of 2016 arising out of Jarada P.S. Case No.62 of 2016 on the file of the learned Judicial Magistrate First Class (J.M.F.C.), Patrapur.

The Appellant (accused) thereunder has been convicted for commission of offence under section 302 of the Indian Penal Code, 1860 (for short, 'the IPC'). Accordingly he has been sentenced to undergo imprisonment for life and pay a fine of Rs.10, 000/- (Rupees Ten Thousand) in default to undergo rigorous imprisonment for a period of six months.

2. **Prosecution Case**:-

On 12.05.2016, it was around 9 a.m. Brundaban Sethy (P.W.3) who happens to be the brother of Sumitra Sethy lodged a written report with the Inspector-in-Charge, Jarada Police Station when the I.I.C. (P.W.25) had come to the spot after receiving a telephonic information from the Assistant Sub-Inspector, Karaiguda Police Out Post (ASI) that a woman having been murdered was lying inside Badheitota near village Turubudi. The said written report of P.W.3 being treated as F.I.R., the IIC (P.W.25) registering the case, took up investigation.He t (P.W.25) held inquest over the dead body of the deceased in presence of witnesses and prepared the report (Ext.2.) The Informant (P.W.3) was examined and his statement was examined under section 161 of the Cr.P.C. The dead body was sent for Post Mortem Examination by issuing necessary requisition. Seizure of incriminating articles were made at the spot and after the Post Mortem Examination, the wearing apparels etc. of the deceased were seized by P.W.25 under seizure list. The Investigating Officer (I.O.-P.W.25) having receicived some confidential information that the accused was having dispute with the deceased, suspecting his involvement to call him to the Police Station for interrogation. He then proceeded to Khariaguda Polcie out Post with the suspect on 18.05.2016. It is stated that one knife which this accused had kept concealed inside the kitchen room of his dwelling house at Bajragumma was recovered and seized at the instance of the accused pursuant to his statement given to the I.O. (P.W.25) while in his custody. The seizure of the said knife was made under the seizure list (Ext.4). The seized incriminating articles then were sent for chemical examination through court. On completion of investigation, the Final Form was submitted placing the accused to face the trial for commission of offence under section 302 of the IPC.

3. Receiving the final form, learned J.M.F.C., Patrapur took cognizance of said offences and after observing all the formalities, committed the case to the Court of Sessions. That is how the trial commenced against these accused persons by framing the charge for the above mentioned offences.

4. The prosecution, in the trial, has examined in total twenty-five (25) witnesses. As already stated P.W.3 is the Informant, who is the brother of the deceased whereas P.W.2 is the scriber of the F.I.R. P.Ws.1, 4, 7 and 8 are the family members of the deceased and the post-occurrence witnesses. P.Ws.5, 6 and 13 are

the co-villages whereas P.W.9 is the post occurrence witness and brother of the deceased. P.Ws.11, 12 & 13 have turned hostile and P.Ws.10, 13 and 14 are the seizure witnesses. The I.O. of the case, at the end, has come to the witness box as P.W.25.

5. Besides leading the evidence by examining the above witnesses, the prosecution has proved several documents which have been admitted in evidence and marked Exts.1 to Ext.18. Out of those, the important are the F.I.R. (Ext.1), the inquest reports (Ext.2/2) and the spot map (Ext.14). The chemical examination report had been admitted in evidence and marked Ext.18.

6. The plea of defence is that of complete denial and false implication. No evidence has also been let in from the side of defence despite opportunity.

7. Ms. P. Naidu, learned counsel for the Appellant submitted that there is no direct evidence to connect the accused with the commission of the offence for which he has been convicted by the Trial Court. She submitted that the prosecution case is based on circumstantial evidence and the circumstances are (1) the prior dispute/enmity between the accused and the deceased (2) the recovery of the knife pursuant to the statement of the accused while in police custody and seizure of the same with which the injuries found on the dead body were possible. She submitted that since there is no evidence to connect the said seized knife with the commission of offence even if the circumstances as above are stated to have been proved those being joined do not complete the chain in every respect ruling out all the hypothecs other than the guilt of the accused. She further submitted that the seizure of the knife at the instance of the accused pursuant to his statement being recovered at his instance while in police custody has not been established through clear, cogent and acceptable evidence, Inviting our attention to the evidence of P.W.10, who is the independent witness in support of said recovery of knife said to have been at the instance of the accused, she submits that the said witness has not supported the prosecution case and he having been cross-examined by the prosecution with permission of the court, no such material has surfaced to come to the aid of the prosecution case in that regard. He then placing the entire deposition of the I.O. (P.W.25) submitted that the version of the IO even accepted in toto do not fulfil the legal tests for admissibility of the evidence under section 27 of the Evidence Act. She further submitted that the Trial Court has completely erred both in law and fact that the evidence as to the recovery of the knife at the instance of the accused pursuant to his statement is admissible under section 27 of the Evidence Act. Therefore, that circumstance with the available evidence on record having not been established accepting for a moment that the deceased and the accused were in enemical terms that, itself, would not be sufficient to base a conviction holding the accused to have intentionally caused the death of the deceased, as according to her, that mere suspicion cannot form the base of conviction.

8. Learned counsel for the State-Respondent while supporting the finding of guilt against the accused has been returned by the Trial Court contended that the circumstances such as the prior enmity/dispute giving rise to the motive on the part of the accused and the recovery of the knife whose user in causing the injury upon the deceased is evident, at the instance of the accused pursuant to his statement while in police custody proving his special knowledge as to keeping of said knife, when there comes any explanation to any other effect by the accused; the finding of guilt is not liable to be disturbed.

9. Keeping in view the submissions made, we have carefully read the impugned judgment of conviction. We have also extensively travelled through the depositions of the witnesses (P.W.1 to P.W.25) examined from the side of the prosecution and have perused the documents admitted in evidence and marked Ext.1 to Ext.18 from the side of the prosecution.

10. Admittedly the prosecution has not piloted any direct evidence to connect the accused with the commission of the offence in establishing that he is the author of the fatal injuries which has caused the death of the deceased. It is the settled position that in a case where is of circumstantial in nature, the circumstance from which the conclusion of guilt is to be drawn should in the first instance be fully established and the all the facts so established should be consistent only with the hypothesis of guilt of the accused overruling his innocence. The circumstance should be of a conclusive nature and tendency and there should be such as to exclude every hypothesis but the one proposed to be produced. The chain of evidence must be complete has not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to so that within all human probabilities the act must have been done by the accused. In the backdrop of the aforesaid, the legal settled position of law with regard to recording of finding of guilt upon an accused where the prosecution relies upon the circumstantial evidence, the rival submissions are required to be addressed in order to ascertain the sustainability of the findings of the Trial Court that the prosecution has established the charge of murder against the accused beyond reasonable doubt.

Prosecution in the case in total has examined twenty five witnesses. Deceased is the sister-in-law of P.W.1. This P.W.1 was residing in Nuasahi whereas her sister-in-law (deceased) was residing in Tentulisahi of the same village. She has not stated anything touching those circumstances except saying that she had received the information from the son of the deceased that his mother was not found and that she with others on the next day gone to mongo groves of their village and had seen Sumitra lying dead with cut injury on her neck. She has not breathed a word against this accused that even he had any enemity with the deceased for any reason, whatsoever. P.W.2 and P.W.3 are also two witnesses who have nothing to do with any of those circumstances. P.W.3 has simply stated to have heard from the co-villagers that there was some quarrel between the deceased who happens to be her sister and the accused. That also he does not state citing any particular instance. He

states that his sister-Chandrakala (P.W.8) had informed him that his other sister-Sumitra was murdered by someone. None of this witness states anything about the movement of this accused during that period in the village or his absence. When P.W.4 states that her sister-in-law-Chandrakala (P.W.8) had told her that accused had killed Sumitra, she has stated that it had been so told merely because that this accused Smianchal threatened Sumitra in her presence to kill her as they were having dispute relating to money matter for which a meeting in the village had also been called. The evidence of P.W.5 and P.W.6 are of no avail in pointing the finger of guilt at the accused to any such circumstance. Son of the deceased is (P.W.7). He simply states that on the alleged day of occurrence in the morning her mother having gone to Badejtota for collecting wood had not come back. Same almost is the evidence of P.W.8, who has further stated to have gone through the forest site and seen the deceased, who happens to be the elder sister of the deceased and brother of the Informant Brundaban (P.W.3), who has stated to have seen the dead body. In this way, the evidence of P.W.9 also does not come to the aid to the prosecution in any manner.

The prosecution relies upon the circumstance as to the recovery of knife pursuant to the statement of the accused while in police custody from the place which was known to him by leading the police and other witnesses to the place. The independent witness in support of the same is P.W.10 who has not stated anything about those aspects. He having been cross-examined by the prosecution with the permission of the Court, we find that nothing has been elicited to provide any support to the prosecution case with regard to the said circumstance. In cross-examination, he has stated to have not known as to from which place the accused brought out the knife. He also says to have not seen the knife and simply been told by the police that the knife was recovered. About recording of the statement, his evidence is also not at all up-to the mark. Now remains the evidence of P.W.18 who has simply stated that he being the Sarpanch, the accused once had come to him and presented his grievance that the deceased had issued death threats to him when the deceased thereafter had made allegations against the accused to have stolen her money. He thus says that there was rift between them. His evidence is only to the above extent and nothing more. On that score to some extent, the evidence of P.W.21 also stands that the accused having taken a sum of Rs.25,000/- from the deceased had returned Rs.20,000/- and there was non-payment of Rs.5,000/- by the accused to the deceased. But he does not state anything more that the accused for this reason was chasing the deceased and waiting for the opportunity movement; by stating any other facts and circumstance in support of the same.

Having already stated that the evidence of P.W.10 is of no avail to the prosecution in proving the evidence of recovery of knife at the instance of the accused; let us come to the evidence of P.W.25, who is none other than the I.O. He first of all states that on 13.05.2016 during confidentially enquiry he found that accused had some dispute with the deceased. So, on 16.05.2016 he called the accused to the Police Station for interrogation. Then he states that on 18.05.2016, he went to Khariaguda Police Out-

Post with the accused and there he recorded the statement of the accused under section 27 of the Evidence Act. He has not said anything that what the accused told before him so that he had to record his statement. His next line of evidence is that the accused confessed his guilt by saying that he had murdered the deceased by that knife which he had concealed inside his kitchen room in his dwelling house at Bajraguma. That part as to confession of guilt before P.W.25 by the accused is wholly inadmissible. He then states that the accused led him (P.W.25) to the spot, i.e., the kitchen room of his house and recovered the concealed knife from upper self of the kitchen room which on being produced was seized. P.W.25 state that as to where he recorded the statement of the accused and who were the other witnesses then present by his side. The evidence of P.W.25 being read as it is, we are wholly in disagreement with the Trial Court that the same satisfy the test requires for said admissibility under section 27 of the Evidence Act. With the above evidence on record, we are lead to hold that the circumstances, as have emerged in evidence, being linked-up, do not complete the chain leading to an irresistible conclusion regarding the guilt of the accused leaving no other hypothesis except that

11. In the result, the Appeal stands allowed. The judgment of conviction and order of sentence dated 07.08.2023 passed by the learned Additional Sessions Judge, Berhampur, in S.T. No.107 of 2016 are hereby set aside.

The Appellant (accused), namely, Simanchal Adhikari be set at liberty forthwith, if his detention is not required in connection with any other case.

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2024 (II) ILR-CUT-1150

D. DASH, J & V. NARASINGH, J.

CRLLP NO. 107 OF 2018

REPUBLIC OF INDIA (CBI) .....Petitioner

-V-

PRAKASH KUMAR SINHA .....Opp.Party

(A) PREVENTION OF CORRUPTION ACT, 1988 – Section 20 – There was an allegation that the accused demanded ₹ 5000/- for clearance of pension paper – The accused was not entrusted with any work towards the settlement of retirement benefits – The learned Trial Court acquitted accused as he has been able to discharge the presumption U/s. 20 of the Act successfully – Whether the order of learned Trial Court needs any interference? – Held, No. (Para 20)

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 378(2) – Scope and Power of the Appellate Court to "re-appreciate", "review" or "re-consider" the evidence and interfere with an order of acquittal – Discussed with reference to case laws.

Case Laws Relied on and Referred to :-

1. (2023) 4 SCC 731 & 2023 SCC online SC 280 : Neeraj Dutta V. State (Govt of NCT Delhi).
2. (2011) 9 SCC 479 : Mrinal Das & Ors. Vrs. State of Tripura.
3. (2007) 4 SCC 415 : Chandrappa & Ors. vs. State of Karnataka.

For Petitioner : Mr. Sarthak Nayak, Spl. P.P (For CBI).

For Opp.Party : Mr. R.Agrawal, Ms. R.Rajgarhia, Mr. A.Dash, Mr. Das, Mr. P.K.Behera.

JUDGMENT Date of Judgment : 01.07.2024

V. NARASINGH, J.

1. Heard Mr. S. Nayak, learned counsel for the Petitioner and Mr. R. Agrawal, learned counsel for the Opposite Party.

2. This is an application filed under Section 378(2) of the Cr.P.C., 1973 by the Republic of India(CBI) seeking leave to appeal against judgment for acquittal dated 08.09.2017 passed by the learned Special Judge,C.B.I-II, Bhubaneswar in TR No.34 of 2010 (RC No.9(A)-2010), acquitting the Opposite Party, Head clerk, Flash Butt welding Plant(FBWP), South Eastern Railway, Jharsuguda from the accusation of committing offences under Section 7 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1908 on account of allegation that the Opposite Party-accused demanded and accepted illegal gratification of Rs.5,000/-(Rupees Five Thousand) from the complaint, abusing his position as a public servant to process the pension papers of the father of the complainant(Kapindra Kishan- P.W.9), who was working as Khalasi.

3. It is the case of the prosecution that the Kapindra Kishan, father of the complainant was working as a Khalasi in the Flash Butt Welding Plant (FBWP), South Eastern Railway, Jharsuguda and since the date of retirement of the father of the complainant-P.W.9 was on 31.05.2010 and he was illiterate, the complainant contacted the accused, who was working as a Head Clerk on 04.03.2010 for settlement of retirement dues and thereafter on 08.03.2010 at about 11 a.m., he again met the accused. On which date the accused gave him a list of the documents to be submitted for retirement dues claim and assured him that he will assist in the early processing of claim his father of retirement dues. After arranging the documents, it is the case of the prosecution that when the complainant went to the office of the accused on 06.04.2010 after checking the papers the opp. Party demanded illegal gratification of Rs.20,000/- for early processing of the matter.

4. And, when the complainant express inability to pay such huge amount, the Opp. party accused told him to pay Rs.5,000/-(Rupees Five Thousand)as upfront payment. On 08.04.2010 in his residence. After which he process the matter and the accused is also stated to have told the complainant (P.W.9) to pay the rest of the amount of Rs. 15,000/- before 30.04.2010.

5. On 06.04.2010 the complainant- P.W.9 stated to have lodged the complaint with the Superintendent of Police CBI Rourkela Unit and basing upon the same, the

Superintendent of Police, CBI, Bhubaneswar registered R.C. Case No.9(A)/2010 on 07.04.2010 and instructed inspector Mr. S.B. Mishra to take up the investigation.

6. During the course of investigation, P.W.10-Trap Laying Officer (TLO) arranged two independent witnesses, namely, Sri Mahindra Kumar Pradhan-P.W.1, Grade-I Clerk, Office of the General Manager, MCL, Lakhanpur Area and Sri Sudhansu Chandra Naik- P.W.2, Senior Personal Assistant, Office of Area Personal Manager, MCL, IB Valley Area, Brajaraj Nagar in the appointed date i.e. 08.04.2010 at 5.30 p.m. all the team members as well as the complainant assembled at BSNL Inspection Quarters at Jharsuguda and pre-trap exercise was under taken. The TLO-P.W.10 Mr. Mishra explained the process. The complainant- P.W.9 handed over the alleged bribe amount of Rs.5,000 (Rupees Five Thousand) in the form of three numbers of Rs.1000/- and twenty numbers of GC notes of the denomination of Rs.100/-. The same were smeared with phenolphthalein powder.

7. The procedure of noting down the number and denomination was duly followed and paper was handed over to witness Sri S.C. Nayak- P.W.2 for future reference. A pre-trap memorandum was also prepared and specific instruction was given to P.W.9 to only handover the money on being demanded. And the independent witnesses P.W.1, who was asked to accompany and to overhear the conversation and the P.W.9, the complainant was asked to give the pre-determined signal after the transaction is over.

8. It is submitted that the members of the Trap Laying reached near the house of the accused and took their pre-determined positions near the residence. Then the complainant went inside the Railway quarter of the accused and once he having entered the house, P.W.1 stationed himself at the entrance of the door of the house taking advantage of darkness of the evening.

9. It is the case of the prosecution that the accused offered the chair to the complainant and immediately enquired whether he had brought sum of Rs. 5000/- as he had asked for and the complainant answered in the affirmative. The accused demanded the money by extending his right hand towards the complainant and the complainant brought out the bribe money of Rs. 5000/- from his shirt pocket and handed it over to the accused. And he accepted the same with his right hand and after counting kept the same in his in left side Kurta pocket.

10. It is the stated by the prosecution that on receipt of such amount of bribe, the accused assured the complainant that his father’s pension papers would be processed soon and his father would get his retirement benefits immediately on the date of his retirement. The entire conversation was seen and overheard by the independent witness Sri M.K. Pradhan- P.W.1.

11. On conclusion of the exercises of demand and payment as noted above on receiving the prearranged signal, the trap team members being led by the I.O.- Shri S.B. Mishra(P.W.10) entered inside the drawing room and caught hold the accused.

Shri S.B. Mishra-P.W.10 reveled his identity and also asked the identity the accused, who identified himself as Prakash Kumar Sinha and on being accosted with the factum of demand and acceptance of bribe from the complainant, the accused is stated to have fumbled and said that he has committed a mistake.

12. Thereafter the left and right hand of the accused were washed with Sodium carbonate solution with water separately and the liquid turned pink. The same was kept in two bottle after following the due procedure marked as M.O-II and III. Independent Witness-P.W.2, Sri S.C.Nayak checked the left side of Kurta pocket and found three numbers of Rs.1000/- and twenty numbers of Rs. 100/-Government Currency notes and on being asked the P.W.2 compared the notes with serial numbers mentioned in the pre-trap memorandum and the same tallied.

13. Thereafter the inner portion of left side pocket of Kurta worn by accused was washed in sodium carbonate solution and same also turned to pink and such pink solution was preserved in an another bottle marked as M.O.4.

14. The accused was arrested, and the house of the accused was searched, and search list Exhibit-15 was prepared. The post-trap memorandum was prepared and signed by all. Thereafter, the office of the accused was also searched and the documents in respect of retirement benefit of father of the complainant was seized under seizure list Exhibit.3.

15. The bottles containing the hand wash liquid were sent to C.F.S.L., Kolkata for opinion. The chemical analyst report was received vide Exhibit.12 and on obtaining sanction for prosecution of the accused charge sheet-Exhibit.11 was submitted. Basing upon which cognizance was taken and the Opposite Party faced trial.

16. The plea of defence was one of denial of demand and acceptance of bribe and further defence plea was that the accused never looked after the pension paper of retired employees and a further specific ground of defence was advanced that the father of the complainant was working in the said office as khalasi and he had taken Rs.20,000/- as loan from the accused in the month of November 2009 and in spite of repeated request he was not returning the same and several visits of the Opposite Party to the house of the accused for recovery of same also proved futile. After persistent demand the father of complainant-P.W.9 had assured the accused he will return the said hand loan within a short period and the amount of Rs.5000/- as recovered from him was on account of part payment of the previous hand loan of Rs.20,000/-.

17. To drive home the charge the prosecution examined 11 witnesses, their details run thus:

P.W.1 over hearing witness to the trap and also witness to transaction of bribe money
P.W.2 independent witnesses to the trap
P.W.3 Assistant Engineer, FBWP, SE Railway.
P.W.4 Personnel Officer.

P.W.5 Sanctioning Authority.
P.W.6 Deputy Chief Engineer.
P.W.7 Chemical Analyst
P.W.8 Head Clerk, witness to the seizure.
P.W.9 Complainant.
P.W.10 Trap Laying Officer, and I.O.
P.W.11 Investigating Officer submitting the charge sheet.

18. Defence exhibited one Prahalad Kolet as D.W.1. Exhibits were marked on behalf of the prosecution as well as defence and of which Exhibit.10 order relating to distribution of work is the most significant one. Documents were also exhibited by the defence marked as Exhibit form in Booklet-A and one Exhibit marked as 'X' i.e. letter dated 08.04.2010 allegedly signed by Kapindra Kishan, father of P.W.9-complainant.

19. M.Os-II to IV are the bottles containing left and right side hand wash of the accused and pocket wash of Kurta of the accused.M.O.V is the sealed envelope containing tainted money.

20. On going through the evidence on record, the learned Trial Court in the background of the plea of defence that the accused was not entrusted with any work towards the settlement of retirement going unchallenged and also recorded the finding that the accused has been able to successfully discharge the presumption under Section-20 of the Prevention of Corruption Act 1988, directed acquittal of the accused. Such judgment of acquittal assailed, inter alia, on the ground of perversity on the face of it.

21. Learned counsel for the Petitioner (CBI) Mr. Nayak submitted with vehemence that the appreciation of evidence as has been made by the Trial Court is patently perverse since on analysis of the same the only conclusion that can be arrived at being one of guilt of the Opposite Party. And, he relied on the judgment of the Apex Court of **Neeraj Dutta V. State (Government of NCT Delhi)**, reported in, **(2023) 4 SCC 731 & 2023 SCC online SC 280**. He, therefore, contended that the final outcome in the trial acquitting the accused cannot be sustained and is liable to be interfered with.

22. Learned counsel for the accused, who appeared pursuant to the notice for condonation of delay in filing the present CRLLP opposes the prayer to grant leave. He submits that in acquitting, the learned Trial Court meticulously analyzed the evidence of P.W.1, shadow witnesses, the complainant-P.W.9 and the Trap Laying Officer- P.W.10 and finding that their evidence did not get corroboration from the complaint Exhibit.13 and pre and post trap memorandum Exhibits-2 &6 respectively, the trial Court arrived at the finding that even the version of the prosecution, as regards the demand of bribe on 06.04.2010 and the date of trap on 08.04.2010, was also not proved against the accused.

He further drew the attention of this Court to the deposition of D.W.1 to the effect that the father of the complainant (P.W.9) had taken loan from the accused-Opposite Party to the tune of Rs.20,000/-(Rupees Twenty Thousand) and the alleged amount of illegal gratification as demanded was in fact towards clearance of such loan.

23. The evidence D.W.1 withstood the scrutiny of cross-examination.

24. In **Neeraj Dutta V. State (Government of NCT Delhi)**, **(Supra)** ex facie the Constitution Bench judgment of the Apex Court answered the reference in the following terms.

> **"xxx xxx xxx**
>
> **90**. Accordingly, the question referred for consideration of this Constitution Bench is answered as under:
>
> In the absence of evidence of the complainant (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.
>
> **xxx xxx xxx"**

24-A. In terms of the judgment of the Constitution Bench the individual case was decided in the other judgment relied upon by the learned counsel for the CBI i.e. **(2023) SCC online SC 280**.

24-B. It is apposite to note here the said judgment was against the judgment of conviction which was ultimately set aside, in the facts of the said case, taking note of the principles decided by the Constitution Bench in evaluating evidence, in the event complainant cannot be put in the witness box, inter alia, on account of death.

25. On careful analysis both the judgments have no bearing in the matter of scrutiny of judgment of acquittal, as in the present case.

26. One of the vital aspects which would have sealed the case for the prosecution was the testimony of the father of the complainant (P.W.9), the employee for processing of whose pension papers the alleged gratification to the tune of Rs.20,000/-(Rupees Twenty Thousand) was demanded.

27. There is nothing on record to indicate as to why such vital witness kept away from the witness box. In the absence of any explanation to the said effect the entire case of the prosecution from the beginning gets pushed into thick cloud and the onus is squarely on the prosecution to dispel the same which they have signally failed to discharge.

28. On close scrutiny of testimony of the complainant (P.W.9) and TLO (Trap Laying Officer-P.W.10) this Court is in agreement with the finding of the learned Trial Court, that they are not reliable witness.

29. In this context it is apt to refer to the evidence of P.W.10, paragraph-14 of cross-examination.

> **"xxx xxx xxx**
>
> I cannot say if the complaint received at Rourkela Office is registered as an F.I.R. Ext.13 the complaint of this case is not registered at Rourkela CBI, Unit office. In Ext.13 there is nothing that it was received at Rourkela CBI unit office. During the relevant period one Kabi Babu was working at Rourkela CBI office. There is nothing in Ext.13 that Kabi Babu had received the same at Rourkela Office. I had not directed my investigation to know how Ext.13 the F.I.R was received at Bhubaneswar CBI office.
>
> **xxx xxx xxx"**

30. The guiding principles in an Appeal against acquittal and the power of the Appellate Court to "re-appreciate, review or reconsider evidence and interfere with an order of acquittal was restated in **Mrinal Das & Others Vrs. State of Tripura**, **(2011) 9 SCC 479**. In the said judgment the Supreme Court quoted with approval, inter alia, paragraph-42 of the judgment of the Apex Court in the case of **Chandrappa and Others vs. State of Karnataka** reported in **(2007) 4 SCC 415**.

> **"42.....**The following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:
>
> (1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.
>
> (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
>
> (3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.
>
> (4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. *Firstly*, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.
>
> (5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

31. On careful examination, this Court finds absolutely no justifiable reason to differ from the view as expressed by the learned Trial Court that the evidence of P.W.9 (the complainant-decoy) do not inspire confidence in the absence of any independent corroboration and also keeping in view the deposition of D.W.1. And, the prosecution without any rational not examining the most vital witness, as rightly noted by the learned Trial Court, the father of P.W.9 for processing of whose pension

papers the alleged bribe was given. As such, this Court does not find any infirmity in the appreciation of evidence by the learned Trial Court so as to warrant interference.

32. Accordingly, leave to prefer appeal stands rejected.

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2024 (II) ILR-CUT-1157

D. DASH, J & V. NARASINGH, J.

W.P.(C) NO. 41680 OF 2023

THE CHIEF MANAGER-CUM-A.O, UNION BANK OF INDIA, JHARSUGUDA …….Petitioner

-V-

1. RAJESH KUMAR AGRAWAL .…….Opp.Parties

2. DIST.CONSUMER REDRESSAL COMMISSION, JHARSUGUDA

(A) INTERPRETATION OF STATUTES – SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS & ENFORCEMENT OF SECURITY INTEREST ACT, 2002 – Sections 34,37 r/w Section 35, 100 and Regulation 17 of Consumer Protection Act as well as the Consumer Protection (Consumer Commissioners Procedure) Regulation, 2022 – Interpretation of the expression "other authority" U/s. 37 of the SARFAESI Act – Whether the consumer commission has the jurisdiction to entertain any proceeding which can be entertained by the Debt Recovery Tribunal or the Appellate Tribunal – Held, No – The expression "other authority " must be given its full play, otherwise the legislative intent of Section 37 of SARFAESI Act would be set at naught – There cannot be any iota of doubt that the expression "other authority" will encompass the consumer commission. (Para 15)

(B) INTERPRETATION OF STATUTES – Internal aid – Heading of the Section – Use of – Does not necessarily reflect the import of the provisions thereof – It is trite that only in case of ambiguity one has to fall back on the internal aid. (Para 16)

Case Laws Relied on and Referred to :-

1. (2010) 8 SCC 110 : United Bank of India vs. Satyawati Tandon & Ors.
2. 2010 (II) CLR (SC) 589 =(2010) 8 SCC 129 : Indian Bank vs. M/s. Blue Jaggers Estates Ltd. & Ors.
3. 2012 (8) SCC 524 : Cicily Kallarackal vs. Vehicle Factory.
4. 2022 (6) SCC 496 : Vodafone Idea Cellular Limited vs. Ajay Kumar Agarwal.
5. AIR 2021 SC 70 : M/s. Imperia Structures Limited vs. Anil Patni & Anr.
6. 2014 SCC Online Madras High Court 11940 : I R Prakash and Hema Prakash vs. The District Consumer Disputes Redressal Forum & Anr.
7. 2024 SCC Online SC 528 : PHR Invent Educational Society vs. UCO Bank & Ors.
8. (2010) 8 SCC 110 : United Bank of India vs. Satyawati Tandon & Ors.
9. AIR 1990 SC 689 : Frick India Ltd. v. Union of India.

10. AIR 2000 SC 378 : Forage & Co. v. Municipal Corporation of Greater Bombay.
11. (2003) 6 SCC 697 : Islamic Academy of Education & Anr. vs. State of Karnataka & Ors.
12. (2002) 3 SCC 496 : Haryana Financial Corporation V. Jagdamba Oil Mills.

For Petitioner : Mr. B.C.Panda.
For Opp.Parties : Mr. S.K.Jethy.

JUDGMENT Date of Judgment : 01.07.2024

V. NARASINGH, J.

Plenary jurisdiction of this Court under Article 226 and 227 of the Constitution of India has been invoked by the Chief Manager-cum-Authorized Officer, Union Bank of India (Opposite Party No.1) assailing order dated 14.12.2023 at Annexure-8 passed in Misc. Case No.31 of 2023 arising out of C.C. No.91 of 2023 by District Consumer Commissioner, Jharsuguda in exercise of its power U/s.38(8) of the Consumer Protection Act, 2019 (hereinafter referred to as "C.P. Act") thereby directing the Petitioner-Bank not to proceed for the auction of secured assets which was being undertaken in terms of the provisions contained in Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 read with Rule 8 of the Security Interest (Enforcement) Rules, 2002.

1. Heard learned counsel Shri B.C Panda for the Petitioner and learned counsel Sri S.K. Jethy for the Opposite Party No.1.

2. The brief facts germane for just adjudication are indicated as under;

I. The present opposite party No.1 is one of the guarantors & mortgagors for the credit facilities availed by the Company M/s-Tulshyan Storeware Pvt. Ltd. Apart from the Opp.Party No.1 there are other guarantors & mortgagors for the credit facilities availed by the said company. The said company had availed a term loan to the tune of Rs. 280.00 Lakhs and cash credit facility to the tune of Rs.35.00 Lakhs from the erstwhile Corporation Bank, Jharsuguda in the year 2015. Thereafter, the said loan was renewed in the year 2016 and 2019 and another loan facility was sanctioned being working capital term loan for Rs.20.20 lakh in the year 2019. In the said loan the present Opp.Party No.1, his wife and other persons were stood as guarantors & mortgagors.

II. In order to secure the loan dues, the Opp.Party No.1, his wife and other persons had mortgaged landed properties.

III. As, the borrowers did not repay the loan amount in time and consequently the loan account turned to NPA as per RBI guidelines. Therefore, the petitioner bank i.e the secured creditor, recalled the loan and issued demand notice under section 13(2) of SARFAESI Act 2002 on 09.12.2021 and 18.04.2022 calling upon the borrowers, guarantors and mortgagors to pay the dues within the time stipulated there. Copy of the said notice U/s-13(2) of SARFAESI Act, 2002 is annexed to the Writ Petition at Annexure-1.

IV. It is stated that as no steps were taken to comply with the said demand notice, further notice U/s.13(4) of SARFAESI Act, 2002 read with Rule 8 of the Security Interest (Enforcement) Rules, 2002 for possession of the property were taken and the same was published in daily newspaper. Copy of the said notice is on record at Annexure-2.

V. Admittedly, assailing such action of the Petitioner-Bank, the Opposite Party No.1 along with his wife filed Securitisation Appeal No.66 of 2022 in the DRT, Orissa Cuttack U/s.17(1) of the SARFAESI Act, 2002 and the relief sought for and the interim relief prayed for in the said S.A. are extracted hereunder for ready reference;

"6. Relief(s) sought for:-

(a) To declare the e-auction notice for sale of the schedule properties of the applicants as illegal and quash the same.
(b) To declare the e-auction scheduled to be held 29.04.2022 as illegal, arbitrary and null and void.
(c) To set aside/quash the notices U/s.13(2), 13(4) as well as all actions taken under SARFAESI Act being illegal.
(d) Cost of the proceeding be awarded in favour the applicants.
(e) Any other relief/reliefs which the applicants may be entitled to.

7. **Interim relief, if any, prayed for**:

Pending final adjudication of the application the applicants pray for the following interim reliefs:

(a) Defendant No.1 be restrained from auctioning, or creating any third party interest or change the nature or character of the schedule properties."

VI. It is apt to note that there is no dispute that in the said Securitization Application, no interim order has been granted and the same is pending.

It is stated by the Petitioner-Bank that E-Auction sale was published in daily newspapers initially fixing the date to 29.04.2022 and thereafter, though several dates were notified the E-Auction did not fructify.

Therefore, the Petitioner-Bank published E-Auction sale notice afresh on 29.11.2023 in Vernacular Daily and English Newspaper on 30.11.2023 and the E-Auction was fixed to 16.12.2023. The said E-Auction notice is on record at Annexure-4.

VII. It is stated that as per such E-Auction sale notice, the outstanding as on 10.10.2023 is to the tune of Rs.3,76,58,321/- (Rupees Three Crores Seventy Six Lakhs Fifty Eight Thousand Three Hundred Twenty One only) excluding interest and other expenses.

And, it is submitted on behalf of the Petitioner that such E-Auction sale notice dated 29.11.2023 was also sent to the Opposite Party No.1 as well as the borrowers and other guarantors and mortgagers by Registered post with AD and the same has been duly received and in evidence thereof, notice with postal receipts have been placed on record vide Annexure-5.

VIII. It is stated that at this stage, the Opposite Party No.1 filed C.C. Case No.91 of 2023 U/s.35 of the CP Act inter alia assailing the E-Auction scheduled to be held on 16.12.2023 by impleding the Petitioner as one of the Opposite Parties along with the Chief-Manager, Union Bank of India, Jharsuguda.

IX. For convenience of ready reference the prayers in the Consumer Case No.91 of 2023 on the file of the District Consumer Redressal Commission, Jharsuguda at the behest of Opposite Party No.1 are extracted hereunder;

"i. The opposite parties may be directed to furnish up to date account statement of the principle borrower to the complainant so as to enable him to settle the account and to redeem the mortgaged property.
ii. To declare the publication of auction notice dated 30/11/2023 published in Sambad Odiya newspaper is illegal and in violation of provision of law of land.

iii. To direct the opposite parties not to proceed with the auction on 16/12/2023 as published in the Sambad Odiya newspaper dated 30/11/2023 without leave of the commission.

iv. To direct the opposite party to pay compensation of Rs. 5,00,000/- to the complainant for causing mental and physical harassment.

Any other reliefs deem fit and proper."

X. And, along with the C.C. Case, a petition U/s.38(8) of the CP Act was filed seeking an interim ex-parte order restraining the Petitioner (Opposite Parties before the Consumer Commission) from proceedings with the auction scheduled for 16.12.2023 and by the impugned order at Annexure-8 dated 14.12.2023 in effect the auction has been stayed.

3. It would be apposite to quote the reasoning of the District Consumer Redressal Commission in granting the ex-parte interim order;

"xxx xxx xxx

As the property (movable or immovable) of the petitioner has been repossessed by the O.Ps without any prior notice duly unserved (sic) is bad in the eye of law and if the said property will be sold the complainant will be in much hardship, hence in the eye of natural justice, it appears us to pass necessary interim order U/S-38(8) of the C.P. Act, 2019 as it seems to be just and proper.

xxx xxx xxx"

4. Learned counsel for the Petitioner, Mr. Bhaskar Ch. Panda, assailing such order of the Consumer Commission submits that it is settled law that SARFAESI Act, 2002 is a Special Act and a Code in itself and the steps taken in terms of the said Act cannot be called in question in a proceeding under the CP Act and to fortify his submission, he banked upon the provisions as contained in Section 34 and the overriding clause U/s.35 of the SARFAESI Act, 2002.

5. He also relied on the judgment of the Apex Court in the case of **United Bank of India vs. Satyawati Tandon and others** reported in **(2010) 8 SCC 110** and also in the case of **Indian Bank vs. M/s. Blue Jaggers Estates Ltd. and others** reported in **2010 (II) CLR-(SC) 589 = (2010) 8 SCC 129**.

6. Learned counsel Mr. Panda submitted with vehemence that notwithstanding the wide amplitude of unfettered powers conferred on the High Courts in terms of Article 226 and 227 of the Constitution of India, the Apex Court has always sounded a caution that even the High Courts ought not to issue prerogative writs in matters relating to securitization.

7. It is submitted that since the impugned order passed is ex-facie illegal being wholly without jurisdiction and malafied this Court should exercise its plenary powers in entertaining the Writ Petition notwithstanding that statutory remedy as provided under the CP Act.

8. Per contra, learned counsel for the Opposite Party, Mr. Jethy relying on the counter affidavit submits that the Writ Petition is not maintainable that since admittedly the Petitioner has effective alternative remedy and in this context, he

relies on the provisions contained in Section 35 of the CP Act and Regulation 17 of the Consumer Protection (Consumer Commission Procedure) Regulations, 2020.

9. It is his further submission that on a bare perusal of the impugned order, it can be seen that while passing the same, liberty was granted to the Bank to seek for modification/alteration in terms of Regulation 17 of the Consumer Protection (Consumer Commission Procedure) Regulations, 2020 (for short 'the Regulations'). Hence, it is stated that without taking the recourse to such statutory redressal provisions, it is not open for the Petitioner to invoke the Writ jurisdiction of this Court.

10. Learned counsel for the Opposite Party, Mr. Jethy, further draws the attention of this Court to Section 100 of the CP Act and submits that since the provision of this Act are in addition to or not in derogation of the provisions of any other law, there is no embargo to move the consumer forum relating to any matter falling within the domain of SARFAESI Act.

11. For convenience of ready reference, Sections 35 and 100 of the CP Act and Regulation 17 of the Regulations is quoted hereunder.

> **"35. Manner in which complaint shall be made**.-(1) A relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided, may be filed with a District Commission by-
>
> (a) the consumer, -
>
> (1) to whom such goods are sold or delivered or agreed to be sold or delivered or such service is provided or agreed to be provided; or
>
> (ii) who alleges unfair trade practice in respect of such goods or service;
>
> (b) any recognised consumer association, whether the consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service is provided or agreed to be provided, or who alleges unfair trade practice in respect of such goods or service, is a member of such association or not;
>
> (c) one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Commission, on behalf of, or for the benefit of, all consumers so interested; or
>
> (d) the Central Government, the Central Authority or the State Government, as the case may be:
>
> Provided that the complaint under this sub-section may be filed electronically in such manner as may be prescribed.
>
> Explanation. For the purposes of this sub-section, "recognised consumer association" means any voluntary consumer association registered under any law for the time being in force.
>
> (2) Every complaint filed under sub-section (1) shall be accompanied with such fee and payable in such manner, including electronic form, as may be prescribed.
>
> **100. Act not in derogation of any other law**.- The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.
>
> **Regulation 17 of the Consumer Protection (Consumer Commission Procedure) Regulations, 2020**

> **17. Ex parte interim order** - If an application for vacating or modifying or his discharging the ex parte interim order is filed by any of the parties, it shall be decided within forty-five days and the Commission shall have the discretion to extend the ex parte interim order if such application is not decided within forty-five days

12. And, to fortify his submission regarding non-maintability of the Writ Petition on the face of statutory remedy, Opp. Party No.1 relied on the judgment of the Apex Court in the case of **Cicily Kallarackal vs. Vehicle Factory** reported in **2012 (8) SCC 524**, **Vodafone Idea Cellular Limited vs. Ajay Kumar Agarwal** reported in **2022 (6) SCC 496**, **M/s. Imperia Structures Limited vs. Anil Patni and another** reported in **AIR 2021 SC 70** and the judgment of the Madras High Court in the case of **I R Prakash and Hema Prakash vs. The District Consumer Disputes Redressal Forum and another** reported in **2014 SCC Online Madras High Court 11940**.

There is no cavil relating to the proposition of law that on the face of statutory remedies the Writ Court should be slow in interfering. The same is a time tested principle based on the doctrine of self-restraint as it is commonly known but it is equally trite that there is and cannot be any fetter, keeping in view the "basic structure doctrine", on the Constitutional Courts in exercising Writ jurisdiction when the order passed by a sub-ordinate authority shocks the conscience of the Court, as in the present case.

13. In this context, it is apt to refer to one of the recent judgment passed by the Apex Court in the case of **PHR Invent Educational Society vs. UCO Bank and others** reported in **2024 SCC Online SC 528** wherein, the concern expressed by the Apex Court in the case of **United Bank of India vs. Satyawati Tandon and others** reported in **(2010) 8 SCC 110** Paragraph 55 thereof was reiterated and the same is extracted hereunder;

> "**55**. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."
> [(2010) 8 SCC 110]

14. The provisions contained in Section 34, 35 and 37 of the SARFAESI Act, which have a bearing on the point at issue are culled out hereunder for convenience of ready reference;

> 34. **Civil Court not to have jurisdiction**.- No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and **no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act** or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993). (Emphasized)

> **35. The provisions of this Act to override other laws**.- The provisions of this Act shall have effect, notwithstanding anything in consistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law
>
> **37. Application of other laws not barred**. -The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force.

15. On a close reading of the aforementioned provisions of SARFAESI Act, it is evident that Section 34 prescribes the jurisdictional bar for entertaining any suit or proceeding which can be entertained by the Debt Recovery Tribunal or the Appellate Tribunal and specifically it has been mentioned that no injunction shall be granted by any Court or **other authority** in respect of any action in present day or in future to be taken under the SARFAESI Act. Even if the reference to "Civil Court" in heading of the Section 37 of SARFAESI Act as well as in the narration of the sections is interpreted and understood in the context of section 9 of the CPC, the expression "other authority" must be given its full play, otherwise the legislative intent of Section 37 would be set at naught. There cannot be any iota of doubt that the expression "other authority" will encompass the "Consumer Commissions".

16. It is settled principle of interpretation that heading of the section, which is also otherwise known as "internal aid" to construction does not necessarily reflect the import of the provisions thereof. It is trite that only in case of ambiguity one has to fall back on the internal aid. Once a language of the section is clear, the internal aid "heading" "could not be used for cutting down the wide application of the clear words used in the provisions". In this context reference can be made to the decision of the Apex Court in the case of **Frick India Ltd. v. Union of India** reported in **AIR 1990 SC 689** more particularly paragraph-8 thereof which is extracted hereunder;

> "8. It is well settled that the headings prefixed to Sections or entries cannot controlled the plain words of the provision; they cannot also be referred to for the purpose of construing the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only, in the case of ambiguity or doubt the heading or sub-heading may be referred to as an aid in construing the provision but even in such case it could not be used for cutting down the wide application of the clear words used in the provision. Sub-item (3) so construed is wide in its application and all parts of refrigerating and air-conditioning appliances and machines whether they are covered or not covered under sub-items (1) and (2) would be clearly covered under that sub-item. Therefore, whether the manufacturer supplies the refrigerating or air-conditioning appliances as a complete unit or not is not relevant for the levy of duty on the parts specified in sub- item (3) of Item 29A."

On the same aspect said decision has also been followed in the case of **Forage & Co. v. Municipal Corporation of Greater Bombay** reported in **AIR 2000 SC 378**.

Hence, the submission of the learned counsel for the Opposite Party, Mr. Jethy, relying on the heading of Section 34 of the SARFAESI Act, that only Civil Court's jurisdiction is barred/ousted have to be negated.

17. As already quoted Section 35 of SARFAESI Act has the overriding effect Section 37 of said Act specifically deals with the laws, application of which are not barred.

18. If the provisions of Section 35 of SARFAESI Act read with Section 37 thereof is juxtaposed with Section 100 of the CP Act the irresistible conclusion is that any action that is taken or contemplated under the SARFAESI Act or RDDB Act has to be governed by the SARFAESI Act or RDDB Act alone and all other laws save and except those as find mentioned in Section 37 of SARFAESI Act have to yield to the same.

19. For the discussion as made herein above, the submission of the Shri. Jethy, learned counsel for the Opposite Party No.1 relying on Section 100 of the CP Act in the light of the judgment passed by the Apex Court in the Case of **Cicily Kallarackal (*supra*)** has no application in the factual matrix of case at hand. So also, the other judgments relied on by the learned counsel for the Opposite Party are of no significance in the given facts and circumstances.

20. In citing these judgments, the cardinal principle of interpretation of judgments has been lost sight of. Law relating to interpretation of judgments have been set at rest by the Apex Court in the case of **Islamic Academy of Education and another vs. State of Karnataka and others** reported in **(2003) 6 SCC 697** wherein the Apex Court has reiterated its dictum in the case of **Haryana Financial Corporation V. Jagdamba Oil Mills** reported in **(2002) 3 SCC 496** that a judgment is not to be read as a "Euclid's Theorem."

21. The conduct of the Contesting Opposite Party is worth noting which also impelled this Court to entertain this Writ Petition.

21-A. Admittedly, assailing the E-Auction the Opposite Party had moved the DRT, Orissa Cuttack by filing S.A. No.66 of 2022 as noted above.

21-B. On perusal of the complaint petition before the Consumer Commission (Consumer Case No.91 of 2023) at the behest of Opposite Party No.1, it can be seen that reference to such Securitisation Application is conspicuous by its absence.

21-C. In the counter affidavit, the pendency of such Securitisation Application is not controverted but a vague stand has been taken that the ground of challenge before the Consumer Commission is different. For ready reference, Para-14 of the counter affidavit is quoted hereunder;

> "14. That as regards the averments and allegations made in the para 7 it is humbly submitted by the opp party No 1 is admitted to the extent that the guarantor has challenged the proceedings under the SARFAESI Act, 2002 in the appeal bearing number S.A. 66 of 2022 before the DRT, Cuttack. The main ground of the appeal is that

as the account was not an NPA, publication of auction notice under SARFAESI Act and the subsequent proceeding is illegal."

22. On a conspectus of materials on record in view of the provisions contained in the SARFAESI Act as discussed and unambiguous repeated pronouncement of the Apex Court referred to herein above since the District Consumer Commission lacked inherent jurisdiction as noted, this Court is left with no other alternative but to quash the entire proceeding i.e. C.C. No.91 of 2023 pending before the District Consumer Commission, Jharsuguda as also the order dated 14.12.2023 at Annexure-8 passed in Misc. Case No.31 of 2023 arising out of said C.C. No.91 of 2023.

23. The CP Act, 2019 was enacted repealing the Act of 1986 inter alia on the ground that "it has became inevitable to amend the Act to address the myriad and constantly emerging vulnerability of the consumers" and while so doing, the pecuniary jurisdiction for the district commission has been enhanced up to Rs.1 crore and that of the State commission from Rs.1 crore to up to Rs.10 crores.

24. An onerous duty has been cast on the President and Members manning the Consumer Commissions while considering the reliefs sought under the Special Acts and to act and function within the orbit provided thereunder. The maxim "ignoratia juris no excusat" applies in equal measure to all including the Consumer Commissions. The least that can be expected from the learned President and the Members of the District Commissions that before passing any order relating to any alleged violation vis-à-vis the provisions of any Special Act they will test the propositions claiming the reliefs on the touchstone of law governing the field which would enable them not to embark upon a journey which will lead to avoidable litigation and denude the faith of the common man in the fairness and effectiveness of the redressal mechanism and which will also not render otiose, the intent of the legislature in enacting Special Statues.

25. This Court fervently hopes that while dealing with such Special Acts, the Consumer Commissions will refrain from judicial adventurism of the present nature which we strongly disapprove.

26. This Court cannot be oblivious of the conduct of the Opposite Party No.1 in suppressing material facts relating to pendency of Securitization Application before the Debt Recovery Tribunal, while seeking impugned interim order to that cannot be lightly brushed aside as it clearly appears to be purposeful to serve the mischievous end.

27. Hence, this Court imposes a cost of Rs.1,00,000/- (Rupees One Lakh), to be deposited by the Opposite Party No.1 in the Welfare Fund of Jharsuguda District Bar Association within a period of four weeks hence failing which it shall be taken as violation of the order of this Court entailing the legal consequences thereof.

28. The proceeding i.e. C.C. No.91 of 2023 pending before the District Consumer Commission, Jharsuguda is hereby quashed and it is held that all such

orders passed therein or such orders in miscellaneous proceeding arising therefrom would stand nullified.

29. Accordingly, the Writ Petition stands allowed with cost as aforestated.

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2024 (II) ILR-CUT-1166

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

JCRLA NO. 29 OF 2010

RANKANIDHI BEHERA …….Appellant

-V-

STATE OF ODISHA .…...Respondent

(A) INDIAN PENAL CODE, 1860 – Sections 86, 302 – Voluntary Intoxication – Criminal liability of a self-intoxicated person – Held, a person cannot seek exemption from liability for commission of murder on the ground of voluntary intoxication. (Para 9)

(B) SOLITARY WITNESS – A child below 12 years of age – Evidentiary value – To record a conviction on the evidence of a solitary witness the Court has to satisfy that the evidence is clear, trustworthy, and above-board – When the solitary witness happens to be a child – The Court has to be even more cautious so as to ensure that immature answer, influenced by the tender age, do not affect his otherwise impeccapable evidence. (Para 8)

(C) TRIAL AND PROCEDURE – Duty of Trial Court – Sec 280 Cr.P.C. empowers the Presiding Judge, while reading the evidence of witness, to record such remark as he thinks material, respecting the demeanour of such witness whilst under examination – The look or manners of a witness while in the witness box, his hesitation, doubts, or confidence and calmness etc. are facts which only the Judge is in a position to observe. (Para 8)

(D) DEMEANOUR OF WITNESS – Cr.P.C. – Section 280 – Importance of and evidentiary value – Demeanour of the witness is the appearance of credibility that a witness has during testimony and examination at the trial or hearing – The observation of a Trial Judge as regards the demeanour of witness are entitled to grant weightage. (Para 8)

Case Laws Relied on and Referred to :-

1. (2021) 12 Supreme Court Cases 550 : Pramila -Vrs.- State of U.P.
2. (2020) 3 Supreme Court Cases 115 : Paul -Vrs.- State of Kerala.

For Appellant : Mr. Sobhan Panigrahi, Amicus Curiae.

For Respondent : Mr. Priyabrata Tripathy, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment : 24.07.2024

BY THE BENCH

The appellant Rankanidhi Behera faced trial in the Court of learned Additional Sessions Judge, Nayagarh in Sessions Trial Case No.126 of 2008 for commission of offence punishable under section 302 of the Indian Penal Code (hereinafter 'I.P.C.') on the accusation that in the midnight of 11/12.05.2008 at village Nathiapali under Odagaon police station, he committed matricide by killing his mother Heera Behera (hereinafter 'the deceased').

The learned trial Court vide impugned judgment and order dated 10.03.2010 found the appellant guilty of the offence charged and sentenced him to undergo imprisonment for life.

Prosecution Case:

2. The prosecution case, as per the first information report (hereinafter 'F.I.R.') (Ext.1) lodged by one Duryodhan Behera (P.W.1), the President of village committee on 12.05.2008 before the Officer in-charge of Odagaon, in short, is that the appellant committed the murder of the deceased by severing her head and threw the body in the backyard of his house. Some villagers traced the headless dead body of the deceased while going to attend call of nature, for which they informed the same in the village. Upon getting such information, members of the village committee along with other villagers proceeded to the spot and noticed that the head was missing from the dead body.

Chiranjibi Dalabehera (P.W.8) A.S.I. of Police attached to Odagaon Police Station drew up the formal F.I.R. vide Ext.1/3 in the absence of Officer-in-Charge and he himself took up investigation of the case. He deputed two constables to guard the spot where the dead body of the deceased was lying and subsequently he proceeded to the spot at 8.30 a.m., which was the dwelling house of the appellant. He visited the back side of the said house locally called as Kamarapada where the beheaded body of the deceased was found. He went to the house of the appellant and after repeated calls, the appellant opened his door and came out. The I.O. recorded the statement of the appellant wherein he confessed to have committed the murder of the deceased and the said statement was recorded vide Ext.11/1. He then arrested the appellant and conducted inquest over the headless body of the deceased and after that, the appellant led him to his room and brought out a bag containing the severed head of the deceased, which was seized as per seizure list Ext.6. At about 10.30 to 10.50 a.m. on the same day, P.W.8 conducted inquest over the severed head of the deceased and prepared the inquest report vide Ext.3/3. He also conducted inquest over the dead body of the deceased by joining the severed head to the beheaded body and prepared the inquest report vide Ext.4/2. The I.O. then sent the dead body of the deceased to Odagaon Hospital for post mortem examination and collected earth and blood stained sample earth, which were seized as per seizure list Ext.7. He searched for the weapon of offence i.e. sickle and was able to trace it out which was lying in an open field at Kamarapada and seized the same as per seizure list Ext.8. P.W.8 seized the wearing apparels of the appellant as per seizure list

Ext.10/1. On the same day, at about 1.15 p.m., he searched the house of the appellant and recovered one country made pistol and seized the same. He prepared the spot map of the house of the appellant vide Ext.16 and gave requisition to doctor to collect the nail of the appellant. On 13.05.2008, he forwarded the appellant to Court and thereafter, he examined some witnesses on 17.05.2008 and he also produced the seized sickle before Medical Officer and made a query as to the possibility of the injuries by such weapon. On 23.05.2008, he received the nail scraping of the appellant and query opinion from the doctor (P.W.7). Subsequently, he handed over the charge of investigation to Bimal Kumar Mallick (P.W.9), the Officer-in-Charge of Odagaon Police Station.

After taking over the charge of investigation, P.W.9 made a prayer to the learned S.D.J.M., Nayagarh for sending the exhibits for chemical analysis and received the chemical examination report (Ext.20). Upon completion of the investigation, he submitted charge sheet against the appellant on 18.07.2008 under section 302 of I.P.C.

Framing of Charges:

3. After submission of charge sheet, the case was committed to the Court of Session after complying due formalities. The learned trial Court framed charge against the appellant as aforesaid and since the appellant refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

Prosecution Witnesses, Exhibits and Material Objects:

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

P.W.1 Duryodhan Behera was the President of the village committee and also the informant in this case. He stated that during the dawn hours, while he had gone to attend the call of nature, he saw the headless body of a woman lying at a distance of 500 feet. Seeing the same, he shouted, for which many persons gathered at the spot and some of the persons identified the dead body of the deceased. He is also a witness to the inquest held over the headless body and severed head of the deceased.

P.W.2 Jitendra Behera is the minor son of the appellant and grandson of the deceased. He categorically stated that on the night of occurrence, the appellant strangulated the deceased for which she struggled for life but after a while, she became calm. He also stated that upon seeing this in front of his eyes, he cried but the appellant threatened him not to shout. The witness further stated that the appellant asked him to accompany and took the dead body of the deceased to Kamarapada and severed the head from the body of the deceased by means of a sickle. He further stated that the appellant brought the severed head in a bag and returned to the house but threw away the sickle outside.

P.W.3 Mini Behera is the wife of the appellant and daughter-in-law of the deceased. She stated that the appellant had assaulted her prior to the incident for

which she had left for her maternal home along with her elder daughter. Upon getting the news of the death of the deceased, she returned to the marital home.

P.W.4 Kubera Behera stated that when the police asked the appellant about the severed head of the deceased, he agreed to give recovery of the same and led the police to the spot where he had kept the severed head. He is also a witness to the seizure of blood stained earth and sample earth as per seizure list Ext.7, sickle as per seizure list Ext.8 and seizure of one jacket and burnt pieces of pant and shirt as per seizure list Ext.9.

P.W.5 Chakradhar Naik stated that P.W.1 and he himself found the headless body at the dawn hours which they identified to be that of the deceased. While both of them were proceeding to the house of the appellant, they saw the appellant coming. He further stated that on being asked, the appellant informed that he was searching for the deceased but when P.W.1 insisted to know about the whereabouts of the deceased, the appellant rushed to his house and bolted the door from inside. He also stated that about 400 villagers guarded at the house of the appellant to prevent his escape. Subsequently, the police arrived and persuaded the appellant to open the door and thereafter the police took him to the place where the headless body was lying. The appellant then led the police to his house and brought out the head of the deceased kept in a polythene bag. He is a witness to the conduct of inquest over the headless body as well as the severed head of the deceased.

P.W.6 Panu Charana Behera is a co-villager and a post-occurrence witness who stated that at about 06.00 a.m., on being called by P.W.1, he went to Kamarapada and saw the headless body of the deceased. He also stated to have seen the head of the deceased in the house of the appellant. He is also a witness to the conduct of inquest over the headless dead body of the deceased vide Ext.2 and severed head of the deceased vide Ext.3.

P.W.7 Dr. A.K. Mohapatra was posted as the Medical Officer at Kural P.H.C.(New). On police requisition, he conducted post mortem examination over the dead body of the deceased and proved his report vide Ext.12. He, vide Ext.13, responded to the query made by the I.O. as to the possibility of causing of the injuries through the recovered sickle.

P.W.8 Chiaranjibi Dalabehera was working as the Assistant Sub-Inspector of Police at Odagaon police station and he is the initial investigating officer of this case.

P.W.9 Bimala Kumar Mallick was working as the Officer-in-Charge of Odagaon police station. He took over the charge of investigation from P.W.8 and upon completion of investigation, he submitted charge sheet against the appellant.

The prosecution exhibited twenty documents. Ext.1 is the F.I.R., Ext.2/3 is the inquest report, Ext.3/3 is the inquest report, Ext.4/2 is the inquest report., Ext.5 is the zimanama, Exts.6, 7, 8, 9, 17 and 19 are the seizure lists, Ext.10/1 is the seizure list, Ext. 11/1 is the statement of accused recorded by Police, Ext.12 is the post

mortem report, Ext.13 is the reply of P.W.7 on query of I.O., Ext.14 is the command certificate, Ext.15 is the dead body challan, Ext.16 is the spot map., Ext.18 is the copy of forwarding letter of S.D.J.M. and Ext.20 is the chemical examination report.

The prosecution also proved twenty material objects. M.O.I is the seized Sickle, M.Os.II & III are the Gold Nolis, M.O.IV is the Mali having 10 Gold Beads, M.O.V is the Mali without Gold Bead, M.O.VI is the an one Rupee Tamba Paise, M.O.VII is the one athana tamba Paise, M.O.VII is the Gold Naka Fulla, M.O.IX is the Gold Naka Fulla, M.O.X is the Metal Karata (Container), M.Os.XI and XIIare the sarees of the deceased, M.O.XIII is the jean pant of the appellant, M.O.XIV is the half banian, M.Os.XV, XVI, XVII, XVIII and XIX are the sample packets and M.O. XX is the nails scraping sample packet.

Defence Plea:

5. The defence plea of the appellant was one of denial. Defence has neither examined any witness nor exhibited any document to dislodge the prosecution case.

Findings of the Trial Court:

6. The learned trial Court after assessing the oral as well documentary evidence on record came to hold that the death of the deceased Heera, the sexagenarian widow, mother of the appellant on the midnight of 11/12.05.2008 was homicidal in nature. The learned trial Court also accepted the evidence of the child witness (P.W.2), who is the son of the appellant and grandson of the deceased Heera, to be wholly reliable. The statement of the appellant recorded under section 313 of the Cr.P.C., in which he has admitted his guilt, has also been taken into account so also the recovery of the severed head at the instance of the appellant and the opinion of the doctor regarding possibility of the injury caused with the weapon. Accordingly, it has been held that the prosecution evidence proves the charge against the appellant and the irresistible conclusion is that the appellant is the culprit behind the murder of his mother and he intentionally killed her. It was further held that intra-familial tension is not a satisfactory explanation for the crime and resultantly, the learned trial Court held that the prosecution has proved the charge under section 302 of the I.P.C. against the appellant.

Contentions of the Parties:

7. Mr. Sobhan Panigrahi, learned Amicus Curiae contended that the conviction of the appellant is mainly based on the solitary evidence of the child witness (P.W.2), who is the son of the appellant and grandson of the deceased and there are contradictions in his evidence and therefore, it would be too risky to place implicit reliance on his testimony to find the appellant guilty under section 302 of the I.P.C. The learned counsel further submits that the appellant appears to have been under the influence of ‘ganja’ when he committed the crime and therefore, the benefit of doubt should be extended in favour of the appellant.

Mr. Priyabrata Tripathy, learned counsel for the State on the other hand submitted that the learned trial Court has rightly accepted the evidence of P.W.2, whose presence at the scene of occurrence is very natural and which is also accepted by the appellant in the accused statement and the contradictions which are appearing in the evidence of P.W.2 do not go to the root of the matter or demolish his version and his evidence is getting corroboration from the medical evidence adduced by the doctor (P.W.7), who after verification of the weapon of the offence answered to the query made by the Investigating Officer that not only the injuries are fatal but also it could have been caused by the weapon which was produced before him. The learned counsel further submitted that at the instance of the appellant, the head of the deceased was recovered from his house and the evidence of Kabir Behera (P.W.4) in that respect is also very clear coupled with the evidence of the I.O. (P.W.8) and therefore, the learned trial Court is justified in convicting the appellant under section 302 of the I.P.C.

Whether the solitary testimony of the child witness (P.W.2) regarding culpability of the appellant is reliable?:

8. Since the case is mainly based on the evidence of the solitary eye-witness P.W.2, who was a child aged about 12 years at the time of deposition, we have to carefully go through it to see whether the same is acceptable or not. Law is well settled that in order to record a conviction on the evidence of a solitary witness, the Court has to be satisfied that the evidence is clear, trustworthy and above-board. Additionally, when the solitary witness happens to be a child, the Court has to be even more cautious so as to ensure that immature answers, influenced by the tender age, given by the child do not affect his otherwise impeccable evidence. The Hon'ble Supreme Court so also this Court have time and again reiterated the law governing the recording of testimony of child witnesses. In the case of ***Pramila - Vrs.- State of U.P. reported in (2021) 12 Supreme Court Cases 550***, while appreciating the sole testimony of an eleven-year-old child, the Hon'ble Supreme Court noted as follows:

> "5. Criminal jurisprudence does not hold that the evidence of a child witness is unreliable and can be discarded. A child who is aged about 11 to 12 years certainly has reasonably developed mental faculty to see, absorb and appreciate. In a given case the evidence of a child witness alone can also form the basis for conviction. The mere absence of any corroborative evidence in addition to that of the child witness by itself cannot alone discredit a child witness. But the courts have regularly held that where a child witness is to be considered, and more so when he is the sole witness, a heightened level of scrutiny is called for of the evidence so that the court is satisfied with regard to the reliability and genuineness of the evidence of the child witness. PW 2 was examined nearly one year after the occurrence. The Court has, therefore, to satisfy itself that all possibilities of tutoring or otherwise are ruled out and what was deposed was nothing but the truth."

Since P.W.2 is a child witness, the learned trial Court put some questions to test his competency, which is also known as the '*voir dire*' test in the legal parlance.

After noting down the questions put and the answers given by the witness, the learned trial Court observed that the witness understood the questions and is a competent witness to answer and accordingly, the statement was recorded. P.W.2 has stated that the appellant is his father and the deceased Heera Bewa was his grandmother and he stated that in the night of occurrence, he was sleeping with the deceased on the outer verandah of the house when the appellant woke them up and asked to come inside and after a while, he along with the deceased came back and slept in the outer verandah. After some time, the appellant strangulated the neck of the deceased for which the deceased struggled for the life and then she became calm. He further stated that when he cried, the appellant threatened him not to shout and then the appellant asked him to accompany and took the dead body of the deceased to Kamarpada which is at a distance of 100 meters and there the appellant separated the head of the deceased from the body by means of a sickle and brought the beheaded head in a bag and returned to the house. P.W.2 also followed the appellant and the appellant threw away the sickle outside.The witness further stated that the appellant kept him inside the room and closed the door from outside and went to take bath and on the next day morning, the appellant opened the door and the villagers came and he told the villagers about the incident. In the cross-examination, the witnesses stated that he has read upto Class-V and further stated that out of fear, he could not shout during the incident and the appellant was sleeping in the Danda Ghara when he along with the deceased grandmother were sleeping in the Badi Ghara. The previous statement of P.W.2 recorded under section 161 of Cr.P.C. was confronted to him and it has been proved through the I.O. (P.W.8) that he has not stated before him that due to summer, he was sleeping outside and while he along with the deceased were sleeping on the verandah, the appellant called them to come inside and that he disclosed the incident before the villagers and he was kept inside the room and the door was closed from outside. Even though these contradiction has been proved by the defence, we are of the view that the same in no way affects the credibility of P.W.2 and his version that his father (appellant) strangulated the neck of the deceased inside the Danda Ghara and subsequently took the dead body to Kamarapada and there he separated the head of the deceased by means of a sickle has not at all been shattered and the witness appears to be truthful and nothing has been brought out in the cross-examination to disbelieve his evidence.

The witness has further stated that the appellant was always expressing disgust over the deceased and the appellant kept the bag containing the head of the deceased in the bamboo basket of the house. The learned trial Court has noticed the demeanor of the witness and mentioned that P.W.2 continued to remain confident throughout the examination and cross-examination while the appellant was standing in the accused dock. Section 280 Cr.P.C. empowers the Presiding Judge while recording the evidence of witnesses, to also record such remarks (if any) as he thinks material, respecting the demeanour of such witness whilst under examination. The demeanour of the witness is the appearance of credibility that the witness has during testimony and examination at trial or hearing. The look or manners of a witness

while in the witness box, his hesitation and doubts or confidence and calmness etc. are the facts which only the trial Judge is in a position to, and is expected to observe. Though the Court is quite free to make a note of demeanour of the witness, it is desirable to avoid remarks of an apparently exclusive character. The observations of a trial Judge as regards the demeanour of witnesses are entitled to grant weight. When the Court has found the witness to be a competent one and he being the son of the appellant, his presence at the scene of occurrence cannot be disputed and he has narrated the incident in detail as to how the appellant committed the murder of the deceased and subsequently beheaded her and his version has not at all been shattered in the cross-examination, we are of the view that the learned trial Court has rightly placed reliance on the evidence of P.W.2.

Above all, the doctor (P.W.7), who was conducted post mortem examination over the dead body of the deceased has noticed the following injuries:-

> "On examination, externally I found one cut injury in between the chin and thyroid cartilage on the front of the neck going backwards to involve the whole, of neck leading to decapitation of head from body just below the third survicalvertebra from the posterior aspect. Margins of the injury are ragged and bruised. The injury cuts from anterior to posterior. Hyoid bone, phyranx, muscles of neck, vessels, nerves and just below the 3rd cervical vertebrae.
>
> (ii) Abrasion of size 2 c.m. x 1 c.m. behind the right elbow backside red-brown in colour.
>
> (iii) Abrasion of size 1 cm. x 1 c.m. on the back of left elbow red-brown in colour.
>
> All the above three injuries were ante-mortem in nature. Injury on neck was only grievous while two others were simple in nature. Injury on neck might have been caused by sharp cutting weapon with serrated margins (sickle like). Injury Nos. II, III might have been caused by hard and blunt weapons.
>
> On dissection internally he found as follows:-
>
> (I) The cut injury on neck leading to decapitation has transected the spinal cord at the level below C-3 above C-4 thyroid cartilage and hyoid bone, are cut through."

Therefore, the version of this child witness (P.W.2) is not only reliable and trustworthy but the same is also getting sufficient corroboration from the medical evidence. The backing received from the doctor's (P.W.7) evidence ramparts the evidence of P.W.2 and fortifies the prosecution case.

Whether the recovery evidence adduced by the appellant corroborates the prosecution case?:

9. P.W.4 has stated that while the appellant was in police custody, he stated before the police that he could point out the place where the severed head of the deceased has been concealed and accordingly, he led the police to the spot and gave recovery of the same.The police prepared the seizure list which has been marked as Ext.6. P.W.4 further stated about the seizure of the headless body from Nandi Bila as per seizure list Ext.9. Apart from the seizure of the sickle lying at Kamarapada, which was seized as per seizure list Ext.8 and sample earth and blood stained earth

as per seizure list Ext.7, the I.O.(P.W.8) has also stated that after the appellant was taken into custody, he made a statement before him which was recorded in a separate sheet and the same has been marked as Ext.11/1. He further stated that the appellant led him to his room and brought out a bag from Kunda Doli having severed head of the deceased. The I.O. has also stated about the seizure of the weapon of offence and the beheaded body of the deceased and therefore, the versions of P.W.4 and P.W.8 also indicate that at the instance of the appellant basing on his statement recorded under section 27 of the Evidence Act, the head of the deceased was recovered from the house of the appellant.

The appellant was asked a pertinent question in the accused statement recorded under section 313 of the Cr.P.C., which is reflected under Question No.34, as to what he has to say about the case, wherein he has stated that he was under intoxication and the deceased asked him to commit her murder otherwise the villagers would create disturbance and accordingly, he took 'ganja' and killed his mother by way of strangulation and then asked his son (P.W.2) to accompany him and went to the land where he beheaded the deceased and came with the head to his house.

It is needless to mention that a person cannot seek exemption from liability for commission of murder on the ground of 'voluntary intoxication'. The Penal Code does not provide for any provision which can potentially protect an accused from liability for commission of any crime, much less a heinous crime like murder, merely because he chose to intoxicate himself before executing his culpable intention. In the case of ***Paul -Vrs.- State of Kerala reported in (2020) 3 Supreme Court Cases 115***, while adjudicating criminal liability of a self-intoxicated persons, the Hon'ble Apex Court held as follows:

> "32. Section 86 IPC enunciates presumption that despite intoxication which is not covered by the last limb of the provision, the accused person cannot ward off the consequences of his act. A dimension however about intoxication may be noted. Section 86 begins by referring to an act which is not an offence unless done with a particular knowledge or intent. Thereafter, the law-giver refers to a person committing the act in a state of intoxication. It finally attributes to him knowledge as he would have if he were not under the state of intoxication except undoubtedly, in cases where the intoxicant was administered to him either against his will or without his knowledge. What about an act which becomes an offence if it is done with a specific intention by a person who is under the state of intoxication? Section 86 does not attribute intention as such to an intoxicated man committing an act which amounts to an offence when the act is done by a person harbouring a particular intention."

The instant case has exposed this Court to a very unfortunate set of facts where a son did not think twice before killing his creator, i.e. the mother. As per the above position of law, the knowledge of the appellant for commission of the crime can be well inferred, notwithstanding the fact that he was intoxicated. Furthermore, no evidence was led from the side of the defence to show that the intoxication was so intense that it affected the ability of the appellant to form intention to commit the

crime. Therefore, when the evidence is consistent and well-corroborated, the defence cannot be permitted to derail the prosecution case flippantly raising a superfluous plea of intoxication.

When Question No.35 was put to the appellant as to whether he wants to cite any evidence in defence, he responded in negative and further stated that since the murder has been witnessed by his own son (P.W.2), no further evidence remained to be adduced.

Conclusion:

10. In view of the foregoing discussions, we are of the view that the version of the child witness (P.W.2), is not only clear, cogent, reliable and trustworthy but his evidence is getting corroboration from the medical evidence and the recovery of the head of the deceased at the instance of the appellant. Therefore, the learned trial Court is quite justified in holding the appellant guilty under section 302 of the I.P.C. and accordingly, we do not find any merit in this JCRLA.

Accordingly, the JCRLA stands dismissed.

Before parting with the case, we would like to put on record our appreciation to Mr. Sobhan Panigrahi, the learned Amicus Curiae for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.7,500/- (rupees seven thousand five hundred only). This Court also appreciates the valuable help and assistance provided by Mr. Priyabrata Tripathy, learned Additional Standing Counsel.

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2024 (II) ILR-CUT-1175

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

W.P.(C) NO. 9115 OF 2024

ASHOK KUMAR SWAIN …….Petitioner

-V-

STATE OF ORISSA ..……..Opp.Party

ODISHA CIVIL SERVICE (PENSION) RULES, 1992 r/w the 2005 Amendment – The petitioner was working as daily wage mulia with effect from 28.06.1999 – He was appointed as Faras in regular cadre on 06.03.2006 – Whether petitioner is entitled to the benefit of pension as per 1992 Rules – Held, No – The petitioner's right was not established under the old rules by the time of his appointment – The retrospective application of the amendments to the petitioner's benefits before he took birth in the regular cadre is impermissible – The petitioner was governed by the prevailing rules at the time of his appointment.

(Paras 11-13)

Case Laws Relied on and Referred to :-

1. W.P.(C) Nos. 15433 & 15856 of 2012 & W.P.(C) No. 1471 of 2013 : Shri Anand Dash & Seven Ors. vs. State of Orissa.
2. W.P.(C) Nos. 3244, 3247 & 3249 of 2022 : Ranjan Kumar Sahu vs. State of Odisha & Ors.
3. W.P.(C) No. 23073 of 2015 : Tushar Mukherjee vs. State of Odisha & Ors.

For Petitioner : Mr. Arabinda Tripathy.
For Opp.Party : Mr. Biplab Mohanty, Addl. Govt. Advocate

JUDGMENT Date of Judgment : 29.07.2024

CHITTARANJAN DASH, J.

1. Heard Mr. Tripathy, learned counsel for the Petitioner and Mr. Mohanty, the learned Additional Government Advocate.

2. By means of this application, the Petitioner seeks to quash the order dated 18.08.2023 passed by this Court through the Registrar (Judicial) while considering the representation of the Petitioner pursuant to the direction issued by this Court in W.P.(C) No.13254 of 2018.

3. The background facts of the case are that the Petitioner had appeared in the interview for engagement as Daily Wage Mulias in the year 1999. A select list of 31 candidates was published on 28.06.1999, along with a waiting list of 9 candidates which also enlisted the Petitioner, as per Annexure-2. Subsequently, a list of empanelled Daily Wage Mulias was prepared where the name of the Petitioner was placed along with 27 other existing empanelled Mulias. Thereafter, upon creation of Class-IV posts, 19 persons of the said empanelment were appointed against different posts vide Office Order No. III-A-40/92-431 (Annexure-3) dated 17.01.2003, in which the Petitioner was not selected. The Petitioner was appointed as Faras in the regular cadre in the Court's establishment on 06.03.2006 vide Office Order No. III-A-40/92-95-1839 (Annexure-6) from which his service period is counted.

4. The Petitioner claims that he is similarly situated at par with the Mulias taken on regular role with effect from 17.01.2003 is covered under the provisions of OCS (Pension) Rule, 1992 as well as General Provident Fund (Orissa) Rules, 1938 even though his appointment was with effect from 06.03.2006. It is further case of the Petitioner that he has been brought under the provision of notification issued on 17.09.2005 wherein the OCS (Pension) Rule, 1992 was amended and was also the amendment to the provision of General Provident Fund (Orissa) Amendment Rule, 2007 under Annexure - 7 and 8. According to the Petitioner, since the persons similarly situated in empanelment who got appointed for the permanent role of this Court with effect from 17.01.2003 are covered under the provisions of the said Pension Rule.

5. The Petitioner respectfully submitted that pursuant to the order dated 16.03.2005 number of persons appointed as Junior Stenographers in the Court's establishment have been brought within the ambit of the provision of OCS (Pension) Rule, 1992 as well as General Provident Fund (Orissa) Rules, 1938 even after joining

on 02.04.2005 i.e. the amended provision of the OCS (Pension) Rules 1992 and as such the Petitioner having been empaneled as Daily wage Mulia with effect from 28.06.1999 were shown below the persons in the said panel list against Sl. No. 13 & 15 to 20 and were given regular appointment with effect from 17.01.2003 under Annexure-3.

According to the Petitioner, had those candidates not included at Sl. No.13 & 15 to 20 the Petitioner would have been appointed with effect from the year 2003 and would have been within the provision of OCS (Pension) Rules, 1992 and GPF (Orissa) Rules, 1938. It is the further case of the Petitioner, that the benefit of the said provision be extended to him in view of the order passed by this Court in W.P.(C) No.15433 of 2012 and batch as well as W.P.(C) No.23073 of 2015 as otherwise he is deprived of his legitimate right. According to the Petitioner, the Court through the Registrar (Judicial) while considering his representation did not take into account the ratio of the decision in the aforesaid writ petitions and disposed of the same illegally and as such the same is not sustainable and is liable to be quashed and the Petitioner be directed to be covered under the said OCS (Pension) Rules, 1992 and GPF (Orissa) Rules, 1938 to extend the benefit of pension as well as GPF.

6. The New Pension Scheme was formally introduced with effect from January 1, 2005. The amendments to the General Provident Fund (Orissa) Rules and the Orissa Civil Services (Pension) Rules, which reflect this transition, were duly notified on 17.09.2005. The confirmation of Petitioner's appointment on 06.03.2006, clearly post-date the implementation of the NPS.

7. It is to be noted that the amendments to the pension and provident fund rules, though effective from January 1, 2005, were meant to apply to all employees appointed from this date forward. The position of the Petitioner, whose recruitment process was completed and whose service commenced after the NPS came into force, places them within the ambit of the new rules. While it is well-settled that rules cannot take away vested rights retrospectively, in the present case, the Petitioner's rights were not established under the old rules by the time of their appointment. The applicability of the new rules to their service is consistent with the legal principle that newly appointed employees are governed by the prevailing rules at the time of their appointment.

8. As cited by the Petitioner, the decision in ***Shri Anand Dash and Seven Ors. vs. State of Orissa*** reported in **W.P.(C) Nos. 15433 & 15856 of 2012 and W.P.(C) No. 1471 of 2013** is not applicable to the present matter as held:

> "**15**. It is no doubt true that Rules made under Article 309 can be made so as to operate with retrospective effect. But it is well settled that rights and benefits which have already been earned or acquired under the existing Rules cannot be taken away by amending the Rules with retrospective effect. (See N.C. Singhal v. Armed Forces Medical Services ; K.C. Arora v. State of Haryana and T.R. Kapur v. State of Haryana). Therefore, it has to be held that while the amendment, even if it is to be considered as

> otherwise valid, cannot affect the rights and benefits which had accrued to the employees under the unamended rules. The right to NPA @ 25% of the pay having accrued to the respondents under the unamended Rules, it follows that respondent employees will be entitled to the non-practising allowance @ 25% of their pay up to 20-5-2003."In a large number of cases, the Hon'ble apex Court has categorically laid down that the right of an employee, which accrued in his favour on the date of appointment, cannot be taken away by the amending provisions of the Rules concerning the service with retrospective effect. An employee, while entering into service, is subjected to the condition of service as on the date, when he joins. Any right given to such employee under the provision of any Act or Rules governing the employment, if taken away by amending such Rules with retrospective effect, the same would amount to violating the Rules under Articles 14 & 16 of the Constitution.
>
> **16**. In the case at hand, as already stated above, all the Petitioner joined in their due assignment on 02.04.2005 by which date, the amended Rules were not existing. The said amended Rules, which were introduced by Notification dated 31.08.2007 and 17.09.2005 there could not have been given retrospective effect by stating that they will come into operation from 01.01.2005, which is prior to the date, when the Petitioner joined in their new assignments.
>
> **17**. We are, therefore, of the considered view that the said amendments brought to the General Provident Fund (Orissa) Rules, 1938 and the Orissa Civil Service (Pension) Rules, 1992 will not apply to the Petitioner, who will be governed by the said Rules as it existed on the date of their joining in service.
>
> We also find that the opposite parties - State has discriminated the Petitioner by allowing the benefits under the old Pension Rules and General Provident Fund (Orissa) Rules in the case of 13 regularly recruited OES officers, though they have been appointed on 14.02.2005 and joined the Government much after 01.01.2005. The said action on the part of the State also amounts to discrimination violating Articles 14 & 16 of the Constitution of India."

9. In Shri Anand Das (*supra*), the Petitioner were challenging amendments that sought to apply new rules retrospectively to individuals who had already accrued rights under the old rules, based on the timing of their recruitment. They address the issues of retrospective application affecting those who had accrued rights prior to rule changes, whereas the current Petitioner's situation falls squarely within the scope of the rules as they existed at their time of joining. However, the present case involves Petitioner who joined service well after the cut-off date of January 1, 2005, and thus their entitlements were governed by the rules in force at the time of their appointment. The claim of discrimination based on similar cases being treated differently is not substantiated with adequate material. The selective application of rules to other employees does not automatically extend to the Petitioner without clear legal basis or statutory provision.

10. This Court in the matter of ***Ranjan Kumar Sahu vs. State of Odisha and Ors***. in **W.P.(C) Nos. 3244, 3247 and 3249 of 2022**, has held that:

> "**10**. In this regard, we must stress upon the judgment of Constitutional Bench of Hon'ble Supreme Court in the case of **Chairman Railway Board v. C.R Rangadhamail**. The Court having held that right to receive pension is a right vested under Right to Property, made certain observations as under:

"It can, therefore, be said that a rule which operates in futuro so as to govern future rights of those already in service cannot be assailed on the ground of retrospectivity as being violative of Articles 14 and 16 of the Constitution, but a rule which seeks to reverse from an anterior date a benefit which has been granted or availed, e.g., promotion or pay scale, can be assailed as CIVIL APPEAL NO. 4174-82 OF 1995 being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively."

11. Further, in para-24 of the judgment, the Hon'ble Supreme Court, in very strong terms observed that-

"In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc. of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution."

……

19. In the case at hand, as already stated above, all the Petitioner joined their due assignments before the amendment of the Old Pension Rules. The said amended Rules, which were introduced by Notification 5W.P. (C) 640/2021 dated 31.08.2007 and 17.09.2005 there could not have been given retrospective effect by stating that they will come into operation from 01.01.2005, which is prior to the date, when the Petitioner joined in their new assignments.

20. It is crystal clear that the statutes or Rules dealing with substantive rights - is prima facie/generally prospective unless it is expressly or by necessary implications made to have retrospective operation. In the case of **Young v. Adams**, the observation reveals that a statute cannot be provided with a retrospective effect unless the language of the statute intends or expressly mentions the same. The fact that the legislature can execute the power to extinguish the existing rights and obligations provided by a statute by means of retrospective enactment seems unfair. While the apex Court in the case of **Govind Das v. Income Tax Officer** has followed in the maxim "lexprospicit non respicit" which means that the law in hand always looks forward and not towards the back. The essence of this principle is to subject current activities under the current laws only.

21. This Court is, therefore, of the considered view that the said amendments brought to the General Provident Fund (Orissa) Rules, 1938 and the Orissa Civil Service (Pension) Rules, 1992 will not apply to the Petitioner, (1898) A.C. 469 7(1976) 1 SCC 906 who will be governed by the said Rules as it existed on the date of their joining in service.

22. This Court, therefore, quashes the impugned orders by which the representations of the Petitioner were rejected arbitrarily inasmuch as without assigning any reason in support of such rejection and direct that the Petitioner will be governed by the provisions of the old General Provident Fund (Orissa) Rules, 1938 and the Orissa Civil Service (Pension) Rules, 1992 as it stood prior to the amendments brought into the same and will be entitled to all the benefits, which were provided thereunder prior to such amendments. The amendments brought into the above two Rules, will have prospective effect from the date, such amendments were notified."

11. It is a well-established from the above decisions that statutes or rules which impact substantive rights are generally construed to operate prospectively unless there is a clear and explicit intention to the contrary. This principle ensures that individuals' established rights are not unfairly altered by retrospective amendments. In the instant case, the amendments to the General Provident Fund (Orissa) Rules, 1938, and the Orissa Civil Service (Pension) Rules, 1992, explicitly state their date of effect. The amendments were notified to take effect from January 1, 2005. This explicit declaration of the effective dates indicates a clear intention that the new provisions apply to employees appointed on or after these dates.

12. Since the Petitioner was appointed on 06.03.2006, his entitlements are governed by the rules as they stood at the time of his appointment, which reflects the new amendments. The application of the old rules, which were in force prior to these amendments would be inconsistent with the explicit intent of the amendments and would violate the principle that rules affecting substantive rights should generally operate prospectively as in the case of the Petitioner.

13. Therefore, the retrospective application of these amendments, to the Petitioner's benefits before they take birth in the regular cadre, is impermissible. Such an application would contravene the established legal principle that individuals' rights should be governed by the rules in effect at the time of their service commencement. The clear and explicit effective dates of the amendments reinforce the intention that these changes should apply only prospectively, affirming that the Petitioner's benefits should be governed by the rules applicable at their time of appointment.

14. In view of the above, the decisions taken by this Court vide Order No. III-17/2023-18310 in Annexure-11 is both clear and well-founded. The judgement in **W.P.(C) No. 15433 & 15856 of 2012** and **W.P.(C) No. 1471 of 2013**, which benefitted employees like Anand Dash, was specifically applicable to those who commenced service before the amended rules of the Odisha Civil Service (Pension) Rules, 1992 were enacted. Given that Swain and Mallick joined service on 06.03.2006, after the amendments came into effect, their entitlement to the pre-amendment benefits does not align with the legal precedents established in those cases. Similarly, the reference to **Tushar Mukherjee vs. State of Odisha and Others** in **W.P.(C) No. 23073 of 2015** is inapplicable as Mukherjee's situation involved temporary appointments, whereas the Petitioner's service commenced under the new regulations directly. The order accurately reflects the legal framework and the specific circumstances surrounding each case, and thus, the findings and conclusions of the High Court are upheld.

Accordingly, the writ petition is dismissed.

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2024 (II) ILR-CUT-1181

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

W.P.(C) NO. 16933 OF 2024

SARAT KUMAR PRADHAN …….Petitioner

-V-

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

SERVICE LAW – Claim of seniority & promotion – Period of limitation – The petitioner seeks to challenge the seniority list issued in the year 2005 – The petitioner first raised his objections in 2017 and filed the original application in 2018 – Effect of – Held, individuals cannot remain passive for an extended period and later seek to challenge concluded matter – The doctrine of delay and laches is a crucial aspect of judicial discretion, ensuring that claims are raised promptly to avoid prejudice to other parties and to uphold the integrity of legal process.

Case Laws Relied on and Referred to :-

1. (2012) 7 SCC 610 : Vijay Kumar Kaul vs. Union of India.
2. (2019) 2 SCC (L&S) 630 : Ajit Kumar Bhuyan and Others vs. Debajit Das & Ors.
3. (2008) 2 SCC 750 : Union of India and Another vs. Narendra Singh.

For Petitioner : Mr. Nirmal Ranjan Routray.

For Opp.Parties : Mr. Biplab Mohanty, Addl. Govt. Advocate.

JUDGMENT Date of Judgment : 29.07.2024

CHITTARANJAN DASH, J.

1. Heard Mr. Routray, learned counsel for the Petitioner and Mr. Mohanty, the learned Additional Government Advocate.

2. By means of this writ petition, the petitioner seeks to quash the order dated 24.06.2024, passed by the learned Central Administrative Tribunal (C.A.T.), Cuttack Bench in O.A. No. 398/2018 (Annexure-17). Further, the petitioner seeks a directive for Opposite Parties No. 1 to 5 to declare Opposite Party No. 6 as a failed candidate in the selection for promotion to the post of Technician Grade-III against the 25% LDC Quota, as per the letter dated 07.12.2004, and to remove his name from the seniority list.

3. The background facts of the case are that the petitioner was appointed as a Group-D employee on 15.05.1997, and Respondent No. 5 on 15.06.1997. On 07.12.2004, Opposite Party No. 4 announced a competitive examination for Skilled Artisan Grade-III posts, listing both the petitioner and Opposite Party No. 5 as eligible candidates. The results published on 29.03.2005 placing Opposite Party No. 6 and the petitioner at positions 8 and 15, respectively. Both were subsequently promoted to Filter Operator. Later promotions advanced them to Technician Grades-II and I.

The petitioner discovered that Opposite Party No. 6 did not achieve the required 60% marks in the 24.03.2005 exam, yet was promoted and placed higher in

seniority. Representations made by the petitioner on 30.01.2017 and subsequent dates highlighted these issues but were rejected or ignored due to alleged delays. Despite repeated grievances, including a joint application and RTI requests, the authorities failed to address the core issues. On 12.07.2018, another promotion list again placed Opposite Party No. 6 above more qualified candidates, including the petitioner. The petitioner filed O.A. No. 398/2018 before the C.A.T., Cuttack Bench, challenging the fraudulent promotions. The application was dismissed due to delay, prompting this writ petition seeking judicial intervention.

4. The learned counsel for the petitioner advanced his arguments challenging the dismissal of the Miscellaneous Application (M.A.) on grounds of delay. Firstly, the counsel argued that the Learned Tribunal erred in dismissing the M.A. without considering the relevant case law from the Hon'ble Apex Court, specifically the judgments in Ajit Kumar Bhuyan and Others v. Debajit Das and Others (2019) 2 SCC (L&S) 630 and Union of India and Another v. Narendra Singh (2008). These judgments, which were relied upon by the petitioner, emphasize the importance of examining the merits of a case despite procedural delays. The counsel contended that the Tribunal's reliance on other decisions, not cited by the parties, was inappropriate and led to an unsustainable order dated 24.06.2024, which should be quashed. The learned counsel highlighted that the Opposite Party No. 6 had secured only 55.90% marks, below the qualifying threshold of 60%, as per the information obtained under the RTI Act. In contrast, the petitioner had secured 61.85% marks, indicating a clear case of merit-based illegality during the selection process for promotion to the post of Skilled Artisan Grade-III. The counsel argued that the Tribunal failed to properly consider this evidence and the relevant legal precedents in condoning the delay under Section 21(3) of the Administrative Tribunals Act, 1985. The Tribunal's focus on the lapse of time failed to address the substantive illegality of promoting a less meritorious candidate, thereby regularizing the illegal promotion of Opposite Party No. 6. This oversight warrants the quashing of the Tribunal's order.

5. The learned counsel for the Opposite Party states that it is pertinent to highlight that the petitioner's challenge to the promotion and seniority issues was belated. The promotion orders in question date back to 31.03.2005, and the petitioner's first representation was made only on 30.01.2017, nearly 12 years after the initial promotion. The subsequent application filed on 04.10.2017 and the challenge to the seniority were significantly delayed. He further submits that the issue of seniority was addressed adequately. The petitioner's seniority was corrected in 2016 as per the findings of the seniority correction exercise. The response dated 09.10.2017 clearly stated that the seniority of Shri Dip Kumar Samal was rectified and circulated correctly. The error in seniority was acknowledged and rectified, demonstrating the Department's commitment to maintaining accurate records. The learned counsel further submits that even if there were discrepancies, the petitioner has not demonstrated how these have caused actual harm to his career or seniority

position. The records and responses provided show that the correction of seniority was handled transparently and according to procedural norms. The allegations of unfair treatment or wrongful promotion of Respondent No. 6 do not hold when viewed against the backdrop of the department's corrective measures and the petitioner's delay in challenging the promotions. The petitioner's challenge is both time-barred and lacks substantive evidence to overturn the Tribunal's order. The promotion process and seniority adjustments were conducted in compliance with the relevant norms, and the delay in filing the application justifies the dismissal of the petitioner's claims as the challenge lacks merit.

Whether there was an inordinate delay by the Petitioner in filing the writ petition?

6. The promotions and seniority list issues that the petitioner seeks to challenge date back to 2005. The petitioner first raised his objections in 2017 and filed the original application in 2018, approximately 12 years after the promotions were granted. This significant lapse of time, without a satisfactory explanation, constitutes an unreasonable delay.

7. Upon careful review of the petition and the underlying facts, it is evident that the petitioner's application suffers from significant delay and laches, warranting its dismissal. The petitioner's first prayer seeks to quash the letter dated 09.10.2017, which was a response to his appeal. Notably, the petitioner did not challenge the initial rejection of his representation on 22.05.2017, indicating a lack of timely action. Furthermore, the petitioner's request to declare Respondent No. 6 ineligible for promotion based on the letter dated 07.12.2004 is inconsistent with his subsequent plea to adjust the seniority list of Tech. Gr.-I, given that Tech. Gr.-III is the feeder cadre for Tech. Gr.-II and Tech. Gr.-I.

8. The gradation lists for these positions were published regularly, yet the petitioner did not raise any objections until 09.10.2017, almost twelve years after the initial promotion order of 31.05.2005. This significant delay in challenging the promotion and seniority of Respondent No. 6 undermines the credibility of the petitioner's claims and demonstrates a lack of due diligence. The petitioner's justification that the illegality and irregularity in the promotions came to light only through an RTI reply in 2017 is insufficient to overcome the extended period of inaction.

9. The Hon'ble Supreme Court in the matter of ***Vijay Kumar Kaul vs. Union of India***, reported in **(2012) 7 SCC 610** has held as follows-

> 23. It is necessary to keep in mind that a claim for seniority is to be put forth within a reasonable period of time. In this context, we may refer to the decision of this Court in P.S. Sadasivaswamy v. State of T.N. wherein a two-Judge Bench has held thus: (SCC p. 154, para 2)
>
> "2. … It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary

> powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters."
>
> 24. In Karnataka Power Corpn. Ltd. v. K. Thangappan this Court had held thus that : (SCC p. 325, para 6) "6. Delay or laches is one of the factors which is to be borne in mind by the High Court when they exercise their discretionary powers under Article 226 of the Constitution. In an appropriate case the High Court may refuse to invoke its extraordinary powers if there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the opposite party. Even where fundamental right is involved the matter is still within the discretion of the Court as pointed out in Durga Prashad v. Controller of Imports and Export. Of course, the discretion has to be exercised judicially and reasonably."
>
> 26. From the aforesaid pronouncement of law, it is manifest that a litigant who invokes the jurisdiction of a Court for claiming seniority, it is obligatory on his part to come to the Court at the earliest or at least within a reasonable span of time. The belated approach is impermissible as in the meantime interest of third parties gets ripened and further interference after enormous delay is likely to usher in a state of anarchy.
>
> 27. The acts done during the interregnum are to be kept in mind and should not be lightly brushed aside. It becomes an obligation to take into consideration the balance of justice or injustice in entertaining the petition or declining it on the ground of delay and laches. It is a matter of great significance that at one point of time equity that existed in favour of one melts into total insignificance and paves the path of extinction with the passage of time.

10. It is a well-established principle that individuals cannot remain passive for an extended period and later seek to challenge concluded matters. The doctrine of delay and laches is a crucial aspect of judicial discretion, ensuring that claims are raised promptly to avoid prejudice to other parties and to uphold the integrity of legal processes.

Whether the order of learned Central Administrative Tribunal, Cuttack bench, dated 24.06.2024 is illegal or improper on account of dismissing the M.A. on ground of delay without taking into account the grounds of the Petitioner?

11. This Court finds the order of the Central Administrative Tribunal, Cuttack bench, dated 24.06.2024 with no infirmity or illegality. The petitioner cited the judgments in Ajit Kumar Bhuyan and Others vs. Debajit Das and Others (2019) 2 SCC (L&S) 630 and Union of India and Another vs. Narendra Singh (2008) 2 SCC 750, arguing that these cases were not adequately considered by the Tribunal. However, both cases reiterate the importance of timely action and the consequences of unreasonable delay. In ***Ajit Kumar Bhuyan and Others vs. Debajit Das and Others*** reported in **(2019) 2 SCC (L&S) 630**, the appeal was considered because a clear case of fraud was made out and established. The instant case does not involve allegations of fraud but rather concerns the petitioner's delayed challenge to promotions and seniority lists and unsubstantiated proof of illegality in the challenged result of promotion. The distinction between fraud and mere delay is crucial, as fraud can toll the limitation period, whereas delay without fraud does not.

In ***Union of India and Another vs. Narendra Singh*** reported in **(2008) 2 SCC 750**, the Supreme Court, held that mistakes in promotion could be corrected following due process, emphasizing that errors by the department should be rectified even if it causes hardship to employees, however, it considered the facts sympathetically due to the respondent being on the verge of retirement, holding the post of Senior Accountant for seventeen years, and reverted him to his substantive post only for pensionary benefits. The facts in Narendra Singh (supra) are markedly different and do not provide a basis to overlook the significant delay in the present case.

12. In the instant case, the petitioner's delay in challenging the 2005 promotions and seniority list is substantial, and no compelling reason has been provided to justify this delay. The Tribunal's decision to dismiss the M.A. on the ground of delay is consistent with the principles established by the cited judgments. The principle that "law helps those who are vigilant, not those who sleep over their rights" aptly applies in this case. Therefore, the order dated 24.06.2024 is legally sound and not improper.

13. Furthermore, the petitioner also claims that he obtained information about the respondent securing 55.90% marks through RTI. The said RTI reply indicates that the request was with regard to the status of the appeal dated 04.10.2017 to the General Manager and furnishing note sheets from the dealing assistant to the CPO. The reply dated 09.01.2018 noted that the petitioner's representation was under consideration and that the seniority correction was based on irregularities identified during the selection process. However, it was also mentioned that the panel formed in 2005 was unavailable, and the promotion order confirmed Shri Samal's seniority above the petitioner, with no evidence showing Shri Samal's unsuitability in any selection/test. Additionally, the "08 pages" of handwritten note sheets supplied with the RTI reply are not found legible due to improper attestation. It is to be noted that in the first application for fixation of seniority filed by the petitioner on 30.01.2017, he has mentioned the said marks when he had no scope of knowing the same before the RTI reply which was only received on 09.01.2018. The petitioner could have obtained the information during the OAT proceedings, rendering the forced evidence unnecessary if his case was valid and lawful. The petitioner failed to demonstrate how he obtained the exact marks of the respondent or himself. Moreover, the established seniority and promotion positions have likely resulted in settled expectations and administrative stability, which should not be disturbed after such a long period. In conclusion, the substantial delay in filing the petition and the absence of a compelling explanation for this delay necessitate the dismissal of the writ petition based on the doctrine of laches. The petitioner failed to act within a reasonable time, and such delay has likely prejudiced the opposite party and impacted the administration of justice.

14. Given these circumstances, the petitioner's application is fundamentally flawed due to inordinate delay and the absence of a compelling justification for such delay, this petition is liable to be dismissed to prevent the revival of stale claims and

to maintain the stability of established legal and administrative decisions. Consequently, this Court finds no merit in the petition and dismisses it on the grounds of delay and laches.

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2024 (II) ILR-CUT-1186

K.R. MOHAPATRA, J.

CMP NO. 1018 OF 2017

KAILASH BHOI (DEAD) THROUGH LRs. .....Petitioners

-V-

KAILASH CH. SAMAL (DEAD) THROUGH LRs. .....Opp.Parties

CODE OF CIVIL PROCEDURE, 1908 – Order VIII, Rule 6-A – Counter claim by defendant – The plaintiff amended the plaint by introducing certain new facts in the pleadings – The petitioner/defendant filed additional written statement U/o. VIII, Rule 9 along with counter claim – Whether the counter claim filed by the petitioner after framing of issue is acceptable under law? – Held, No – Only because some additional issues may be required to be framed that does not *ipso facto* give a right to the defendant to file a counter claim – A counter claim may only be accepted, if the cause of action for filing such counter claim arises on or after filing of the suit but before delivery of decree.

(Paras 10, 10.1)

Case Laws Relied on and Referred to :-

1. (2020) 2 SCC 394 : Ashok Kalra vrs. Wing Cdr. Surendra Agnihotri & Ors.

For Petitioners : Mr. Prasanna Kumar Rath.

For Opp.Parties : Mr. Sourav Suman Bhuyan on behalf of Mr. Bebekananda Bhuyan

JUDGMENT Heard & disposed of on : 24.07.2024

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Petitioners in this CMP seek to assail the order dated 7th October, 2015 (Annexure-7) passed in CS No.289 of 2000, wherein learned 2nd Additional Civil Judge (Senior Division), Cuttack rejected the counter-claim filed by the Petitioners applying the provision under Order VII Rule 11 CPC.

2.1. The Petitioners also assail the order dated 17th April, 2017 (Annexure-11) passed in the said suit, whereby prayer for acceptance of counter-claim filed by the Petitioners was not accepted.

3. Mr. Rath, learned counsel for the Petitioners submits that the Petitioners are LRs of one Kailash Bhoi-Defendant No.1. Before expiry of the period for filing written statement, said Kailash Bhoi died and was substituted by the present Petitioners as his LRs. On appearance, they filed their written statement along with

counter claim. The said counter-claim was rejected vide order dated 7th October, 2015 (Annxeure-7) on the ground that the defects pointed out by Stamp Reporter in the counter-claim were not removed erroneously applying the provision under Order VII Rule 11 CPC and the suit was posted for settlement of issues. After settlement of issues, the Plaintiff amended the plaint. Thus, the Petitioners filed additional written statement along with counter-claim under Annexure-9. While accepting the additional written statement filed by them, learned trial Court refused to accept the counter-claim applying the principles under Order VIII Rule 6-A CPC. Hence, this CMP has been filed.

4. It is his submission that in ***Ashok Kalra vrs. Wing CDr. Surendra Agnihotri and others***, reported in **(2020) 2 SCC 394**, Hon'ble Supreme Court held that a counter-claim may be accepted even after settlement of issues, but not later than commencement of trial. In the instant case, trial of the suit had not commenced by the time additional written statement-cum-counter-claim was filed. Thus, there was no legal impediment for acceptance of the counterclaim. It is further submitted that cause of action for filing of the counter-claim arose after the Plaintiff amended the plaint by introducing certain new facts in the pleadings. Hence, the Defendant-Petitioner should not be prevented from filing the counter-claim to the pleadings brought by way of amendment in the plaint. He further submits that the counter-claim filed earlier was rejected under the provision under Order VII Rule 11 CPC. Thus, the same is not a bar for the Petitioners to file a subsequent counterclaim. Learned trial Court, without considering the same, has passed the impugned order under Annexure-11. Hence, this CMP has been filed.

5. It is his submission that the order under Annexure-7 is also not sustainable as the provision under Order VII Rule 11 CPC is not applicable to a counter-claim in view of the specific provision under Order VIII Rule 6-C CPC. He, therefore, prays for setting aside the impugned orders under Annexures-7 and 11.

6. Mr. Bhuyan, learned counsel for the Plaintiffs-Opposite Parties submits that in view of the subsequent decision clarifying the ratio in ***Ashok Kumar Kalra*** (supra), a counter-claim may be accepted till settlement of issues. In the instant case, the counter claim was filed after settlement of the issues. Further, prayer made in the counter-claim with regard to declaration of RSD No.3090 dated 19th July, 1989 as illegal and invalid is barred by limitation and the same cannot be allowed to be introduced in the counter-claim in view of the provision under Order VIII Rule 6-A (4) CPC. Thus, in view of Section 3 of the Limitation Act, such a prayer cannot be entertained in a counter-claim filed on 12th November, 2016. It is his submission that a counter claim can be filed under three circumstances; firstly, along with the written statement, secondly, by way of amendment of the written statement and thirdly, subsequent to the written statement but before time to file the written statement expires and in no case after the issues are settled. In the instant case, none of the requirements is satisfied. Hence, there is no infirmity in the impugned order. As such, this CMP merits no consideration.

7. Heard learned counsel for the parties.

8. Perused the materials available on record.

9. Order VIII Rule 6-A CPC read as under:

> *"6-A. Counter-claim by defendant.-(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not:*
>
> *Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.*
>
> *(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.*
>
> *(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.*
>
> *(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.]"*

10. On a plain reading of the provision under Rule 6-A of Order VIII CPC, it is clear that a Defendant in addition to his right of pleading a set off under Rule 6, set up by way of a counter-claim against the claim of the Plaintiff, any right or claim in respect of the cause of action accruing to the Defendant against the Plaintiff either before or after filing of the suit, but, before the Defendant has delivered his defence or before time limit for delivery of defence is expired. In the instant case, the counter-claim at the first instance was not accepted on the ground that the defects pointed by Stamp Reporter, were not removed. Although, learned trial Court has applied a wrong provision under Order VII Rule 11 CPC to reject the counter-claim, but that does not take away the effect of the order that the earlier counter-claim filed by the Petitioners was not accepted for non-removal of the defects pointed out by Stamp Reporter. At the same time, the written statement filed by the Petitioners was accepted. Subsequent to the amendment of the plaint, the Petitioners filed additional written statement under Order VIII Rule 9 CPC along with the counter-claim. Order VIII Rule 6-A CPC does not contemplate acceptance of a counter-claim along with additional written statement (subsequent pleading). A counter-claim may only be accepted, if the cause of action for filing such counter-claim arises on or after filing of the suit, but, before delivering of the defence by the Defendants. In the instant case, admittedly, the cause of action for filing of the counter-claim by the Petitioners arose after the amendment of the plaint by the Plaintiffs, i.e., after delivering the defence by the said Defendants. Thus, in view of Order VIII Rule 6-A CPC, a counter-claim filed along with the additional written statement could not have been accepted. It further appears that Hon'ble Supreme Court in ***Ashok Kumar Kalra*** (*supra*) has clarified as under;

> *"Given the fact that on the facts of the present case, a counter-claim was filed after the issues are framed, the said counter-claim cannot be filed as per law laid down by this judgment. Consequently, the Special Leave Petition is dismissed. However, it will be open for the Petitioner to file a fresh suit based on the cause of action in the counter-claim if it is otherwise permissible in law."*

10.1. Thus, a counter-claim may be accepted after delivery of defence, but before the issues are settled. In the instant case, the issues have already been settled. Only because some additional issues may be required to be framed, that does not *ipso facto* give a right to the Defendants to file a counter-claim.

11. It further appears that Order under Annexure-7 was not challenged within a reasonable time. Accepting the same, the Defendants filed additional written statement along with counterclaim. Thus, at this stage, order dated 7th October, 2015 (Annexure7) is no more available to be challenged, more particularly in this CMP.

12. In view of the above, this Court finds that learned trial Court has committed no error in accepting the counter claim.

13. Accordingly, this CMP, being devoid of any merit, stands dismissed.

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2024 (II) ILR-CUT-1189

K.R. MOHAPATRA, J.

W.P.(C) NO. 13864 OF 2020

PRADEEP KUMAR BISWAL …….Petitioner

-V-

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

CONSTITUTION OF INDIA, 1950 – Article 226 – The provisional allotment order of government land was made in 1990 – The said order was communicated to petitioner in the address given in the application – No steps were taken by the petitioner within the stipulated period for which allotment of the case land stood automatically cancelled – Whether the prayer of petitioner for execution of the lease deed by accepting the premium at the present rate with a plea that, as no allotment order/or cancellation order is received by him, is acceptable? – Held, No – Reason indicated with reference to case law. (Paras 11,12)

Case Laws Relied on and Referred to :-

1. C.A.Nos.9895-9896 of 2017 (27.07.2017) : State of Odisha & Anr. Vs. Malati Biswal & Ors.
2. W.P(C) No.8829 of 2012 (19.03.2024) : Subash Ch. Nayak Vs. State of Odisha & Ors.

For Petitioner : Mr. Partha Sarathi Nayak.
For Opp.Parties : Mr. Swayambhu Mishra, ASC

JUDGMENT Heard and disposed of on : 01.08.2024

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Petitioner in this writ petition seeks to assail the order/ letter No.CSP-760/1990/786/CA dated 8th January, 2020 (Annexure-5), whereby the prayer for allotment of government land/regularization of allotment made by the Petitioner was rejected by the General Administration and Public Grievance (GA and PG) Department, Government of Odisha.

3. Mr. Nayak, learned counsel for the Petitioner submits that pursuant to an advertisement, made an application in proper format for allotment of a government plot on 28th January, 1987 (Annexure-1). In the said application form (Annexure-1), Petitioner has stated his permanent address as 'ATIPO: Rachhipur, PS: Jajpur Road, Dist: Cuttack'. His present address was given as 'P.K.Biswal, OFS, Additional Commissioner- Commercial Tax Officer, Cuttack-1, East Circle, Cuttack'. In a drawl of lot, the Petitioner was allotted with the residential Plot No.5 measuring 60'x90', Drawing B/132, Chandrasekharpur, New Capital, Bhubaneswar (for short, 'the case land') vide letter No.19th April, 1990. But the said order was never communicated to the Petitioner. No public notice was ever issued with regard to allotment of the case land in favour of the Petitioner. Thus, he was in complete dark about allotment of the case land in his favour. When the matter stood thus, the Petitioner submitted an application under the provisions of Right to Information Act on 21st September, 2007 to know about the up-to-date status of allotment of Government land in his favour. The Petitioner only came to know from the information supplied that the case land was allotted in his favour vide allotment letter dated 19th April, 1990 and the same was communicated in his official address. By that date, i.e., 19th April, 1990, the Petitioner had already been transferred and was not available in the address in which the allotment order was communicated. Thus, the Petitioner had no occasion to know about such allotment.

4. It is his submission that the permanent address was given in the application form under Annexure-1. Thus, there was no difficulty in sending the allotment order in his permanent address. Had it been so communicated; the Petitioner could have taken steps to deposit the premium within sixty days of such order of allotment as stipulated therein. Thus, no fault can be attributed to the Petitioner in not depositing the premium within the stipulated time.

4.1. However, on receipt of the information through RTI Act, the Petitioner immediately deposited the premium on 24th October, 2007. But no action was taken at the instance of the GA and PG Department to execute the lease deed in his favour. The Petitioner also vide letter dated 26th October, 2007 (Annexure-4) requested to supply a draft lease deed for execution. But the authorities sat over the matter till 2020 and communicated the impugned order/letter under Annexure-5 stating that the prayer for allotment of a piece of government land/regularization of allotment has been rejected. It was stated therein that since the Petitioner did not deposit the premium within a period sixty days and further period of 15 days, as stipulated in the allotment order, the provisional allotment order stood cancelled automatically.

4.2. It is further submitted that immediately after the Petitioner came to know about such allotment through RTI application, the premium was deposited. The GA and PG Department had also never objected to the acceptance of premium deposited by the Petitioner. He further submits that case of the Petitioner is squarely covered by order dated 23rd November, 2017 passed in W.P.(C) No.32757 of 2011. Petitioner also annexed a copy of the said order as Annexure-6 to the writ petition. It is submitted that the said order was challenged by the GA and PG Department before the Hon'ble Supreme Court in SLP(C) No.3939 of 2019, which was dismissed vide order dated 8th January, 2020. It is further submitted that the Petitioner is ready and willing to deposit the premium at the present market rate. Thus, steps should be taken to execute the lease deed in his name.

5. Mr. Mishra, learned ASC vehemently objects to the above. It is his submission that the Petitioner had never intimated the change of his present address to the GA and PG Department. The writ petition is hopelessly barred by time. It is submitted that when the allotment order stood cancelled automatically in view of the stipulation in the order of allotment itself, no cause of action survives to move this writ petition. It is further submitted that the order dated 23rd November, 2017 passed in W.P.(C) No.32757 of 2011 has no application to the instant case, as in that case, the allotment order was communicated in the address of the father of the Petitioner's first wife therein. But by the time the allotment order was communicated, he had married for the second time and intimation of the subsequent address was given to the GA and PG Department. In the instant case, no such communication has been made by the Petitioner. He also relied upon the case of ***State of Odisha and another Vs. Malati Biswal and others*** in Civil Appeal Nos.9895-9896 of 2017 disposed of on 27th July, 2017, wherein, Hon'ble Supreme Court held as under:-

> *"In view of the aforesaid stipulation, it is clear that there was no necessity of passing any formal cancellation order and the provisional allotment order stood cancelled automatically due to admitted non-compliance of the requisites to be performed, as stipulated in the order of allotment. No reason has been shown good bad or otherwise why there was so much of delay in approaching the Court. Once the government framed benevolent scheme such people, it was incumbent upon them to take advantage of the same as stipulated in the scheme and the allotment orders within reasonable time, it would not be a sufficient ground in the facts of the case that since some of them have served the country, they can approach the court at any time after 20 years. Time cannot be relaxed after lapse of decades delay. The delay vas inexcusable and due to latches on the part of the respondent they were not entitled for any relief.*
>
> *Thus, the impugned order is hereby set aside. The appeals are, accordingly, allowed. No order as to costs."*

In the case of ***Malati Biswal (supra)***, Hon'ble Supreme Court has categorically held that there was no necessity for an order of formal cancellation, as the provisional allotment order stood automatically cancelled due to admitted non-compliance of the requisite to be performed as stipulated therein. In the instant case,

admittedly the Petitioner did not deposit the premium within the stipulated time as stipulated in the provisional order of allotment. Thus, no formal order of cancellation is necessary to be passed in the instant case. He further submits that execution of the lease deed by accepting the premium at the present rate does not arise, as the allotment order had already been cancelled automatically, as aforesaid. It is also submitted that receipt of the primum at a much belated stage, i.e., on 26th October, 2007 does not give a right to the Petitioner for allotment of the case land. He, therefore, prays for dismissal of the writ petition. He also relied upon the case of ***Subash Chandra Nayak Vs. State of Odisha and others*** [W.P.(C) No.8829 of 2012 disposed of on 19th March, 2024], wherein this Court relying upon the ratio in ***Malati Biswal (supra)***, held as under:-

> *"10. In the instant case, admittedly there is a delay of nineteen years in filing the writ petition. Further, the premium of the allotted land was not paid within the stipulated time. There is also no material on record to show that the duly filled in lease deed was ever produced for approval. Thus, no formal order was required to be passed for cancellation of the allotment. It stood cancelled automatically in terms of Clause-5 of Annexure-3.*
>
> *xx xx xx*
>
> *14. Admittedly, there is a delay of nineteen years in filing the writ petition. The Petitioner submits that after the matter came to his knowledge, he approached to the Department on several occasions for execution of the lease deed, but in vain. Only because the Petitioner was approaching the Department for redressal of his grievances cannot be a good ground for condoning inordinate delay of nineteen years. There is also no material in support of the same."*

6. Heard learned counsel for the parties. Perused the materials on record including the case laws cited.

7. Admittedly, provisional allotment of the case land was made in favour of the Petitioner on 19th April, 1990 (Annexure-3). The said order was communicated to the Petitioner in the address (present address) given in the application filed by the Petitioner for allotment of the government plot. It is also admitted that at no point of time, the Petitioner had ever communicated the change of his present address to the GA and PG Department. No document is placed before this Court, which would cast an obligation on the GA and PG Department to publish the result of the drawl of lot either in the newspaper or giving a public notice. It is, however, submitted by Mr. Nayak, learned counsel for the Petitioner that the allotment order should have been communicated to the Petitioner in both permanent and present address. Ordinarily, the communications are made in the present address given in the application unless and otherwise intended by the applicant in his application. In the instant case, the Petitioner has never stated that the order of provisional allotment, if any, should be communicated in his both present and permanent address. No ground has been made out as to why the provisional allotment order should have been sent in the permanent address of the Petitioner. Since the Petitioner had given the 'present address' for communication, the GA and PG Department had committed no error in communicating the provisional allotment order in the said address.

8. There is nothing on record to appreciate as to why the Petitioner woke up from his slumber in the year 2007 to make an application under the RTI Act. Admittedly, the application for allotment of government land was made in the year 1987 and the provisional allotment in favour of the Petitioner was made in the year, 1990. The Petitioner sought for the information only in the year 2007, i.e., after seventeen years.

9. Of course, the Petitioner had immediately deposited the premium as stipulated in the provisional allotment order of the case land immediately after getting the information under the RTI Act. Only because the premium was received by the GA and PG Department, that does not give a right to the Petitioner to make a claim for execution of the lease deed. It is, however, not understood as to why the Petitioner was communicated letter/order under Annexure-5 on 8th January, 2020 after receipt of the letter along with primum on 26th October, 2007 as per Annexure-4 series. Be that as it may, in the letter under Annexure-5, it was intimated to the Petitioner that since he failed to deposit the premium within the sixty days from the date of issuance of the provisional order of allotment or within an extended period of further fifteen days on payment of fine of Rs.50/- for each day, as stipulated in the provisional allotment order, the provisional allotment of the case land stood automatically cancelled. In the case of ***Malati Biswal (supra)***, Hon'ble Supreme also in clear terms has categorically held that no formal cancellation order is necessary to be passed since the provisional allotment order stipulates that it would stand automatically cancelled if the allottee does not comply with the stipulation made therein.

10. Order dated 23rd November, 2017 passed in W.P.(C) No.32757 of 2011 is also not applicable to the case of the Petitioner, as the Petitioner therein had communicated his subsequent address to the GA and PG Department, whereas in the instant case, the Petitioner has not.

11. Taking into consideration the facts and circumstances of the case in its entirety, this Court finds that the Petitioner was thoroughly intelligent in enquiring about the status of the provisional allotment of the case land. A prudent man like the Petitioner is expected to make an enquiry within a reasonable time with regard to status of allotment of the government land after making an application in the year 1987. It also appears that the provisional allotment order was issued in the '*present address*' given in the application form submitted by the Petitioner. Thus, no fault can be found with the GA and PG Department for not sending the provisional allotment order in his '*permanent address*' in absence of any express intimation in that regard by the Petitioner.

12. Since the order of allotment stood automatically cancelled since 1990, the prayer for execution of the lease deed by accepting the premium at the present rate is not acceptable.

13. Accordingly, the writ petition being devoid of any merit stands dismissed, but in the circumstances, there shall be no order as to costs.

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2024 (II) ILR-CUT-1194

B.P. ROUTRAY, J.

W.P.(C) NO. 1375 OF 2016

BHARATI PATRA .....Petitioner

-V-

ADDL. COMMISSIONER, S&C, BERHAMPUR & ORS. .....Opp.Parties

(A) ORISSA SURVEY AND SETTLEMENT ACT, 1959 – Section 15(b) – The commissioner remanded the case to the Tahasildar for disposal on merit without giving any opinion in the matter – Whether the commissioner's remand order is sustainable? – Held, No – The commissioner should not delegate the power in favour of the Tahasildar to decide the dispute on merit without giving any opinion.

(Paras 7-8)

(B) ORISSA SURVEY AND SETTLEMENT ACT, 1959 – Section 15(b) – Whether the Additional Commissioner has jurisdiction to entertain revision U/s. 15(b) in a matter for correction of record through mutation without publication of record of right? – Held, Yes – The language of Section 15 is clear to include the correction of ROR through mutation.

(Para 6)

Case Laws Relied on and Referred to :-

1. 1997 SCC Online Ori 138 : Ramesh Chandra Rout vs. The Commissioner, Land Records and Settlement, Board of Revenue, Orissa and Ors.

For Petitioner : Mr. M.K.Mohanty.

For Opp.Parties : Ms. S.Mishra (ASC), Mr. A.Mishra (O.P.4)

JUDGMENT Date of Judgment : 02.07.2024

B.P. ROUTRAY, J.

1. Heard Mr.Mohanty, learned counsel for the Petitioner, Mr.Mishra, learned counsel for Opposite Party No.4 and Ms.Mishra, learned ASC for the State.

2. Present writ petition is directed against order dated 26th July, 2014 of the Revenue Divisional Commissioner-cum-Additional Commissioner of Settlement and Consolidation, Berhampur passed in SRP No. 137 of 2011.

3. The dispute between the parties is that, the original owner namely, Pratap Chandra Patra after selling the land to the vendor's vendor's vendor of Opposite Party No.4 in 1949, again sold it to the Petitioner through the power of attorney holder. But it is the case of the Petitioner that the land sold to her is not the same portion of land sold in favour of Opposite Party No.4. However, on the application of the Petitioner the land was mutated in favour of the Petitioner in Mutation Case No.5631 of 1996.

4. The same was challenged in SRP No. 137 of 2011 under Section 15(b) of the OSS Act before the Additional Commissioner, Berhampur, which resulted present impugned order.

5. The Commissioner after noting down the submissions of both parties, have remanded the case to the Tahasildar for disposal on merit without giving any opinion by him. Mr.Mohanty, learned counsel for the Petitioner advances his challenge by submitting that the Commissioner cannot delegate his power of the revision to the Tahasildar for decision of the case on merit and secondly, he has entertained the revision beyond the limitation period of one year prescribed under Section 15(b) of the OSS Act. It is also the submission of the Petitioner that the Commissioner has no jurisdiction to take up the revision in respect of correction of a record in mutation except publication of record of right.

6. So far as the submissions of the Petitioner that the Additional Commissioner has no jurisdiction to entertain the revision petition under Section 15(b) in a matter of correction of record through mutation, without publication of record of right, has no merit for consideration. It is for the reason that the language of Section 15 is clear to include the correction of record of right through mutation. Similarly, the prescription of limitation for one year is undoubtedly condonable and the Additional Commissioner has in his discretion condoned the delay in entertaining the revision petition.

7. It is true that the power of revision under Section 15 has been vested with the Board of Revenue. This power of revision has been invoked by the parties to decide the revision application on merit by the Board of Revenue and not by any sub-ordinate authority. It is different that if the Commissioner seeks for any enquiry report in the matter by any sub-ordinate authority to decide the case or sent the matter back to any sub-ordinate authority for any particular purpose to help in adjudication of the dispute. But as per the provisions of the OSS Act, the Tahasildar or any sub-ordinate authority to Board of Revenue has no power or jurisdiction to decide the revision application on merit. This Court in ***Ramesh Chandra Rout vs. The Commissioner, Land Records and Settlement, Board of Revenue, Orissa and Ors., 1997 SCC Online Ori 138***, have observed that:-

> "4. We accept the submissions of Mr.Mohanty that the Revisional Authority has gone beyond provision of the statute in asking the Tahasildar to dispose of the revision case. The statute has conferred Revisional jurisdiction on the Board of Revenue and it cannot surrender the said power in favour of a subordinate authority or officer to dispose of the revision case. The statute has not given any power to the Revisional Authority to delegate its power to any other authority or person."

8. As it is seen from the impugned order, the Additional Commissioner has sent back the matter to the Tahasildar for disposal on merit, which means that the entire dispute has been referred to the Tahasildar for disposal on merit, or in other words, he has delegated the power in favour of the Tahasildar to decide the dispute any merit, without giving any opinion by him. According to the opinion of this Court, the same is unsustainable and as such, the impugned order is set aside. The Additional Commissioner, Berhampur is directed to decide the revision on merit by dealing with the contentions of the parties and for this purpose the matter is remitted

back to the Commissioner. Since it is a revision of the year 2011, the Additional Commissioner is directed to dispose of the same on merit after giving opportunity of hearing to both parties, within a period of six months from the date of production of the certified copy of this order. Both parties are directed to appear before the Commissioner on 29th July 2024.

9. The writ petition is disposed of.

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2024 (II) ILR-CUT-1196

B.P. ROUTRAY, J.

W.P.(C) NO. 6359 OF 2018

KALANDI NAYAK …….Petitioner

-V-

RAMAKANTA NAYAK & ORS. .…...Opp.Parties

ODISHA CONSOLIDATION OF HOLDING AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Sections 9, 37 – The matter U/s. 9 was decided on compromise – Whether the matter can be re-opened U/s. 37 of Act? – Held, No – The same cannot be questioned unless there is allegation of fraud. (Para 6)

Case Laws Relied on and Referred to :-
1. 2023 (1) OLR 346 : Ajaya Kumar Rath v. Bijaya Kumar Rath.

For Petitioner : Mr. S.C.Acharya.

For Opp.Parties : Mr. Maheswar Mohanty

JUDGMENT Date of Judgment : 30.07.2024

B.P. ROUTRAY, J.

1. Heard Mr. S.C. Acharya, learned counsel for the Petitioner and Mr. M. Mohanty, learned counsel for Opposite Parties 1, 2, 4, 5 & 7.

2. Present writ petition is filed challenging the revisional order passed under Section 37(1) of the Odisha Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (in short OCH & PFL Act) dated 1st December, 2017 of the Additional Commissioner of Consolidation, Balasore in Consolidation Revision No.378 of 2014.

3. The writ Petitioner was the revision Petitioner also. He approached the authority under Section 37 of the OCH & PFL Act with a prayer for consideration of repartition of the case land. Said prayer of the Petitioner has been rejected by the Commissioner stating that the sharing over the case land between the parties has already been decided by order dated 25th August, 1995 of the Consolidation Officer in Remand Revision Case No.235 of 1991, based on the compromise petition filed

therein, and hence the revision after 18 years is not entertained. The same is challenged in present writ petition.

4. So the crux of the dispute is that, whether there was a compromise arrived between the parties earlier before the Consolidation Officer in Remand Revision Case No.235 of 1991 finally deciding the rights of the parties over the case land?

5. Admittedly, the Petitioner was a party in Remand Revision Case No.235 of 1991, wherein compromise petition dated 25th August, 1995 has been filed. The Consolidation Officer in Order dated 25th August, 1995 has stated that the case is disposed of in terms of the compromise petition and accordingly decided claims of the parties and their respective position to prepare the RoR. Consequent upon such order of the Consolidation Officer dated 25th August, 1995, the RoRs were published including the RoR in the name of present Petitioner also.

6. It is seen that the parties have initiated the case under Section 9 of the OCH & PFL Act and filed their concession in terms of the compromise petition as per the provisions under Section 10 of the Act. The order of the Consolidation Officer dated 25th August, 1995 is based on the concession of the parties arrived in the compromise petition filed by them. A copy of the compromise petition has been filed along with the counter affidavit at Annexure-B/1, which reveals that present Petitioner is a signatory to the same. Further, a petition under Annexure-C/1 reveals the request of the Petitioner to dispose of the case in the terms of compromise issuing separate RoR in his name, and of course, the RoR in the name of the Petitioner has been published under Annexure-D/1. Law is no more *res integra* that when the matter is decided and disposed of on concession of the parties, or compromise, by the competent authority under the OCH & PFL Act, the same cannot be re-opened under Section 37 of the Act. Once the consolidation authority has disposed of the matter on the basis of mutual consent between the parties, the parties are restrained from questioning the same under Section 37 without any allegation of fraud. In ***Ajaya Kumar Rath v. Bijaya Kumar Rath, 2023 (1) OLR 346***, this court has observed that once a proceeding under Section 9 of the OCH & PFL Act is culminated on the basis of mutual partition the same is not questionable unless there is allegation of fraud.

7. In the case at hand, the proceeding under Section 9 was finally decided on 25th August, 1995 and the RoR was issued thereafter basing on the compromise arrived between the parties. Undisputedly, the Petitioner was a party to the said proceeding and he did not challenge such order passed by the authority or publication of the RoR in favour of respective parties for long 18 years, till he approached the revisional authority under Section 37 of the Act. Admittedly, the Petitioner did not proceed further in the higher forum questioning order dated 25th August, 1995 of the Consolidation Officer.

It is here submitted on behalf of the Petitioner that on 25th August, 1995 he was absent before the Consolidation Officer and therefore, was unaware of the order passed by the Consolidation Officer.

8. It is seen from the order of the Consolidation Officer under Annexure-5 that the absence of the Petitioner before the Consolidation Officer on 25th August, 1995 has been recorded by the Consolidation Officer. But the undisputed fact remains that the Petitioner is a signatory to the compromise petition dated 25th August, 1995, presented to the authority on the same day, which is never questioned or disputed by the Petitioner. Even after filing of the compromise petition along with the counter affidavit by the Opposite Parties, the Petitioner remained silent without choosing to reply the same by way of rejoinder affidavit.

The Petitioner has never pleaded fraud or fraudulent activities by any of the parties in filing the compromise petition containing his own signature. It is never the case of the Petitioner that such a compromise has been effected by playing fraud upon him or by getting his false signature on the compromise petition. Moreover, around 18 years had already elapsed from the date of publication of the RoR till filing of the revision before the Consolidation Commissioner and till such period the Petitioner did not raise any objection and therefore he cannot deny his knowledge regarding the same. So, it is satisfied from the conduct of the Petitioner that such challenge advanced by him under Section 37 of the Act before the Commissioner is after thought and to disturb certain claims of the parties.

9. In view of the clear order of the Consolidation Officer dated 25th August, 1995 and the compromise petition, which formed part of the order, no case is made out in favour of the Petitioner to disturb such finding and thus no reason is seen to interfere with the impugned order.

10. The writ petition is dismissed.

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2024 (II) ILR-CUT-1198

Dr. S.K. PANIGRAHI, J.

W.P(C) NO. 30616 OF 2020

SUPRIYA JENA .…….Petitioner

-V-

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

(A) ODISHA SERVICE CODE – Rule 194 – Grant of Maternity Leave – Whether surrogacy mother is entitled to get the benefit of maternity leave? – Held, Yes – Maternity leave should be granted to employees who became mothers through surrogacy to ensure equal treatment & support for all new mothers, irrespective of how they became parents. (Paras 10,15)

(B) MATERNITY LEAVE – Object – Discussed. (Para 7)

(C) INTERPRETATION & CONSTRUCTION – Grant of maternity benefits as a beneficial provision intended to achieve Social Justice – Must be construed beneficially. (Para 8)

(D) INTERPRETATION OF STATUTES – The rules and regulations in force should be interpreted in the light of advancements in medical science and changes in social conditions – Maternity Benefit Act, 1961 – Should be interpreted in an inclusive manner that encompasses all forms of motherhood. (Paras 12,14)

Case Laws Relied on and Referred to :-

1. S.B.Civil Writ Petition No. 7853/2020 (Rajasthan High Court) : Smt. Chanda Keswani W/O Shri Bhupesh v. State of Rajasthan.
2. AIR 1978 S.C.12 : B.Shah v. Presiding Officer, Labour Court, Coimbatore & Ors.
3. AIR 2015 BOMBAY 231 : Dr. Mrs Hema Vijay Menon v. State of Maharashtra.
4. Appeal (Civil) 5657 of 2007 : Anuj Gang v. Hotel Association of India.
5. S.L.P(C) No. 7772 of 2021 : Deepika Singh v. Central Administrative Tribunal.

For Petitioner : Mr. D.P.Nanda, Sr. Adv. with Associates.
For Opp.Parties : Mr. D.Mund, AGA.

JUDGMENT Date of Hearing : 19.04.2024 : Date of Judgment : 25.06.2024

Dr. S.K.PANIGRAHI, J.

1. The Petitioner through this Writ Petition has challenged the Finance Department letter No.38444/F dated 15.11.2019 and G.A & P.G. Department letter No.15803/Gen dated 06.07.2020.

I. FACTUAL MATRIX OF THE CASE AS SUBMITTED BY THE PETITIONER:

2. The brief fact of the case is that:

(i) The Petitioner started her career by joining in Orissa Finance Service on dated 06/07/1995 vide appointment letter of Govt. of Odisha, Finance Department Notification No. 26608/F dated 03/07/1995 and served in different departments of the State of Odisha and lastly she was functioning as OFS (SG), Joint Director (Accounts) in Gopabandhu Academy of Administration, Bhubaneswar and presently functioning as the Financial Advisor of Odisha State Police Housing Welfare Corporation, Bhubaneswar.

(ii) It is submitted by the petitioner that since considerable time after marriage, the petitioner failed to conceive a child, so she opted for surrogate motherhood and accordingly entered into a Gestational Surrogacy Agreement along with her husband as "Commissioning Parents" with one Mrs. Maya Gupta of Mumbai as "Surrogated Mother" on 30.01.2018.

(iii) It is submitted by the Petitioner that the surrogate mother conceived the child who finally took birth on dated 25.10.2018. It is submitted by the petitioner that since there are no female member available in the family to look after the new born baby and after much prolonged waiting the petitioner could became a mother through surrogacy, so the petitioner applied for maternity leave on 20.10.2018 which

was granted from dated 25.10.2018 to 22.04.2019. Subsequently, in continuation to the Maternity leave, on 10.04.2019 the Petitioner applied for Earned Leave of 140 days from 23.04.2019 to 09.09.2019.

(iv) It is submitted by the Petitioner that upon joining of the petitioner on 10/09/2019, the Joint Commissioner, Gopabandhu Academy/O.P. No.4 vide Office Order No. 2948/GAA dated 18.09.2019 granted Maternity leave of the petitioner for a period of 180 days i.e. w.e.f. 25.10.2018 to 22.04.2019 as per Finance Department office Memorandum No.51856/F dated 07.12.2011, No.17372/F dated 17.06.2016 and No.37478/F dated 01.12.2018 and allowed the petitioner to draw her pay as admissible during the period of leave. Further, the O.P. No.4 also passed order that the period of leave is counted as "Nil" towards increment under Rule-79 (a) (i) of the Orissa Service Code and also directed that the above period of leave will not be debited to her leave account.

(v) The O.P.No.5 vide letter No.3188/GAA dated 15.10.2019 while forwarding the earned leave application of the petitioner for subsequent period from 23/04/2019 to 09/09/2019, informed to the Additional Secretary to Govt., Finance Department (OFS Branch), Bhubaneswar, Odisha to sanction earned leave of the petitioner w.e.f. 23/04/2019 to 09/09/2019 (140 days) along with Advisory remark of Doctor's Certificate. It was also intimated that the petitioner has (300+11) days of E.L. to her credit as on 30.06.2019 and, accordingly, the details of leave account reflects in the Original Service Book. The O.P. No.5, therefore, requested the Additional Secretary to Govt., Finance Department to sanction E.L. for 140 days w.e.f. 23.04.2019 to 09.09.2019 as leave due in favour of the petitioner.

(vi) It is submitted by the petitioner that the Under Secretary to the Govt., Government of Odisha, Finance Department vide Letter No.38444/F dated 15.11.2019 intimated to the O.P. No.5 that the entire leave period of petitioner i.e. from 25.10.2018 to 09.09.2019 with reference to extant leave Rules may be examined and if necessary, the proposal for sanction of leave for the said period may be re-submitted to the Finance Department and accordingly Service Book along with leave application of the petitioner were returned back for taking further action.

(vii) The Petitioner contended that as per the information obtained from the Public Information Officer, Gopabandhu Academy Administration, Bhubaneswar seeking certain clarification and the P.L.O. while answering the query vide letter No.1875/GAA dated 13.07.2020 supplied the information seeking clarification regarding sanction of maternity leave of Female Govt. Servant through surrogacy.

(viii) In the said letter the O.P. No.5 referring to the F.D. Memorandum No.51856/F dated 07.12.2011 No.17372/R dated 17.06.2016 and No.37478/F dated 01.12.2018 intimated the O.P. No.1 that the Head of Office is competent to grant maternity leave (180 days) as enhanced from time to time to the Female Govt. Servant working under Chief Administrative Control. The O.P. No.5 further informed that the maternity leave of a Female Govt. Employee is governed by Rule 194 of Odisha Service Code read with F.D.O.M. No.51856/F dated 07.12.2011 in which the provision of sub-rule (b) to Rule-194 has been modified.

(ix) It is submitted that so far as the motherhood of Female Govt. Employee is concerned, the term "Maternity" has not been defined in Odisha Service Code i.e. by way of surrogacy or rent-a-womb. It was also stated that while the motherhood through adoption for a Female Govt. Employee is concerned, a specific F.D.O.M. No.31056/F dated 18.11.2016 is available for availing leave.

(x) Therefore, the O.P. No.5 requested the O.P. No.1 to pass necessary clarification regarding sanction of maternity leave of Female Govt. Employees through surrogacy or begot through rented womb. It is submitted by the petitioner that pursuant to letter No. 615 dated 19.02.2020 (As per Annexure-6), the O.P. No.1 through Under Secretary to Govt. Vide letter NO.15803/Gen dated 06.07.2020 intimated the O.P. No.5 that at present sanction of maternity leave of Female Govt. Servant through surrogacy is not available due to non- existence of specific provision for the same but the issue would be considered by Allowance Committee in future and it has been concurred by the Finance Department File No. FIN-GS2-LV-0001-2020.

(xi) In fact, the maternity leave of a female Govt. Employee is governed under Rule-194 of the Odisha Service Code read with F.D.O.M. No.51856/F dated 07.012.2011 whereby the provision of Sub-rule- (b) of Rule-194 has been modified. The expression "Maternity" by itself has not been defined in the Service Book. Hence, there cannot be any distinction of motherhood attained by a Female Govt. Employee either through natural way or through adoption or through surrogacy procedure. The word "Maternity" as appearing in Rule-194 with advancement of Science and Technology has to carry the meaning which includes within it, the concept of motherhood attained through surrogacy procedure. It is trite to mention it here that the term "Maternity" in law and/or on fact can be established in any one of the thee situations viz (1) where female employees herself conceives and carries the child (2) where a female employees engages the service of the another female to conceive a child with or without the genetic martial being supplied by her and/or her male partner (3) where a female employee adopt a child.

(xii) In the case of third category as stated above, when a specific F.D.O.M No.31056/F dated 18.11.2016 is available for availing the leave and for the first category of the female employees as stated above, F.D.O.M No.51851/F dated 07.12.2011 is available, so no distinction or disentitlement can be made to the second categories of the female employees and the same amount to clear violation of Article-14 and 16 of the Constitution of India.

(xiii) It is submitted by the Petitioner that a married Female Govt. Employee cannot be discriminated insofar as the maternity benefits are concerned, only on the ground that she has obtained the baby through surrogacy because, in every sense, a commissioning mother (i.e. attains motherhood through surrogacy) is the actual mother and she takes the new born baby as soon as it is delivered. Maternity leave is not only necessary for a mother but also is essential for rearing a new born baby. A new born child needs rearing and that is the most crucial period during which the child requires the care and attention of its mother.

(xiv) Any denial of maternity leave as contemplated under Rule-194 of the Odisha Service Code read with F.D.O.M No.51851/F dtd. 07.12.2011 for female employees

who attains motherhood through surrogacy not only violates the right of the new born baby to develop a bond with the mother and also to be compatible in the society which is a statutory right guaranteed under the Constitution to the every citizen including the new born. Thus the Finance Department letter No. 38444/F dated 15/11/2019 as per Annexure-5 and G.A & P.G. Department letter No.15803/ Gen dated.06/07/2020 as per Annexure-7 are unsustainable and are liable to be quashed.

(xv) Hence, this Writ Petition.

II. SUBMISSIONS ON BEHALF OF THE OPPOSITE PARTIES :

3. Learned counsel for the Opposite Parties earnestly made the following submissions in support of his contentions.

(i) It is submitted that the Petitioner had joined as Joint Director (Accounts), GAA, Odisha, Bhubaneswar on 30.6.2017 (FN) as per the Finance Department Notification No. 19805/F, Dated 29.6.2017.

(ii) He contended that the Petitioner has applied for maternity leave on 20.10.2018 which was granted from 25.10.2018 to 22.4.2019. Subsequently, in continuation of the maternity leave, she applied for Earned leave from 23.4.2019 to 9.9.2019. After availing leave, she joined in her duty on 10.9.2019.

(iii) It is further submitted that the Opp. Party No.3 granted maternity leave in favour of the petitioner for a period of 180 days w.e.f. 25.10.2018 to 22.4.2019 vide GAA Office Order No.2948/GAA dated 18.9.2019 as per the Finance Department O.M. No.51856/F dated 7.12.2011, No. 17372/F dated 17.6.2016 and 37478/F dated 1.12.2018. But the above O.Ms. never contemplated any provision for sanction of maternity leave due to surrogacy.

(iv) It is submitted that the Opp. Party No.5 forwarded the Earned Leave application of the petitioner along with the other required documents to Additional Secretary to Govt,, Finance Department for sanction of her earned Leave for the period from 23.04.2019 to 09.09.2019, vide GAA letter No.3188/GAA, dated 15.10.2019.

(v) It is submitted that with reference to the GAA letter No. 3188/GAA, dated 15.10.2019, Finance Department, vide letter No.38444/F, dated 15.11.2019 intimated that the entire leave period from 25.10.2018 to 09.09.2019 with reference to extant leave Rules may be examined and if necessary, the proposal for sanction of leave w.e.f. 25.10.2018 to 09.09.2019 may be re-submitted to Finance Department. As a sequel to the : Finance Department letter No.38444/F, dated 15.11.2019, GAA sought clarification from GA&PG Department regarding sanction of Maternity Leave for female Government servant through Surrogacy, vide letter No.615/GAA, dated 19.02.2020.

(vi) It is submitted that the Maternity Leave of a female Government employee is governed by Rule 194 of Odisha Service Code read with F.D.O.M. No. 51856/F dated 07.12.2011 in which provision of Sub rule- b to Rule- 194 has been modified enhancing the existing limit of Maternity Leave of 90 days to 180 days. While the motherhood through adoption for a female Government employee is concerned, F.D.O.M. No.31056/F dated 18.11.2016 is available where a leave of 180 days is granted to female Government servant on adoption of a child upto one year of age

in line with Maternity Leave as admissible to natural mothers for proper care of adopted child. But there is no provision of Maternity leave for the purpose of rearing of child blessed through surrogacy.

(vii) It is submitted that GA&PG Department vide letter No.15803/Gen, dated 06.07.2020 clarified that at present sanction of Maternity Leave for female Government servant through surrogacy is not available due to non- existence of specific provision for the same, but the issue will be examined and considered by Allowance Committee of Finance Department in future with due consultation with G.A. & P.G. Department, Odisha.

(viii) Learned counsel for the Opposite Parties, accordingly, prays for dismissal of this Writ Petition.

III. COURT'S REASONING AND ANALYSIS:

4. Learned Counsel for the Opposite Party has submitted that with reference to the GAA letter No. 3188/GAA, dated 15.10.2019, Finance Department, vide letter No.38444/F, dated 15.11.2019 intimated that the entire leave period from 25.10.2018 to 09.09.2019 with reference to extant leave Rules may be examined and if necessary, the proposal for sanction of leave w.e.f. 25.10.2018 to 09.09.2019 may be re-submitted to Finance Department. As a sequel to the : Finance Department letter No.38444/F, dated 15.11.2019, GAA sought clarification from GA&PG Department regarding sanction of Maternity Leave for female Government servant through Surrogacy, vide letter No.615/GAA, dated 19.02.2020.

5. It is reiterated that Maternity Leave of a female Government employee is governed by Rule 194 of Odisha Service Code read with F.D.O.M. No. 51856/F dated 07.12.2011 in which provision of Sub rule- b to Rule- 194 has been modified enhancing the existing limit of Maternity Leave of 90 days to 180 days. While the motherhood through adoption for a female Government employee is concerned, F.D.O.M. No.31056/F dated 18.11.2016 is available where a leave of 180 days is granted to female Government servant on adoption of a child upto one year of age in line with Maternity Leave as admissible to natural mothers for proper care of adopted child. But there is no provision of Maternity leave for the purpose of rearing of child blessed through surrogacy.

6. However, this Court is of the opinion that the contention of the opposite party with respect to Sub rule- b to Rule- 194 is very rigid. In this regard, the Rajasthan High Court in the case of ***Smt. Chanda Keswani W/O Shri Bhupesh v. State of Rajasthan***[1] opined that the word 'maternity leave' was not defined under the 1951 Rules, but Rule 103 of the 1951 Rules, indicated that the maternity leave might be granted to a female Government servant for a period of 180 days twice. The Court opined that prior to the substitution of Rule 103 to the 1951 Rules, there was a provision of granting maternity benefits under the Maternity Benefit Act, 1961 ('1961 Act') to the women before and after the child-birth who were employed in

1. S.B.Civil Writ Petition No.7853/2020 (Rajasthan High Court)

certain establishment for certain period. As per Section 3(b) of the 1961 Act, child included still-born child, but nowhere the words mother and child were defined under 1951 Rules or 1961 Act. The Court opined that a female could become a mother not only by giving birth to a child but also by adopting a child and now with the development of medical science, especially by the Assisted Reproductive Technology (ART), surrogacy was also an option for a female or couple to have their child. To this effect, the Court opined that:

> *"As per the provisions of the Assisted Reproductive Technology (Regulations) Act, 2021, an infertile married couple who approaches an Assisted Reproductive Technology Clinic or an Assistant Reproductive Technology Bank for the purpose of bearing a child through surrogacy, is referred to as a 'commissioning couple'. Likewise, a commissioning mother would be the mother, who seeks to obtain a child through a rented womb of a surrogate mother. However, the commissioning mother remains the biological mother of the child and retains all rights in respect of the child. Once the surrogacy has been recognized by the Legislature, by enacting the Act of 2021 and a female can now become mother through the procedure of surrogacy, then she cannot be denied the benefit of maternity leave, after birth of the child through surrogacy process."*

7. The Rajasthan High Court further opined that the maternity meant the period during pregnancy and shortly after the child's birth. If the maternity meant motherhood, it would not be proper to distinguish between a natural and biological mother and mother who had begotten a child through surrogacy. The Court further opined that the *"object of maternity leave is to protect the dignity of motherhood by providing for full and healthy maintenance of the woman and her child. Maternity leave is intended to achieve the object of ensuring social justice to women as the motherhood and childhood both require special attention. Not only are the health issues of the mother and the child considered while providing for maternity leave, but the leave is provided for creating a bond of affection between the two."*

8. The provision related to the grant of maternity benefits was a beneficial provision intended to achieve social justice and therefore it must be construed beneficially. The Hon'ble SC in the case of ***B. Shah v. Presiding Officer, Labour Court, Coimbatore & Ors.***[2] has held in para 18 as under:

> *"18…it has also to be borne in mind in this connection that in interpreting provisions of beneficial pieces of legislation like the one in hand which is intended to achieve the object of doing social justice to women workers employed in the plantations and which squarely fall within the purview of Article 42 of the Constitution, the beneficent rule of construction which would enable the woman worker not only to subsist but also to make up her dissipated energy, nurse her child, preserve her efficiency as a worker and maintain the level of her previous efficiency and output has to be adopted by the Court".*

9. Accordingly, right to life under Article 21 of the Constitution includes the right to motherhood and also, the right of every child to full development. If the Government could provide maternity leave to an adoptive mother, it would be

2. AIR 1978 SUPREME COURT 12

wholly improper to refuse to provide maternity leave to a mother who had begotten a child through surrogacy procedure after implanting an embryo created by using either the eggs or sperm of the intended parents in the womb of surrogate mother. Therefore, this Court accedes to the submission of the petitioner.

10. Maternity leave should be granted to employees who become mothers through surrogacy to ensure equal treatment and support for all new mothers, irrespective of how they become parents. Additionally, the initial period after the birth of a child is crucial for the mother's involvement in caregiving and nurturing, which is pivotal for the child's development. In this regard, Hon'ble Bombay High Court in the case of ***Dr. Mrs Hema Vijay Menon v. State of Maharashtra***[3], opined that:

> *"A newly born child needs rearing and that is the most crucial period during which the child requires the care and attention of his mother. There is a tremendous amount of learning that takes place in the first year of the baby's life, the baby learns a lot too. Also,the bond of affection has to be developed. A mother, as already stated hereinabove, would include a commissioning mother or a mother securing a child through surrogacy. Any other interpretation would result in frustrating the object of providing maternity leave to a mother, who has begotten the child."*

11. Recognizing and supporting surrogacy as a legitimate means of becoming a parent aligns with India's progressive stance on reproductive rights and gender equality. Providing maternity leave for these mothers ensures that they have the necessary time to create a stable and loving environment for their child, promoting the well-being of both the mother and the child.

12. It is well settled law that the rules and regulations in force should be interpreted in light of advancements in medical science and changes in societal conditions. The Supreme Court in the matter of ***Anuj Gang v. Hotel Association of India***[4] has held that changed social psyche and expectations are important to upkeep the law. The maternity benefit provisions should, therefore, be interpreted accordingly.

13. It is imperative that the provisions concerning maternity benefits are structured to encourage and support women's participation in the workforce. The Hon'ble High Court of Bombay in the case of ***Deepika Singh v. Central Administrative Tribunal***[5] in this respect, has opined that:

> *"The grant of maternity leave under Rules of 1972 is intended to facilitate the continuance of women in the workplace. It is a harsh reality that but for such provisions, many women would be compelled by social circumstances to give up work on the birth of a child, if they are not granted leave and other facilitative measures. No employer can perceive child birth as detracting from the purpose of employment. Child birth has to be construed in the context of employment as a natural incident of life and hence, the provisions for maternity leave must be construed in that perspective."*

3. AIR 2015 BOMBAY 231
4. Appeal (Civil) 5657 of 2007.
5. Special Leave Petition (C) No. 7772 of 2021

14. Moreover, the Maternity Benefit Act, 1961, which aims to protect the employment of women during maternity and ensure their full health, should be interpreted in an inclusive manner that encompasses all forms of motherhood. Additionally, international conventions to which India is a signatory, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), mandate equal treatment and non-discrimination in matters related to employment and maternity.

15. With respect to the aforesaid discussion and the cases cited hereinabove, this Court is inclined to quash the Finance Department letter No.38444/F dated 15/11/2019 and G.A & P.G. Department letter No.15803/Gen dated 06/07/2020. This Court hereby directs the Opposite Parties/ State to sanction 180 days maternity leave to the Petitioner, within three months of the communication of this order. It is further directed to the concerned Department of the State to incorporate this aspect in the relevant provisions of the rules to treat a child born out of surrogacy in the similar manner as a child born out of the natural process and provide the commissioning mother with all the benefits provided thereto.

16. This Writ Petition is, therefore, allowed.

17. Interim order, if any, passed earlier stands vacated.

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2024 (II) ILR-CUT-1206

Dr. S.K.PANIGRAHI, J.

W.P.(C) NO. 6075 OF 2017

GADADHAR RATHA …….Petitioner

-V-

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

REGULARIZATION OF SERVICE – Effective date – Petitioner joined as watchman on 03.01.1981 – His service was terminated on 01.03.1985 – The Labor Court ruled out the termination as unjustified and directed re-instatement of the Petitioner – The authority re-instated petitioner on 27.09.1995 – Whether the Petitioner is entitled to continuity of service from the date of his initial appointment upon re-instatement by the competent court of law – Held, Yes.

Case Laws Relied on and Referred to :-

1. (1979)2 SCC80:Hindustan Tin Works (P)Ltd. v. Employees of Hindustan Tin Works (P)Ltd.
2. (2022) 9 SCC 586 : Armed Forces Ex-Officers Multi Services Cooperative Societies Ltd. v. Rashtriya Mazdoor Sangh.
3. (1975) 1 SCC 70 : Eurasian Equipment and Chemicals Ltd. v. State of West Bengal.

For Petitioner : Mr. Pradeep Kumar Das-1.
For Opp.Parties : Mr. Sonak Mishra, ASC & Mr. Jugal Kishore Panda (O.P.3)

JUDGMENT Date of Hearing : 09.07.2024 : Date of Judgment : 31.07.2024

Dr. S.K.PANIGRAHI, J.

1. In this Writ Petition, the Petitioner prays before this Court to quash the Bargarh Municipality's decision on his representation and to direct regularization of his service with all consequential benefits.

I. FACTUAL MATRIX OF THE CASE:

2. The brief facts of the case are as follows:

(i) The petitioner joined Bargarh Municipality as a Watchman/Choukidar on 03.01.1981 and retired on 31.01.2013.

(ii) In the course of his employment, he was terminated on 01.03.1985, which led to an industrial dispute (I.D. Case No. 2/1993). The Labour Court vide order dated 02.06.1995 ruled the termination unjustified and directed reinstatement of the Petitioner without back wages. The Petitioner was, accordingly, reinstated on 27.09.1995.

(iii) The Bargarh Municipality challenged the Labour Court's award in OJC No.5671/1995 and this Court disposed of the case on 18.04.1997, directing consideration for regularization of the Petitioner within six months.

(iv) Various resolutions and orders were issued regarding the regularization of DLR and NMR employees, specifically those engaged before the cut-off date of 12.04.1993. As per the resolution dated 26.09.2012, the Petitioner was granted "temporary status" from September 2013 and was paid consolidated salary Rs.4400/- per month. However, he did not receive the Grade Pay of Rs.1300/- or the one-time 'cessation of engagement' benefit of Rs.1,50,000/-.

(v) The Petitioner was paid a consolidated salary from September 2012 until his retirement in January 2013, without grade pay or regular scale of pay.

(vi) Consequently, the Petitioner filed W.P.(C) No.24720/2014, resulting in the order of this Court on 02.03.2015 directing the Opposite Party No.2 to consider his case. This was followed by a Contempt Petition i.e. CONTC No.1070/2015 due to administrative delays, which was disposed of on 16.02.2016, granting the Opposite Parties with the time of two months to comply the order.

(vii) The representation made by the petitioner was then considered and rejected by the Bargarh Municipality, and the same was communicated via letter No. 884/HUD dated 12.01.2017.

(viii) Aggrieved by the rejection, the petitioner filed the current Writ Petition seeking the quashing of Order No. 884 dated 12.01.2017 and directing the regularization of his service with all consequential benefits

II. SUBMISSIONS ON BEHALF OF THE PETITIONER:

3. Learned counsel for the Petitioner earnestly made the following submissions in support of his contentions:

(i) The petitioner submitted that the rejection order dated 12.01.2017 is illegal, unjustified and arbitrary and was issued without proper consideration or hearing.

(ii) He further submitted that the petitioner should be treated as a regular employee from 08.11.1997, with all corresponding benefits including scale of pay, basic pay, DA, ADA, grade pay, and other allowances. He asserts his right to pension from 01.02.2013, following his retirement on 31.01.2013.

(iii) The Petitioner highlights the Municipality's and State Government's failure to implement the Labour Court's award and the High Court's order for regularization, despite multiple communication and recommendations.

(iv) The Petitioner also cited Finance Department Resolutions dated 15.05.1997 and 04.09.2012, which outlined the schemes for the absorption and regularization of NMR/DLR/Job Contract Workers engaged prior to 12.04.1993. Despite these resolutions, his case for regularization was not acted upon by the State Government.

III. SUBMISSIONS ON BEHALF OF THE OPPOSITE PARTIES:

4. The Learned Counsel for the Opposite Parties earnestly made the following submissions in support of his contentions:

(i) It is submitted that the Petitioner's regularization could not be acted upon due to missing information and the fact that the Petitioner was engaged after the cut-off date of 12.04.1993.

(ii) It is further submitted that the financial resolutions cited by the petitioner are inapplicable to this case as he was not engaged against a sanctioned post.

(iii) The representation made by the petitioner was duly considered and rejected in compliance with the previous court order, communicated via letter No. 884/HUD dated 12.01.2017.

(iv) It is further contended that the Petitioner's claim for grade pay is raised quite belatedly, and he had accepted the consolidated wages until his retirement. Accordingly, the Learned Counsel for the Opposite Parties prays for dismissal of this Writ Petition.

IV. COURT'S REASONING AND ANALYSIS:

5. Heard the Learned Counsels for the respective parties at length. At the outset, it is to be noted that the Petitioner was employed as a Watchman/Chowkidar in Bargarh Municipality starting from 03.01.1981. His service was terminated on 01.03.1985. However, the Labour Court ruled in his favour on 02.06.1995, leading to his reinstatement on 27.09.1995.

6. The Government adopted a policy to regularize the services of its daily-waged employees retrospectively, as outlined in its resolutions dated 15.05.1997 and 04.09.2012. Consequently, a group of employees had their services regularized. However, the Petitioner was excluded, as it was asserted that he was engaged after the cut-off date of 12.04.1993

7. Now, let us look into some judicial precedents pertaining to this issue. In the case of ***Hindustan Tin Works Pvt. Ltd. v. Employees of Hindustan Tin Works Pvt. Ltd.***[1], the Apex Court discussed this matter at length. In para 9, the Court held as under:

1. (1979) 2 SCC 80

> *"9. It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying.."*

8. Furthermore, in the case of ***Armed Forces Ex-Officers Multi Services Cooperative Societies Ltd. v. Rashtriya Mazdoor Sangh***[2], the Apex Court opined that "*there is no quarrel with the principle of law that reemployment of retrenched workmen does not entitle them to claim continuity of service as held in Cement Corpn. of India Ltd. v. Presiding Officer Industrial Tribunal-cum-Labour Court and Anr, as well as the Maruti Udyog Ltd v. Ram Lal and Ors. However, the principle laid down in these judgments will only apply to cases where the retrenchment is bona fide. The Tribunal has held that the retrenchment of all the drivers followed by an offer of re-employment on new terms and conditions is not bona fide. Once the orders of retrenchment are set aside, the workmen will naturally be entitled to continuity of service with order of back wages as determined by a Tribunal or a Court of law."*

9. The scrutiny of the aforementioned judicial precedents unequivocally establishes that an employee is entitled to continuity of service upon reinstatement by the competent labour court. Consequently, it would be judicious to infer that the Petitioner's employment tenure should be deemed to commence from 03.01.1981, rather than from the date of his reinstatement on 27.09.1995.

10. The service conditions in the resolution passed by the Finance Department, Government of Odisha, clearly sets out the following:

> *"(iii) Unless their services are dispensed with/terminated in accordance with the Para-5(b) (vi) and (vii), the casual/daily wage labourers with 'Temporary Status' will continue as such till attaining the age of 60 years. On attaining the age of 60 years, they would cease to be employed and, on such cessation, a casual/daily wage labourer with 'Temporary Status' shall get Rs. 1.50 lakhs as one time 'cessation of engagement' benefit, in case the employee concerned could not be absorbed against any regular post in accordance with the scheme of absorption as enumerated in Para-6."*

11. Despite being granted 'temporary status', the Petitioner was deprived of his rightful remuneration in accordance with the aforementioned provisions.

2. (2022) 9 SCC 586.

12. As held by the Apex Court in the case of ***Eurasian Equipment and Chemicals Ltd. v. State of West Bengal***[3], the Government, unlike a private entity, does not have the liberty to pick and choose individuals with whom it will engage. Even when entering into contracts or distributing benefits, the Government must act impartially and cannot arbitrarily exclude any person from its dealings or distribute benefits without sufficient justification.

13. Post-retirement benefits are envisioned as a social welfare measure aimed at ensuring retired Government employees can live with dignity in the twilight of their lives. Consequently, these benefits should not be unjustly denied, particularly on the grounds of mere technicalities.

14. The Writ Petition is, accordingly, allowed. The concerned Authorities are directed to reconsider the Petitioner's case within one month and subsequently disburse the allowances he is entitled to.

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2024 (II) ILR-CUT-1210

MISS. SAVITRI RATHO, J.

W.P.(C) NO. 31380 OF 2011

HARIHARA PANDA & ORS. …….Petitioners

-V-

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

SCALE OF PAY – Equivalency – Whether the classical Teachers of General High Schools and the Asst. Pandit of the Sanskrit Tolls are same and eligible for equal TGT scale of pay? – Held, Yes – Reason indicated. (Para-11)

Case Law Relied on and Referred to :-

1. 2017 (I) ILR-CUT-546 : Radharani Samal vs. State of Orissa.

For Petitioners : Mr. P.K.Kar.

For Opp.Parties : Mr. S.N.Mohapatra, Standing Counsel (S & M.E Dept)
Mr D.K. Mishra, AGA.

JUDGMENT Date of Judgment : 01.07.2024

SAVITRI RATHO, J.

This writ application has been filed with the following prayer:

"Under the above circumstances, it is therefore humbly prayed that this Hon'ble Court be graciously pleased to issue a writ in the nature of mandamus or any other appropriate writ/writs, direction/directions, order/orders by directing the State Govt, and other opp.parties to extend the benefits of higher scale of pay i.e TG scale of pay as that has been extended to the classical teachers (Sanskrit teachers) of the High Schools

3. (1975) 1 SCC 70.

of the State under the Govt. resolution No. 174542 dated 05.09.2011 under Annexure 3 without any discrimination .

And/or pass any other appropriate order/orders in the fitness of the case."…

PETITIONERS' CASE

2. The case of the petitioners in the writ petition is as follows:

2.1. The petitioners are working as Assistant Pandit in different Sanskrit Tolls throughout the State and are receiving Grant-in-aid from the State Government. As they have claimed the same relief, they have filed the writ petition jointly.

2.2. They are imparting instructions to the students of their institution and preparing them to appear H.S.C.C. Examination of the Board with 300 marks in Sanskrit subjects. The students in Sanskrit Tolls are reading higher Sanskrit. In the General High Schools, the teachers who are preparing students to appear in the H.S.C. Examination conducted by Board of Secondary Education, Orissa are only imparting Education in the Sanskrit for 100 marks i.e. which is an optional subject , because the students in the High Schools can opt to take either Sanskrit or Hindi. The teachers with the same qualification as that of the petitioners are also appointed in the general schools.

2.3. The Sanskrit teachers of the General High Schools were receiving the same scale of pay of Rs.1300-2200/- (pre revised) i.e. at par with the Assistant Pandit in the Sanskrit tolls (petitioners). But on 05.09.2011, the State Government has issued Notification No. 17542, (in short the "2011 notification") allowing the T.G. scale of pay i.e. the scale of Rs. 1400/-to 2600/- to the classical teachers (Sanskrit teachers of the general schools) having Sikhya Sahitya and Sikhya Acharya qualification i.e. which is the same qualification that is possessed by the petitioners. No provision has been made for allowing TGT scale of pay to the Assistant Pandits employed in the Sanskrit tolls.

2.4. Under the Orissa Education Act and the Rules framed there under, the Madhyama wing of Sanskrit Tolls is equivalent to a general High School as students of both arrear in the H.S.C. examination conducted by the Board.

2.5. Petitioner Nos.1 and 2 joined as Assistant Pandit in Atmaram Sanskrit, Bidyapitha, Jatadhari Ashram in the district of Cuttack. The petitioner No.1 has Sikhya Sastri qualification whereas the petitioner No. 2 is a Sahitya Acharya. Both of them were approved by the opposite party No.3 on 29.6.1996 and are receiving grant-in-aid from the State Government with effect from 1.6.1994 in the scale of pay Rs.1350/- to Rs.2200/- as it has been revised from time to time.

2.6. Petitioner No.3 is an Assistant Pandit of Baba Sri Ram Prasad Sanskrit Academy, Kuranga Sasan, Cuttack and approved by the opposite party No.3 on 21.7.1997 and is receiving grant in aid from 1.6.1994 in the same scale of pay of Rs.1350/- to Rs.2200/- with Acharya qualification.

2.7. Petitioner Nos.4 and 5 joined in Rushikula Sanskrit Vidyalaya Athagaon, Dumbermal in the district of Sambalpur and are also approved receiving grant in aid from 1.6.1994 as Assistant Pandit in the same scale of pay like others.

2.8. The petitioners have filed representation dated 1.11.2011 and 2.11.2011 vide Annexure 4 Series before the State Government and the other authorities praying for extension of the benefits of T.G. scale of pay to them, which has been extended to the classical teachers to the General High Schools under the Government resolution dated 5.9.2011, but no decision has been by the Government as yet.

COUNTER AFFIDAVIT OF OPPOSITE PARTY NO.3

3. A counter affidavit has been filed by the opposite party No. the District Education Officer on 08.07.2014 refuting the allegations in the writ petition and stating that the deponent is not the appropriate authority to give a reply as to why the benefit has not been extended to the petitioners until the Government takes a decision in this regard. Maintainability of the writ petition was challenged stating that a single writ application is not maintainable as it has been filed by five Sanskrit teachers of Sankrit Tolls if different districts. As a government resolution has been challenged and claim has been made for extending the same benefit to them, the Govt in the Department of School and Mass Education Department can take a decision regarding claim of the petitioners. It was stated the posts of Classical (Sanskrit) Teachers has been provided in the yardstick for both Government and Non-Government Secondary Schools/High Schools. The minimum prescribed qualification for post of Classical teacher is "Sikhya Shastri" Acharya whereas minimum qualification of Assistant Pandits in Madhyama under Sankrit tolls is "Sastri". They have different status as they stand on different footing. The letter dated 15.12.2008 of the Government prescribing the staffing pattern and qualification of Pandits in the tolls was annexed as Annexure A/3. It was also stated that the Resolution No.174542 dated 5.9.2011 under Annexure-3 is a policy decision of the Government and is meant for classical teachers serving in different Govt. fully aided Block Grant and recognized High Schools .In the resolution, provision has been made to provide Trained Graduate Scale of pay for Classical teachers who are continuing in different High Schools as classical teachers and not the teachers of Sanskrit Tolls. The teachers appointed in Government/Non-Government High Schools to teach Sanskrit are treated as "Classical Teachers", whereas the Assistant Pandits appointed in Sanskrit Toll to teach Sanskrit stand on a different footing, for which they are not entitled to receive Trained Graduate Scale of Pay. The posts of Shastri held by the petitioners in respective aided Sanskrit Institutions carry T.I.T. scale of pay as per the staffing pattern and the said "Shastri" posts have not yet been upgraded to the post of TGT (Sanskrit), so there was no illegality committed by the State-opposite parties and its action is in accordance with the prevailing Rules and Regulations of the State Government. It was also stated that the Classical Teacher post is a single post in General High Schools, whereas Sanskrit Tolls imparting Madhyama courses have three Sanskrit Teaching posts. So, in the case of exigency,

sometimes stop-gap arrangements are made by deputing a Sanskrit teacher from Sanskrit Tolls to General High schools and whenever required vice versa deputation is also directed by the Local Education Authority.

REJOINDER OF THE PETITIONER TO COUNTER OF OPPOSITE PARTY NO 3.

4. A rejoinder was filed on behalf of the petitioners reiterating the averments in the writ petition and referring to Section 3(i), Section 3 (s) and Section 7-C(5) (b) and stating that on a conjoint reading of these provisions, it is apparent that the institutions imparting Madhyama education are High Schools and from letter No 3508 /SME dated 28.02.2009 (Annexure 6) it is apparent that Madhyama Tolls are equivalent to Secondary Schools (High Schools) and the certificates issued in Madhyama is equivalent to HSC and such certificates are issued by one agency – the Board of Secondary Education .The declaration of equivalency was annexed (Annexure-5).

ADDITIONAL REJOINDER AFFIDAVIT

5. An additional rejoinder affidavit has been filed by the petitioners annexing documents stating that these were not in their possession at the time of filing the rejoinder which are as follows :

(i) Govt. notification No. 14260/SME dtd.4.06.2012 issued by School and Mass Education Department, fixing the Scale of pay of Classical (Sanskrit) Teachers of the Schools notionally under Rule 74 of the Orissa Service Code and introducing common qualification for the post of Classical teacher (Sanskrit) in Government, Fully Aided, Block Grant and recognized High Schools of the State (Annexure-8).

(ii) Resolution No 23399/SME dated 27.10.2014 introducing common qualification for the post of Classical (Sanskrit) Teachers in Government, Fully Aided , New Grant in Aid and recognized High Schools of the State (Annexure 9).

(iii) The pay Fixation Statement of the Sanskrit Teachers in Sanskrit tolls and Sanskrit teachers in High Schools as per the 4th Pay commission, 5^{th} Pay Commission and 6^{th} Commission was submitted in the form of a table.

(iv) The Scale of pay comparison of the teachers in the fully aided schools and Sanskrit Toll teachers as per the 6^{th} Pay Fixation was provided in form of another table.

COUNTER AFFIDAVIT OF THE OPPPOSITE PARTY NO.1

6. A counter affidavit has been filed on behalf of the opposite party No 1 State challenging the maintainability of the writ petition as it has been filed by the five petitioners who are working in five different Sanskrit tolls in different districts and further stating as follows :

6.1. The post of Classical (Sanskrit) Teachers has been provided in the yardstick for both Govt. & Non-Govt. Secondary Schools/High Schools. The Govt. in the Department of School and Mass Education has issued Resolution No. 174542, dtd.05.09.2011, to provide Trained Graduate Scale of pay to the classical teachers who are continuing in different high schools. It is a policy decision of the Govt.and

is meant for the classical teachers imparting Secondary Education from class - VIII to class - X and the High School Certificate Examination.

6.2. The teachers who are serving under different Sanskrit Tolls belong to a separate cadre of teachers with distinctly different service conditions and their employment advertisement also prescribes different induction eligibility criteria for which the resolution dated 05.09.2011 is silent about them.

6.3. Merely because these teachers are sometimes deputed to teach Sanskrit in the High Schools, that does not clothe them with any right to be treated at par with the classical teachers as such deputations are stop gap/temporary arrangements. These deputations without any express Government policy or prescribed service conditions, does not entitle these petitioners to be treated at par with classical Sanskrit teachers of the High schools.

6.4. The averment that some Sanskrit pandits from Sanskiit Tols are permanently absorbed in the general High Schools to teach Sanskrit is not correct without support of any document.

6.5. Teachers appointed in Govt./Non-Govt. High Schools to teach Sanskrit are treated as "*Classical Teachers*", whereas the teachers appointed in Sanskrit Tols to teach Sanskrit are called "*Pandits*". The existing post of "Shastri" held by the petitioners in respective Aided Sanskrit Institutions carries the T.I.T. scale of pay as per the staffing pattern & the said "Shastri" posts have not yet been upgraded to the post of TGT (Sanskrit). The petitioners are not entitled for Trained Graduate Scale of pay.

6.6. The action of the State - opposite party is in accordance with the prevailing Rules and Regulations of the State Government. The courses of studies for both General High School & Sanskrit Tols are prepared by separate Board of syllabus Committee and the objectives behind these Sanskr'it Tols are also substantially different than that of general high Schools. Separate syllabus Committees prepare the courses of studies and the very object of inception of these two types of education institutions are different to each other, so there is no scope for comparing the standard of education imparted by these institutions.

6.7. The Classical Teacher post is a single post in General High Schools, whereas Sanskrit Tols imparting Madhyama courses have three (3) Sanskrit teaching posts. So, in the case of exigency, sometimes stop-gap arrangements are made by deputing a Sanskrit teacher from the Sanskrit Tols to General High Schools and some time also the vice versa deputation is directed by the Local Education Authority.

6.8. The assertion that the petitioners are imparting higher standard of instruction /education is denied. The document vide Annexure 7 is a mere suggestion made by the Local Education Authority, i.e., DEO, to adjust the Sanskrit Teachers of Sanskrit Tols in the nearby High Schools as to fill up the vacancy and to save Government

exchequer, and does not confirm the concept of parity between these two category of teachers. The cadre of the teachers in General High Schools is separate from the Sanskrit Tols.

6.9. The State Government after considering various aspects including gravity of work, degree of responsibility involved, fixed different recruitment and appointment policies for different posts with different scale of pay. Under the State Government, the employees of District Office, Head of The Departments and Secretariat etc., though perform similar type of works, but different scales of pay are fixed to their posts. It is further humbly submitted that, all the employments of the State Government is governed by their respective service rules and law is well settled that only the employer is competent to decide / regulate the service rules and conditions as per their requirement.

6.10. The petitioners having accepted the contract of employment on its terms and condition and employed as Sanskrit Teachers and designated as "Pandit" cannot be treated and benefitted at par with a "Classical Teacher" of a High School.

6.11. The minimum prescribed qualification for the post of Classical teacher as has been notified by the Govt, in the Department of School and Mass Education, as B.A.(Sanskrit) with '*Sikhya Shastri Acharya*, whereas the minimum qualification for Assistant Pandits in Madhyama| under different Tols is 'Sastri'. Classical Teachers serving in different high schools have got a different status than that of the Assistant Pandits serving in Sanskrit Tolls for prosecution of Madhyama studies.

The letter dated 15.12.2008 issued by the Govt., in the Department of School and Mass Education prescribing staffing pattern and qualification of the pandits in different is annexed to the Counter affidavit (Annexure-A/1).

REJOINDER TO COUNTER OF OPPOSITE PARTY NO.1

7. The petitioners have filed a rejoinder to the counter affidavit of Opposite party No.1 stating that the writ petition is maintainable as the grievances of the petitioners are the same even if they are working in different Sanskrit Tols and that there is no mis-joinder of parties. It has been further stated that the State Policy discriminates amongst the same category of teachers working in same teaching discipline, whose qualification and accountability are same. Asst. Pandits of the Sanskrit Tol are teaching 300 marks for Sanskrit subject in Madhyama under Sanskrit Tol, which is equivalent to H.S.C of Secondary School, the same has been accepted by the State Government as per the letter No. 3508/SME dtd.20.02.20009. Both H.S.C and Madhyama certificates are issued by the Board of Secondary Education Odisha. Further submitted that, the curriculum/syllabus of Sanskrit Tol, is higher standard than the general High School Sanskrit syllabus. Asst. Pandit and other teaching staff of the Sanskrit Tol are deputed to different Schools vide O/o No. 5717 dtd. 27.04.2002, 7837 dtd. 07.04.2005, 15187 dtd. 02.12.2005, 23747 dtd. 29.11.2005, 26093 dtd. 31.12.2005. Their scale of pay of Pandit and Asst. Pandit of

Sanskrit Toll and Sanskrit Teacher of High School are same and identical up to 5th pay fixation. But there is discrimination in revised pay fixation as per the circular dtd.05.09.2011 vide Annexure-3 to the writ petition. Madhyama of Sanskrit Toll is equivalent to High School Certificate of General School examination which has been conducted by one Education agency known as Board of Secondary Education. As per the workload/exigency Government have framed staffing pattern. As the cadre is same and identical amongst the classical teacher of general School and Asst. Pandit of Sanskrit Tolls they have been deputed by the opposite parties to work in the High Schools and Aided Schools and deputation deputation/transfer can be done only in the same cadre .The petitioners have annexed the Government orders issued by the opposite parties from time to time by posting some teachers of Madhyama Institutions in general High School to the Additional Rejoinder as filed Annexure-7. The scale of pay of Headmaster of Government Aided School is equivalent to Head Pandits of Sanskrit Tolls. The scale of pay of other teaching and non-teaching Staffs of Government Aided High Schools and Sanskrit Tolls are identical (equivalent). The qualification of Classical Teacher of General High School and Asst. Pandit of Sanskrit Toll are same and they belongs to same cadre till Circular dtd.05.09.2011 and their scale of pay are same and identical up to 5th Pay Fixation, but as per the Circular dtd. 05.09.2011 the scale of pay of the Classical Teachers having Acharya qualification has been revised as Rs.9,300/-, G.P. Rs.4,200/- instead of Rs.5,200/-, G.P. Rs.2,800/-, even though the petitioners are possessing the same and identical qualification as them but have been discriminated. As per, the Circular No.l7542/SME dtd.05.09.2011 clause 8 (i) reads as: *"The minimum educational qualification for the post of Classical (Sanskrit) Teachers for all categories of High Schools (Government Fully Aided, Block Grant and Recognized) shall be as below. "Acharya (except Yotischarya and Ayurvedacharya) or Sahityacharya or M.A. in Sanskrit or it's equivalent Degree from a recognized University/Institution. OR A Bachelor's Degree with Sanskrit as one ofthe optional subjects from a recognized University with Shikshya Shastri (Sanskrit) from a recognized University or Shastri (Sanskrit) with Shikshya Shastri (Sanskrit) from a recognized University"* The educational qualification of the Asst Pandits in the Sanskrit Tolls is Shastri/Shikshya Shastri. Shikshya Shastri is equivalent to "Acharya". Till the date of Circular vide Annexure-3, the Classical Teachers of General High Schools and the Asst. Pandit of the Sanskrit Tolls were treated as same and identical posts.

AFFIDAVIT OF THE PETITIONER

8. That an affidavit has been filed by the petitioners stating that this Court directed vide order dtd.04.08.2022 to clarify numbers of Asst. Pandits having Acharya qualification in State working in Sanskrit tools and the Petitioner No.3 came to know by virtue of letter No 16338 dtd.08.07.2022 issued by the Director, Secondary Education to Additional Secretary in Government (NGHS), Department of School & Mass Education, Odisha, Bhubaneswar about up-gradation of the post of Shastri Pandit to Acharya Pandit in Prathama and Madhaya Sanskrit Tools in

where it is found that there are total numbers of 36 Shastri Teachers having Acharya qualification. It is also stated in the affidavit that in the said letter it has been mentioned that if a Shastri post is upgraded to Acharya Pandit Prathama there will be an average of monthly increase of Rs.172,760/- per month per post (as per ORSP Rules 2008) for 36 posts the financial burden will be Rs.55,12,320/- per annum.

SUBMISSIONS

9. Mr. P.K. Kar, learned counsel for the petitioners submits that though the petitioners have fulfilled all the requisite qualifications and holding the post like their counter parts who are imparting general education. Thereby they are deserved to get the B.Ed scale of pay like their counter parts who are imparting general education. The opposite parties have been transferring/deploying both teaching and non-teaching staff of Sanskrit tolls to both aided and fully aided, Government High Schools for which the petitioners had filed Government Orders under Annexure-7 series to demonstrate that they are in the same cadre. He further submits that even though the petitioners are working in different schools under the control of the opposite parties, the relief sought for by the petitioners are common as they are aggrieved by Annexure-3, for which they have filed one writ petition , but have paid individual Court fees. He further submitted that the petitioners are teaching in Class-VI and VII that is Prathama 1st year and 2nd year for 300 marks each in Sanskrit, whereas there is 50 marks for Sanskrit taught in Class-VI and VII in General Education. Further Sanskrit Teachers/Assistant Pandit in Sanskrit Tolls are providing 300 marks in Madhyama (Class-VIII) 1st year, Madhyama (Class-IX) 300 marks in 2nd years and thirdly in Madhyama (Class-X) 300 marks in final year, whereas Sanskrit Teachers in High Schools are providing teaching only for 100 marks in Class-VIII, IX and X each. Whenever government have fixed Acharya qualification for Sanskrit Teachers in a High Schools who are teaching only 100 marks in Sanskrit, the teachers teaching Sanskrit are getting T.G.T. scale of pay but the Sanskrit Teachers/Assistant Pandit of Sanskrit Tolls who are legally entitled to get same T.G.T. scale of pay as they are providing 300 marks each in Madhyama 1st year, 2nd year and 3rd year (Class-VIII, IX and X) have not been extended the TGT scale of pay, which amounts to discrimination violation of the principle of equal pay for equal work by the Government. As the petitioners are quite similarly situated as well as qualified as the teachers of Sanskrit in the High Schools have been debarred by the Government from getting TGT scale of pay which is unconstitutional, discriminatory, arbitrary, unjust and irrational. He relies on the decision of this Court in the case ***Akshya Kumar Nayak vs. State of Orissa and batch*** decided on **04.08.20022** involving Hindi teachers and the case of ***Radharani Samal vs. State of Orissa : 2017 (1) ILR-CUT-546*** .

10. Per contra, the learned counsel for the State reiterates the averments in the counter affidavits filed on behalf of the Opposite Parties No. 1 and 3 has opposed the submissions of the learned counsel for the petitioners stating that the writ application is not maintainable as the impugned Notification is a policy decisions of

the Government and as the petitioners stand on a different footing than the Classical teachers (Sanskrit) in Government High Schools , there is intelligible differentia between them for which there is no illegality in the impugned Notification (Annexure 3).

ANALYSIS AND DISCUSSION

11. Considering the submissions by the learned counsel for the respective parties, I am of the view that :

(i) One writ application at the instance of the petitioners is maintainable as they are all Sanskrit teachers working in different Sanskrit tolls and their services have been approved and all of them are aggrieved by the impugned Resolution No. 17542 dated 05.09.2011. (Annexure 3).

(ii) The petitioners were getting the same scale of pay as per the 4th Pay Commission w.e.f. 01.01.1986 and 5th Pay Commission w.e.f. 01.01.1996 as the Classical teachers in the Government High Schools. In the 6th Pay Fixation, there was change w.e.f. 01.01.2006.

(iii) The petitioners are carrying out similar duties-teaching Sanskrit to students who appear in the examinations conducted by the Board of Secondary Education.

(iv) While petitioners teach students of Classers VII, IX and X (three years) and their papers are of 100 marks each (Total 300 marks), the Classical (Sanskrit) teachers teach students of two classes (Classes VII and VIII) for 50 marks each (Total 100 marks)

(v) In case of exigency, both categories of teachers are deputed to carry out each others functions.

(vi) After declaration of the equivalency of Madhayama with HSC Schools, since the year 2020 the Government is contemplating revising the staffing pattern of the Madhayam Tolls and declaring the post of Classical teacher (Sanskrit) in High Schools is equivalent to post of Acharya Pandit of Sanskrit Tolls of the State and the demand to declare Shastri teacher at par with teacher of High Schools High Schools as Trained Graduate Teacher as would be apparent from letter dated 08.07.2022 of the Director Secondary Education. It has been stated therein as follows:

"Consequent upon declaration of equivalency of Madhyama Tols with that of High Schools. The staffing pattern of Madhyama Tols needs to be revised in order to impart Sanskrit Education to the Students at par with High Schools in the State. Hence the post of Classical Teacher i.e. Sanskrit in High Schools is equivalent with the post of Acharya Pandit of Sanskrit Tols of the State for which the demand of declaring the Shastri Teacher to Acharya Teacher having Acharya qualification at par with the teacher of High Schools declared as Trained Graduate Teacher having Acharya qualification by Govt."

(vii) The representations filed by the petitioners as way back as on 1.11.2011 and 2.11.2011 are still pending and no decision on the same have been taken by the opposite parties in spite of lapse of all these years.

CONCLUSION

12. In view of the above discussion and the categoric assertions of the petitioners who are working as Assistant Pandits in the Sanskrit Tolls And having Acharya qualification which appears to be equivalent to the qualification of the

Classical teachers (Sanskrit) in the High Schools who have been extended TGT scale of pay by the impugned notification, and were getting the same scale of pay under the 4th and 5th Pay Fixation and difference arose in 2006 at the time of the 6th Pay Fixation dated 01.01.2006, which was followed by the impugned Notification dated 05.09.2011 (Annexure 3), the opposite parties are directed to examine if :

(i) The petitioners were enjoying the same pay scale as the Classical teachers in the High Schools, Aided Schools under the different Pay Fixations till the 6th Pay Fixation dated 1.01.2006.

(ii) The petitioners possess the same/equivalent qualification as the Classical teachers (Sanskrit) in the Government High Schools who have been extended the benefit of Trained Graduate Scale of pay under the impugned notification of 2011 (Annexure 3).

13. The entire exercise shall be completed within a period of three months from receipt of this order. If it is found that the petitioners were continuing in the same status till issuance of the impugned notification and possess the same / equivalent qualification as the Classical teachers (Sanskrit) in the High Schools, they shall be extended TGT scale of pay and consequential benefits with effect from the date when the Classical teachers (Sanskrit) received the same benefits

14. The writ application is disposed of with the above direction. There is no order as to costs.

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2024 (II) ILR-CUT-1219

R.K. PATTANAIK, J.

W.P.(C) NO. 9029 OF 2013

DILIP KUMAR SINGH ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

(A) CONSTITUTION OF INDIA, 1950 – Article 243-W r/w 12th schedule – Matter pertaining to urban & town planning – Whether it should be dealt under the Municipal law/local Act or O.D.A Act? – Held, it should be dealt under Municipal law.

(B) JURISDICTION – Whether the question of jurisdiction can be challenged at any stage even if not raised before? – Held, Yes.

Case Laws Relied on and Referred to :-

1. 2015 (I) OLR 588 : Bijaya Krushna Das, President, Hotel Association of Puri. -Vs- State of Odisha & Ors.
2. AIR 1963 SC 734 : Traders -Vs- Chief Controller of Imports and Exports.
3. AIR 1966 SC 108 : Cantonment Board, Ambala -Vs- Pyare Lal.
4. (1914) 1 KB 608 : Rex -Vs- Williams.

For Petitioner : Mr. Jaydeep Lal
For Opp. Parties : Mr. D.K. Mohapatra

JUDGMENT Date of Judgment : 13.05.2024

R.K. PATTANAIK, J.

1. Instant writ petition is filed by the petitioner challenging the orders dated 10th November, 2009 (Annexure-3) and dated 19th January, 2013 (Annexure-7) vis-à-vis an action initiated against him in connection with Misc. Case No.07 of 2009 and confirmation of order in Appeal Case No.02 of 2010 passed by opposite party Nos.2 and 3 respectively under the Orissa Development Authorities Act, 1982 (hereinafter referred as to 'the O.D.A. Act') for alleged construction taken up over Plot No.AM/25, Mouza-Durgapur Area No.17, Rourkela with a direction to remove the deviation in setback area and to remove encroachments from Government and railway lands on the grounds inter alia that such action is not legally tenable and hence, therefore, the impugned decisions are liable to be set aside.

2. Bereft of unnecessary details, the brief facts of the case of the petitioner are as follows. According to the petitioner, opposite party No.3 issued notice on 29th April, 2009 to him to show cause in a proceeding under Section 91 of the O.D.A. Act alleging that he has made construction in deviation of the approved plan to the extent described therein with a direction to stop the same with a notice and pursuant to such notice received, with the appearance on record, show cause was filed and denied it with the plea that the plot in question was purchased by a registered sale deed dated 31st March, 2005 under a Composite Housing Scheme and later, an area of 3062 Sq.ft adjacent to the said plot was allotted to him by the Odisha State Housing Board vide letter No.24601 dated 7th November,1997. As per the show cause, the petitioner pleaded that the allotment of the land by the Odisha State Housing Board was to be finalized and the same was under process. With such other facts stated in the show cause, the petitioner denied the encroachment alleged by opposite party No.3. It was further pleaded in the show cause by the petitioner that the railway land behind the allotted plots is being used by the allottees of the houses (AM-1 to AM-24) and in so far as, the land in occupation by him is concerned, the same is only covered by tin sheds in order to protect own space from the encroachers, who are residing nearby in a Basti area with unauthorized constructions. It is alleged by the petitioner that opposite party No.3 passed an ex parte order dated 10th November, 2009 and directed him to remove the unauthorized development and encroachment within thirty days failing which action to follow. The said order (Annexure-3), as per the petitioner, was based on a report dated 22nd June, 2009 of the Planning Member, Rourkela Development Authority and was challenged in appeal under Section 91(2) of the O.D.A. Act before opposite party No.2, who without considering the plea advanced and put on record dismissed it by the impugned order under Annexure-7 series. After the dismissal of appeal, according to the petitioner, opposite party No.3 directed him to remove the encroachment and development within seven days from then with a letter dated 2nd April, 2013 (Annexure-8). The contention of the petitioner is that the proceeding

initiated under the O.D.A. Act by opposite party No.3 is without jurisdiction and the action in respect of the railway land and removal of encroachment therefrom has to be as per the provisions of the Odisha Public Premises (Eviction of Unauthorized Occupants) Act, inasmuch as, at no point of time the Railway Administration had issued any notice to him nor taken any steps for eviction and demolition in respect of the alleged possession over the same and therefore, any such eviction shall have to be following due procedure established by law with an action in terms of Section 122 of the O.D.A. Act.

3. Opposite party No.3 filed counter affidavit and justified the action against the petitioner. According to opposite party No.3, as pleaded on record, the petitioner has not only made unauthorized and illegal construction over the set back area of the approved plan but also covered the adjacent land of the Government and Railways and initially on receipt of a report (Annexure-9) dated 28th February, 2009 from the Senior Draughtsman, R.D.A., the proceeding under the O.D.A. Act in Misc. Case No.07 of 2009 was initiated against him. It is further pleaded that the hearing of the matter was taken up with prior notice (Annexure-B/3) but on the date fixed i.e. 7th August, 2009, he was absent. By citing the conduct of the petitioner on the subsequent dates, opposite party No.3 claims that the action under the O.D.A. Act is fully justified with adequate and sufficient opportunity being provided followed by the final order under Annexure-3. As per the counter, it is stated that opposite party No.3 has not been extended with jurisdiction to act as per Section 122 of the O.D.A. Act by way of any Government notification and hence, in exercise of powers conferred under the O.D.A. Act, action for the illegal construction and possession of Government and railway lands was initiated against the petitioner.

4. By filing the rejoinder, the petitioner has questioned the usurpation of power under the O.D.A. Act after Seventy-fourth amendment to the Constitution of India coming into force w.e.f. 1st June, 1993 which deals with the powers of Urban Local Bodies having been introduced with a concept of self-government. It is stated that opposite party No.3 does not have the jurisdiction to initiate any such action under the provisions of the O.D.A. Act as such power stands vested with the Rourkela Municipal Corporation. As per the petitioner and in view of the rejoinder affidavit referring to Annexure-11 thereto, which is an order dated 30th March, 2010 of the Government of Odisha in Housing and Urban Development Department duly notified in the Orissa Gazette, whereby, all the Development Authorities have been directed to consider delegation of the functions of urban planning etc.to the local bodies in exercise of Section 111 of the O.D.A. Act.

5. Heard Mr. Pal, learned counsel for the petitioner, learned AGA for the State and Mr. Mohapatra, learned counsel for opposite party No.3.

6. Mr. Pal, learned counsel for the petitioner confines the challenge to the impugned orders under Annexure-3 and Annexure-7 on the premise that after the commencement of the Constitution (Seventy-fourth Amendment) Act,1992, opposite

party No.3 lost its jurisdiction and hence, the very initiation of the proceeding under the O.D.A. Act and confirmation of the order of eviction and demolition by opposite party No.2 in appeal is untenable and nonest in the eye of law and hence, liable to be quashed. Mr. Pal refers to Article 243-ZD and Article 243-ZE and also Article 243-ZF besides Article 243-W of the Constitution of India to contend that the Rourkela Municipal Corporation was to exercise the jurisdiction in case of any such encroachment of Government land. It is further contended that after insertion of Article 243-ZF, exercise of jurisdiction in matters listed in 12th Schedule introduced by Seventy-fourth amendment stands bestowed upon the Corporation and hence, the initiation of the proceeding under the O.D.A. Act at the behest of opposite party No.3 is without competence. While advancing such an argument, Mr. Pal refers to a decision of this Court in the case of ***Bijaya Krushna Das, President, Hotel Association of Puri Vrs. State of Odisha and others 2015(I) OLR 588*** and contends that the action of opposite party No.3 cannot be sustained in law for being without jurisdiction as it could not have been exercised with the powers being exercisable by the Rourkela Municipal Corporation.

7. Mr. Mohapatra, learned counsel for opposite party No.3 submits that delegation of powers with regard to urban and town planning and functions to be looked after and managed by the Rourkela Municipal Corporation was underway. Referring to the affidavit of opposite party No.3 filed in compliance of the Court's order dated 15th February, 2024 as a reply to the rejoinder affidavit of the petitioner dated 9th August, 2023, Mr. Mohapatra, would further submit that after the Government's decision dated 30th March, 2010 vide Annexure-11 to the rejoinder, the State Government by order dated 19th January, 2015 (Annexure-C/3) of the said affidavit clarified that Rourkela Development Authority was required to delegate the powers to deal with unauthorized constructions, however, in that connection, a meeting was held on 9th July, 2018 in presence of the Commissioner, Rourkela Municipal Corporation as a Special Invitee to discuss with regard to delegation of functions vis-à-vis urban planning etc. but the Commissioner delegatee expressed inability to take over the responsibility due to shortage of planning staff. The minutes of the said proceeding in 14th Authority Meeting held on 9th July, 2015 (Annexure-D/3), as according to Mr. Mohapatra, was dully communicated to the Government for approval of the proposal for transfer of urban planning functions to the Rourkela Municipal Corporation from Rourkela Development Authority by letter dated 31st December, 2015 (Annexure-E/3), whereafter, a reminder was issued on 26th April, 2016 (Annexure-F/3) later to which the State Government was pleased to ensure delegation of powers of building plan approvals, lay out/sub-divisional approvals and dealing with unauthorized constructions to Rourkela Municipal Corporation duly communicated vide Annexure-G/3 dated 17th August, 2019 as per which, such transfer of the planning functions to the Corporation was to take place by 30th August, 2019 keeping in view the mandate of Seventy-fourth amendment to the Constitution of India. In such view of the matter, Mr. Mohapatra lastly submits

that since the transfer of power was pending consideration of the Government and the same could be processed in 2019, till such time, opposite party No.3 continued to exercise jurisdiction dealing with unauthorized and illegal constructions. In reply and response to the above, Mr. Pal, learned counsel for the petitioner submits that irrespective of the above exercise, with the introduction of the Constitution (Seventy-fourth Amendment) Act, 1992, proceeding initiated under the O.D.A. Act by opposite party No.3 is beyond jurisdiction.

8. As per the contention of Mr. Pal, learned counsel for the petitioner, exercise of power under Section 91 of the O.D.A. Act at the instance of opposite party No.3 is void ab initio with the insertion of Constitutional amendment and introduction of Part IX-A in the Constitution of India after Seventy-fourth amendment. For a better appreciation, Article 243-W of the Constitution of India is extracted hereunder:

> **"243-W. Powers, authority and responsibilities of Municipalities, etc.-** Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow-
>
> (a) the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to—
>
> (i) the preparation of plans for economic development and social justice;
>
> (ii) the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule;
>
> (b) the Committees with such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including those in relation to the matters listed in the Twelfth Schedule."

As per the above, the Municipalities have been conferred with the powers and authority to deal with subjects listed in the 12th Schedule.

9. The action for encroachment of the Government land and of the Railways has been initiated against the petitioner in the year 2009. In view of the affidavit filed by opposite party No.3 and the stand taken referring to Annexures-C/3 to G/3, the State Government considered delegation of power to the Rourkela Municipal Corporation in 2019. Then the question is, whether, till such time pending delegation of power, the Rourkela Development Authority continued to possess the jurisdiction with respect to matters of urban and town planning and functions under the O.D.A. Act?

10. A preliminary point is to be considered, whether, the jurisdiction to initiate the action by opposite party No. 3 can be agitated before this Court? Such a question was not earlier raised by the petitioner. According to Mr. Pal, learned counsel for the petitioner, the challenge to the jurisdiction may be raised at any stage and as such, there lies no bar. It is contended by Mr. Pal that if the petitioner is said to have surrendered to the jurisdiction of opposite party No.3, it can not be assumed by any such concession with respect to the matters under 12th Schedule of the Constitution

of India. It is further contended that consent of parties cannot clothe the Rourkela Development Authority with the jurisdiction. The above contention may be countered on the ground that a question on jurisdiction is not to be entertained at this stage when the petitioner never raised it earlier. It is well settled law that lack of inherent jurisdiction of a court or authority may be challenged at any stage even if not raised before since it goes to the very root of the matter. In the case of ***Pioneer Traders Vrs. Chief Controller of Imports and Exports AIR 1963 SC 734***, it is observed that where an authority, whether, judicial or non-judicial has in law no jurisdiction to make an order, the omission to raise before that authority, the relevant facts for deciding the question cannot confer it with jurisdiction, In ***Cantonment Board, Ambala Vrs. Pyare Lal AIR 1966 SC 108***, it is held and concluded that a question of jurisdiction not depending on facts to be investigated, can be allowed to be raised at any stage though in the said case, the Apex Court was not inclined to entertain it. On the other hand, it is equally an acceptable principle that if one has elected to argue a case on its merits before a court or authority, he must not be allowed afterwards to seek to repudiate by applying for a writ of certiorari. In ***Rex Vrs. Williams (1914) 1 KB 608***, a classical decision on the point, it is observed that a party may by his conduct preclude himself from claiming the writ ex debito justitiae no matter whether the proceedings which he seeks to quash are void or voidable; if such proceedings are void, it is true that no conduct of his will validate them; but such considerations do not affect the principles on which the Courts act in granting or refusing the writ of certiorari; this special remedy will not be granted ex debito justitiae to a person, who fails to state the evidence on moving for the rule nisi at the time of the proceedings impugned that he was unaware of the facts on which he relied to impugn them. The above are the legal principles in precise to take cognizance of while deciding a question of jurisdiction.

11. There is no denial to the fact that such a question vis-à-vis jurisdiction of opposite was not raised at the inception. The proceedings sought to be impugned have apparently been disposed without a real contest and to an extent, for the default of the petitioner. In fact, there was no any challenge to the jurisdiction when it could have been agitated. Yet, a patent lack of jurisdiction is alleged in the case at hand. Such an aspect, in the considered view of the Court, is needed to be examined keeping in view the settled legal position discussed. As earlier stated, the subjects in 12^{th} Schedule of the Constitution of India stand to be taken over and earmarked for the Local Bodies after Seventy-fourth amendment to it. It does mean, such powers to be exercised as per the Municipal law and rules framed thereunder. In view of Article 243-W of the Constitution of India, powers and authority to be exercised by the Local Bodies. The powers relate to the matters listed in 12^{th} Schedule of the Constitution of India. In other words, in view of introduction of Part IX-A to the Constitution of India, the matters pertaining to the urban and town planning shall have to be dealt with as per the law of the Local Bodies and not by invoking the provisions of the O.D.A. Act. The scheme of the thing envisioned with introduction

of the Constitution (Seventy-fourth Amendment) Act w.e.f. 1st June, 1993 is to clothe the Local Bodies, the role and responsibility to manage and exercise powers with respect to the matters listed in 12th Schedule. So therefore, it would not be incorrect to hold that opposite party No.3 was required to deal with the action initiated as per the Municipal law instead of the O.D.A. Act.

12. In so far as delegation of power with the exercise undertaken by the Government in view of Section 111 of the O.D.A. Act is concerned, which on a bare reading, it would suggest that the Development Authority may by a notification direct that any power exercisable thereunder, except the power to make regulations, may also be exercised by such other officials or authorities, in such cases and subject to such conditions as may be specified therein, which means, the authority is exercisable within the confines of the said Act, whereas, the subjects listed in 12th Schedule of the Constitution of India are related to the matters to be taken care of and looked after as per the Municipal law. It can further be said that the Development Authority is allowed to share the jurisdiction in view of Section 111 of the O.D.A. Act but such power is exercisable as per the aforesaid Act. Since the subject of urban and town planning post-amendment lies within the folds of the Local Bodies, exercise of power to initiate action, in the humble view of the Court, has to be as per the Municipal law. For better understanding and appreciation, the 12th Schedule of the Constitution of India is reproduced herein below:

TWELFTH SCHEDULE

(Article 243-W)

1. Urban planning including town planning.
2. Regulation of land-use and construction of buildings.
3. Planning for economic and social development.
4. Roads and bridges.
5. Water supply for domestic, industrial and commercial purposes.
6. Public health, sanitation conservancy and solid waste management.
7. Fire services.
8. Urban forestry, protection of the environment and promotion of ecological aspects.
9. Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded.
10. Slum improvement and upgradation.
11. Urban poverty alleviation.
12. Provision of urban amenities and facilities such as parks, gardens, play-grounds.
13. Promotion of cultural, educational and aesthetic aspects.
14. Burials and burial grounds; cremations, cremation grounds; and electric crematoriums.
15. Cattle pounds; prevention of cruelty to animals.
16. Vital statistics including registration of births and deaths.
17. Public amenities including street lighting, parking lots, bus stops and public conveniences.
18. Regulation of slaughter houses and tanneries.

13. With the insertion of the amendment to the Constitution of India including 12th Schedule, the matters relating to the urban and town planning have become a

subject under the Municipal law. Furthermore, the jurisdiction of the Municipalities is derived from Section 374-A of the Odisha Municipal Act under Chapter- XXV-A introduced vide Odisha Act No.11 of 1994 w.e.f. 31st May, 1994 purportedly after the Seventy-fourth amendment to the Constitution of India. Hence, therefore, the Court is of the conclusion that all such matters pertaining to urban and town planning and powers exercisable shall have to be as per the Municipal law. In fact, it is the domain of the Local Bodies to deal with such urban planning and if any such authority is to be exercised, the same is necessarily as per the Municipal law. In the instant case, opposite party No.3 exercised the authority under the O.D.A. Act which ought to have been as per the Municipal Act and Rules. The said conclusion receives concurrence from the decision in Bijaya Krushna Das, President, Hotel Association of Puri (supra), wherein, construction activities were prevented by the Puri-Konark Development Authority with action undertaken as per the provisions of the O.D.A. Act when the purpose of urban planning and actions needed to be accomplished following the Municipal Act and Rules and the same was sought to be impugned and upheld referring to the Seventy-fourth amendment to the Constitution of India with a conclusion that after such amendment, for the purposes such planning, the laws of the Local Bodies stand to rule and prevail.

14. Finally to sum up, the Court is to conclude that in view of the amendment to the Constitution and insertion of Part IX-A, since the jurisdiction is exercisable under the Municipal Law in respect of urban and town planning, opposite party No.3 can therefore be said to have erroneously exercised the authority under the O.D.A. Act and not by following the provisions of the Municipal law. Since the manner of exercise of the authority is not in accordance with law and such usurpation of power is under the O.D.A. Act, notwithstanding any such exercise to delegate the power thereunder, it is to be held that the very initiation of the action against the petitioner never had the sanction of law. It is reiterated that exercise of authority under the Municipal law is in distinction from delegation of power under Section 111 of the O.D.A. Act. With the discussions as aforesaid, the irresistible conclusion of the Court is that the proceeding vis-à-vis the petitioner under the O.D.A. Act is liable to be interfered with as it stands on the pedestal lacking competence and jurisdiction.

15. Hence, it is ordered.

16. In the result, the writ petition is allowed. As a logical sequitur, the impugned orders under Annexures-3 and 7 are hereby set aside leaving it open for an action against the petitioner by such Authority for the alleged encroachment as per and in accordance with law, an exercise which is expected to be commenced and accomplished at the earliest preferably within next three months since such encroachment covers and includes large extent of area of the Government and Railways. It is observed that the plea of the petitioner regarding allotment of land by the State Government adjoining the plot owned by him shall also examined while considering action according to law. In circumstances, however, there is no order as to the costs.

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2024 (II) ILR-CUT-1227

R.K. PATTANAIK, J.

W.P.(C) NO. 35991 OF 2023

M/s. CHOUDHURY MEDICAL STORE, BHUBANESWAR .....Petitioner

-V-

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

(A) CONSTITUTION OF INDIA, 1950 – Article 226 – Basic principles of judicial review in administrative decision – Discussed with reference to case laws.

(B) NATURAL JUSTICE – The authority declined to renew the contract with the petitioner – The order is not supported by any reason – Effect of – Held, any order without any reason amounts to violation of principle of Natural Justice.

(C) WORDS & PHRASES – Discretion – Meaning with reference to case laws.

Case Laws Relied on and Referred to :-

1. 2004 (3) SCC553 : ABL International Ltd. & Anr. Vrs. Export Credit Guarantee Corporation of India Ltd. & Ors.
2. 2006(10) SCC 1 : Reliance Airport Developers (P)Ltd. Vrs. Airport Authority of India & Ors.
3. 1978 (1) SCC 405 : Mohindra Singh Gill & Anr. Vrs. The Chief Election Commissioner, New Delhi & Ors.
4. 2007(2) SCC 588 : Ramchandra Muralilal Bhattad & Ors. Vrs. State of Maharashtra & Ors.
5. 2015 (8) SCC 519 : Dharampal Satyapal Ltd. Vrs. Deputy Commissioner of Central Excise, Gauhati & Ors.
6. 2010 (9) SCC 496 : Kranti Associates Pvt. Ltd. Vrs. Masood Ahemed Khan & Ors.
7. 1978(1) SCC 248 : Menaka Gandhi Vrs. Union of India.
8. 1978 (1) SCC 405 : Mohindra Singh Gill & Anr. Vrs. The Chief Election Commissioner, New Delhi & Ors.
9. 2023 (2) SCC 703 : M.P. Power Management Company Ltd. Vrs. SKY Power South East Solar India Pvt. Ltd. & Ors.
10. (1990) 3 SCC 280: Star Enterprises Vrs. City & Industrial Development Corporation of Maharashtra Ltd.

For Petitioner : Ms. Pami Rath, Sr. Adv.
For Opp.Parties : Mr. Aurovinda Mohanty (O.P.Nos. 2 to 4)

JUDGMENT Date of Judgment: 19.06.2024

R.K. PATTANAIK, J.

1. Instant writ petition is filed by the petitioner for quashment of the eviction orders dated 21st September, 2023 and 1st November, 2023 passed by opposite party No. 4 under Annexures-8 & 10 respectively with a direction to opposite party No. 2 to allow him to run 24X7 medicine shop inside the campus of AIIMS after renewal of the contract dated 1st November, 2021 on the grounds stated.

2. The petitioner is a registered proprietorship firm involved in selling of medicines and other products from a store at AIIMS, Bhubaneswar, which was

allowed for a period of two years. According to the petitioner, opposite party No.3 invited tender on 28th October, 2020 for opening and running of 24X7 pharmacy/chemist shop within the campus of AIIMS and pursuant to the said tender call notice, the petitioner participated in the bidding process and finally, the Technical Evaluation Committee found it to be qualified, a decision stood was approved by the competent authority. It is further pleaded that opposite party No.2 thereafter issued a notice on 8th February, 2021 for opening of the financial bid with the date and time fixed and the process included scrutiny of all the documents upon submission of the documents in pursuance of the request received by letter dated 11th January 2021, whereafter, the petitioner was declared as L-1 bidder. It is stated that against the bid of the petitioner, the other bidders approached this Court in W.P.(C) No. 9899 of 2021 and the same was disposed of on 31st March, 2021 and then, RVWPET No.89 of 2021 was filed, which was dismissed on 5th July, 2021. It is pleaded that after validity of the tender process was upheld in favour of the petitioner, opposite party No. 3 issued the work order dated 3rd May, 2021 in its favour with an agreement executed on 1st November, 2020. It is claimed that the petitioner availed a loan from the Bank sanctioned in the year 2022 in connection with the shop but in the meanwhile, received a termination notice dated 2nd December, 2022 (Annexure-3) with an intimation that such termination of contract is with immediate effect carrying a direction to vacate the premises and being aggrieved, W.P.(C) No. 34167 of 2022 was filed, which was disposed of by order dated 15th December, 2022 (Annexure-4). It is alleged that without complying the directions issued by this Court under Annexure-4, opposite party No.4 passed the order dated 21st March, 2023 (Annexure-5) thereby terminating the contract of the petitioner to run the shop inside AIIMS campus and was communicated via e-mail on 24th March, 2023 to vacate the hospital premises within five days from the date of receipt of such intimation. It is further alleged that the orders of termination of contract and vacation of the premises by the decision of opposite party No.4 is without following due process of law, inasmuch as, the petitioner was not provided any opportunity of hearing and furthermore, there has been non-compliance of the Court's order dated 15th December, 2022. According to the petitioner, being aggrieved of the issuance of the termination order dated 21st March, 2023 followed by a notice to vacate the premises of the hospital, W.P.(C) No. 9406 of 2023 was filed and thereafter, CONTC No. 2013 of 2023, later to which, opposite party No.4 withdrew the show cause issued to them so also termination and eviction orders and tendered unconditional apology, whereafter, the contempt proceeding was dropped by an order under Annexure-7 series and when the shop was once again made operational, letter of closure of contract and eviction dated 21st September, 2023 (Annexure-8) was received without assigning any reason for renewal of the same and on receipt of such letter, representation was submitted with a plea that previous vendor was granted several extensions and was allowed to run the shop for almost six years and hence, in view of such renewal clause, there has been a legitimate expectation for grant of renewal but the same has been denied by opposite party

No.4 with a direction to vacate and handover the premises by letter dated 1st November, 2023 (Annexure-10). Such eviction notice and non-renewal of the contract by the opposite parties with the petitioner, as pleaded further, is illegal and arbitrary, hence, therefore, the same is liable to be interfered with.

3. On contrary, the opposite parties justify eviction and termination of contract by orders vide Annexures-8 & 10 with a plea that discretion lies with the Authority concerned and in the facts and circumstances of the case, such renewal of contract was not possible and therefore, it was declined. The contention is that Annexures-8 & 10 cannot be termed as notice and action for eviction and as far as Annexure-8 is concerned, the same is merely an intimation to the petitioner to vacate the premises on completion of contractual period executed on 1st November, 2023. It is further pleaded that Annexure-10 is a reply to the notice of renewal of contract where the authority expressed its view not to extend or renew the same, so therefore, the action is not in relation to eviction. In a reply to the petitioner's plea that the action is unjustified, it is also pleaded by the opposite parties that Annexures- 8 & 10 does not disclose action for eviction in terms of the OPP (Eviction of Unauthorized Occupants) Act. It is again pleaded that the petitioner since did not vacate the premises after expiry of the contract period, only thereafter, action was initiated under the aforesaid Act, during which, opportunity to file a show case was provided and hence, the contention that the proceeding is not tenable is liable to be rejected as any such occupation of the premises inside the campus of AIIMS, Bhubaneswar on expiry of the contract has become unauthorized. Referring to Annexure-B/2 series, it is claimed that a criminal action against the petitioner is pending in 2 C.C.Case No. 317 of 2007 in the file of learned SDJM, Sambalpur and since there has been allegations received towards distribution of wrong medicines etc. with reference to the complaints under Annexure-C/2 & D/2 and the fact that issuance of work order is based on documents with false annual turnover shown and submitted at the time of bid in respect of which a complaint dated 16th November, 2022 (Annexure-E/2) was received and with other events for selling expiry goods and medicines on a complaint (Annexure F/2), wherein, the petitioner was directed to file a show cause, such a decision was taken not to continue with the contract but to terminate it in order to avoid future litigation, hence, such notice was issued to vacate the premises with the expiry of the contract period and when it was not vacated, the same was followed by an action under the OPP (Eviction of Unauthorized Occupants) Act.

4. Heard Ms. Rath, learned Senior Advocate and Mr. Mohanty, learned counsel for AIIMS.

5. On the following grounds the eviction notice and closure of contract is challenged which are as follows: (i) the decision is without providing an opportunity to show cause vis-à-vis renewal of contract thereby violation of principles of natural justice;(ii) opposite parties have not provided any reason as to why the contract is not to be renewed even though there is a clause for renewal; (iii) the Authority concerned did not follow due process while exercising the discretion vested, an

exercise which has not been carried out considering the clause for renewal of contract; (iv) the entire process not to renew the contract followed by termination orders and the malafide conduct of the opposite parties clearly reflect the vindictive attitude towards the petitioner ignoring the fact that the previous administration of AIIMS granted extension to the earlier vendor for about six years but in the present case, it has been given a go by;(v) the State cannot act whimsically and arbitrarily even in contractual matters and the Authority being an instrumentality of State cannot resort to such actions, which are liable to judicial review; (vi) the premise upon which the termination of contract and eviction notice stands is on account of the performance of the petitioner not being satisfactory but without conceding the same, any such opinion by the Authority is without carrying out a proper exercise and hence, the same lacked due diligence and against the spirit of the contract with a renewal clause therein; (vii) the performance of the petitioner has all been along satisfactory and any such stigmatic orders without offering an opportunity of hearing to the petitioner is illegal and unjustified and also in violation of the principles of audi alteram partem; (viii) the opposite parties being authorities under law and parties to the execution of contract is to honour public trust and hence, bound to act with prudence but in the case at hand, though the petitioner was allowed to run the business inside the campus of AIIMS, but suddenly without any opportunity to explain as to why the contract could not be renewed, decided to terminate the same with an eviction followed by a proceeding under the OPP (Eviction of Unauthorized Occupants) Act; (ix) since the petitioner fulfills all the criteria and was granted the tender to run the medicine shop based on a contract with huge investment made, renewal of it was legitimately expected and hence, the action of the opposite parties is in contravention of Articles 19(1)(g) and 21 of the Constitution of India; (x) the State in case acts arbitrarily even in the realm of contract, such action can be a subject of challenge and could be interfered with in exercise of writ jurisdiction under Article 226 of the Constitution of India; (xi) the opposite parties are instrumentalities of the State within the meaning of Article 12 of the Constitution of India and therefore, are bound to act in a fair and transparent manner but then, the petitioner was never called upon to explain about the non-renewal of the contract thereby failing in duty cast upon them; (xii) judicial review of administrative decision is permissible in law on certain grounds where there is clear violation of principles of natural justice and the authority concerned acted arbitrarily when the settled position of law is that any such discretion with respect to tenders is not unfettered; (xiii) abrupt closure of the medical shop is an arbitrary action of the opposite parties and till date, there has been no alternative arrangement for a 24X7 medical shop within the campus of AIIMS and hence, the public would be affected in case of immediate closure and in so far as the petitioner is concerned, it is selling medicines at discount in respect of generic products, therefore, without any such arrangement, the patients visiting the hospital may have to purchase medicines at a much higher price from the shops situate outside AIIMS; (xiv) the contract between the petitioner and opposite parties did contain a renewal clause for further two years

of one year each at the discretion of the Director, AIIMS, Bhubaneswar subject to satisfactory performance and enhanced payment of compensation but while not renewing the contract, in utter violation of the principles of natural justice, the opposite parties have acted in a most arbitrary and unlawful manner and declined renewal followed by termination of the contract on its expiry.

6. Ms. Rath, learned Senior Advocate while advancing argument cited number of authorities which are to be discussed hereafter. It is submitted by Ms. Rath that the writ petition is maintainable in contractual matters and Article 14 is also applicable to the obligations arising therefrom where State instrumentalities are parties to it and such remedy provides effective prevention of miscarriage of justice and in support of such contention, the decision of the Apex Court in ***ABL International Ltd. and another Vrs. Export Credit Guarantee Corporation of India Ltd. & others 2004(3) SCC553*** and authority reported in 2023(2) SCC 703 are relied on. Further by referring to a citation in the case of ***Reliance Airport Developers (p) Ltd. Vrs. Airport Authority of India and others 2006(10) SCC 1***, Ms. Rath, learned Senior Advocate would submit that renewal of contract is at the discretion of the Director of AIIMS and of course such renewal cannot be claimed as a matter of right but discretion to be exercised by the authority cannot be whimsical and not by considering all the relevant facts since the settled law discussed therein implies discretion according to rules of reason and justice, for absence of reason not to waive renew of the contract. Ms. Rath also cited the following decisions, such as, ***Mohindra Singh Gill & Another Vrs. The Chief Election Commissioner, New Delhi and Others 1978 (1) SCC 405; Ramchandra Muralilal Bhattad and Others Vrs. State of Maharashtra and Others 2007(2) SCC 588; Dharampal Satyapal Limited Vrs. Deputy Commissioner of Central Excise, Gauhati and Others 2015 (8) SCC 519; Kranti Associates Pvt. Ltd. Vrs. Masood Ahemed Khan and Others 2010 (9) SCC 496*** and on the point of action to be arbitrary and hence, is violative of Article 14 of the Constitution of India: ***Menaka Gandhi Vrs. Union of India 1978(1) SCC 248***. In support of legitimate expectation, Ms. Rath referring to the decision in ***2021(II) OLR 568*** contends that such expectation was with the petitioner in view of the renewal clause of the contract and for the fact that its performance to be satisfactory and that similar contract having been renewed on earlier occasions. In other words, it is submitted that the petitioner had all the reasons to expect renewal of the contract and hence, had the legitimate expectation. Ms. Rath contends that the stand taken by the opposite parties in no way sustainable in law by the very conduct of the authority concerned and further cited a decision of the Apex Court reported in ***2007 (1) SCC 33: MANU/OR/0457/2007***. It is contended that the reason not to renew the contract cannot be supplemented with affidavits filed in Court by the opposite parties and in that regard, Ms. Rath referred to a decision reported in ***1978(1) SCC 405*** and hence, all such grounds raised at present cannot be entertained, so to say, the reply affidavit is only an attempt to justify the impugned decision. Lastly, Ms. Rath, learned Senior Advocate would submit that even

existence of arbitration clause in view of the decision of the Supreme Court in ***2021 (6) SCC 15*** does not debar a matter to be entertained with a writ petition filed seeking enforcement of fundamental right and where there is infringement of natural justice and in the case of the petitioner, violation of principle of natural justice and rights guaranteed under Article 14 of the Constitution of India has taken place.

7. In reply to the counter, the petitioner filed the rejoinder affidavit and in addition to the grounds pleaded, it is stated that the relief sought for is to be entertained notwithstanding any such alternative forum to challenge the action against eviction. It is reiterated that the opposite parties clearly misutilised the discretionary power and acted in an arbitrary manner to terminate the contract notwithstanding a clause in agreement itself that the arrangement is to continue till such time a new arrangement with a 24X7 shop coming up inside the campus of AIIMS. The opposite parties have denied the allegations filing the affidavit to the rejoinder and pleaded that the action is on account of the illegalities committed by the petitioner and for having received complaints against it and for the fact that fraud was perpetuated at the time of bidding which was revealed later on. In response to the reply affidavit of the opposite parties, the petitioner also filed a rejoinder and referring to the decision of the Apex Court in ***Mohindra Singh Gill & Another Vrs. The Chief Election Commissioner, New Delhi and Others 1978 (1) SCC 405*** pleaded that with the counter on record and reasons assigned, it cannot substitute the eviction orders as the same is impermissible in view of the law laid down therein. In reply to the contention of the opposite parties, in the rejoinder affidavit, it is stated that there has been satisfactory performance of the petitioner as no such allegations were ever proved and hence, non-renewal of the agreement on any such ground is a false plea altogether by claiming further that the validity of the tender has been upheld in W.P.(C) Nos.5072,8917,9899 & 20198 of 2021; RVWPET No. 89 of 2021; and finally, SLP(C) No. 11564-11565 of 2021, hence, even the allegation of fraud against the petitioner is a falsehood. It is rather alleged that the opposite parties are hell bent to not renew the contract with an oblique motive and accordingly, did so and further initiated action under the OPP (Eviction of Unauthorized Occupants) Act to evict the petitioner and the reason for such action, lies somewhere else. As a matter of fact one of the bidders, namely, M/s., A.K. Dey and Night Medical Store challenged the tender floated by AIIMS for opening and running 24X7 pharmacy with Chemist store within its campus awarding the contract in favour of the petitioner by filing W.P.(C) No. 9899 of 2021 and it was disposed of and dismissed by an order dated 31st March, 2021 and citing it and other grounds, the contention of the petitioner is that there has been no fraud or any misrepresentation proved during the bidding process and therefore, the opposite parties cannot be permitted to take any such plea.

8. The first and foremost question is, whether, the writ petition is maintainable and if at all, the Court should interfere in the contractual matters. In support of maintainability, Ms. Rath, learned Senior Advocate has referred to the case in ***ABL***

International Ltd. (supra). For better understanding, it is apposite to extract of the relevant paragraphs of the said decision and the same is reproduced below:

> "23. xxx once State or an instrumentality of State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants, the first respondent as an instrumentality of the State has acted in contravention of the above said requirement of Article 14, then we have no hesitation that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent. In this context, we may note that though the first respondent is a company registered under the Companies Act, it is wholly owned by the Government of India. The total subscribed share capital of this company is 2,50,000 shares out of which 2,49,998 shares are held by the President of India while one each share is held by the Joint Secretary, Ministry of Commerce and Industry and Officer on Special Duty, Ministry of Commerce and Industry respectively. The objects enumerated in the Memorandum of Association of the first respondent at Para 10 states:
>
> "To undertake such functions as may be entrusted to it by Government from time to time, including grant of credits and guarantees in foreign currency for the purpose of facilitating the import of raw materials and semi-finished goods for manufacture or processing goods for export."
>
> Para 11 of the said object reads thus:
>
> "To act as agent of the Government, or with the sanction of the Government on its own account, to give the guarantees, undertake such responsibilities and discharge such functions as are considered by the Government as necessary in national interest."
>
> "24. It is clear from the above two objects of the company that apart from the fact that the company is wholly a Government owned company, it discharges the functions of the Government and acts as an agent of the Government even when it gives guarantees and it has a responsibility to discharge such functions in the national interest. In this background, it will be futile to contend that the actions of the first respondent impugned in the writ petition do not have a touch of public function or discharge of a public duty. Therefore, this argument of the first respondent must also fail."

9. In ***M.P. Power Management Company limited vs. SKY Power South East Solar India Pvt. Ltd. & Others 2023(2) SCC 703*** while referring to the decision in ***ABL International Ltd.*** (supra), the Supreme Court observed as hereunder:

> "67. ABL marks a milestone, as it were, in the matter of the superior court interfering in contractual matters where the State is a player even after the contract is entered into. A petition was filed under Article 226 wherein the respondent which was incorporated under the Companies Act repudiated an insurance claim made by the appellant writ petitioner. This Court undertook an elaborate discussion of the earlier case law. We find that this Court dealt with several obstacles which were sought to be posed by the respondent. They included disputed questions of facts being involved, availability of alternate remedy, and the case involving entertaining a money claim. This Court went on to hold as follows:
>
> "27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:
>
> (a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

"82.5. After the contract is entered into, there can be a variety of circumstances, which may provide a cause of action to a party to the contract with the State, to seek relief by filing a writ petition.

82.10. The reach of Article 14 enables a writ court to deal with arbitrary State action even after a contract is entered into by the State. A wide variety of circumstances can generate causes of action for invoking Article 14. The Court's approach in dealing with the same would be guided by, undoubtedly, the overwhelming need to obviate arbitrary State action, in cases where the writ remedy provides an effective and fair means of preventing miscarriage of justice arising from palpably unreasonable action by the State."

It has thus been held by the Supreme Court in the aforesaid case that a civil action before the appropriate forum is undoubtedly maintainable but having regard to the fact that the State is involved and it has duty to act fairly and to eschew arbitrariness in all its actions, resort to the Constitutional remedy on the cause of action that the same is arbitrary is permissible.

10. Taking into account the decisions (supra) and the fact that the petitioner is a party to the contract which has been entered into by AIIMS, an instrumentality within the definition of Article 12 of the Constitution of India, notwithstanding any such alternate remedy by way of a civil action, the Court is of the humble view that despite expiry of contractual period since arbitrariness is alleged against the opposite parties in flagrant violation of Articles 12 & 14, the subject matter in dispute is entertainable. It is restated that the writ petition is maintainable in contractual matters which is based on a cause of action attributing arbitrariness and miscarriage of justice when an instrumentality of the State is involved and when such violation is alleged for contravention of Article 14 of the Constitution of India. In the case at hand, as earlier stated, the petitioner has been allowed to run a 24X7 medicine shop inside the campus of AIIMS with a contract duly entered into, though the same having expired in the meantime without its renewal despite a provision for the same in the agreement and since the opposite parties are alleged of not allowing the contract to renew in absence of any such non-satisfactory performance, an action alleged to be filled with arbitrariness, all such aspects being the subject matter in dispute, according to the Court, the cause of action as well as the remedy so sought for in the writ petition is maintainable.

11. When there is a renew clause in the contract, the further question is, whether, the opposite parties are bound to allow such renewal? Whether the Director, AIIMS is obliged to renew the agreement in view of a clause in the contract in the peculiar facts and circumstances of the case? There is no denial to the fact that the contract allows renewal for a further period stipulated therein subject to discretion and satisfactory performance by the petitioner. In so far as the action

initiated with a notice and intimation regarding termination of the contract and to vacate the campus premises, in view of the contention of the petitioner that there has been no reason assigned and as such the discretion has not been exercised in the manner expected from a statutory Authority, it is to be ascertained, whether, the opposite parties and in particular, the concerned Authority did exercise the discretionary power according to law.

12. In ***Reliance Airport Developers (p) Ltd.*** (supra), the Apex Court while dealing with the matter involving decision making process and the discretion to be exercised by the authority empowered to take any such decision stressed upon and outlined the parameters which are to be followed. As to what means 'discretion' and when it is to apply to a Court of justice stands described therein and the extract of the same is reproduced herein below:

> "26. While exercising the discretion, certain parameters are to be followed:
>
> 'Discretion', said Lord Mansfield in R.v. Wilkes, 'when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular'." (See Craies on Statute Law, 6th Edn. p.273 and Ramji Dayawala & Sons(P)Ltd. v. Invest Import, SCC P-96, Para-20)
>
> 27. Discretion undoubtedly means judicial discretion and not whim, caprice or fancy of a judge. (See Dhurandhar Prasad Singh v. Jai Prakash University.) Lord Halsbury in Susannah Sharpe v. Wakefield considered the word "discretion" with reference to its exercise and held:
>
> "Discretion means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion; Rooke's case according to law, and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular, and it must be exercised within the limit to which an honest man competent to the discharge of his office, ought to confine himself."
>
> "35. In the instance case, though the High Court seems to have noted that EGOM has absolute discretion, it has really not held that the discretion was unfettered. In fact, it has on facts found that the discretion was properly exercised to make some variations in the terms of RFP."

13. Ms. Rath, learned Senior Advocate for the petitioner submits that in the instant case, the discretion has not been exercised properly and contended that any such discretion which lies with the Authority is not boundless. In response to the above, Mr. Mohanty, learned counsel for AIIMS submits that the reason is clearly assigned in the counter affidavit and additional affidavit filed and the circumstances leading to non-renewal of the contract on expiry of the same. If a show cause is invited, it is expected that the authority shall consider reply and exercise discretion judiciously with respect to the renewal of contract. Considering the settled legal position, there is no gainsay that if final decision of the AIIMS authority dehors any reason against renewal, when such a provision is in place subject to satisfactory performance of the petitioner with a claim of having an unblemished record, the opposite parties are under obligation to consider any such reply and response of the

petitioner before taking a decision exercising discretion according to rules of reason and justice. An Authority cannot lightly brush aside the renewal clause in the contract when the petitioner having been allowed to run a 24X7 medicine shop inside the campus of AIIMS and is always expected to respond for renewal in a manner which is not fanciful but based on sound principles being a party thereto and an instrumentality of the State.

14. Since the discretion to be exercised by the Authority in such matters is not unfettered or immune from judicial review, action of the opposite parties is to be tested on the touchstone of the principles highlighted upon and discussed herein before. In absence of reasons in the decision dated 1st November, 2023, Ms. Rath, learned Senior Advocate cited ***Mohindra Singh*** (supra) by contending that the same cannot be supplemented by filing a reply affidavit. In the aforesaid decision, the Apex Court concluded 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 an affidavit. It is observed therein that if such a course is adopted, an order otherwise bad from the inception, may by the time, it reaches the Court could stand validated with additional grounds advanced.

15. In fact, absence of reasons at times makes an order susceptible to challenge, hence, therefore, it is the duty of the authority dealing with the matter, whether, administrative or quasi-judicial, to offer such reasons justifying the decision. In this context, the authority of the Apex Court in ***Dharampal Satyapal Limited*** (supra) is referred to from the side of the petitioner. In the said decision, the Apex Court discussed the concept and doctrine of natural justice in common law. It is again profitable to quote the relevant excerpt of the decision, which is hereunder;

> **"**21. In Common Law, the concept and doctrine of natural justice, particularly which is made applicable in the decision-making by judicial and quasi-judicial bodies, has assumed a different connotation. It is developed with this fundamental in mind that those whose duty is to decide, must act judicially. They must deal with the question referred both without bias and they must give (sic an opportunity) to each of the parties to adequately present the case made. It is perceived that the practice of aforesaid attributes in mind only would lead to doing justice. Since these attributes are treated as natural or fundamental, it is known as "natural justice". The principles of natural justice developed over a period of time and which is still in vogue and valid even today are: (i) rule against bias i.e. nemo debet esse judex in propria sua causa; and (ii) opportunity of being heard to the party concerned i.e. audi alteram partem. These are known as principles of natural justice. To these principles a third principle is added, which is of recent origin. It is the duty to give reasons in support of decision, namely, passing of a "reasoned order".

It has been held in the above decision that there should not be any bias and furthermore, opportunity of hearing should be provided to the parties in judicial and quasi-judicial matters, which are the basic principles of natural justice. In other words, it is held that the Authority has a duty to pass a reasoned order in support of its decision having heard the parties involved. A similar view has been expressed by

the Apex Court in ***Ramchandra Murarilal Bhattad*** (supra). The said decision is based on an administrative action which was subjected to judicial scrutiny. While referring to a decision in ***Star Enterprises Vrs. City and Industrial Development Corporation of Maharashtra Limited (1990) 3 SCC 280***, it is held thus:

> "52.10. In recent times, judicial review of administrative action has become expansive and is becoming wider day by day. The traditional limitations have been vanishing and the sphere of judicial scrutiny is being expanded. State activity too is becoming fast pervasive. As the State has descended into the commercial field and giant public sector undertakings have grown up, the stake of the public exchequer is also large justifying larger social audit, judicial control and review by opening of the public gaze; these necessitate recording of reasons for executive actions including cases of rejection of highest offers. That very often involves large stakes and availability of reasons for actions on the record assures credibility to the action; disciplines public conduct and improves the culture of accountability. Looking for reasons in support of such action provides an opportunity for an objective review in appropriate cases both by the administrative superior and by the judicial process."

16. In ***Kranti Associates Private Limited*** (supra), the Apex Court summed up the basic principles to be followed while exercising judicial, quasi-judicial and even administrative powers by the authority concerned and they are in the following words:

> "47. Summarizing the above discussion, this Court holds:
>
> (a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.
>
> (b) A quasi-judicial authority must record reasons in support of its conclusions.
>
> (c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.
>
> (d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.
>
> (e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.
>
> (f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.
>
> (g) Reasons facilitate the process of judicial review by superior courts.
>
> (h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.
>
> (i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.
>
> (j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor [(1987) 100 Harvard Law Review 731-37].)

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain [(1994) 19 EHRR 553] EHRR, at 562 para 29 and Anya v. University of Oxford [2001 EWCA Civ 405 (CA)], wherein the Court referred to Article 6 of the European Convention of Human Rights which requires,

"adequate and intelligent reasons must be given for judicial decisions".

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process".

It is well known that any decision which is not in consonance with the principles of natural justice could be termed as arbitrary and in violation of Article 14 of the Constitution of India as has been the view of the Apex Court in ***Mrs. Menaka Gandhi*** case.

17. On a bare reading of the order dated 24th September, 2023 under Annexure-8, it would reveal that the Authority declined to renew the contract with the petitioner, however, the same is not supported by any reason. The circumstances under which the contract is not renewed should at least be made known to the petitioner. When it is a contract with a renewal clause subject to discretion of the Authority and performance of the petitioner, it is but quite natural to expect to have it renewed for such further period. The Authority concerned, if has taken a decision for whatever reasons against renewal, must made it clear and conspicuous, while taking a final decision stating the reasons therefor. In the present case, the petitioner alleges that no hearing with a response was held and the impugned decision either for or against renewal of contract is not accompanied with any justifiable reasons. In view of the decisions discussed before with reference to the ratio laid down in ***Star Enterprises*** referred to in ***Ramchandra Murarilal Bhattad*** (supra) to the effect that executive actions necessitate recording of reasons in order to assure credibility to such action as looking for reasons in support of action provides an opportunity and objective review in appropriate cases both in the administrative and judicial side. In the said decision, the cancellation of bid pursuant to change in policy decision though was held valid and the appeal was dismissed but the Apex Court discussed the expansive role of the Courts in exercising power of judicial review with a rider that each case shall have to be examined on its own facts.

18. In the case of the petitioner, the contract was in place between the petitioner and AIIMS, Bhubaneswar, Odisha executed on 1st November, 2021, which contained the terms and conditions with a renewal clause for a further two terms of one year each at the discretion of the Director, AIIMS, Bhubaneswar, Odisha subject to the satisfactory performance and enhanced payment of compensation. The unsuccessful bidder, as earlier stated, challenged the final tender but was unsuccessful. In fact, the said matter in W.P.(C) No.9899 of 2021 challenging the award of tender in favour of the petitioner was on the premise, whether, the bidder had a valid drug license and if AIIMS acted in favour of such L-1 bidder by extending deadline. While disposing of the matter, this Court finally reached at a conclusion that there was no illegality committed by the AIIMS Authority in awarding the contract in favour of the petitioner. As against the said decision, a review was filed but the same also ended in dismissal by order dated 5th July, 2021 in RVWPET No. 89 of 2021. Though the review was dismissed on 5th July, 2021 but the work order had already been issued on 3rd May, 2021 in favour of the petitioner subject to conditions stipulated therein. The SLP which was filed by M/s A.K. Day and Night Medical Store was dismissed by the Apex Court on 6th August, 2021. Pursuant to the work order, an agreement was entered into between the petitioner and the Director, AIIMS, Bhubaneswar on 1st November, 2021. The contractual period was from the date of execution of agreement till 31st October, 2023 with a clause for its renewal subject to satisfactory performance. As a matter of fact, Clause-12 of the contract authorizes AIIMS to terminate the contract and if the performance of the petitioner is found to be not satisfactory. It does mean that during the continuation of contract, it may be terminated, in case, discretion is so exercised and the performance of the petitioner is found to be unsatisfactory. Such is the condition even for renewal of the contract. Furthermore, as per Clause-45, even after expiry of the contract, the petitioner is to run the shop till a new party is engaged. The contention of the petitioner is that its performance is satisfactory all through and hence, it was natural to expect renewal of the contract. But then, the petitioner was issued with a show cause notice from AIIMS on 4th November, 2022 with respect to complaint received in the distribution of medicines, on discount benefits and overcharging the patients. It is claimed by the petitioner that M/s A.K. Day and Night Medical through its representative challenged the tender on the ground that the petitioner suppressed certain seizures made at Sambalpur and thereafter, another show cause was invited on 16th November, 2022. Sometime thereafter, on 2nd December, 2022, the petitioner received termination notice with immediate effect, however, according to the claim, it was not for any unsatisfactory performance. It is made to reveal from the record that a criminal proceeding in 2(C) C.C. Case No. 317 of 2007 to be pending in the Court of learned S.D.J.M., Sambalpur initiated against the petitioner. But the termination dated 2nd December, 2022 was set aside by this Court in W.P.(C) No.34167 of 2022 with a conclusion that the contract and its termination cannot go hand in hand while inviting a show cause. Quite interestingly, the contract was again terminated on 21st March, 2023 for the reasons, such as,

discrepancy is turnover during tender process; pendency of the criminal proceeding in 2(C) C.C. Case No. 317 of 2007 and other irregularities. The said termination was also challenged by the petitioner in W.P.(C) No. 9406 of 2023 and during such pendency, CBI raided the premises of the petitioner on 12th April, 2023 on the self-same allegation as claimed by the petitioner, for which, the Agency was impleaded as a party therein. Since, the second termination was found to be contemptuous, it was withdrawn and an affidavit was filed on 10th May, 2023. Against the aforesaid backdrop, the intimation was received for closure of the contract on 21st September, 2023 and it was without undertaking any exercise as to whether the same should be renewed or otherwise. The only reason cited was that apparently on account of expiry of the contract by 31st October, 2023.

19. Admittedly, such letter to close the contract has no reference of any decision not to renew the contract. In fact, the petitioner submitted a representation but the same was rejected by AIIMS Authority on 1st November, 2023, which is also under challenge. In the above circumstances, despite action of AIIMS to terminate the contract which could not materialize and in the meantime, the contract expired on 31st October, 2023.

20. Appreciating the contention of Mr. Mohanty, learned counsel for the AIIMS, it is to be held that no doubt the concerned Authority has discretion to consider renewal of contract but in the humble view of the Court, before such decision against it, an opportunity should have been provided to the petitioner. Furthermore, the decision dated 21st September, 2023 does not reveal if there is any call taken by AIIMS for renewal of contract. Even though certain complaints were received, as according to the Court, it should have been confronted to the petitioner while closing the contract without renewal as it was much anticipated. On perusal of Annexure-8, it is made to understand that notice for closure of contract was issued due to its expiry on 31st October, 2023 with a direction to the petitioner to remove all such articles from the premises in question and to hand it over by the end of the business hours on the expiry date. Hence, with such a response, it is obvious for anyone to carry an impression that AIIMS was not inclined and in favour of renewal of the contract. After receipt of the representation dated 30th October, 2023, the decision of the AIIMS was intimated vide letter dated 1st November, 2023. As per the said intimation, renewal of contract with effect from 1st November, 2023 has not been acceded to by the competent Authority of AIIMS. Thus, it is clear and apparent from Annexure-10 that renewal of contract was outrightly refused. But, as stated before, no reason was assigned as to what prevailed upon the Authority of AIIMS to not consider renewal of contract. It is quite natural for the petitioner to expect and to know the reasons against renewal of contract, which was not revealed by the AIIMS. The only intimation vide Annexure-10 is that the competent Authority of AIIMS declined to grant permission to renew the contract. Prima facie, the impugned decision is want of reasons. As stated, it was for the Authority of AIIMS to make its intention clear with reasons assigned while not being in favour of renewal of the

contract. If no reasons were assigned allowing the contract to die down, in view of the decision of the Apex Court in Mohinder Singh Gill (supra), the correctness of such decision is to be judged by reasons and the same, cannot be justified later with the affidavits filed. In other words, the challenge to the action does not stand validated with the reasons assigned by filing the affidavits in Court, which is what has been held and observed by the Supreme Court in the decisions (supra). According to AIIMS, as made to reveal from the counter affidavit and additional affidavit, there is no need for any other medicine shops as it has already a pharmacy shop running inside the campus and also inclined to have a 'Janaushadhi Kendra'. Any such decision by AIIMS should have been brought to the notice to the petitioner. Of course, it is not a matter of right to get the contract renewed but rules of prudence and justice demanded a hearing and reply disclosing the clear reasons. If the complaints and allegations were received and any such false annual turnover was revealed at the time of submission of bid, it could possibly a ground to terminate the contract and as such, twice actions had been taken before expiry of the contractual period. The petitioner, in the considered view of the Court, should have been allowed an opportunity to respond when it is claimed that the performance has been satisfactory all along and all the allegations to be falsehood.

21. With the above discussion, the conclusion of the Court is precisely stated and summed up herein below:

(i) In contractual matters, for its continuation with a renewal, reciprocity demands;

(ii) Such renewal not being an extension is not automatic and hence, it needs consent of the parties and certainly cannot be forced;

(iii) Nevertheless, renewal of contract being an agreement, the parties are to be abided by the terms and conditions of it;

(iv) Intention to continue with the renewal of contract or otherwise must be made clear and conspicuous leaving no space for any distrust;

(v) To consider any such renewal, the role of the Authority assumes significance as its responsibility to take a decision is to be fair and balanced;

(vi) Authority is to exercise the discretion in an unbiased manner keeping in view the terms of the contract and applying the rules of reason and justice;

(vii) If no provision is in place to renew the contract, obviously it shall have a natural death, unless the parties further agree to enter into a fresh one;

(viii) But, if the contract has a renewal clause, the same needs consideration according to the terms contained therein mindful of the fact that it is no extension;

(ix) In case of a restitution clause, it is not unusual for the party with whom the agreement is executed to render service, to expect renewal of contract, however, subject to the conditions agreed upon;

(x) In matters of contract with renewal provision, the Authority does possess discretion but the same is not limitless or unfettered, as in such a situation, it could lead to arbitrary exercise of powers;

(xi) While considering the renewal of contract, the Authority assigned with the role shall have to be alive to all the relevant facts by not being influenced by extraneous considerations detrimental to the interest of the other party involved as the latter may have all the rights and reasons expecting a decision in its favour;

(xii) To claim that the fate of a contract and its renewal depends on the exclusive discretion of the Authority never ever unaffected by any other relevant considerations would be a fallacy, inasmuch as, such an exercise cannot or ought not to be based on anyone's whim and caprice but to be guided by fairness and justice.

22. With so much of events having taken place before expiry of the contract period and thereafter, initiation of action treating the possession by the petitioner to be unauthorized, the concerned Authority was needed to take cognizance of the same besides such other criteria necessary while considering the plea for renewal of the contract without being bias in any manner and keeping in view the catchword 'justice should not only be done but should appeared to have been done' without any lip service extended. The Court finds that the Authority of AIIMS apparently based its decision against renewal and presumably on the grounds commencing from the time of the bidding process with receipt of other allegations not clearly known to have been substantiated. To determine the contract on any such plea or excuse as borne out of record is alleged by the petitioner to be not bonafide. The very conduct of a third party is suspected by claiming that all or most of the obstacles created against renewal of the contract is at its behest for the reason quite obvious. It is alleged that forces are behind the scene playing part to ensure the contract not to be renewed. Such apprehension does not appear to be entirely misplaced, if the facts on record are taken judicial notice of with parties having frequent tussle and rounds of litigations. The Court is not to cast any aspersion on the Authority dealing with the matter but very much concerned with the manner in which the entire episode has unfolded. Despite complaints received, unless it is substantiated or a strong reason to believe exists to find the petitioner to be on the wrong side, the Authority which is to consider the plea for renewal should not be unduly influenced by any such events having taken place as otherwise it would lead to miscarriage of justice thereby at times facilitating visible or invisible forces to succeed in defeating the contract which is again followed by spending precious time and resources, the fact which cannot and could not have been lost sight of by the AIIMS Authority. Of course, renewal of the contract depends on the terms and conditions but the aforesaid aspects are to be borne in mind while exercising discretion or else it would certainly result in gross injustice to the party at the receiving end, who rather deserves a fair treatment even when the Authority has reservations which should be made known particularly when there lies expectation for renewal considering the precedent. No doubt, any earlier instance of renewal is not to affect the exercise of discretion as it is based on the terms of the contract but it would not be incorrect to say that on account of a satisfactory performance, continuation of it with an expectation is quite natural. It may be said that favourable performance of the petitioner, which has been claimed, founded a reasonable expectation of renewal of contract notwithstanding other events with litigations and battles fought out. If all the allegations made now to be the grounds not to renew the contract and have led to the litigations without the allegations being substantiated, a case for renewal can be said to have been made out. It is no doubt not a case of any assurance to the petitioner before expiry of

contract for its renewal and hence, to demand it with a plea of legitimate expectation but having regard to the satisfactory performance exclaimed with an unblemished track record without the allegations ever substantiated, the petitioner could be said to have a reasonable expectation in favour of its continuation with a fresh agreement entered into with AIIMS. To set the record straight, the view of the Court is that the petitioner deserved a fair treatment instead but it could not be properly responded to by the Authority may be for the mess around with the involvement of a third party and the litigations. A decision not to renew is needed to be taken without being biased or having any prejudices. This Court is of the humble view that the concerned Authority was required to judiciously balance the competing interests of both the sides but it has not exhibited so or in a way demonstrated by not taking notice of all the facts and aspects necessary to consider renewal of contract followed by a decision with a non-speaking order and intimation and that too, rejecting the representation within no time without the grievance of the petitioner being properly attended to. It is reiterated that the Authority has to observe fairness and follow rules of justice even in contract matters as the exercise of discretion and jurisdiction is never unfettered. Having said that, the irresistible conclusion of the Court is that the case of the petitioner for renewal of contract certainly deserves a fresh consideration instead of action alleging its possession to be unauthorized keeping in view all the relevant facts otherwise it would result in miscarriage of justice.

23. Hence, it is ordered.

24. In the result, the writ petition stands disposed of with a direction to opposite party No.2 to reconsider the plea for renewal of the contract vis-à-vis the petitioner as per the contract with respect to the medicine shop situate inside the campus of AIIMS with a summary hearing and decision concluding the said exercise within four weeks from today keeping in view the observations made herein above and the settled legal position. It is further directed that till such time, a final decision is taken within the stipulated period, status quo in respect of the subject matter shall be maintained. As a necessary corollary, the impugned orders dated 21st September, 2023 and 1st November, 2023 passed by opposite party No. 4 under Annexures-8 & 10 are hereby quashed.

25. In the circumstance, however, there is no order as to costs.

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2024 (II) ILR-CUT-1243

SASHIKANTA MISHRA, J.

RSA NO. 383 OF 2015

SNEHALATA SAHU …….Appellant

-V-

KOKILA SAHU & ORS. …….Respondents

(A) INDIAN REGISTRATION ACT, 1908 – Section 58 – Whether absence of endorsement on the sale deed by the Sub-Registrar regarding receipt of consideration amount by the vendor vitiate the deed? – Held, No – Such endorsement is made when payment of consideration amount is paid and received by the parties in his presence. (Para 14)

(B) INDIAN EVIDENCE ACT, 1872 – Sections 91 & 92 – There is clear and categorical assertion by the vendor himself in the sale deed that he has received the consideration amount – Whether the successor in interest of the vendor can question regarding receipt of the consideration amount as reflected in sale deed – Held, No – Statement of dead person against his pecuniary interest is good evidence. (Para 12)

Case Laws Relied on and Referred to :-

1. 44 (1977) CLT 552 : Ushamani Dei & Ors. vs. Gandharba Barik & Ors.

For Appellant	: M/s. U.N. Sahoo, U.K. Sahoo, U. Sahoo, & S.C. Samantaray.
For Respondents	: M/s. Bibekananda Bhuyan, T. Sahoo, C. Nanda, S. Sahoo, S.S. Bhuyan & S.S. Mohapatra.

JUDGEMENT Date of Judgment : 19.07.2024

SASHIKANTA MISHRA, J.

The plaintiff is the appellant against a reversing judgment. The suit, C.S. No.5 of 2012 filed by the plaintiff was decreed by judgment dated 28.09.2013 followed by decree passed by the learned Addl. Civil Judge (Sr. Division), Dhenkanal. Said judgment and decree was reversed and set aside in appeal in RFA No.89 of 2013 vide judgment dated 20.07.2015 followed by decree passed by learned Addl. District Judge, Dhenkanal, which is impugned herein.

2. For convenience, the parties are referred to as per their respective status in the Court below.

3. The plaintiff's case, briefly stated, is that she had purchased Ac.0.100 dec. of land appertaining to Sabik Khata No. 2593 and Sabik Plot No. 5645 corresponding to Hal Khata No. 2920 and Hal Plot No. 5645/9250 from one Sanatan Sahoo vide RSD No. 1059/84 and was in possession thereof. Her purchased land was in between the plot of the Mahadeb Sahoo on the south and Kokila Sahoo on the north. As there was no passage to approach her land, she purchased another patch of land measuring Ac.0.010 dec. vide RSD No.1060/84 from its owner Mahadeb Sahoo, which was used by her for such purpose since the date of purchase. After death of the plaintiff's husband and their vendor, Mahadeb Sahoo, the defendant No. 1 encroached upon the passage by locking the entry gate of the plaintiff on the ground that the sale deed No.1060/1984 in respect of the passage had been cancelled by a cancellation deed. As such, the plaintiff obtained certified copy of the deed of

cancellation bearing No. 1202 of 1988 and came to know that same has been executed without any notice to her on the false ground of non-payment of consideration. On such facts, the plaintiff filed the suit for permanent injunction against respondents from interfering in her peaceful possession, declaration of the deed of cancellation as null and void and to declare her right, title and interest over the suit land on the basis of the RSD bearing No.1060/84.

4. The defendants contested the suit by filing written statement, inter alia, stating that Mahadeb Sahoo had executed RSD No. 1060/84 without any legal necessity but the sale had not materialized for non-payment of consideration amount. For such reason, the original registered sale deed and the registration receipt was not handed over to the plaintiff which was subsequently cancelled vide deed No. 1202 dated 05.03.1988. As such, no title was passed in favour of the plaintiff. It was further alleged that the suit land was not identifiable and that the so called passage claimed by the plaintiff is actually a part and parcel of the defendants" building area. The plaintiff was rather using the suit land for transporting her building materials for construction of her house on her plot with permission of the defendants and being instigated by local touts she had claimed title. Further, no ROR was issued in favour of the plaintiff and besides, the suit was also barred by limitation.

5. On such pleadings, the trial Court framed the following issues for determination.

i. Whether the suit is maintainable?
ii. Whether there is cause of action for filing of the suit?
iii. Whether the plaintiff has acquired right title and interest over the suit land by purchase vide registered sale deed bearing no. 1060 dt.21.02.84 /27.02.84?
iv. Whether the plaintiff's possession over the suit land can be confirmed?
v. Whether the deed of cancellation bearing no. 1202/99 dt.31.05.88 can be declared as null and void?
vi. Whether the defendants can be permanently restrained from entering over the property and from interfering into the peaceful possession of the plaintiff thereof?
vii. What other relief the plaintiff is entitled to?

6. Taking up issue No.iii for consideration at the outset, the trial Court after examining the oral and documentary evidence found that the recitals of the sale deed in question are clear and unambiguous which reveals that the consideration amount was received by the vendor. Therefore, it cannot be said that payment of consideration was a pre-requisite for passing of title. On issue Nos. iv and v, the trial Court held that the plaintiff was in possession of the suit land. On issue Nos.vi and vii, the trial Court held that the unilateral deed of cancellation had no legal sanctity being void ab initio. On issue Nos. i and ii, the trial Court found that when the sale deed as well as its cancellation was executed by the same person, i.e. Mahadeb Sahoo, it implies that he was well aware of the property he was dealing with and therefore, it cannot be said that the suit property was not capable of being identified.

As regards the ground of limitation, the trial Court held that the deed of cancellation being void ab initio, cannot give rise to any cause of action for the suit to be filed within three years. On such findings the suit was decreed in full by declaring the right, title, interest of the plaintiff over the suit land and by confirming her possession. Further, defendant No.3 was permanently restrained from interfering with her possession.

7. Being dissatisfied with the decree, the defendant Nos.1 & 2 carried the matter in appeal to the District Court, which was heard and disposed of by learned Additional District Judge. After considering the rival contentions, the first appellate Court took note of the fact that that the original sale deed, Ext.A was produced by defendant No.1, which suggests that the consideration amount was not paid. Since the defendant disputed the claim of payment of consideration, oral evidence being adduced in this regard was admissible and not in violation of Sections 91 and 92 of the Indian Evidence Act. The first appellate Court further found that there being no endorsement on the sale deed by the Sub-Registrar regarding receipt of consideration amount by the vendor before him as provided under Section 58 of the Indian Registration Act, the same also proves that title had not passed for non-payment of consideration. The first appellate Court further found discrepancy in the description of the suit property on consideration of the schedule to the sale deed and the evidence of the plaintiff herself. As such, it was held that no executable decree can be passed because of improper identification of the suit land. On such finding, the appeal was allowed and the judgment and decree passed by the trial Court was set aside.

8. Being aggrieved by such reversal of the judgment and decree of the trial Court, the plaintiff has filed the second appeal which has been admitted on the following substantial questions of law.

> *"1. Whether the lower appellate court has erred in holding that the title in respect of the land covered under sale deed bearing no. 1060/84 has not passed from the hands of the vendor to the vendee on the ground that there is no proof of consideration in the absence of any endorsement on the sale deed by the registering authority, although the vendor admits the receipt of consideration and delivery of possession in the recital?*
>
> *2. Whether the lower appellate court has fallen in error by ignoring the fact that when the parties admit the existence of a road over the suit plot, there was no occasion to hold that the description of the suit land is vague and as unidentifiable?"*

9. Heard Mr. S.C. Samantaray, learned counsel for the plaintiff-appellant and Mr. Bibekananda Bhuyan, learned counsel appearing for the defendant-respondents.

10. Mr. Samantaray would argue that the first appellate Court committed manifest error in holding that there was no proof of passing of consideration being swayed away by absence of endorsement made by the Sub-Registrar under Section 58 of the Registration Act. He would submit that when the vendor himself acknowledged receipt of consideration amount in the sale deed itself, no further

evidence is either necessary or admissible. In any event, the vendor being no longer alive, his admission in the sale deed cannot be reversed by his successors, i.e. defendant Nos.1 and 2. Even otherwise, execution of the sale deed and its registration are themselves proof of passing of title even if it be accepted that the consideration was not paid. The unilateral deed of cancellation by the vendor was rightly held to be ab inito void by the trial Court and therefore, the sale deed in question cannot be ignored. As regards identity of the suit land, Mr. Samantaray would argue that the suit land has been clearly and specifically described with its boundaries in the sale deed. There is no scope for any confusion or ambiguity arising relating to its meaning. Under such circumstances, even if the plaintiff in her cross-examination stated something different, the same would never override the recital of the sale deed.

11. Mr. Bhuyan, on the other hand would argue that the suit land has to be properly identified as otherwise an effective decree cannot be passed. Referring to the plaint schedule, he submits that the description of the suit property is non-specific and differs from sale deed. He further argues that what the plaintiff essentially claims is title and not right of easement. Therefore, the property ought to have been specifically described. The plaintiff could also have adduced additional evidence by seeking permission of the Court under Order 41, Rule 27 of CPC by having the land identified through a Survey Knowing Commissioner, which she did not. On the question of title, Mr. Bhuyan, referring to Section 58 of the Registration Act argues that in the absence of any such endorsement by the Sub-Registrar, it cannot be held that consideration had been paid by the vendee to the vendor. As such, no title had been passed. Mr. Bhuyan also argues that the suit is otherwise barred by limitation inasmuch as the plaintiff's prayer for mutation of the property was rejected in the year 2006. As such, she could have filed the suit within three years but she filed the same only in 2012. Moreover, the fact of cancellation of deed was within her knowledge at least at the time of the mutation case but she had not approached the Court within the prescribed period of three years.

12. After considering the facts of the case and the above mentioned arguments advanced by learned counsel for the parties carefully, this Court would first consider whether any title had passed from the vendor to the vendee by execution and registration of sale deed in question. Admittedly, the original sale deed was produced not by the plaintiff but by defendant No.1. It has been deposed by defendant No.1 as D.W.-1 that as the plaintiff had failed to pay the consideration money, the vendor neither handed over the "Baradi" receipt nor the original sale deed to her. This Court however, is not persuaded to place much reliance on the above statement of defendant No.1 in view of the clear and categorical assertion by the vendor himself in the sale deed that he had received the consideration amount which was fixed at Rs.1500/-. The said recital of the sale deed and its English rendering read as follows:

*"********** କ୍ରେତାଙ୍କୁ ଧାର୍ଯ୍ୟ ମୂଲ୍ୟରେ ବିକ୍ରୟ କରି ଦେଇ ସମସ୍ତ ଜରସମନ ବୁଝି ନେଇ ଥିବାରୁ ଉକ୍ତ ବୃତ୍ତିରେ କ୍ରେତାଙ୍କୁ ଦାଖଲ ମଡାଣ ଦେଇ ସ୍ୱତ୍ୟବାନ କରାଇ ସରେତ କରୁ ଅଛୁ ଯେ କ୍ରେତା ତଫସିଲ ବୃତ୍ତିକୁ ଆପଣା ନାମେ ରେକର୍ଡ ଓ ଜମାବନ୍ଦି କରାଇ ନେଇ******** /"*

*********** kretanku dharya mulyare bikraya kari dei samasta jarsaman bujhi nei thibaru ukta bruttire kretanku dakhal madana dei swatyaban karai saret karu achhu je kreta tafsil bruttiku apana name record o jamabandhi karai nei *********"*

This Court fails to understand as to what ambiguity is in the aforesaid statement so that other evidence is necessary to be looked into. It is needless to mention that when the recitals of the instrument are clear and unambiguous no oral evidence explaining the same may be admitted as provided under Sections 91 and 92 of the Indian Evidence Act. Therefore, regardless of the fact that the original sale deed was somehow in the possession of the defendant No.1, such fact, ipso facto, cannot override the clear and unambiguous admission of the vendor itself in the sale deed of having received the entire consideration amount. It is highly significant to note that the vendor Mahadeb Sahoo was no longer alive during the suit. Under such circumstances, the statement made by him as reflected in the sale deed regarding receipt of the consideration amount cannot be questioned by his successors-in-interest, i.e. defendant Nos. 1 and 2, who are his grandsons. Law is well settled that the statement of dead person against his pecuniary interest is good evidence in support of passing of consideration as held by this Court in the case of **Ushamani Dei and others vs. Gandharba Barik and others**[1]. In the said case it was held as follows:

"……Having held, as stated above, the lower appellate Court has come to the conclusion that there was no passing of consideration and, consequently, there was no delivery of possession. It is contended that under Section 32(3) of the Evidence Act, there should be a presumption of passing of consideration. Parikshit is admittedly dead. In the document Ext.3, he has stated that he has received the consideration. Reliance is placed on the case of Gulam Ali Saha v. Sultan Khan I.L.R. 1969 Cutt. 571 Wherein it has been held that the recital of payment of, consideration which is a statement made by a deceased person is binding against the interests of his successors as the same is against the pecuniary and proprietary interest of the vendor under Section 32(3) of the Evidence Act. This principle has also been confirmed in Lakshmidhar Sahu v. Kanhel Sahu 1973 (2) C.W.R. 1759. On the principle enunciated in the aforesaid two decisions, the statement of a dead person against his pecuniary interest is a good evidence in support of passing of consideration. This should have been taken notice of while considering the question of passing of consideration."

This Court therefore, finds that the first appellate Court erred in holding that there was no evidence of passing of consideration.

13. It is the further case of the defendants that a deed of cancellation was executed by the vendor but it was unilateral and without any notice to the plaintiff. The trial Court rightly held the same to be ab inito void. Such finding has not been specifically disturbed by the first appellate Court. Therefore, the only admissible evidence regarding the sale transaction in question is the sale deed executed by Mahadeb Sahoo.

1. 44(1977) CLT 552

14. Coming to the point raised regarding absence of endorsement by the Sub-Registrar as provided under Section 58 of the Registration Act, this Court finds that such endorsement is made when payment of consideration amount is paid and received by the parties in his presence. If the recitals of the sale deed are to be read carefully, the same would suggest that the statement of the vendor implies that he had already received the consideration amount. There is nothing in the deed to suggest that the same was paid at the time of registration in the presence of the Sub-Registrar. There is no law which mandates that consideration has to be paid by the vendee to the vendor only at the time of registration and before the Sub-Registrar. The first appellate Court has clearly fall into error in taking such a view, which can only be treated as contrary to law.

15. As regards identification of the property, reference to the sale deed, marked Ext.A and Ext.3 (certified copy) shows that the suit land has been described in the following manner.

> "North- Vendee
> South –Road
> East- Badrinath
> West- Vendor."

Further, other relevant particulars of the property, such as khata number and plot number including the name of mouza have been specifically mentioned. This Court therefore, fails to comprehend as to how the property is not capable of being identified. True, the plaintiff in her evidence referred to some other boundary tenants but then the same would pale into insignificance when one considers the clarity with which the property has been described in the sale deed. Interestingly, the deed of cancellation (Ext.B), which has otherwise no legal sanctity, also mentions the very same particulars of the property as also the boundaries, i.e. north-vendee, south-road, east-Badrinath and west-vendor. So it is clear that the vendor was himself certain as to which property he was dealing with. It is therefore, not open to his successors to take a contrary plea after his death. This Court finds that the trial Court rightly held the suit property to be identifiable.

16. From the foregoing discussion on facts and law, this Court finds that the trial Court had very rightly decreed the suit but the first appellate Court, on entirely erroneous premises, reversed the findings.

17. From what has been narrated hereinbefore, it is well evident that the findings of the first appellate Court cannot be sustained being erroneous. This Court is therefore, persuaded to interfere with the impugned judgment.

18. In the result, the appeal is allowed. The impugned judgment and decree passed by the first appellate Court is hereby set aside. The judgment and decree passed by the trial Court is hereby confirmed. There shall be no order as to costs.

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2024 (II) ILR-CUT-1250

SASHIKANTA MISHRA, J.

W.P.(C) NO. 5897 OF 2004

BIDYUTANANDA BASTIA .....Petitioner

-V-

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

ODISHA REVISED SCALE OF PAY (COLLEGE TEACHER) RULES, 2001 – Rule 2(1) and Rule 4 – Benefit of additional increment – As per Rule, the persons having M.Phil. and M.Litt. qualifications at the initial date of first appointment, shall be entitled to two additional increments – The petitioner admittedly did not have M.Phil. qualification as on the first date of his appointment – Whether the petitioner is eligible for benefit of additional increment? – Held, No. (Para 8)

Case Laws Relied on and Referred to :-

1. OJC No. 4906/1993 of (13.12.1996) : Madhab Chandra Mishra vs. State of Odisha
2. W.P.(C) No. 16151/2019 of (17.05.2024) : Dr. Ashok Kumar Mohanty vs. State

For Petitioner : Mr. J. K. Rath, Sr. Adv. with Mr. D.N. Rath
For Opp.Parties : Mr. S.N. Patanaik, A.G.A

JUDGEMENT Date of Judgment : 26.07.2024

SASHIKANTA MISHRA, J.

The Petitioner joined as a Lecturer in English in Choudwar College, Choudwar on 19.4.1985 being appointed by the Management. He acquired M. Phil qualification in the year 1988, the result of which was published in the year 1990. The College was declared an Aided Institution w.e.f. 1.6.1986. Since the Petitioner's service was not approved, he approached this Court in O.J.C. No.1561/1993, which was disposed of by order dated 20.12.1994 directing the concerned authorities to approve the appointment of the Petitioner and to release the salary component in accordance with grant-in-aid principle. The State Government by order dated 26.6.1995 accorded approval of the appointment of the Petitioner against 4th post of Lecturer. He therefore, again approached this Court in O.J.C No.5189/1995, which was disposed of by order dated 22.8.1995 directing the Petitioner to submit a representation to the Director. The Petitioner submitted a representation basing on which the Government approved his appointment against the 3rd post by order dated 22.1.2000 w.e.f. 01.6.1986. Grant-in-aid was released w.e.f. 01.6.1986. The Petitioner's pay was also revised after coming into force of the revision of pay scales w.e.f. 01.6.1986. The Petitioner was transferred to U.N. College, Soro on 25.10.1996. He was paid the differential salary from 1.6.1986 till 31.02.2000 as also his annual increment from 01.6.1987 to 01.6.2000. The Petitioner's grievance is that the Government introduced another pay revision in 1998 according to which the scale of pay of Lecturers was revised from Rs.2200-4000/- to Rs.8,000-13500/- w.e.f. 1.1.1996. The Petitioner's pay was fixed in such scale w.e.f. 1.1.1996 at Rs.8550/- with the next increment being due on 1.6.1996. However, the differential

dues from 1.1.1996 till March, 2002 were not paid though he received his salary from April, 2002 onwards. The increment dues of the Petitioner from 1.6.2001 till date has not been released. The Petitioner was transferred to Tarini Thakurani Mahavidyalaya, Ghatagaon, on 23.11.2001. Despite sanction of the incremental dues by the Principal of the previous College, the same were not disbursed to him.

The Petitioner's further grievance is that as per U.G.C. guidelines, a Lecturer having 8 years of service without M. Phil and Phd. qualification is entitled to the Senior Lecturer scale of pay and Lecturer having 16 years of service without M. Phil and Phd. is entitled to draw Selection Grade Lecturer scale of pay after 16 years of service. The Petitioner is a M.Phil holder for which relaxation of one year is admissible. The Petitioner is therefore entitled to Sr. Lecturer scale in the year 1993 and selection grade lecturer scale w.e.f. 1.6.2001. The pay of the Petitioner ought to have been fixed accordingly. Further, as per the Odisha Revised Scale of Pay (College Teachers) Rules, 2001 two advance increments are to be paid to a Lecturer as per 2001 Pay Revision Rules for persons having M.Phil and M.Litt. Qualification. The Petitioner having M.Phil qualification is also entitled to 2 additional increments. Other Lecturers working in the Government institutions are getting the benefit of scale of pay as per 2001 Rules w.e.f. 1.1.1996, but the Petitioner has been discriminated, which is in violation of Rule(9) of the Odisha Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974. Necessary correspondence has been made by the College authorities with the State Government with regard to the fixation of pay scale of the Petitioner to the Sr. Scale and Selection Grade since 5.2.2001, but the benefits have not been extended to the Petitioner as yet. The Petitioner was granted Senior Scale only w.e.f. 10.8.1997. Since the law in this regard has been settled by this Court in the case of **Madhab Chandra Mishra vs. State of Odisha** (OJC No.4906/1993, decided on 13.12.1996), the inaction of the authorities in this regard is illegal. On such facts, the Petitioner has filed this Writ Petition with the following prayer;

> *"Under the above circumstances, it is therefore, humbly prayed that the Hon'ble Court be graciously pleased to issue a writ in the nature of writ of mandamus or any other appropriate writ, direction or order by directing the Opposite Parties to allow the increments to the petitioner for the year 2002, 2003 and 2004 without any further delay.*
>
> *Further the Hon'ble Court be pleased to direct the Opposite Parties No. 1 and 2 to grant Senior Lecturer Scale of Pay in favour of the petitioner with effect from 01.06.1993 on completion of 7 years of teaching service and to grant two additional increments to the petitioner in lieu of his acquiring M. Phil., qualification, to grant the petitioner the Selection Grade Lecturer Scale of pay with effect from 01.06.2001 and to fix the pay of the petitioner in the Senior Lecturer Scale of pay with effect from 01.06.1993 in the scale of pay of Rs.3000-5000/- and to fix up the pay of the petitioner as per College Teachers Rules, 2001 with effect from 01.01.1996 in the Senior Lecturer Scale of pay i.e. Rs.10,000-15,200/- instead of the fixation made in favour of the petitioner on 01.06.1996 in the scale of pay of Rs.8000-13,500/-.*

Further the Hon'ble Court be pleased to direct the Opposite Parties No.1 and 2 to fix up the pay of the petitioner in the scale of pay of the selection Grade Lecturers with effect from 01.06.2001 in the scale of pay of Rs.12,000- 18,300/- and to re-fix the same by taking into the increments as are available to such time scale of pay and to calculate the differential dues of the petitioner considering such re-fixation and to release the same within a stipulated time as deemed fit and proper in the facts and circumstanced of the case."

2. The stand of the Opposite Parties as can be culled out from three counter affidavits filed in the case is that the period from 3.7.2001 to 22.11.2001 has not been regularized and that the same would be done. As regards his claim for grant of Senior Scale of Pay w.e.f. 1.6.1993 and selection grade scale from 1.6.2001, it was initially stated that the same was under consideration and that the Petitioner had never applied for his placement in the higher grades. In the subsequent counter affidavits, a stand was taken that the Petitioner is not entitled to the Senior Scale as he has completed only 3 refresher courses out of the required 4 for placement in Reader scale. As regards two advance increments, reference has been made to the Government Resolution dated 1.3.2001 as per which a person is required to have acquired M.Phil. Degree as on the date of his first appointment. Since the Petitioner acquired M.Phil degree much later he is not entitled to such advance increments. Further, reference has been made to the Odisha Education (Amendment) Act, 1998, to contend that the Petitioner may be eligible to be placed in the Senior scale after 5 + 8 years of service from the approved date of joining and in the selection grade (Reader scale) after 5+8+8 years of service. The Petitioner shall therefore, be entitled to Lecturer, senior scale after 7 years from the approved date of joining i.e, w.e.f. 10.8.1997. It is also stated that the Petitioner is otherwise not eligible for the career advancement scale as he has not participated in the required number of refresher courses. Therefore, he can only be placed in the senior scale from 10.8.1997, but not in the selection grade.

3. Heard Mr. J.K.Rath, learned Senior Counsel, with Mr. D.N. Rath, learned counsel for the Petitioner and Mr. S.N.Patanaik, learned Addl. Government Advocate for the State.

4. Mr. Rath would argue that despite the stand taken by the Opposite Parties that the Petitioner's service for the period in question has to be regularized and his differential salary including unpaid increments shall be released, no action has been taken in the matter as yet. As regards the Petitioner's claim for grant of career advancement scale, in view of the ratio laid down by this Court in the case of ***Madhab Ch. Mishra (supra)*** and ***Dr. Ashok Kumar Mohanty vs. State*** (W.P.(C) No.16151/2019, decided on 17.5.2024), the Petitioner would be entitled to Lecturer Sr. Scale of pay w.e.f. 1.6.1993 and Selection Grade Scale of Pay w.e.f. 1.6.2001. Accordingly, his pay has to be revised and the differential be released at an early date since in the meantime he has retired from service on attaining the age of superannuation.

5. Mr. S.N.Patanaik, learned Addl. Government Advocate would submit that in so far as regularization of the period of service is concerned, necessary steps need to be taken by the authorities. However, as regards grant of additional increment for acquiring M.Phil qualification, the same is unacceptable because the Petitioner acquired such qualification during his service career and not by the time of his initial appointment. As regards the claim for Career Advancement scale, Mr. Patanaik would contend that the service of the Petitioner was approved w.e.f. 1.6.1986 and he also received grant-in-aid on the same day. Therefore, by operation of the amended provisions of Section (4-a) and (4-b) of Section 7(C) of the Odisha Education Act, he would be eligible for Senior scale after 13 years i.e. on 1.6.1998 after granting one year relaxation for M.Phil qualification and further 8 years of service for selection grade i.e. 1.6.2005 subject to fulfilment of the other eligibility criteria. Since the Petitioner has admittedly has not participated in the required number of refresher courses, he will not be eligible for the Selection Grade Scale of pay.

6. Taking up the first claim of the Petitioner i.e. non-payment of his incremental dues for the years 2002, 2003 and 2004, this Court finds that in the counter affidavit filed on 28.7.2005, the following was stated in paragraph-5;

> *"That as regards the averments made in paragraphs-5 and 6 of the writ petition, it is humbly submitted that the petitioner has admitted that his pay has been fixed in the scale of pay 8000 13,500/- w.e.f. 1.1.96 at Rs.8,550/- along with sanction of periodical increments raising his pay to Rs.9,925/- w.e.f. 1.6.2000. It is a fact that the differential arrear dies w.e.f. 1.1.1996 till 7/2001 and salary for the month of November 2001 to February 2002 has not been paid to the petitioner along with other employees of Non-Government Aided Collages continuing in service under Plan Sector due to severe resource constraint of the State.*
>
> *As regards non-releasing of incremental dias from 1.7.2001 till to date as alleged by the petitioner, it is humbly submitted that the petitioner was relieved on transfer on 2.7.2001 (AN.) from U.N. College, Soro i.e, previous station and joined in the present institution on 23.11.2001, But the period from 3.7.2001 to 22.11.2001 has not yet been regularised, Further, the Principal, T. T. Mahavidyalaya, Ghatagaon 1, 0, the petitioner's present institution, has stated in his letter No. 296 dt. 18.3.2005 that the exercise for regularisation of the above period and sanction of increments in favour of the petitioner will be completed within two months.*

Further, in counter affidavit filed on 4.1.2018, the following was stated under paragraph-3;

> *"That in reply to the averments made in para 2 to 13 of the additional affidavit, it is humbly submitted that the State Govt. have allowed Senior Lecturer scale of pay w.e.f. 10.08.1997 under career advancement scheme vide Govt. Notification No.34786/HE dt.18.12.2017 and the same has been communicated to Principal, Adivasi College, Baliguda vide this Directorate Memo No.44408 dt.19.12.2017. Further the Principal, Adivasi College, Baliguda has requested to fix up the pay w.e.f. 10.08.1997 and submit the proposal of differential arrear bill to this Directorate for course of action vide this Directorate letter No.44436 dt. 20.12.2017. As per Govt, notification, the Principal, Adivasi College, Baliguda has fixed the Sr. Scale of pay w.e.f. 10.08.1997 and submitted the all financial benefit of arrear bill in favour of the petitioner vide his letter No.1093*

dt.26.12.2017. The xerox copy of Govt. Notification No.36786/HE dt.18.12.2017, the Xerox copy of Directorate letter No.44436 dt.20.12.2017 and the Xerox copy of letter No.1093 dt.26.12.2017 are filed herewith as Annexure-C/2, Annexure- D/2 & Annexure-E/2 respectively.

As regards, the placement of Reader Scale of pay, it is submitted that the petitioner has not been allowed by Govt. as he has completed only 03(three) refresher course out of 04(four) which is required for placement of Reader Scale as per the Govt. Notification No.9491/EYS dt.19.03.1990 vide Annexure-B/2."

7. From the above pleadings, it is evident that necessary steps have been taken to regularize the period of service from 3.7.2001 to 22.11.2001 and to release the unpaid salary for the period from 1.1.1996 to 7.1.2001 and November, 2001 to February, 2002 and incremental dues but, actual benefits have not been disbursed. Such being the case, no further adjudication is required by this Court save and except for directing the concerned authority to disburse the unpaid dues at the earliest.

8. As regards the claim for two additional increments, the Petitioner has relied upon the 2001 Rules. Perusal of the Schedule-I read with Rule 2(1) and Rule-4 of the said Rules provides that persons having M. Phil and M. Litt. Qualification at the initial date of first appointment shall be entitled to two additional increments. The Petitioner claims to have appeared in the examination in 1988 the result of which was published in 1990. The 2001 Rules came into force from 1.1.1996. There is no provision for retrospective application of such Rules. The Petitioner admittedly did not have M. Phil qualification as on the first date of his appointment i.e. 10.8.1985. Even assuming that the date of appearing in the examination would be considered then also the Petitioner not having the required qualification as on the date of his appointment i.e. on 10.8.1985 would not be entitled to the benefit of two additional increments.

9. Coming to the claim of the Petitioner for grant of Career Advancement Scale, it would be profitable to refer to the amended provision of Section 7-C i.e. sub-sections (4-a) and (4-b) of the Odisha Education Act, which are quoted herein below.

"4-a The grant-in-aid to be borne by the State Government on account of placement of a teacher in an aided educational institution receiving University Grants Commission scales of pay under the Career Advancement Scheme, shall be limited to the extent as may be admissible by computing the period of service rendered by him against an approved post with effect from the date of completion of five years of service against such approved post:

Provided that nothing in this sub-section shall be construed as to affect the seniority or any other conditions of service of such a teacher.

4-b Notwithstanding anything contained in any judgement, decree or order of any court to the contrary, any instructions issued, actions taken or things done on or after the 1st day of January, 1986 in regard to matters provided in sub Section-(4-a) shall be deemed to have been validly issued, taken or done as if the said sub section were in force at all material points of time."

10. Thus, subject to other conditions being fulfilled a teacher would be eligible to be placed in Sr. Lecturer Scale after completing 8 years of service which in turn is to be reckoned after deducting five years from the date of approved appointment. Since the Petitioner's services were approved on 01.6.1986 he would be eligible to Senior scale after continuing 5+8=13 years of service from such date i.e. from 1.6.1999 but as per Clause 3.6.6 of Government Resolution dtd.6.10.1989, he is entitled to relaxation of one year because of his M.Phil qualification. Accordingly, he would be entitled to the Senior scale w.e.f. 1.6.1998.

11. As regards the Selection Grade Scale of Pay, a teacher is required to contribute 8 years of service in the Senior Scale. The Government Resolution dtd.19.3.1990 provides under Clause 5(2) the eligibility criteria. Thus, merely by completing 8 years of service in the Senior scale will not lead to automatic placement in the Selection Grade unless other conditions mentioned in Clause 5(2) are fulfilled. It is stated that the Petitioner did not participate in the required number of refresher courses for which he was only placed in the Senior scale from 10.8.1997 as per Notification dated 18.12.2017.

12. In Para 10 of the Counter-Affidavit filed by the State on 06.04.2024, the Petitioner's approved date of joining i.e., 10.08.1985 has been reckoned for the purpose of calculating required period for his entitlement to the Career Advancement Scale. As such, he has been held eligible to get Senior Lecturer Scale on completing 13 years, i.e. 10.08.1998 and with 1 year relaxation due to M.Phil qualification, he was approved for Senior Scale, with effect from 10.08.1997.

13. It is stated at the bar that other Lecturers being appointed through State Selection Board have been conferred with said benefit without deducting 5 years from the approved date of joining and therefore the petitioner cannot be discriminated only as he was appointed by the management.

14. Sri Rath, learned Senior Counsel, states that similar issue was dealt with by this court in the case of ***Dr. Ashok Kumar Mohanty*** (supra), wherein the following was held:

> *Furthermore, when the amended provision of sub-*
>
> *Section (4-a) itself does not make any distinction between teachers appointed to non-government educational institutions through different sources, it is obviously not open to the authorities to unilaterally do the same as it would run entirely contrary not only to the settled position of law but also the statute and therefore, unconscionable. If the interpretation made by the authorities is to be accepted it would result in creating a class within a class, which again is not permissible in the eye of law as it would amount to discrimination. In other words, the Government cannot make a differential treatment for one set of employees as against another set, who are equally placed. It would be apposite at this stage to refer to the law relating to discrimination. It has been held that equality is the basic feature of the Constitution. The contents of the Article 14 of the Constitution have been expanded conceptually so as to comprehend non-arbitrariness. Article-14 of the Constitution only permits classification on legally valid grounds where two categories from different classes cannot be held to be*

similarly situated. Such is not the case here as discussed hereinbefore. It is also well settled that discrimination means an unjust, unfair action in favour of one against another. It involves an element of intentional and purposeful differentiation and further an element of unfavourable bias; an unfair classification. Reference may be had to the judgments of the Supreme Court in the case of ***Kathi Raning Rawat v. State of Saurashtra; AIR 1952 SC 123 and M/s. Video Electronics Pvt. Ltd., and another v. State of Punjab and another;*** *AIR 1990 SC 820.*

Thus, the settled position of law is, the State cannot selectively apply a particular law by making it enforceable against one set of employees and relaxing the provisions in respect of another set of employees as has been done in the present case. It goes without saying that the statutory provision, as it stands, ought to be applied to all persons situate equally without any discrimination as otherwise it would amount to an infringement of the fundamental right of equality enshrined under Article 14 of the Constitution of India. The argument of learned State Counsel that the amended provision has not been challenged as such therefore, holds no water in view of the above discussion.

After going through the submissions and the judgement rendered in the case of ***Dr. Ashok Kumar Mohanty*** (Supra), this court finds this case to be squarely covered by the principles laid therein. To amplify, it would be iniquitous to discriminate the petitioner by deducting 5 years from his approved date of joining while calculating the period required for being eligible to draw Career Advancement Scale. As such, the approved date of joining being accepted as 10.08.1985, he would be entitled to Senior Lecturer Scale with effect from 10.08.1993.

15. As regards the petitioner's claim for grant of Selection Grade Scale of Pay, this Court finds that the same has not been rejected by passing specific order so far. It is therefore, left to the authorities to take a call in this regard in accordance with law. This court would hasten to observe that if the petitioner is otherwise found eligible to get Selection Grade Scale of Pay, the same shall be effective from 10.08.2001, i.e. after 8 years of service in the Senior Lecturer Scale as per the principle decided in the case of **Dr. Ashok Kumar Mohanty vs. State** (supra).

16. The Writ Petition is accordingly, disposed of in terms of the above observations.

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2024 (II) ILR-CUT-1256

A.K. MOHAPATRA, J.

BLAPL NO. 592 OF 2024

SANDEEP KUMAR CHOUDHURY ……Petitioner

-V-

STATE OF ODISHA ……Opp.Party

(A) PRIZE CHITS AND MONEY CIRCULATION SCHEMES (BANNING) ACT, 1978 – Section 2(b) r/w Section 6 of OPID Act, 2011 – Whether the Yes token/crypto currency or virtual currency is coming under the definition of money U/s. 2(b) of the PCMCS Act, 1978? – Held, No.

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Commission of an offence U/ss. 420, 467, 468, 471, 120-B of IPC r/w Sections 4, 5, 6 of PCMCS (Banning) Act and Section 6 of the OPID Act & Section 66-C of IT Act – Whether the petitioner is entitled to bail? – Held, Yes – Trading or transaction in crypto currency has not been declared as illegal as of now in the country either by the Government or any Statutory Authority – Therefore, mere trading in crypto currency cannot be held to be illegal – The petitioner be released on bail subject to stringent terms & conditions.

Case Laws Relied on and Referred to :-

1. W.P(C) No.528/2018 : Internet and Mobile Association of India vs. Reserve Bank of India.
2. 2013 (7) SCC 439 : Y.S.Jagan Mohan Reddy vs. C.B.I.

For Petitioner : Mr. Milan. Kanungo, Sr. Adv. with Mr. Sidhartha Das
For Opp.Party : Mr. Bibekananda Bhuyan (OPID).

ORDER Date of Hearing : 08.05.2024 : Date of Order : 30.07.2024

A.K. MOHAPATRA, J.

1. Challenging order dated 18.12.2023 passed by the learned Presiding Officer, Designated Court under the OPID Act, Cuttack whereby the Petitioner's application for grant of regular bail was rejected, the petitioner has approached this Court by filing the application under Section 439 Cr.P.C.

2. C.T. Case No.124 of 2023 was registered for commission of an offence under Sections 420, 467, 468, 471, 120-B of I.P.C. read with Sections 4, 5, 6 of Prize, Chits Money Circular Scheme (banning) Act and Section 6 of OPID Act, 2011 and Section 66-C of the Information Technology Act. On perusal of the record it appears that on the basis of the allegations made by the prosecution, the petitioner has been arrested and is languishing in custody since 17.11.2023.

3. The prosecution case in short, is that, on 16.10.2023, one Swagat Kumar Nayak lodged a written complaint inter alia alleging that he has been cheated of a sum of Rs. 80,000/- by a company known as Yes World and it's CEO Sandeep Chowdhury and others. It has been alleged that the company Yes World has launched its own Crypto Currency in the name of "Yes Token", but in the name of Crypto Token, the company has been running a Ponzi scheme and thereunder forcing investors to add new members. In the process, the company has accumulated money illegally by defrauding the investors and causing a huge loss to the poor and innocent investors. On the basis of the aforesaid allegation a case was registered by E.O.W. P.S. bearing P.S. Case No.25 of 2023 which corresponds to C.T. Case No.124 of 2023 pending before the Court of learned Presiding Officer, Designated Court under the O.P.I.D. Act, Cuttack for alleged commission of offences under Section 420, 467, 468, 471, 120-B of IPC read with Sections 4, 5, 6 of P.C.M.C.S. (banning) Act and Section 6 of the OPID Act and Section 66-C of the I.T. Act.

4. After his arrest by the EOW P.S., the Petitioner moved an application for bail. Such application having been rejected vide order dated 18.12.2023 by the learned P.O., Designated Court under the OPID Act, Cuttack, the Petitioner has approached this Court by filing the present application under Section 439 of Cr.P.C.

5. Heard Shri Milan Kanungo, learned Senior Counsel along with Shri Sidhartha Das, learned counsel appearing for the Petitioner and Shri Bibekananda Bhuyan, learned counsel who usually appears for the OPID. Perused the Case Diary as well as other materials on record.

6. Learned Senior Counsel appearing on behalf of the Petitioner at the outset contended that the petitioner is languishing in custody since 17.11.2023. He further contended that the investigation has progressed substantially in the meantime and that no further custodial interrogation of the Petitioner is required in connection with the present case. Further, referring to the allegations made in the F.I.R., learned Senior Counsel appearing for the Petitioner submitted that no specific role has been assigned to the Petitioner in the alleged crime and as such no specific allegation has been made against the Petitioner in the F.I.R. In such view of the matter, learned Senior Counsel contended that the Petitioner has been arrested and taken into custody on the basis of mere surmises and conjuncture. In course of his argument he further asserted that there exists no material whatsoever to indicate that the Petitioner has cheated the complaint or others in any manner whatsoever. As such, it was also contended that no case is made out under the alleged sections against the present Petitioner.

7. Mr. Kanungo, learned Senior Counsel in course of his argument referred to the judgment of the Hon'ble Supreme Court in the case of ***Internet and Mobile Association of India vs. Reserve Bank of India bearing W.P.(C) No.528/2018*** and emphasized on the following findings of the Hon'ble Supreme Court in paragraphs 6.171 and 6.173:-

> *"6.171. In case the said enactment (2019) had come through, there would have been an official digital currency, for the creation and circulation of which, RBI/central government would have had a monopoly. But that situation had not arisen. The position as on date is that VCs are not banned, but the trading in VCs and the functioning of VC exchanges are sent to comatose by the impugned Circular by disconnecting their lifeline namely, the interface with the regular banking sector. What is worse is that this has been done (i) despite RBI not finding anything wrong about the way in which these exchanges function and (ii) despite the fact that VCs are not banned.*
>
> *6.173. It is no doubt true that RBI has very wide powers not only in view of the statutory scheme of the 3 enactments indicated earlier, but also in view of the special place and role that it has in the economy of the country. These powers can be exercised both in the form of preventive as well as curative measures. But the availability of power is different from the manner and extent to which it can be exercised. While we have recognized elsewhere in this order, the power of RBI to take a pre-emptive action, we are testing in this part of the order the proportionality of such measure, for the determination of which RBI needs to show at least some semblance of any damage*

> *suffered by its regulated entities. But there is none. When the consistent stand of RBI is that they have not banned VCs and when the Government of India is unable to take a call despite several committees coming up with several proposals including two draft bills, both of which advocated exactly opposite positions, it is not possible for us to hold that the impugned measure is proportionate.*"

8. In course of his argument, learned Senior Counsel appearing on behalf of the Petitioner further emphatically argued that in view of the aforesaid judgment of the Hon'ble Supreme Court virtual currency has not been banned in India as of now and as such, trading in such currency is not illegal. Thus, it was contended that even assuming that the Petitioner was involved in trading of virtual currency (crypto currency) through Yes Token, the same cannot be construed as an illegal act by any stretch of the imagination. He further contended that in the meantime investigation has been concluded and charge sheet has been filed. It was also contended that there is no material on record to establish the fact that the Petitioner has either allured or induced the investors by promising them high returns. On such grounds, learned Senior Counsel appearing for the Petitioner submitted that the Petitioner has not committed any illegality at all.

9. Learned Senior Counsel appearing for the Petitioner further contended that since the trading in Crypto Currency (Virtual Currency) has not been banned or prohibited in India, the Petitioner has not committed any illegality at all in indulging in the trade of Crypto Currency. He further emphatically argued that the Petitioner's Company is an exchange of crypto currency wherein the investors are registered and do trading in crypto currency. All sale and purchase of crypto currency is made through the exchange. He further argued that in the process of aforesaid trading/ transaction no money has been transferred to the account of the present petitioner. Furthermore, since the method of trading in crypto currency is that of "***Person to Platform***". Therefore, there was no scope on the part of the Petitioner to make any illegal gains or even to circulate them. Hence, learned Senior Counsel for the Petitioner submitted that the provisions of PCMCS (banning) Act and OPID Act are not attracted to the facts of the present case. He further contended that the Yes Token purchased by the investors are from various available crypto exchanges and that such transactions have been done by the investors on their own volition and free will by creating their own IDs and converting the physical currency into crypto currency.

10. Further referring to the provisions contained in PCMCS (banning) Act, 1978 particularly referring to the provisions contained in Section 2(b) thereof, learned Senior Counsel appearing for the Petitioner submitted that the definition of money includes a cheque, postal order, demand draft, telegraphic transfer or money order. So far Yes Token is concerned, it is stated that the same is a crypto currency or a virtual currency which is purchased by the investors by downloading applications from the web-based apps like Google Play Store and Binance Crypto Exchange and thereafter the crypto currency acquired by the investors are kept in a

Trust Wallet which is a Digital Wallet and does not include any physical transaction of currency. In such view of the matter, and further referring to the definition of money as has been enumerated under Section 2(b) of PCMCS (banning) Act, 1978, learned Senior Counsel for the Petitioner contended that the Yes Token does not come within the definition of money under Section 2(b) of the PCMCS Act, 1978 and as such no case under the said Act is made out against the present petitioner.

11. Similarly, referring to Section 6 of the OPID Act, learned Senior Counsel appearing for the Petitioner submitted that the Section 2(b) of the said act defines "deposit" as "the deposit of money either in one lump sum or by installments made with a Financial Establishment for a fixed period either for interest or for returns of any kind or for any service". Thus, it was contended that the essential ingredients of deposit as enshrined under the OPID Act are not fulfilled by the factual allegation made against the Petitioner in the instant case. In the aforesaid context, it was also argued that so far the crypto currency is concerned; the same is kept in the name of the depositor in a Trust Wallet which is operated by the investors themselves. To explain, the function ability of the crypto currency learned Senior Counsel for the Petitioner cited the example of a stock market and how the share certificates are traded in the open market by the investors and an attempt was made to illustrate the similarities between the stock exchange and crypto exchange. In the aforesaid context, learned Senior Counsel for the Petitioner further submitted that it is not case of the prosecution that the petitioner has violated any of the rules and regulations prescribed by any statutory authority.

12. In sum and substance, the case of the Petitioner was demonstrated before this Court in a manner so as to suggest the inference that the Petitioner has neither accepted any money nor has any money been transferred to his account and that the Petitioner has neither cheated nor dishonestly induced delivery of any property to any person through Yes Token. Moreover, it was also argued by learned Senior Counsel for the Petitioner that the prosecution has failed to establish the fact that any money has been transferred to the account of the Petitioner by producing the bank statement of the Petitioner. He also referred to the fact that in course of the hearing of the bail application, the prosecution, on being asked by this Court to produce any specific material to establish the fact that the money has been transferred from the investors to the account of the present petitioner, have failed to place any such materials before this Court.

13. On the aforesaid grounds, learned Senior Counsel for the Petitioner submitted that since no offence is made out against the present Petitioner, the Petitioner is entitled to be released on bail with any stringent terms and conditions deemed fit by this Court. He further assured this Court that although the Petitioner does not belong to the State of Odisha, however, the Petitioner is ready and willing to cooperate with any further investigation and to appear before the I.O. as and when his presence is required and to appear before the trial court on each and every date fixed without fail.

14. Mr. Bibekananda Bhuyan, learned counsel appearing for the OPID on the other hand objected to the release the Petitioner on bail. He further submitted that in the year 2023, the complainant lodged the F.I.R. alleging that on being induced by one-Manoj Kumar Pattnaik and Basanta Kumar Pradhan, they had invested a sum of Rs.80,000/- in the Petitioner's company, which dealt with Crypto Currency and in the process, the Petitioner and his company have managed to collect crores of rupees from many innocent investors all over the country. However, the Petitioner and his company have failed to return the money to the investors. He further submitted that the investigation reveals that the 'Yes World' is a Virtual Platform which was launched all over India and its Crypto Currency is named as Yes Token. He further contended that the Petitioner being the head of the company, has managed to induce the general public to invest in the company's Crypto Currency with a promise of high return. He further contended that the Petitioner and his associates had organized promotional activities regularly to induce the investors to invest in Yes Token. He further alleged that the Petitioner and his company had asked the investors to purchase USDT through binance and then the said amount of USDT was converted to Yes Token. Thus, it was alleged that the Petitioner and his company are involved in illegal money circulation in the garb of Crypto Currency, which violates the provisions of the PCMCS (banning) Act, 1978 as well as the OPID Act.

15. In course of his argument, learned counsel for the OPID, referring to the 161 statement of some of the investors, submitted that such investors were induced and allured by the Petitioner and his associates to buy Yes Token with a promise of high returns. On the basis of the materials available on record and on the basis of the statement of the investors recorded in course of the investigation, learned counsel for the OPID submitted that a case is well made out against the present petitioner under the alleged sections of the respective acts as has been narrated in the F.I.R. He further contended that although a charge sheet has been filed, however, the investigation has been kept open under Section 176(8) of Cr.P.C. Considering the magnitude of the offence and the fact that the same spans across the country, the learned counsel for the OPID submitted that the investigation requires a longer time to be finally concluded. He further argued that a lot of poor and innocent investors across the country have been defrauded to the tune of crores by the Petitioner and his associates. Mr. Bhuyan, learned counsel for the OPID further contended that the Petitioner's company, namely, Yes World, which is a Crypto Currency Exchange Platform, has been banned by the Financial Intelligence Unit (FIU) under the charge of money Laundering Act and for non-disclosure of data sought for by the Law enforcement agencies. To substantiate his contentions in the aforesaid regard, the learned counsel for the OPID also referred to the Electronically Generated documents to establish that the Petitioner's company has been banned by the Financial Intelligence Unit (FIU). He further contended that a legal notice under Section 91 Cr.P.C. has also been issued to the Legal Head of Binance to provide

documents related to all transactions with effect from 01.01.2022. He further alleged that the preliminary investigation reveals that huge money has been transferred on multiple occasions to the account of the Petitioner and such persons have yet to be examined by the prosecution. He further contended that in course of custodial interrogation, the Petitioner has admitted that he has created Yes Tokens to the tune of 1000 crores and the same has been circulated in the web market.

16. Finally, learned counsel for the OPID submitted that the allegation made in the F.I.R. involves the commission of serious economic offence through the virtual mode and that the allegation in the F.I.R. involves illegal transfer of money to the Petitioner's account from various investors in the State of Odisha. Further, considering the magnitude of the economic offence, learned counsel for the OPID submitted that the release of the Petitioner at this juncture would cause serious jeopardy to the ongoing investigation. He further expressed his apprehension that in the event the Petitioner is released on bail there is every likelihood that the Petitioner might run away from the country which would eventually cause delay in the conclusion of the trial. In the context of the seriousness and gravity of economic offences, learned counsel in course of his argument referred to the judgment of the Hon'ble Supreme Court in ***Y.S. Jagan Mohan Reddy vs. C.B.I.*** reported in ***2013 (7) SCC 439***. On such ground, learned counsel for the OPID further submitted that the claim of the Petitioner to be released on bail at this juncture is devoid of merit and as such the rejection of his bail by the learned trial court deserves no consideration by this Court at this stage.

17. Having heard the learned counsels appearing for the respective parties, on a careful examination of the materials placed on record and, on a careful examination of the statements recorded in course of investigation, this Court is of the prima facie view that a lot of the investors have lost their money while dealing in Crypto Currency. This is a phenomenon not confined to the State of Odisha, rather it is a pan India phenomenon. While observing so, this Court is also conscious of the fact that there exists no law as of now to either ban the trading in Crypto Currency or to effectively regulate the same in the Country. The aforesaid view of this Court, also derives support from the judgment of the Hon'ble Supreme Court in ***Internet and Mobile Association of India***'s case (*supra*). The Hon'ble Supreme Court in its judgment dated 04.03.2020 in the above noted case has categorically observed the stand of the RBI that they have not banned the Virtual Currency and the Govt. of India is yet to take a call on the issue. Although several committees constituted for the purpose have come up with different proposals including two draft bills, no tangible steps have been taken to either ban or effectively regulate the trading of Crypto Currencies in the country.

18. Reverting back to the facts of the present case, this Court on a careful analysis of the facts and materials on record is of the view that trading or transacting in Crypto Currency has not been declared illegal as of now in the country either by the government or any statutory authority. Therefore, the mere trading in Crypto

Currency cannot be held to be illegal at this juncture. Moreover, in the event, any illegalities have been committed, the same is required to be examined in course of trial after scanning various evidence in this regard to be adduced by both sides during the trial. At this juncture this Court retrenches itself from making any observations which may affect the trial adversely. However, considering the fact that trading in Virtual Currency is not banned in India and that the investigation has substantially progressed and a charge sheet has been filed, although the investigation has been kept open under Section 173(8) Cr.P.C., further taking note of the role played by the present petitioner in the alleged occurrence and the fact that no further custodial interrogation of the Petitioner would be required at this juncture, this Court is inclined to release the petitioner on bail subject to stringent terms and conditions.

19. Accordingly, it is directed that the Petitioner be released on bail on furnishing a bail bound of Rs.5,00,000/- (Rupees Five Lakhs only) with two local solvent sureties of the like amount each to the satisfaction of the court in seisin over the matter. The release of the Petitioner shall also be subject to the following conditions:-

I) shall not indulge in similar criminal activities;

II) shall cooperate with the investigation and appear before the I.O. as and when his presence is required and shall cooperate with the investigation by furnishing the details/ documents in his possession as would be demanded by the I.O.;

III) shall appear before the trial court on each and every date fixed without fail if not prevented by sufficient cause;

IV) shall not make any attempt to gain over any prosecution witnesses or tamper with prosecution evidence while on bail;

V) shall not leave the country without the specific permission of the trial court;

VI) shall surrender all his travel documents including passport, before the trial court. In the event the Petitioner does not have any travel documents like passport, then he shall file a specific affidavit in that regard.

VII) shall keep the I.O. informed about his updated whereabouts and furnish his latest address, phone number and other details from time to time preferably at an interval of every two months.

Violations of any of the aforesaid conditions shall entail automatic cancellation of the bail granted to the petitioner.

20. Further, liberty is granted to the prosecution to move for cancellation of bail in the event it is found that any incriminating material is collected in the course of further investigation.

21. With the aforesaid terms and conditions, the bail application of the Petitioner stands allowed.

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2024 (II) ILR-CUT-1264

A.K. MOHAPATRA, J.

BLAPL NO. 3864 OF 2024

SANDEEP MOHANTY ……Petitioner

-V-

UNION OF INDIA ……Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – The petitioner is in custody for alleged commission of an offence U/ss. 132(1)(b) & 132(5) of Central Goods & Services Tax Act, 2017 – The maximum period of punishment prescribed under the alleged Sections is up to 5 years – The petitioner is in the custody since 4 months – Whether the petitioner can be released on bail? – Held, Yes – As, the offence alleged is based on documentary evidence and the investigation has been concluded and the final P.R has been submitted, the petitioner be released on bail on stringent terms & conditions.

Case Laws Relied on and Referred to :-

1. (2021) 10 SCC 733 : Satender Kumar Antil vs. CBI & Anr.
2. (2014) 8 SCC 273 : Arnesh Kumar vs. State of Bihar & Anr.
3. SLP (Crl.) No.10319 of 2022 : Ratnambar Kaushik vs. Union of India.
4. BLAPL No.9999 of 2023 & 2023(III)-ILR-CUT-1145 : Nitin Kapoor vs. State of Odisha.
5. (2013) 7 SCC 439 : Y.S.Jagan Mohan Reddy vs. Central Bureau of Investigation.
6. (1987) 2 SCC 364 : State of Gujarat vs. Mohanlal Jitamaliji Porwal & Anr.
7. (2013) 7 SCC 466 : Nimmagadda Prasad vs. C.B.I., Hyderabad.
8. 2020 (32) G.S.T.L. 336 (M.P) : Shailesh Rajpal vs. Commissioner.
9. W.P.No.4764 of 2019 (Telangana High Court) : P.V.Ramana Reddy vs. UOI.
10. Criminal Misc.-M-50256 of 2019 : Bharat Raj Punj vs. Commissioner of Central Goods Service Tax : Sanjay Dhingra vs. Director General of Goods & Service Tax Intelligence.

For Petitioner : Mr. Rudra Prasad Kar, Sr. Adv. with Ms. Itishree Tripathy.
For Opp.Party : Mr. Tushar Kanti Satapathy, SSC for GST & Central Tax.

ORDER Date of Hearing : 15.05.2024 : Date of Order : 30.07.2024

A.K. MOHAPATRA, J.

1. Assailing order dated 09.04.2024 passed by the learned 1st Addl. Sessions Judge, Rourkela passed in BLAPL No. 129 of 2024 whereby the regular bail application of the petitioner was rejected, the petitioner has approached this Court by filing the present bail application under Section 439 Cr.P.C.

2. The prayer of the petitioner in the present bail application is for grant of regular bail in connection with 2(C) (CC) Case No.11 of 2024 pending in the Court of learned S.D.J.M., Panposh, Uditnagar, Rourkela for alleged commission of offence under Sections 132(1)(b) and 132(5) of the Central Goods and Services Tax Act, 2017 (hereinafter in short referred to as CGST Act).

3. The prosecution case in a nut shell is that a complaint was lodged on 06.03.2024 by the Additional Assistant Director, office of Directorate General of

Goods and Services Tax Intelligence, (DGGI), Rourkela Regional Unit, Rourkela inter alia alleging that the accused-petitioner was engaged in sale/purchase of fake GST entities and, in some cases he was also involved in arranging GST invoices for recipient firms for fraudulently availing fake GST Input Tax Credit (ITC). It has also been alleged that the accused-petitioner has provided fake GST entities to some persons, namely, Somnath Sharma and Sunil Kumar and as such had arranged fake GST ITC for some firms like R.K. Mishra and Co., Gangadhar Jena, Parida Enterprises etc. The complaint further reveals that the accused-petitioner had provided the names of a few persons from whom he had purchased fake firms. Primarily, the petitioner had acted as a middle man between the issuer of fake firms and the fraudulent beneficiaries of the fake GST ITC. Further, it has been alleged that in the process the petitioner has received a sum of Rs.40 lakhs till date and has dealt with around 30 entities since his release on bail from the learned Sessions Court, Bhubaneswar. The complaint further reveals that the petitioner used to collect GST registration documents from different parties for creating fake entities and for generating fake invoices and bills. In course of the investigation, the department has detected 19 such fake firms that were being operated by the petitioner in connivance with one Chandra Prakash Jaiswal.

On the basis of the aforesaid allegation, summons were issued under Section 70 of the CGST Act, 2017 to the petitioner to cause production of the documents in his possession in connection with the alleged offences as mentioned in the complaint petition. Thereafter, the petitioner was arrested and taken into custody on 06.03.2024 by following the provisions contained in Section 69 of the CGST Act, 2017.

4. Heard Shri R.P.Kar, learned Senior Counsel along with Ms.Itishree Tripathy, learned counsel for the petitioner and Mr. T.K. Satapathy, learned Senior Standing Counsel for the GST and Central Tax. Perused all the materials on record.

5. Mr. Kar, learned Senior Counsel appearing for the petitioner, at the outset raised the following grounds in support of his contention to release the petitioner on regular bail:-

I) The Maximum Period of punishment prescribed under the alleged Sections is up to 5 years and those offences are all triable by magistrate.

II) Investigation has been concluded and final P.R. has been submitted.

III) Arrest of the petitioner is based on the confessional statement of Principal accused, namely Sri Chandraprakash Jaiswal and, that the said principal accused has not been arrested as of now.

IV) Issuer and receiver (i.e the Beneficiaries) have not made as accused in the present case and as such, they have neither been interrogated nor have they been taken into custody.

V) Certificate of Registration under the CGST Act has been issued by the competent authority after conducting due enquiry and investigation.

VI) Offences alleged are compoundable in nature in view of the provisions contained in Section 138 of CGST Act, 2017.

VII) The nature of the case is such that the prosecution is to rely upon documentary evidence stored in electronic mode, which are already in possession of the opposite parties and, there exists no possibility of tampering with such evidence.

VIII) Since the case is based on documentary evidence no further custodial interrogation of the petitioner is required in connection with the present case.

IX) All the witnesses are official witnesses and as such there exists no chance of influencing, inducing or gaining over such official witnesses.

X) Since the petitioner is a permanent resident of State of Odisha, there is no chance of him absconding or fleeing away from justice.

6. Mr. Kar, learned Senior Counsel appearing for the petitioner, in course of his argument emphatically argued that the maximum punishment prescribed under the alleged sections is imprisonment extendible up to a maximum period of 5 years and, the same are to be tried summarily by a Magistrate. In such view of the matter, learned Senior counsel for the petitioner, referring to the judgment of the Hon'ble Supreme Court in ***Satender Kumar Antil vs. CBI & Anr.*** reported in (***2021) 10 SCC 733*** and ***Arnesh Kumar vs. State of Bihar and anr.*** reported in ***(2014) 8 SCC 273***, contended before this Court that the I.O. has committed an illegality by not following the mandatory procedural requirement under Section 41(a) of Cr.P.C. On the contrary, it was argued that the I.O. has taken the petitioner into custody by violating the provisions of the Cr.P.C and by ignoring the guidelines of the Hon'ble Supreme Court as laid down in the above noted two cases. He further submitted that since the detention of the petitioner is contrary to the Section 41(a) of the Cr.P.C. and the principles laid down by the Hon'ble Supreme Court in the above noted two judgments, therefore any further detention of the petitioner in custody is highly illegal and violative of Article 21 of the Constitution of India.

7. Mr. Kar, learned Senior Counsel further submitted that no further custodial interrogation of the petitioner is required in the present case. Further, referring to the nature of the case learned senior counsel for the petitioner submitted that the entire prosecution case is based on documentary evidence. Therefore, the custodial interrogation of the accused-petitioner is not at all required. He further submitted that if any custodial interrogation was ever felt necessary, the same must have been done by now by the Investigating Agency, especially since the petitioner has been in custody for more than four months as of now and, in the meantime the final P.R. has also been filed.

8. Furthermore, in the course of his argument, the learned Senior counsel for the petitioner emphatically argued that the petitioner has been implicated in the present case on the basis of the confessional statement of the co-accused, who happens to be the principal accused, namely one Chandraprakash Jaiswal. Although the final P.R. has been submitted indicating the fact that the investigation has come to an end, the above named principal accused has not been arrested either during the investigation or as of now. Therefore, keeping the aforementioned factual position in mind, any further detention of the petitioner in custody would be highly illegal and the same would be contrary to the underlying principle contained in Article 21 of the Constitution of India.

9. With regard to the antecedent of the present petitioner, learned senior counsel for the petitioner submitted that, no doubt the petitioner is having one similar criminal antecedent, however, the same is not in any way conclusive in proving the guilt of the present petitioner in the present case. He further contended that the petitioner has already been sufficiently punished by his pre-trial detention in custody for nearly four months. In the aforesaid context, learned senior counsel for the petitioner also submitted that the petitioner is ready and willing to abide by any terms and conditions that would be imposed by this Court in the event he is enlarged on bail. It was also contended that the above named Chandraprakash Jaiswal, who is the principal accused in the present case, is the master mind behind the present crime and he operates a racket to commit GST frauds in the country. Despite such serious allegation against the above named principal accused, the CGST authorities have never apprehended the said accused in connection with the present case. On the contrary, on the basis of the confessional statement of the aforesaid principal accused- Chandraprakash Jaiswal, the present petitioner has been taken into custody and he has been suffering incarceration for more than four months as of now.

10. In course of his argument, Mr. Kar, learned senior counsel for the petitioner referred to the CBIC Circular dated 17.08.2022. In the said Circular certain guidelines have been framed which are to be followed by the CGST authorities. In the aforesaid guidelines, reference has been made to the judgment of the Hon'ble Supreme Court dated 16.08.2021 in ***Criminal Appeal No.838 of 2021***, wherein the Hon'ble Apex Court has observed as follows:-

> *"We may note that personal liberty is an important aspect of our constitutional mandate. The occasion to arrest an accused during investigation arises when custodial investigation becomes necessary or it is a heinous crime or where there is a possibility of influencing the witnesses or accused may abscond. Merely because an arrest can be made because it is lawful does not mandate that arrest must be made. A distinction must be made between the existence of the power to arrest and the justification for exercise of it. If arrest is made routine, it can cause incalculable harm to the reputation and self-esteem of a person. If the investigating officer has no reason to belief that the accused will abscond or disobey summons and has, in fact, throughout cooperated with the investigation we fail to appreciate why there should be compulsion on the officer to arrest the accuse."*

11. Learned Senior counsel for the petitioner further referred to the conduct of the CGST authority. In the said context, Mr. Kar, learned Senior Counsel for the petitioner submitted that although a notice was issued on 05.03.2024 under Section 70 of the CGST Act, 2017 for production of documents, the petitioner was arrested on the very next day, i.e. on 06.03.2024. In such view of the matter, learned senior counsel for the petitioner submitted that the provisions contained under Section 70 of the CGST Act, 2017 became nugatory and that such a provision in the act has become otiose. Once the authorities issued a summons under Section 70, they should have given reasonable time to the petitioner to produce the documents and, in the event of failure of the petitioner to produce the required documents, the eventual

step of arrest of the petitioner should have been resorted to. He further contended that despite notice to produce documents, the petitioner was immediately arrested and the prosecution report was submitted on the date of arrest itself before the learned S.D.J.M., Panposh. Therefore, it was contended that the authorities had already determined to implicate the petitioner in the present crime without giving the ample opportunity to produce the required documents called for. Ergo, it was contended that the conduct of the authorities in arresting the present petitioner is allegedly a pre-meditated one.

12. In course of his argument, learned Senior Counsel for the petitioner also referred to the observation of the Hon'ble Supreme Court in para-6 of the judgment in ***Ratnambar Kaushik vs. Union of India*** bearing ***SLP (Crl.) No.10319 of 2022*** decided on 05.12.2022, the relevant portion is quoted herein below:-

> *"In considering the application for bail, it is noted that the Petitioner was arrested on 21.07.2022 and while in custody, the investigation has been completed and the charge sheet has been filed. Even if it is taken note the alleged evasion of tax by the Petitioner is to the extent as provided under section 132(1)(I)(i), the punishment provided is, imprisonment which may extend to 5 years and fine. The Petitioner has already undergone incarceration for more than four months and completion of trial, in any event, would take some time. Needless to mention that the petitioner of released on bail, is required to adhere to the conditions to be imposed and diligently participate in the trial. Further, in a case of present nature, the evidence to be tendered by the respondent would essentially be documentary and electronic. The ocular evidence will be through official witness, due to which there can be no apprehension of tampering, intimidating or influencing. Therefore, keeping all these aspects in perspective, in the facts and circumstances of the present case, we find it proper to grant the prayer made by the Petitioner."*

Following the aforesaid judgment of the Hon'ble Supreme Court, this Court in ***Nitin Kapoor vs. State of Odisha*** in ***BLAPL No.9999 of 2023*** reported in ***2023(III)-ILR-CUT-1145*** has been pleased to grant bail to the accused.

13. On the strength of such aforementioned grounds, learned Senior Counsel for the petitioner submitted that the petitioner be released on bail on any terms and conditions as would be deemed just and proper by this Court by taking note of the judgment of the Hon'ble Supreme Court in *Ratnambar Kaushik*'s case (*supra*).

14. Mr. T.K. Satapathy, learned Senior Standing Counsel for the GST and Service Tax on the other hand contended that the learned Trial court, after perusal of the record, was prima facie satisfied with regard to the existence of a case under the alleged sections against the present petitioner and his involvement in the alleged crime. He further submitted that the alleged occurrence in the complaint reveals an economic offence of grave magnitude. Thus, he supported the observation of the learned Trial court that the release of the petitioner on bail at this stage would lead to an overwhelming probability of tampering with the prosecution evidence and influencing the witnesses and, that the petitioner might also commit similar offences again. Moreover, considering the gravity and seriousness of the allegation made

against the present petitioner and, that the fact that the alleged occurrence gives rise to an economic offence involving huge government revenue, the learned Senior Counsel for the Opposite Party supported the order passed by the learned Trial court whereby the bail application of the petitioner was rejected.

15. In course of his argument, learned senior counsel for the Opposite Party led much emphasis on the fact that the petitioner is a habitual offender and he is having a similar criminal antecedent. The petitioner was earlier arrested on 31.12.2020 in connection with a case of similar nature bearing 2(c) C.C.Case No.82 of 2020. Although the petitioner was released on bail in the previous case, however, his involvement in the present case is tantamount to violation of the bail condition imposed in the earlier order. Learned senior counsel for the Opposite Party further reiterated the allegations made in the complaint petition and emphatically argued that the present case being an economic offence and involving huge loss of government revenue, no leniency should be shown to the present petitioner. He further expressed his serious apprehension that in the event the petitioner is released on bail there is every likelihood that the petitioner might indulge in similar criminal offences once again.

16. While opposing the bail application of the present petitioner, Mr. Satapathy, learned Senior counsel for the Opposite Party relied upon the judgment of the Hon'ble Supreme Court in ***Y.S.Jagan Mohan Reddy vs. Central Bureau of Investigation*** reported in ***(2013)7 SCC 439***, ***State of Gujarat vs. Mohanlal Jitamaliji Porwal & anr.*** reported in ***(1987)2 SCC 364***, ***Nimmagadda Prasad vs. C.B.I., Hyderabad*** reported in ***(2013)7 SCC 466***, ***Shailesh Rajpal vs. Commissioner*** reported in ***2020 (32) G.S.T.L. 336 (M.P.)***, ***P. V.Ramana Reddy vs. UOI W.P.No.4764 of 2019 (Telangana High Court)***, ***Bharat Raj Punj vs. Commissioner of Central Goods Service Tax***, ***Sanjay Dhingra vs. Director General of Goods & Service Tax Intelligence (Criminal Misc.-M-50256 of 2019)***.

17. Learned senior counsel for the Opposite Party further specifically submitted that this Court should particularly take into consideration the larger interests of the public and the state, as well as, the huge amount of government revenue involved in the present case and, also the fact that further investigation is currently on to unearth even more revenue fraud. Therefore, it was submitted that it would be prejudicial to the Investigating Agency to release the petitioner at this juncture. He also referred to the seriousness and gravity of the allegation made against the petitioner, and strongly objected to the grant of bail to the petitioner in the present case. On such grounds, learned senior counsel for the Opposite Party submitted that the present bail application is devoid of merit and, the same should be dismissed.

18. Having heard the learned counsels appearing for the respective parties, on a careful conspectus of the attending circumstances as well as materials on record and, on a careful reading of the judgment cited by both sides, this Court is of the considered view that, so far as the grant of bail to the accused persons is concerned,

the law laid down by the Hon'ble Supreme Court in *Ratnambar Kaushik*'s case (supra) and *Satendra Kumar Antil*'s case (supra) holds the field and the same is also applicable to the facts of the present case. Keeping in view the principle laid down by the Hon'ble Supreme Court in the above noted two judgments, this Court observes that the maximum period of punishment prescribed is up to 5 years and that the petitioner, at his point, has been in custody for more than four months. It is also seen that the offence alleged is based on documentary evidence and that the investigation has been concluded and the final P.R. has been submitted. In such view of the matter, this Court is persuaded to release the petitioner on bail on stringent terms and conditions.

19. Accordingly, it is directed that the Petitioner be released on bail on furnishing a bail bound of Rs.50,000/- (Rupees Fifty Thousands only) with two local solvent sureties each of the like amount to the satisfaction of the court in seisin over the matter. The release of the Petitioner shall also be subject to the following conditions:-

I) shall not indulge in similar criminal offences while on bail and as such shall not misuse the liberty of bail granted by virtue of this order;
II) shall appear before the I.O. as and when his presence is required for further investigation of the case and shall cooperate with the I.O. by producing whatever materials are required by the I.O. and which are in the possession of the present petitioner;
III) shall appear before the trial court on each and every date fixed without fail if not prevented by any sufficient cause;
IV) shall not leave the jurisdiction of the trial court without prior permission of the trial court;
V) shall not tamper with prosecution evidence in any manner whatsoever and shall not make any attempt to influence, induce or threaten any of the prosecution witnesses;
VI) shall surrender his all travel documents, including passport, before the trial court. In the event the Petitioner does not have any travel documents like passport, then he shall file a specific affidavit in that regard.

Violation of any of the aforesaid conditions shall entail an automatic cancellation of the bail granted to the petitioner.

20. With the aforesaid terms and conditions, the bail application of the Petitioner stands allowed.

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2024 (II) ILR-CUT-1270

BIRAJA PRASANNA SATAPATHY, J.

FAO NO. 446 OF 2018

STATE OF ODISHA & ANR. ……Appellants

-V-

SARAT CHANDRA SWAIN & ANR. ……Respondents

ODISHA AIDED EDUCATIONAL INSTITUTIONS (APPOINTMENT OF LECTURERS VALIDATION) ACT, 1998 – Section 3(1) r/w Para 9(2)(C) of GIA Order, 1994 – The learned Tribunal taking into account the composite workload of both the Aided +2 wing and unaided +3 wing of the College, validate the appointment of respondent as per the provision of Validation Act – Whether the order needs any interference? – Held, No – In view of the provisions contained under Para 9(2)(C) of the GIA Order, 1994 the respondent is eligible for the benefit of GIA w.e.f. 17.10.1998.

Case Laws Relied on and Referred to :-

1. 2007 1 OLR 133 : Bilkesh Parveen Vrs. State of Odisha & Anr.
2. FAO No. 174 of 2012 : Basanta Kumar Patra Vrs. State of Odisha & Ors.
3. FAO No. 132 of 2009 : State of Odisha & Ors. Vrs. Sarada Prasanna Mohapatra & Ors.
4. 1984 (Supp) SCC 196 : Union of India & Anr. Vs. G.M. Kokil & Ors.
5. AIR (2000) 6 SCC 359 : Kunhayammed & Anr. Vrs. State of Kerala & Anr.

For Appellants : M/s. S.K.Samal, AGA.
For Respondents : Mr. K.K.Swain & Associates.

JUDGMENT Date of Hearing : 02.05.2024 : Date of Judgment : 23.07.2024

BIRAJA PRASANNA SATAPATHY, J.

1. The present Appeal has been filed challenging the judgment dated 02.01.2018, so passed by the State Education Tribunal (in short "Tribunal") in GIA Case No.132 of 2010. Vide the said judgment, the Tribunal allowed the claim of private Respondent No.1 to get the benefit of validation of his appointment as against the 3rd post of Lecturer in English in Mahima Mohavidyalaya, Joranda and further entitling him to receive Grant-in-aid w.e.f. 17.10.1998 under GIA Order, 1994.

2. The appellants herein have challenged the judgment *inter alia* on the ground that the Tribunal taking into account the composite work load of both the Aided +2 wing and Unaided +3 wing of the College, held the appointment of the Respondent No.1 as against the 3rd post of Lecturer in English as having been made validly and while holding so, held the Respondent No.1 entitled to get the benefit of the Validation Act and consequential release of Grant-in-Aid under Grant-in-Aid Order, 1994 w.e.f. 17.10.1998. The other ground on which the judgment has been assailed is that Respondent No.1 on being found eligible since was extended with the benefit of block grant at the rate of 100% w.e.f. 01.02.2009 under GIA Order, 2009, no direction could have been issued to extend the benefit of grand-in-aid under GIA Order, 1994 by validating his appointment under the Validation Act.

2.1. The private Respondent No.1 raised the claim to get the benefit of grant-in-aid under GIA Order, 1994 or in the alternate for validation of his appointment under the Validation Act and thereby entitling him to get the benefit of Grant-in-Aid w.e.f. 17.10.1998 under GIA Order, 1994. But since Grant-in-aid Order, 1994 was already repealed w.e.f. 01.01.2004 with introduction of block grant, no such claim

made by the Respondent No.1 could have been entertained by the Tribunal with passing of the impugned judgment in question. The judgment has also been assailed with the plea that right to claim grant-in-aid depends on the financial capacity and economic potentiality of the State and there is no absolute right to claim grant-in-aid from a particular date.

2.2. It is also the case of the Appellant that even though Tribunal relying on the decision of this Court so rendered in the case of ***Bilkesh Parveen Vrs. State of Odisha and Another***, reported in 2007 1 OLR 133 allowed the claim, but the decision in the case of ***Bilkesh Parveen*** as cited (supra) cannot be made applicable to the case of the private Respondent No.1, in view of the Note Appended to the Yardstick for approval of post in Aided Educational Institutions for the purpose of Grant-in-Aid.

2.3. Placing reliance on the Note Appended to the Yardstick learned Addl. Govt. Advocate contended that in order to get the benefit, the work load of both +2 wing and degree/+3 wing will be taken into consideration if both the wings have already been notified as an Aided Educational Institution. Since by the time Respondent No.1 was appointed as against the 3rd post of Lecturer in English. +3 wing of the College was not notified as an Aided Educational Institution within the meaning of Section 3(b) of Orissa Education Act, 1969 (in short "the Act"), the work load of the +3 wing cannot be taken into consideration to justify the appointment of private Respondent No.1 as against the post in question. Since the +3 wing of the College in question was not notified as an Aided Educational Institution by the Time the Respondent No.1 was appointed as against the post in question, the Tribunal erred in taking into consideration the work load of the +3 wing in addition to the work load of +2 wing to justify the appointment of private Respondent No.1.Note Appended to the yardstick vide Annexure-III to the GIA Order, 1994 reads as follows:-

> *"Note: In an Educational Institution which has both Higher Secondary Course and Degree Course notified as aided the admissible student strength for the institution shall be calculated taking into account the admissible student strength for both the courses together."*

2.4. Placing reliance of the aforesaid Note, learned Addl. Govt. Advocate vehemently contended that since by the time private Respondent No.1 was so appointed by the governing body of the College vide order dated 28.10.1991, the +3 wing of the College was an Unaided one, the work load of both +2 wing and degree wing could not have been taken into consideration by the Tribunal to justify the appointment of private Respondent No.1 as having been validity made as per the prevailing yardstick.

2.5. It is accordingly contended that since the very appointment of the private Respondent No.1 was not justified, in view of the Note Appended to the Yardstick under GIA Order, 1994, claim of Respondent No.1 could not have been allowed by the Tribunal to validate his appointment under Validation Act,1998 and to extend the benefit of Grant-in-Aid w.e.f. 27.10.1998 under GIA Order, 1994. It is also contended

that since in the case of ***Bilkesh Parveen*** as cited (supra), this Court has not taken into consideration the Note Appended to the Yardstick, the said decision cannot be applied to the case of the private Respondent No.1. The tribunal erred in relying on the decision while allowing the claim of Respondent No .1.

2.6. Making all these submissions, learned Addl. Govt. Advocate contended that the impugned judgment is not sustainable in the eye of law and requires interference of this Court.

3. Mr. K.K. Swain, learned counsel for the private Respondent No.1 on the other hand made his submissions basing on the stand taken by him before the Tribunal in GIA Case No.132 of 2010. 3. It is contended that the College in question i.e. Mahima Mahavidyalaya, Joranda was established in the year 1978 and received Govt. concurrence and affiliation from Utkal University during the Academic Sessions 1979-80. The College became eligible to receive Grant-in-Aid as a Junior College during the Academic Sessions 1984-85. The +3 Degree Course was opened in the College during the Academic Sessions 1986-87 with concurrence of the Govt. and affiliation from Utkal University. The +3 wing though became eligible to be declared as an Aided Educational Institution after commencement of the GIA Order, 1994, but the authorities concerned did not notified the College as such. However, the College was notified as an Aided Educational Institution in terms of GIA Order, 2004.

3.1. It is also contended that petitioner though was appointed as against 3rd Post of Lecturer in the College in the +2 wing, vide order of appointment issued on 28.10.1991, wherein he joined on 04.11.1991, but Respondent No.1 was adjusted as against the 1st Post of Lecturer in English in the degree wing after its bifurcation.

3.2. Respondent No.1 taking into account the work load in both +2 and +3 wing of the College was appointed as a Lecturer in English (3rd post) vide order of appointment issued on 28.10.1991. Respondent No.1 pursuant to such order of appointment joined in the College on 04.11.1991. In spite of the eligibility of Respondent No.1 to get the benefit of Grant-in-Aid under GIA Order, 1994 when the same was not extended and Respondent No.1 in the alternate was extended with the benefit of Grant-in-Aid w.e.f. 01.02.2009 in the shape of 100% block grant under GIA Order, 2009, Respondent No.1 claiming extension of the benefit of grant-in-aid under GIA Order, 1994 or in the alternate seeking validation of his appointment as against 3rd post of Lecturer in English under the provisions of the Validation Act, 1998 moved the Tribunal in GIA case No.132 of 2010.

3.3. It is contended that by the time Respondent No.1 was appointed vide order of appointment issued on 28.10.1991, the College was already under the Grant-in-aid fold w.e.f. 01.06.1984 within the meaning of Section 3(b) of the Odisha Education Act. Section 3(b) of the Act reads as follows:-

> *"(b) Aided Educational Institution means private educational institution which is eligible to, and is receiving grant-in-aid from the State Government, and includes an*

educational institution which has been notified by the State Government to receive grant-in-aid."

3.4. Similarly, definition of College as indicated under Section 3(d) of the Act reads as follows:-

"(d) College means an educational institution imparting instructions in higher general education leading to any degree conferred by any of the Universities established under the Odisha Universities Act, Act 5 of 1989."

3.5. Learned counsel for the Respondent No.1 contended that concept of Junior College came into existence vide Odisha Act 13 of 1994, which was published in the Gazette extraordinary on 04.07.1994. Junior College as defined under Section 3(j)-1 of the Act reads as follows:-

"(j-1) Junior College means an educational institution imparting instructions in Higher Secondary courses as defined in the Odisha Higher Secondary Act, 1982."

3.6. It is also contended that Odisha Aided Educational Institution (Appointment of Lecturers Validation) Act, 1998 (in short "Act") was published in the Odisha Gazette on 17.10.1998. As provided under Section 3(1) of the Act, Lecturers of Aided College and Aided Junior Colleges who have been appointed on temporary basis against approved or admissible post by the concerned Governing Bodies during the period between 01.01.1985 and 31.12.1992 and who are continuing as such having the requisite qualification prescribed for such post and are in the payroll of the concerned college against the said approved or admissible post as the case may be, shall be deemed to have been validly and regularly appointed and no such appointment shall be challenged in any Court of law. As provided under Section 3(2) of the Act, Lecturers whose appointment are so validated shall be governed by the Odisha (Non-Govt. Colleges, Junior Colleges and Higher Secondary Schools) GIA Order, 1994 for the purpose of their entitlement to receive grant–in- aid under GIA Order, 1994, but they shall be entitled to receive grant-in-aid with effect from the date of commencement of the Act i.e. 17.10.1998.

3.7. Placing reliance on the provisions contained under Section 3(1) and 3(2) of the 1998 Act, learned counsel for the Private Respondent No.1 contended that since private Respondent was appointed on 28.10.1991 with his date of joining as 04.11.1991, the said date of appointment since comes in between the period 01.01.1985 and 31.12.1992, Respondent No.1 claiming the benefit of Validation Act, 1998 moved the Tribunal in the GIA case. But as provided under Section 3(2) of the Act after such validation of appointment Respondent No.1 became entitled to get the benefit of Grant-in-Aid under GIA Order, 1994. Even though GIA Order, 1994 was repealed w.e.f. 01.01.2004, but no such provision was incorporated under the 1998 Act debarring the appointees covered under Validation Act, to get the benefit of Grant-in-aid Order, 1994.

3.8. It is further contended that with regard to the eligibility to get the benefit of Grant-in-aid under GIA Order, 1994, an appointee after satisfying the provisions contained under different paragraph of the said order became entitled to get the benefit.As provided under Para-4 of the GIA Order,1994, the posts were categorized

as Category-I, Category-II and Category-III. Since the College in question was notified and brought under the purview of Grant-in-aid w.e.f. 01.06.1984, the College comes under the Category-I. Entitlement to get the benefit to appointees under Category-I so described under para-4 reads as follows:-

> *"4. For the purposes of this order, Non-Government Educational Institutions specified in Sub-paras (1) and (2) of Para-3 and the posts in such institutions shall be classified into the following categories namely:-*
>
> *Category-I (i) Non-Government Educational Institutions and approved Posts in such institution which have received grant-in-aid from Government or in respect of which grant-in-aid has been sanctioned by the Government prior to the Commencement of the Amendment Act.*
>
> *(ii) Other posts in Non-Government Educational Institutions covered under Category-I(i) which were admissible on the basis of workload and prevalent yardstick and had been filled up prior to commencement of the Amendment Act, but in respect of which no grant-in-aid had been sanctioned.*
>
> *Note: If a question arises whether a post was admissible on the basis of work-load and prevalent yardstick, the decision on the Director shall be final."*

3.9. Similarly, as provided under Para-5(1) of the Order all Non-Govt. Educational Institutions included in Category-1(i) of Para-4 shall be deemed to be an Aided Educational Institutions for the purpose of this order.

3.10. Similarly, as provided under Para-9(1) of GIA Order, 1994, a teaching or a non-teaching post in a Non-Govt. Educational Institutions coming under Category-1 in respect of which Grant-in-Aid has been sanctioned at any time prior to commencement of the Amended Act shall be deemed to be an approved post for the purpose of this order.

3.11. Similarly, as provided under Para-9(2) of GIA Order, 1994 a Teaching or Non-teaching post not covered under Sub-para-1 of Para-9, shall be treated as admissible and shall be eligible for approval subject to satisfying the following conditions:-

> *"(A) The post in respect of which approval is sought is a post in an educational institution which has been notified as an Aided Educational Institution.*
>
> *(B) (i) a post in a Non-Government Educational Institution coming under Category-I for which no grant-in-aid has been sanctioned prior to commencement of the Amendment Act, if;*
>
> *(a) The post was admissible as per workload and yardstick prevalent prior to commencement of the amendment Act.*
>
> *(b) has been filled up prior to that date; and*
>
> *(c) it has completed the qualifying period of five years or more, or of 3 years or more in case the institution is situated in backward area."*

3.12. Learned counsel for Respondent No.1 further contended that as provided under Para-9(2)(C) of the order, the work load determining admissibility of the post shall be counted by taking into account the total work load on account of degree course and Higher Secondary courses in all stream conducted in that institution.

Placing reliance on the provisions contained under Para-9(2)(C) of the order, learned counsel for the Respondent No.1 contended that since the work load of both Degree course and Higher Secondary Courses justifies the appointment of the Respondent No.1 as against the 3rd post of Lecturer in English, where he was appointed on 28.10.1991, the Tribunal taking into account the said provision clearly held that by the time the Respondent No.1 was so appointed the work load in both the degree and +2 wing justifies such appointment.

3.13. It is also contended that the appellants never disputed the appointment of the Respondent No.1 not having been made without the work load taken jointly of both +2 and +3 wing. The plea raised by the appellants that since the +3 wing by the time Respondent No.1 was so appointed was not an Aided Educational Institution and in view of the Note Appended to the Yardstick of GIA order, 1994, the workload of the +3 wing cannot be taken into consideration, is not acceptable in view of the decision of this Court in the case of ***Bilkesh Parveen*** as cited (supra).

3.14. It is contended that similar issue with regard to taking into consideration the work load of +2 and +3 wing, if one of the wing is an Un-aided one, was the issue in the case of ***Bilkesh Parveen*** as cited (supra). This Court in Para-6 to 8 of the Judgment in ***Bilkesh Parveen*** as cited (supra) has held as follows:-

> *"6. In this connection, we have looked into the provisions of Grant-in-Aid Order, 1994. Rule 4 of the Grant-in-Aid Order prescribes three categories of institutions in existence when 1994 Grant-in-Aid Order came into force. This order, inter alia, prescribes that Non-Government Educational Institutions and approved posts in such institutions which have received Grant-in-aid from the Government or in respect of which Grant-in-aid has been sanctioned by the Government prior to commencement of Amendment Act are to be treated as Category-I institution. It further stipulates that other posts in Non-Government Educational Institutions covered under Category-I(1) which were admissible on the basis of workload and prevalent yardstick had been filled up prior to commencement of the Amendment Act, but in respect of which no Grant-in-aid had been sanctioned are also covered under Category-I institutions. It is pertinent to note here that the Amendment Act came in the year 1994. Rule 9(c) of the Grant-in-Aid Order, 1994 categorically states that the workload to be determined for admissibility of a post by computing the total workload on account of Degree Course and Higher Secondary course in all the streams conducted in that institution. In view of this provision of the Grant-in-Aid Order as amended above, as the petitioner's college, i.e., Tangi Mahavidyalaya was having +2 and +3 stream with the approval of the State Government and the institution being an aided institution before the Amended Act came into force and further since the petitioner was appointed before the coming into force the Amended Act and also the existence of the Grant-in-Aid Order, 1994 there can be no dispute, in our view, that Tangi Mahavidyalaya would come within the ambit of Category-I institution and therefore, the admissibility of the post in any discipline are to be adjudged computing the workload of both +2 and +3 stream. It was submitted by learned Counsel for the petitioner and it is also revealed from Annexure-17 that the 2nd post of Lecturer in English is admissible and the same was justified to the college. This stand has been taken in the writ petition and the same has nowhere been denied by O.P. No. 2 in the counter affidavit nor in the additional affidavit filed in reply to the rejoinder*

affidavit of the petitioner. From a reading of the affidavit filed by O.P. No. 2 it is apparent that O.P. No. 2 has not taken into account the workload of +3 stream and has rejected the claim of the petitioner only on the basis of the workload of +2 wing. This, in our view, and in the facts and circumstances is not sustainable in the eye of law. Rather, the 2nd post of Lecturer in English was admissible and it was justified in the college in question when the petitioner was appointed and for that the Order of the Government under challenge, vide Annexure-16 appears to be incorrect and the same has been passed without taking into consideration the aforementioned facts and without application of mind.

7. The second plank of argument that was advanced on behalf of the petitioner is about validating the services of the petitioner in pursuance to the Validation Act, 1998. On a bare reading ot the said Validation Act, it is found that the Lecturers of aided colleges who have been appointed on temporary basis against the approved and admissible post by the concerned Governing Body during the period between 1.1.1985 and 31.12.1992 and are continuing as such having the requisite qualification prescribed to hold such post and are in the pay roll of the concerned college against the said approved and admissible post, as the case maybe, shall be deemed to have been validly and regularly appointed. In the case at hand, as we find undisputedly, when the petitioner was appointed the college was an aided college. The petitioner was admittedly appointed on 1.11.1991 having the requisite qualification. She is continuing in the said college right from her date of appointment till date and she is in the pay roll of the college. The post to which she was appointed is an admissible post as we have observed earlier in the preceding paragraphs. In that view of the matter, she fulfils all the requirements necessary for attracting the provisions of Validation Act. We have also found that O.P. No. 1 has not considered the case of the petitioner in its proper perspective and has rejected her case on 2.5.2001 under Annexure-16.

8. In view of our above findings on analysis of the facts and circumstances and the prevailing legal position, we are of the considered view that the order passed under Annexure-16 is not at all sustainable in the eye of law and therefore, while allowing the writ petition of the petitioner we quash the said Annexure-16 mandating the opposite parties, specifically O.P.No.1, to accord approval to the appointment of the petitioner as Lecturer in English in 2nd post with effect from the date of her appointment, i.e., 1.11.1991, in accordance with the provisions of Validation Act, 1998. The petitioner shall be entitled to her salary component in accordance with Sub-section (2) of Section 3 of the Validation Act, 1998 with effect from the date of commencement of the said Act. This order shall be given effect to within six months from the date of receipt of the same."

3.15. It is also contended that this Court taking note of the decision in the case of ***Bilkesh Parveen*** as cited (supra) in the case of ***Santanu Kumar Mishra Vrs. State of Odisha and Others*** in Para-21 of the said judgment has held as follows:-

*"**21.** Since it is admitted case of the opposite party-State that if composite workload of the college in question will be taken into consideration the case of the petitioner will be deemed to have been validated under the Validation Act, 1998. It is also admitted on the part of the opposite party-State made at Paragraph-8 that the +2 and +3 wings are going on in that Institution hence taking into consideration the composite workload of both +2 and +3 wings of the college, post in which petitioner is continuing as Lecturer in Political Science will be said to be validated under the Validation Act, 1998 and as such it is held to be validated."*

3.16. It is also contended that placing reliance on the decision in the case of ***Bilkesh Parveen*** as cited (supra), this Court in the case of ***Basanta Kumar Patra Vrs. State of Odisha and Others*** in FAO No.174 of 2012 decided on 31.11.2016 allowed similar claim. This court in Para-2, 7, 10, 11 and 12 has held as follows:-

> *"2. The matter being then continuously raised and placed before the Director and the State Government by filing successive representations, finally the Director referring to Government letter dated 03.04.2010 approved the appointment of the appellant with some other lecturers holding them to be entitled to Block Grant w.e.f. 01.02.2009 as per Annexure-8. This is challenged as wholly arbitrary and discriminatory. In this connection, the case of one Hara Priya Behera, lecturer in Political Science in Indira Gandhi Women's College, Cuttack has been cited under Annexure-9 stating that being similarly situated in all respect with the appellant; she had so received the benefits of which the appellant has been deprived of.*
>
> *It is the further case of the appellant that his case being squarely covered under the Validation Act, 1998 and payment of salary being guided under section 3(2) of the said Act, the Director's order merely entitling him with the Block Grant as per the Grant in Aid order, 2009 is untenable.*
>
> *xxxx xxxx xxxx xxxx*
>
> *7. In case of Bilkesh Parveen (Supra), the court was seized with the situation to decide whether the post of lecturer in a subject in the college was admissible to the college at the time of his appointment and whether said appointment is to receive the validation under the provision of Validation Act, 1998. The stand of the State therein was that since the petitioner was appointed at the 10 time in the college which though was an aided, the +3 decree wing having been opened later was not aided one and accordingly the work load of the college for approval of any post stands to be adjudged taking into account the +3 decree wing work load only and therefore in such cases, the provision of Validation Act, 1998 would not come into play to save the appointment of the petitioner as lecturer in the said post. It was further pleaded that the +3 decree wing having been declared an aided institution by the Government on 01.01.2004, the same is just and legal. In the rejoinder affidavit filed therein, the college was stated to be a composite college with +2 and +3 decree wing followed by assessment of the work load in accordance with rule 4 of the G.I.A. Order, 1994. So it was stated that the post was admissible and as there was justification in view of the work load, the governing body had created the post and appointed the petitioner therein and it was further pleaded that similarly situated colleges prior to that had been brought into the fold of Grant-in-Aid and such appointees being extended with the benefit of Validation Act, 1998.*
>
> *xxxx xxxx xxxx xxxx*
>
> *10. The above judgment rendered by this Court had been carried before the Apex Court in Civil Appeal No.(s) 2401 of 2011 at the behest of the State of Orissa and that has been dismissed finding no reason to interfere.*
>
> *11. This Court in the case of Akshya Kumar Mohanty V. State of Orissa and others, 1997(II) OLR 136, upon consideration of various notifications of the Government with regard to justifiability of a 2nd post in a subject came to the conclusion that where the number of classes per week in a subject is 29 or more, the 2nd post stands justified.*
>
> *12. The case of M/s. Bilkesh Parveen (supra) having been referred to in the case of State of Orissa v. Sarada Prasanna Mohapatra, (supra) under similar factual setting of the cases, this 15 Court therein refused to interfere with the order of the learned State*

Education Tribunal rendered in favour of the claimant petitioner finding their cases to be covered under the Validation Act, 1998 holding the posts to be admissible with effect from 17.10.1998, the date covered under the Validation Act, 1998 followed by entitlement of benefit of Grant-in-Aid under section 3 of the said act.

On the face of the above settled position in the facts and circumstances, I find the submissions of learned counsel for the petitioner have got full force and as such acceptable. "

3.17. Similarly reliance was also placed in the decision in the case of ***State of Odisha and Others Vrs. Sarada Prasanna Mohapatra and Others*** in FAO No.132 of 2009 decided on 06.09.2010. This Court in Para-8 of the said judgment has held as follows:-

"8. The situation, as described in the said case, exists in the present case also. Therefore, it is incumbent to hold that taking the workload of both the streams, i.e., +2 and +3 wings together, the same justified a 2nd post of Lecturer in Economics in the concerned college to which post the respondent no.1 was appointed. The contentions raised for the first time in this appeal cannot be taken into consideration in view of the ratio of the judgment in the case of Mahendra Singh Gill and another v. the Chief Election Commissioner, New Delhi and others, AIR 1978 SC 851, wherein the Supreme Court held that the statutory functionary marks 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, by the time it comes to court on account of a challenge, gets validated by additional grounds subsequentially brought out."

3.18. Placing reliance on the aforesaid decisions, learned counsel for Respondent No.1 further contended that the Note Appended to the Yardstick so provided under GIA Order, 1994 on which much reliance has been placed by the learned Addl. Govt. Advocate is not applicable to the facts of the present case as the said 'Note' in the Gazette published on 06.12.1994 was appended to Clause-10 of the Yardstick. It is contended that in the Gazette so published on 06.12.1994 notifying the Grant-in-Aid Order 1994 the said Note was Appended to Clause-10 of Annexure-III which prescribe the Yardstick in order to be eligible for approval of the post to get the benefit of Grant-in-Aid under GIA Order, 1994.

3.19. It is accordingly contended that in view of the provisions contained under Section 3(1)(2) of the Validation Act, 1998 and the provisions contained under Para-9(2)(C) of Grant-in-Aid Order, 1994, the work load of both the +2 and Degree wing was required to be taken into consideration to justify the admissibility of the post by the time Respondent No.1 was so appointed as against the 3rd post of Lecturer in English on 28.10.1991. The issue has also been settled at rest by this Court in the case of ***Bilkesh Parveen*** as cited (supra) which has been affirmed by the Hon'ble Apex Court and subsequent decision rendered in the case of ***Santanu Kumar Mishra as well as Basanta Kumar Patra*** as cited (supra).

3.20. It is also contended that in view of the non-obstante clause incorporated in the Validation Act, it will have overriding effect over any contrary provision in any other enactment. In support of same, learned counsel of Respondent No.1 relied on

the decision reported in ***1984 (Supp) SCC 196 (Union of India and Another Vs. G.M. Kokil and Others)***, Hon'ble Apex court in Para 11 of the judgment has held as follows :

> *"11.Section 70, so far as is relevant, says "the provisions of the Factories Act shall, notwithstanding anything contained in that Act, apply to all persons employed in and in connection with a factory". It is well-known that a* ***non****-obstante* ***clause*** *is a legislative device which is usually employed to give over-riding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions. Thus the non-obstante clause in Section-70, namely, "notwithstanding anything in that Act" must mean notwithstanding anything to the contrary contained in that Act and as such it must refer to the exempting provisions which would be contrary to the general applicability of the Act. In other words, as all the relevant provisions of the Act are made applicable to a factory notwithstanding anything to the contrary contained in it, it must have the effect of excluding the operation of the exemption provisions. Just as because of the* ***non-obstante clause*** *the Act is applicable even to employees in the factory who might not be 'workers' under sec. 2(1), the same* ***non-obstante clause*** *will keep away the applicability of exemption provisions qua all those working in the factory. The Labour Court, in our view, was, therefore, right in taking the view that because of the* ***non-obstante clause*** *s.64 read with Rule 100 itself would not apply to the respondents and they would be entitled to claim overtime wages under s. 59 of that Act read with s. 70 of the Bombay Shops and Establishments Act, 1948."*

3.21. It is accordingly contended that the Tribunal has rightly allowed the claim of the private Respondent No.1 and it requires no interference.

4. To the submissions made by the learned counsel for Respondent No.1, learned Addl. Govt. Advocate made further submissions and contended that though the +2 wing of the College was notified as an Aided Educational Institution and the +2 Wing became entitled to get the benefit of Grant-in-aid w.e.f. 01.06.1985, but +3 wing was notified to receive Grant-in-aid w.e.f. 01.09.2004 under GIA Order, 2004. Though it is not disputed that the Respondent No.1 was appointed as against the 3rd post of Lecturer in English vide order of appointment issued on 28.10.1991, where he joined on 01.01.1992, but his appointment and joining was approved by the governing body after repeal of the GIA Order, 1994.

4.1. Since by the time Respondent No.1 was appointed as against the 3rd Post of Lecturer in English, the work load of the +2 wing does not justify such appointment, the work load of both +2 and +3 could not have been taken into consideration to justify the admissibility of the post and consequential appointment of the Respondent No.1. As the +3 wing by the time Respondent No.1 was so appointed was not an Aided Educational Institutions, the very appointment of Respondent No.1 was not permissible.

4.2. Since the Respondent No.1 was appointed as against an inadmissible Post, in view of the provisions contained under the Note Appended to Annexure-III of GIA Order, 1994, the appointment of the Respondent No.3 could not have been taken as against an admissible post by the Tribunal while allowing his claim.

4.3. It is also contended that as provided under Validation Act, 1998 the appointment of a Lecturer must be against an Admissible/Approved post and the appointment must be between 01.01.1985 and 31.12.1992. Since under the provisions of the Validation Act, Colleges and Junior Colleges have been defined separately under Section 2(a) and 2(b) of the Act, both the College and Junior College must be an Aided one to get the benefit of the provisions of the said act.

4.4. It is also contended that services of the Respondent No.1 was duly approved under GIA Order, 2009 vide order dated 31.03.2010 and 100% block grant was extended in favour of Respondent No.1 w.e.f. 01.02.2009 under GIA Order, 2009. After accepting such benefit and after repeal of GIA Order, 1994 on 01.01.2004, claim of the Respondent No.1 to get the benefit of Grant-in-aid under GIA Order, 1994 and/or validation of his appointment under the Validation Act, 1998 could not have been entertained by the Tribunal in view of the decision of the Hon'ble Apex Court in the case of ***Anup Kumar Senapati***. Hon'ble Apex Court in the case of ***Anup Kumar Senapati*** in Para 35 has held as follows:-

> *"35. The High Court in Loknath Behera has rightly opined that due to repeal, the provisions of the Order of 1994 cannot be invoked to obtain grant-in-aid. The High Court has rightly referred to the observations of this Court in State of Uttar Pradesh and others v. Hirendra Pal Singh, and others, (2011) 5 SCC 305, wherein it was observed:*
>
> *"22. It is a settled legal proposition that whenever an Act is repealed, it must be considered as if it had never existed. The object of repeal is to obliterate the Act from the statutory books, except for certain purposes as provided under Section 6 of the General Clauses Act, 1897. Repeal is not a matter of mere form but is of substance. Therefore, on repeal, the earlier provisions stand obliterated/abrogated/wiped out wholly i.e. pro tanto repeal (vide Dagi Ram Pindi Lall v. Trilok Chand Jain, (1992) 2 SCC 13; Gajraj Singh v. STAT, (1997) 1 SCC 650; Property Owners' Assn. v. State of Maharashtra, (2001) 4 SCC 455 and Mohan Raj v. Dimbeswari Saikia, (2007) 15 SCC 115).*
>
> *24. Thus, there is a clear distinction between repeal and suspension of the statutory provisions and the material difference between both is that repeal removes the law entirely; when suspended, it still exists and has operation in other respects except wherein it has been suspended. Thus, a repeal puts an end to the law. A suspension holds it in abeyance.""*

4.5. Reliance was also placed to the judgment of the Hon'ble Apex Court in the case of ***State of U.P. and Others Vrs. Hirendra Pal Singh and Others***. Hon'ble Apex Court in Para 22 has held as follows:-

> *"22.It is a settled legal proposition that whenever an Act is repealed, it must be considered as if it had never existed. The object of repeal is to obliterate the Act from the statutory books, except for certain purposes as provided under section 6 of the General Clauses Act, 1897. Repeal is not a matter of mere form but is of substance. Therefore, on repeal, the earlier provisions stand obliterated/abrogated/wiped out wholly, i.e., protanto repeal (vide:M/s. Dagi Ram Pindi Lall & Anr. v. Trilok Chand Jain & Ors., AIR 1992 SC 990; Gajraj Singh etc. v. The State Transport Appellate*

Tribunal & Ors. etc.,AIR 1997 SC 412; Property Owners' Association & Ors. etc. etc. v. State of Maharashtra & Ors., AIR 2001 SC 1668; and Mohan Raj v. Dimbeswari Saikia & Anr., AIR 2007 SC 232)."

4.6. Reliance was also placed on an order passed by this Court in FAO No.69 of 2017, decided on 05.05.2023. It is contended that while not allowing the claim of Respondent No.1 to get the benefit of Grant-in-Aid under GIA Order, 1994, the other prayer to validate his appointment under the Validation Act, 1998 could not have been allowed. This court in Para-2 of the order in FAO No.69 of 2017 has held as follows:-

"2. It is contended that the Respondent No 1 in GIA Case No. 836 of 2012 though raised a claim for extension of the benefit of Grant-in-aid as per Grant-in-aid Order, 1994, but the Tribunal while not acceding to the said prayer of the Respondent No. 1, held the Respondent No. 1 entitled to get the benefit under the Validation Act, 1998 and accordingly Appellant No. 1 was directed to consider the claim of the Respondent No. 1. It is contended that when the claim made by the Respondent No. 1 to get the benefit of Grant-in-aid as per Grant-in-aid order, 1994 was not acceded to by the Tribunal, it should not have directed the Appellants to validate the appointment of the Respondent No. 1 under the Validation Act, 1998 and to release the consequential financial benefit in terms of Grant-in-aid Order, 1994 w.e.f.17.10.1998.".

4.7. It is also contended that the order passed by this Court in FAO No.69 of 2017 was upheld by the Hon'bleApex Court by dismissing the Appeal in SLP (Civil) Diary No.47055 of 2023 decided on 08.12.2023. Reliance was also placed in the decision of the Hon'ble Apex Court in the case ***Kunhayammed and Another Vrs. State of Kerala and Another***, reported in ***AIR (2000) 6 SCC 359***. Hon'ble Apex Court in Para 39, 40 & 41 has held as follows:-

"39. We have catalogued and dealt with all the available decisions of this Court brought to our notice on the point at issue. It is clear that as amongst the several two-Judges Bench decisions there is a conflict of opinion and needs to be set at rest. The source of power conferring binding efficacy on decisions of this Court is not uniform in all such decisions. Reference is found having been made to (i) Article 141 of the Constitution, (ii) doctrine of merger, (iii) res-judicata, and (iv) Rule of discipline flowing from this Court being the highest court of the land.

40. A petition seeking grant of special leave to appeal may be rejected for several reasons. For example, it may be rejected (i) as barred by time, or (ii) being a defective presentation, (iii) the petitioner having no locus standi to file the petition, (iv) the conduct of the petitioner disentitling him to any indulgence by the Court, (iv) the question raised by the petitioner for consideration by this Court being not fit for consideration or deserving being dealt with by the apex court of the country and so on. The expression often employed by this Court while disposing of such petitions are - heard and dismissed, dismissed, dismissed as barred by time and so on. May be that at the admission stage itself the opposite party appears on caveat or on notice and offers contest to the maintainability of the petition. The Court may apply its mind to the meritworthiness of the petitioners prayer seeking leave to file an appeal and having formed an opinion may say dismissed on merits. Such an order may be passed even ex-parte, that is, in the absence of the opposite party. In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and

no law has been declared by the Supreme Court. The dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into, they are the merits of the special leave petition only. In our opinion neither doctrine of merger nor Article 141 of the Constitution is attracted to such an order. Grounds entitling exercise of review jurisdiction conferred by Order 47 Rule 1 of the C.P.C. or any other statutory provision or allowing review of an order passed in exercise of writ or supervisory jurisdiction of the High Court (where also the principles underlying or emerging from Order 47 Rule 1 of the C.P.C. act as guidelines) are not necessarily the same on which this court exercises discretion to grant or not to grant special leave to appeal while disposing of a petition for the purpose. Mere rejection of special leave petition does not take away the jurisdiction of the court, tribunal or forum whose order forms the subject matter of petition for special leave to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court. Here also the doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of Article 141 of the Constitution. The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting to do so would be subversive of judicial discipline and an affront to the order of this Court. However this would be so not by reference to the doctrine of merger.

41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non- speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court."

5. Having heard learned counsel for the parties and after going through the materials available on record, this Court finds that Respondent No.1 was appointed as against the 3rd post of Lecturer in English by the governing body of Mahima Mahavidyalaya, Joranda vide order dated 28.10.1991. In terms of the said order, Respondent No.1 joined on 04.11.1991 and with effect from the said date Respondent No.1 continued as against the 3rd post of Lecturer in English. It is also found from the record that even though services of the Respondent No.1 was approved under the provisions of GIA Order, 2009 and he was extended with the benefit of 100% block grant w.e.f.01.02.2009 with approval of his services vide order

dated 31.03.2010, but claiming extension of the benefit of Grant-in-aid under GIA Order, 1994 or in the alternate seeking validation of his appointment under Validation Act, 1998, Respondent No.1 approached the Tribunal in GIA Case No.132 of 2010.

5.1. It is not disputed that by the time Respondent No.1 was so appointed, the work load of both +2 and Degree wing taken together justifies such appointment. It is also not disputed that taking into account the work load of both the +2 and degree wing, the post of 3rd post of Lecturer in English was admissible to the College. The plea taken by the Appellants that since by the time Respondent No.1 was so appointed, +3 wing of the College was not declared as an Aided Educational Institution and in view of the provisions contained in the Note Appended to Annexure-III of GIA Order, 1994, Respondent No.1 is not eligible to get the benefit as has been allowed by the Tribunal, cannot be accepted in view of the clear provisions contained under Para-9(2)(C) of GIA Order, 1994 and decision of this Court in the case of ***Bilkesh Parveen*** and subsequent decisions in the case of ***Santanu Kumar Mishra and Basanta Kumar Patra***. Since this Court in the case of ***Bilkesh Parveen*** as well as ***Santanu Kumar Mishra*** and ***Basanta Kumar Patra*** while examining the entitlement of the appointee, clearly held that the work load of both the +2 and +3 wing has to be taken into consideration in view of the provisions contained under Para-9(2)(C) of the GIA Order, 1994, this Court is unable to accept the plea taken by the Appellants placing reliance on the Note Appended to Annexure-III to GIA Order, 1994. Not only that in the Gazette so published on 06.12.1994, notifying Grant-in-Aid Order, 1994, the Note so relied on by the Appellants is Appended to Clause-10 of Annexure-III. Clause-10 of the Annexure-III deals with the maximum number of posts admissible for approval other than post of Teachers, Demonstrators, PET and Laboratory Attendant. Therefore, in any view of the matter, the plea taken by the appellants with regard to the admissibility of the post, placing reliance on the Note Appended to Annexure-III of GIA Order, 1994 is also not acceptable.

5.2. In view of the aforesaid analysis, this Court finds no illegality or irregularity with the impugned judgment dtd. 02.01.2018 so passed by the Tribunal in GIA Case No 132 of 2010 and is not inclined to interfere with the same.

6. The Appeal accordingly fails and stands dismissed.

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2024 (II) ILR-CUT-1284

B.P.SATAPATHY, J.

W.P.C (OA) NO. 2525 OF 2018

Dr. NARAYAN PRASAD BEHERA ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

ODISHA CIVIL SERVICE (CLASSIFICATION CONTROL AND APPEAL) RULES, 1962 – Rule 15(10) – Disciplinary Proceeding – Enquiry Officer while submitting the report clearly opined that Government may take lenient view to regularize the period of absence as leave – The disciplinary authority while issuing the 2nd show-cause differed with the finding of the Enquiry Officer, no disagreement note was enclosed – Effect of – Held, the authority violates the provision contained U/r. 15(10) of the Rules, which amounts to violation of principle of Natural Justice.

Case Laws Relied on and Referred to :-

1. 1963 SCC On Line SC 6 : State of Andhra Pradesh & Ors. Vs. S. Sree Rama Rao.
2. (1991) 1 SCC 588 :Union of India & Ors. Vs. Mohd. Ramzan Khan.
3. (1995) 6 SCC 749 : B.C. Chaturvedi Vs. Union of India & Ors.
4. (1996) 3 SCC 364 : State Bank of Patiala & Ors. Vs. S.K. Sharma.
5. (2000) 1 SCC 416 : High Court of Judicature at Bombay through its Registrar Vs. Shashikant S. Patil & Anr.
6. (2021) 2 SCC 612 : Dy.Gen.Manager (Appellate Authy) & Ors. Vs. Ajai Kumar Srivastava.
7. (2022) 15 SCC 190 : State Bank of India & Anr. Vs. K.S. Vishwanath.
8. W.P(C) No.4416 of 2002 (dtd.10.03.06) : Raj Kishore Sahu Vs. Govt. of Orissa & Ors.

For Petitioner : Mr. A.K. Chhatoi
For Opp.Parties : Mr. M.K. Balabantaray, AGA

JUDGMENT Date of Hearing & Judgment : 24.07.2024

BIRAJA PRASANNA SATAPATHY, J.

1. Heard Mr. A.K. Chhatoi, learned counsel for the Petitioner and Mr. M.K. Balabantaray, learned Addl. Govt. Advocate for the State.

2. Petitioner has filed the present Writ Petition inter alia challenging order dated 25.05.2018, so passed by Govt.-O.P. No.1 under Annexure-13. Vide the said order, while disposing the proceeding initiated against the petitioner vide Memorandum dated 25.03.2017, the following punishment was imposed:-

> *"i. Censure.*
> *ii. Withholding of one annual increment with cumulative effect.*
> *iii. The period of absence from 01.12.2010 to 04.12.2013 be treated as EOL."*

2.1. Learned counsel for the Petitioner contended that petitioner while in service, a proceeding in question was initiated against him on 25.03.2017 vide Annexure-6 inter alia with the following charges:-

> *"Article of Charges:-*
>
> *Whereas, Dr. Narayan Prasad Behera, ADMO(M), Khordha has committed such gross irregularities as stated in the statement of imputations (Annexure-II).*
>
> *Therefore, he is charged as under.*
>
> *1. Unauthorized and willful absence from Govt. Duty.*
> *2. Disobedience of the orders of higher authority.*
> *3. Negligence in duty.*
> *4. Misconduct."*

2.2. It is contended that petitioner not only filed his written statement of defence under Annexure-7 but also participated in the Enquiry so conducted by the Joint Director, Health Services (Leprosy), Odisha. It is contended that the Enquiry Officer after conducting the Enquiry submitted the Enquiry Report on 20.10.2017 inter alia with the following finding:-

> *"Basing on the Medical certificate issued by Prof and HoD, Neurology, SCB Medical College and Hospital, Cuttack on referral by Dr. L.D. Sahu, Orthopaedic Specialist, Capital Hospital, Bhubaneswar to consult Neurology, it is evident that Dr. Behera was suffering and under treatment. Hence, he was compelled to continue on leave due to his illness. Hence, it is suggested that Govt. may take lenient views to regularize the period of absence as leave."*

2.3. It is contended that the petitioner was issued with the 1st show-cause as provided under Rule-15(10) of the OCS (CCA) Rules, 1962 on 07.11.2017 under Annexure-9 along with the report of the Enquiry Officer. Petitioner though submitted his reply under Annexure-10, but on the face of the finding of the Enquiry Officer and without giving a disagreement note assigning the reason for differing with the view of the Enquiry Officer, the 2nd show-cause was issued on 29.01.2018 under Annexure-11 proposing therein the following punishment:-

> *"i. Censure.*
> *ii. Withholding of one annual increment with cumulative effect.*
> *iii. The period of absence from 01.12.2010 to 04.12.2013 be treated as EOL."*

2.4. Learned counsel for the petitioner contended that since the Enquiry Officer while submitting the report held that petitioner during the period in question was under treatment and accordingly continued as leave and suggested to take a lenient view to regularize the period of absence as leave, but the Disciplinary Authority who happens to be the O.P. No.1, without giving a disagreement note as provided under Rule-15(10) of the Rules proposed the punishment in question while issuing the 2nd show-cause under Annexure-11.

2.5. It is contended that since statutory provisions as contained under Rule-15(10) of the Rules was never followed by the Disciplinary Authority by giving a disagreement note while issuing the 2nd show-cause under Annexure-11, the impugned order passed by O.P. No.1 on 25.05.2018 under Annexure-13 is not sustainable in the eye of law.

2.6. In support of his submission learned counsel for the Petitioner relied on various decisions of the Hon'ble Apex Court in the case of:-

> i) ***State of Andhra Pradesh & Ors. Vs. S. Sree Rama Rao*** reported in 1963 SCC On Line SC 6
> ii) ***Union of India & Ors. Vs. Mohd. Ramzan Khan*** reported in (1991) 1 SCC 588
> iii) ***B.C. Chaturvedi Vs. Union of India & Ors.*** reported in (1995) 6 SCC 749
> iv) ***State Bank of Patiala & Ors. Vs. S.K. Sharma*** reported in (1996) 3 SCC 364
> v) ***High Court of Judicature At Bombay through its Registrar Vs. Shashikant S. Patil & Anr.*** reported in (2000) 1 SCC 416

vi) ***Deputy General Manager (Appellate Authority) & Ors. Vs. Ajai Kumar Srivastava*** reported in (2021) 2 SCC 612
vii) ***State Bank of India & Anr. Vs. K.S. Vishwanath*** reported in (2022) 15 SCC 190

Mr. Chhatoi, learned counsel for the Petitioner also relied on a decision of this Court passed in the case of ***Raj Kishore Sahu Vs. Government of Orissa & Ors.*** (W.P.(C) No. 4416 of 2002) decided on 10.03.2006.

2.7. Hon'ble Apex Court in the case of ***S. Sree Rama Rao*** in Para 7 has held as follows:-

> *"**7.** There is no warrant for the view expressed by the High Court that in considering whether a public officer is guilty of the misconduct charged against him, the rule followed in criminal trials that an offence is not established unless proved by evidence beyond reasonable doubt to the satisfaction of the Court, must be applied, and if that rule be not applied, the High Court in a petition I …under Article 226 of the Constitution is competent to declare the order of the authorities holding a departmental enquiry invalid. The High Court is not constituted in a proceeding under Article 226 of the Constitution a court of appeal over the decision of the authorities holding a departmental enquiry against a public servant : it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence. The High Court may undoubtedly interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion, or on similar grounds. But the departmental authorities are, if the enquiry is otherwise properly held, the sole judges of facts and if there be some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226 of the Constitution."*

2.8. Hon'ble Apex Court in the case of ***Mohd. Ramzan Khan*** in Para 15 & 18 has held as follows:-

> *"**15.** Deletion of the second opportunity from the scheme of Article 311(2) of the Constitution has nothing to do with providing of a copy of the report to the delinquent in the matter of making his representation. Even though the second stage of the inquiry in Article 311(2) has been abolished by amendment, the delinquent is still entitled to represent against the conclusion of the Inquiry Officer holding that the charges or some of the charges are established and holding the delinquent guilty of such charges. For doing away with the effect of the enquiry report or to meet the recommendations of the Inquiry Officer in the matter of imposition of punishment, furnishing a copy of the report becomes necessary and to have the proceeding completed by using some material*

behind the back of the delinquent is a position not countenanced by fair procedure. While by law application of natural justice could be totally ruled out or truncated, nothing has been done here which could be taken as keeping natural justice out of the proceedings and the series of pronouncements of this Court making rules of natural justice applicable to such an inquiry are not affected by the Forty-second Amendment. We, therefore, come to the conclusion that supply of a copy of the inquiry report along with recommendation, if any, in the matter of proposed punishment to be inflicted would be within the rules of natural justice and the delinquent would, therefore, be entitled to the supply of a copy thereof. The Forty-second Amendment has not brought about any change in this position.

xxx xxx xxx

***18.** We make it clear that wherever there has been an Inquiry Officer and he has furnished a report to the disciplinary authority at the conclusion of the inquiry holding the delinquent guilty of all or any of the charges with proposal for any particular punishment or not, the delinquent is entitled to a copy of such report and will also be entitled to make a representation against it, if he so desires, and non-furnishing of the report would amount to violation of rules of natural justice and make the final order liable to challenge hereafter."*

2.9. Hon'ble Apex Court in the case of ***B.C. Chaturvedi*** in Para 12 has held as follows:-

***"12.** Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case."*

2.10. Hon'ble Apex Court in the case of ***S.K.Sharma*** in Para 33(1) & 33(2) has held as follows:-

*"**33.** We may summarise the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee):*

(1) An order passed imposing a punishment on an employee consequent upon a disciplinary / departmental enquiry in violation of the rules / regulations / statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character.

(2) A substantive provision has normally to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

2.11. Hon'ble Apex Court in the case of ***High Court of Judicature at Bombay*** in Para 16 has held as follows:-

*"**16.** The Division Bench of the High Court seems to have approached the case as though it was an appeal against the order of the administrative/disciplinary authority of the High Court. Interference with the decision of departmental authorities can be permitted, while exercising jurisdiction under Article 226 of the Constitution if such authority had held proceedings in violation of the principles of natural justice or in violation of statutory regulations prescribing the mode of such enquiry or if the decision of the authority is vitiated by considerations extraneous to the evidence and merits of the case, or if the conclusion made by the authority, on the very face of it, is wholly arbitrary or capricious that no reasonable person could have arrived at such a conclusion, or grounds very similar to the above. But we cannot overlook that the departmental authority (in this case the Disciplinary Committee of the High Court) is the sole judge of the facts, if the enquiry has been properly conducted. The settled legal position is that if there is some legal evidence on which the findings can be based, then adequacy or even reliability of that evidence is not a matter for canvassing before the High Court in a writ petition filed under Article 226 of the Constitution."*

2.12. Hon'ble Apex Court in the case of ***Ajai Kumar Srivastava*** in Para 24 has held as follows:-

*"**24.** It is thus settled that the power of judicial review, of the constitutional courts, is an evaluation of the decision-making process and not the merits of the decision itself. It is to ensure fairness in treatment and not to ensure fairness of conclusion. The court/tribunal may interfere in the proceedings held against the delinquent if it is, in any manner, inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached or where the conclusions upon consideration of the evidence reached by the disciplinary authority are perverse or suffer from patent error on the face of record or based on no evidence at all, a writ of certiorari could be issued. To sum up, the scope of judicial review cannot be extended to the examination of correctness or reasonableness of a decision of authority as a matter of fact."*

2.13. Hon'ble Apex Court in the case of ***K.S. Vishwanath*** in Para 18 has held as follows:-

*"**18.** Recently in N. Gangaraj [State of Karnataka v. N. Gangaraj, (2020) 3 SCC 423 : (2020) 1 SCC (L&S) 547] after considering other decisions of this Court on judicial review and the power of the High Court in a departmental enquiry and interference with the findings recorded in the departmental enquiry, it is observed and held that the High*

Court is not a court of appeal over the decision of the authorities holding a departmental enquiry against a public servant. It is further observed and held that the High Court is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. It is further observed that if there is some evidence, that the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition under Article 226 of the Constitution of India to review/reappreciate the evidence and to arrive at an independent finding on the evidence.

2.14. This Court in the case of ***Raj Kishore Sahu*** in Para 10, 11, 12 & 13 has held as follows:-

*"**10.** The C.C.A. Rules are the statutory rules and departure from the same would definitely be an illegality.*

11. Apart from the statutory provision, is the common law that according to the principle of natural justice an employee should at least know the tentative reasons for disagreement with the report of the enquiry officer before inflicting punishment upon him so that he may be able to make a representation to satisfy the punishing authority by way of his explanation to the tentative reasons which are formed by the punishing authority to its mind.

12. In the case of Joginath D. Badge v. State of Maharashtra and Anr. reported in MANU/SC/0583/1999: AIR1999SC3734 the Apex Court held that:

It was open to the Disciplinary Authority either to agree, with the findings recorded by the enquiring authority or disagree with those findings. If it does not agree with the findings of the enquiring authority, it may record its own findings. Where the enquiring authority has found the delinquent officer guilty of the charges framed against him and the Disciplinary Authority agrees with hose findings, there would arise no difficulty. So also if the enquiring authority has held the charges proved, but the Disciplinary Authority disagrees and records a finding that the charges were not established, there would arise no difficulty. Difficulties have arisen in all those cases in which the enquiring authority has recorded a positive findings that the charges were not established and the delinquent officer was recommended to be exonerated, but the Disciplinary Authority disagreed with those findings and recorded its own findings that the charges were established and the delinquent officers was liable to be punished. This difficulty relates to the question of giving an opportunity of hearing to the delinquent office at that stage. Such an opportunity may either be provided specifically by the rules made under Article 309 of the Constitution or the Disciplinary Authority may, of its own, provide such an opportunity. Where the rules are in this regard silent and the Disciplinary Authority also does not give an opportunity, of hearing to the delinquent officer and records findings different from those of the enquiring authority that the chargers were established, "an opportunity of hearing" may have to be read into the rule by which the procedure for dealing with the enquiring authority's report is provided principally because it would be contrary to the principles of natural justice if a delinquent officer, who has already been held to be "not guilty" by the enquiring authority, is found "guilty without being afforded an opportunity of hearing on the basis of the same evidence and material on which a finding of "not" guilty" has already been recorded.

> *13. Similar view has been expressed by the apex Court in the cases reported in MANU/SC/0263/1963: (1963)ILLJ295SC (The State of Assam and Anr. v. Bimal Kumar Pandit MANU/SC/0531/1998 (1998)IILLJ809SC (Punjab National Bank and Ors. v Kunj Behari Misra) MANU/SC/0788/1998: (1999) ILLJ432SC (Radhe Shyam Gupta v U.P.State Agro Industries Corporation Ltd. and Anr.), MANU/SC/0101/1999: [1999] 1SCR532 (Dipti Prakash Banerjee v. Satvehdra Nath Bose National Centre for Basis Sciences, Calcutta and Ors.) & MANU/SC/0285/1984 (1984) IILLJ 517S (Rajinder Kumar Kindra v. Delhi Administration through Secretary (Labour) and Ors."*

3. Learned Addl. Govt. Advocate on the other hand while supporting the impugned order contended that since the petitioner all through was provided due opportunity of hearing and the proceeding was conducted in accordance with Rule-15 of the Rules, no illegality or irregularity can be found with the impugned order in question. The stand taken in Para-5 & 7 of the counter reads as follows:-

> *"5.That, as per the provision of rule the proposed penalties were referred to Odisha Public Service Commission. The Commissioner while upholding the proposed punishment as Serial No. 1 & 3 recommended to enhance the proposed punishment at Serial No.2 as "withholding of one annual increment with cumulative effect". In this backdrop, the State Government awarded the punishment to the applicant as per Annexure-13 in accordance with the recommendation of OPSC. Thus, there was no scope to differ from the findings of I.O.*
>
> *7. That, accepting the findings/recommendation of I.O. and views of OPSC, State Respondent awarded punishment upon applicant and therefore there was no reason to differ from the findings/recommendation of the I.O. Hence prayer of the applicant to drop the proceeding, to exonerate him from all charges and to regularize the period of leave as commuted leave, earned leave, half pay leave etc. and to grant him promotion with retrospective effect from the date of his juniors are devoid of any merit. Therefore, Hon'ble OAT may graciously be pleased to dismiss the original application in the fitness of Justice."*

4. Having heard learned counsel for the parties and considering the submissions made, this Court finds that the proceeding was initiated against the petitioner under Rule 15 of the Rules vide memorandum dated 25.03.2017 under Annexure-6. The petitioner after filing his written statement of defence participated in the enquiry. Enquiry Officer while submitting the report on 20.10.2017 under Annexure-9 clearly opined that because of the suffering and treatment, petitioner continued on leave. While taking such a view, enquiry officer suggested that Govt. may take a lenient view to regularize the period of absence as leave.

4.1. On the face of the such finding of the Enquiry Officer, this Court finds that while issuing the 2nd show-cause by differing with the finding of the Enquiry Officer no disagreement note was enclosed to the 2nd show-cause so issued on 29.01.2018 under Annexure-11 in terms of the provisions contained under Rule-15(10) of the Rules. Since no disagreement note was enclosed to the 2nd show-cause notice issued under Annexure-11, which amounts to non-compliance of the statutory provisions, placing reliance on the decisions of the Hon'ble Apex Court as cited supra as well as of this Court, this Court is inclined to quash the order of punishment

so passed against the petitioner vide the impugned order dated 25.05.2018 under Annexure-13. While quashing the same, this Court allows the Writ Petition.

5. The Writ Petition is accordingly disposed of.

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2024 (II) ILR-CUT-1292

MURAHARI SRI RAMAN, J.

W.P.(C) NO. 14328 OF 2023

CHIRA KUMAR MOHAPATRA .....Petitioner

-V-

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

(A) SERVICE LAW – Ante-dated Promotion – The petitioner was not in the cadre of Law Officer while other eligible Law Officers were being considered for promotion to the rank of Under Secretary – Whether the claim of petitioner for ante-dated promotion from the date other got promoted is admissible? – Held, No – The petitioner was not borne in the cadre when others were considered. (Para 16.9)

(B) WORDS & PHRASES – 'Cadre', 'Post' & 'Service' – Meaning of – Explained. (Paras 16.6, 16.9)

Case Laws Relied on and Referred to :-

1. 2018 (II) ILR-CUT 416 : State of Odisha Vrs. Sarada Kanta Tripathy.
2. S.L.P.(C) No.6168-6173 of 2019 : State of Odisha Vrs. Sarada Kanta Tripathy.
3. (1991) 2 SCR 410 : State of Bihar Vrs. Akhouri Sachindra Nath.
4. (1991) 1 SCR 341 : Director, Lift Irrigation Corporation Ltd. Vrs. Pravat Kiran Mohanty.
5. (1998) 4 SCC 456 : Jagdish Ch. Patnaik Vrs. State of Orissa.
6. (2006) 10 SCC 346 : Uttaranchal Forest Rangers' Assn. (Direct Recruit) Vrs. State of U.P.
7. 1991 Supp (1) SCC 334 : State of Bihar Vrs. Akhouri Sachindra Nath.
8. (2007) 15 SCC 406 : Nani Sha Vrs. State of Arunachal Pradesh.
9. (2017) 10 SCR 261 : Sunaina Sharma Vrs. State of Jammu and Kashmir.
10. (2002) 9 SCC 634 : Kaushal Kishore Singh Vrs. Dy. Director of Education.
11. (2022) 2 SCR 764 : Union of India Vrs. Manpreet Singh Poonam.
12. 2021 SCC OnLine SC 1195 = (2022) 12 SCC 579 : Ajay Kumar Shukla Vrs. Arvind Rai.
13. (1991) 2 SCC 295 : Director, Lift Irrigation Corporation Ltd. Vrs. Pravat Kiran Mohanty.
14. (1999) 7 SCC 209 : Ajit Singh Vrs. State of Punjab.
15. 1989 Supp (2) SCC 625 : Union of India Vrs. K.K. Vadhera.
16. (2019) 16 SCC 28 : Ganga Vishan Gujarati Vrs. State of Rajasthan.
17. (1990) 2 SCC 715 : Direct Recruit Class II Engg.Officers' Assn. Vrs. State of Maharashtra.
18. (2007) 1 SCC 683 : State of Uttaranchal Vrs. Dinesh Kumar Sharma.
19. (2011) 3 SCC 267 = (2011) 2 SCR 831 : Pawan Pratap Singh Vrs. Reevan Singh.
20. (2013) 8 SCC 693 : P. Sudhakar Rao Vrs. U. Govinda Rao.
21. (1988) 3 SCR 147 : R. Prabha Devi Vrs. Government of India.
22. (1985) 1 SCR 351 : O.P. Singla Vrs. Union of India.
23. 2004 SCC OnLine P&H 1029 = ILR (2005) 1 P&H 143 = (2005) 1 SLR 792 : Jaskaran Singh Brar Vrs. State of Punjab.

24. (1988) 2 SCC 214 : Dr. Chakradhar Paswan Vrs. State of Bihar.
25. (1996) 8 SCC 266 : State of Maharashtra Vrs. Purushottam.

For Petitioner : M/s. Bhabani Sankar Tripathy, Atul Tripathy & Amit Sahoo.
For Opp.Parties : Mr. Jyoti Prakash Patnaik, Govt. Adv.

JUDGMENT Date of Hearing : 02.07.2024 : Date of Judgment : 30.07.2024

MURAHARI SRI RAMAN, J.

CLAIM OF THE PETITIONER:

Alleging it to be erroneous decision contained in the Order dated 02.02.2023 of the Additional Chief Secretary to Government of Odisha in Home Department, opposite party No.1, in refusing to antedate the promotion in the post of Under Secretary with effect from 25.02.2021 and to revise the Gradation List of Under Secretaries and accordingly, failure to grant consequential promotion to the rank of Deputy Secretary in the Odisha Secretariat Service Cadre, the petitioner has approached this Court by way of filing this writ petition invoking provisions under Article 226/227 of the Constitution of India with the following prayer(s):

> *"On the facts and in the circumstances stated above, your petitioner, therefore, humbly prays that this Hon'ble Court be pleased to:*
>
> *i) quash the impugned Order dated 02.02.2023 in Annexure-9 by holding the same as bad, illegal and contrary to law;*
>
> *and thereby*
>
> *ii) direct the opposite parties to antedate the promotion of the petitioner to the post of Under Secretary with effect from 25.02.2021 in terms of the decision of the Hon'ble Supreme Court under Annexure-3 Series and to allow him consequential promotion to the post of Deputy Secretary with effect from 31.01.2023, i.e. the date of promotion of his juniors in service vide Annexure-11 with consequential restoration of his inter se seniority in the cadre of Under Secretary by modifying Notification dated 17.11.2021 as well as Gradation List published on 05.01.2022;*
>
> *iii) pass such other order(s) as deemed fit and proper in the bona fide interest of justice and fair play and for which act of your kindness, the petitioner shall as in duty bound, ever pray."*

THE FACTS:

2. The relevant facts as adumbrated in the writ petition are narrated.

2.1. The petitioner entered into the Secretariat Service as direct recruit in the post of Junior Assistant on 24.08.1992 being selected through the process of selection conducted by the Odisha Public Service Commission ("OPSC", for brevity) against the vacancies of recruitment years 1982-83 and 1983-84. Subsequently, the petitioner was promoted to the post of the Senior Assistant (presently Assistant Section Officer) on 11.11.1997 being recommendation of the Departmental Promotion Committee ("DPC", as well known) made under the prevalent Odisha Secretariat Service Rules, 1980 (hereinafter called "OSS Rules"). Subsequently, the petitioner joined as Assistant Law Officer ("ALO", abbreviated) in Fisheries and Animal Resources Development Department on 04.06.2010.

2.2. It is a matter of record that at that point of time when the petitioner joined as ALO no cadre rule was in vogue for ALO/Law Officer of the Secretariat other than the Law Department.

2.3. While the matter stood thus, OSS Rules, 1980 was amended by virtue of the Odisha Secretariat Service (Amendment) Rules, 2001 and the provisions of Rules 5 and 7 of the OSS Rules, 1980 as amended by the said OSS (Amendment) Rules, 2001 were the subject matter of challenge in a batch of Original Applications before the learned Odisha Administrative Tribunal in which the leading case was OA No.l235(C) of 2001, which came to be disposed of on 12.05.2011 by holding that the aforesaid provisions are ultra vires Articles 14 and 16 of the Constitution of India. Striking down the same, there was a direction that the promotional vacancies (21 in numbers) of Under Secretary, which were existed prior to promulgation of the OSS (Amendment) Rules, 2001, would be filled up through DPC adhering to the OSS Rules, 1980.

2.4. The Order dated 12.05.2011 of the Odisha Administrative Tribunal passed in O.A. No.l235(C) of 2001 and batch, being challenged in the writ applications before this Court at the behest of the Government of Odisha, was upheld by a common Judgment dated 01.08.2018 reported at 2018 (II) ILR-CUT 416 as *State of Odisha Vrs. Sarada Kanta Tripathy*. This Court issued further direction to the State of Odisha to convene Review DPC for the applicants and other eligible Officers for promotion to the cadre of Under Secretary as per the provisions of OSS Rules, 1980 in respect of the vacancies in the year 2001 and also for subsequent years with all consequential benefits within a period of 3 months.

2.5. The State of Odisha further proceeded to challenge the decision of this Court before the Hon'ble Supreme Court of India and, SLP(C) No.6168-6173 of 2019 have been disposed of *vide* Order dated 01.10.2020.

2.6. As due regard had not been extended to the petitioner for promotion to the post of Under Secretary, he approached this Court by way of a writ petition, being W.P.(C) No.12807 of 2021, seeking direction by calling upon the opposite parties therein to hold review DPC for promotion to the post of Under Secretary in accordance with OSS Rules, 1980. Said writ petition was disposed of *vide* Order dated 09.04.2021, as modified *vide* Order dated 28.07.2021 passed in I.A. No.6320 of 2021, required the Additional Chief Secretary to Government, Home Department to work out the said direction dated 09.04.2021. As there was non-compliance of the aforesaid direction in W.P.(C) No.12807 of 2021, the present petitioner filed CONTC No.5937 of 2021, which came to be disposed of on 08.10.2021 with liberty to the petitioner to file an application for fixation of time limit for compliance of that order and the contempt proceeding was dropped. In view of leave granted by the aforesaid Order dated 08.10.2021, the petitioner filed I.A. No.l5451 of 2021(arising out of W.P.(C) No.l2807 of 2021) seeking modification of the Order dated 09.04.2021 passed in W.P.(C) No. 12807 of 2021 to the extent of fixing a time limit for disposal of the representation of the petitioners under Annexure-9 series therein in the manner indicated in the said Order dated 09.04.2021. Said application got disposed of fixing compliance of Order dated 09.04.2021 within a period of 15 days from the date of communication of the certified copy of the order by

the petitioners and to submit compliance report before the Registry of this Court within a period of seven days thereafter.

2.7. The Additional Chief Secretary obtaining the views of Law Department and the opinion of the learned Advocate General, Odisha on the issue of compliance of direction in W.P.(C) No.12807 of 2021, considered the case of the petitioner along with another Sri Prafulla Kumar Mohanty for initial promotion to the post of Law Officer on completion of 7 years of service as Assistant Law Officers as per Home Department Resolution dated 30.10.2001 and thereafter to the post of Under Secretary on completion of 10 years as Assistant Law Officer and Law Officer taking together with effect from 01.01.2021 through Review DPC held on 09.11.2021. However, while issuing the order of promotion *vide* Home Department Notification No.40459— PT1-HOME-OSS-CASE1-0018-2021/OSS, dated 17.11.2021, the Additional Chief Secretary had given prospective effect to such promotion of the petitioner and Sri Prafulla Kumar Mohanty.

2.8. Being aggrieved by such prospective promotion, and finding his seniority in the cadre of Under Secretary being fixed below all the Under Secretaries promoted earlier in the Gradation List of Under Secretaries published on 05.01.2022, the petitioner has filed representation dated 13.06.2022 seeking modification of the said Notification dated 17.11.2021 for antedatation of his promotion to the rank of Under Secretary retrospectively as has been done in the case of other Law Officers as per Order dated 01.10.2020 of the Hon'ble Supreme Court referred to above with effect from 29.02.2020, when his immediate junior was given such promotion to the rank of Under Secretary *vide* Notification No.10386, dated 29.02.2020 of Home Department and for re-fixation of his *inter se* seniority in the post of Under Secretary over his juniors.

2.9. In the meanwhile, the *ad hoc* promotion of the petitioner in the rank of Under Secretary was regularized on the concurrence of OPSC with effect from the date of his joining in the rank of Under Secretary, i.e., 17.11.2021 as per Home Department Notification dated 22.07.2022. Pending consideration of his representation dated 13.06.2022, the petitioner has appeared before the Chief Secretary on 02.08.2022 in Grievance Cell through his petition dated 01.08.2020 and highlighted his grievance reiterating his prayer for promotion to the post of Under Secretary retrospectively with consequential fixation of his inter se seniority by modifying the Notification dated 17.11.2021 appropriately so that his case for promotion to the rank of Deputy Secretary could be considered by modifying Gradation List of Under Secretaries published on 05.01.2022.

2.10. By a Letter No.27588, dated 12.08.2022, the Joint Secretary to Government, Home Department communicated that the said representation of the petitioner was rejected, which gave rise to filing of W.P.(C) No.36580 of 2022 before this Court, which came to be disposed of on 04.01.2023 by quashing the Order dated 12.08.2022. This Court remitted the matter to the Additional Chief Secretary to reconsider the representation of the petitioner dated 01.08.2022.

2.11. In consideration thereof, the Additional Chief Secretary by Order No.4159— HOME-OSS-CASE1-0003-2023/ OSS, dated 02.02.2023 rejected the claim of the petitioner on the ground that granting seniority to the petitioner on the basis of initial

counterpart of OSS Cadre would be illegal and void in the eye of the law as the petitioner was given deemed promotion to the post of Law Officer and simultaneously promoted to the rank of Under Secretary as a special case due to hardship faced by him.

2.12. The petitioner has also approached the Promotion Adalat in Case No.Home-OSS-PG-4-0007-2020/3 seeking promotion to the rank of Deputy Secretary with effect from his eligibility by restoring his seniority by way of modification of the Gradation List of Under Secretaries in the OSS Cadre published on 05.01.2022. The Pension Adalat rejected the petitioner's prayer on the ground that the claim has no merit.

COUNTER AFFIDAVIT FILED ON BEHALF OF OPPOSITE PARTY NO.1:

3. Clarifying the position of provisions for promotion, it has been delineated that:

> i. prior to the OSS (Amendment) Rules, 2001 came to force, recruitment to Odisha Secretariat Service and promotion were governed by the Odisha Secretariat Service Rules, 1980, and the amendments made to it from time to time, whereby and whereunder the post of Under Secretary was being filled up by way of promotion from the ranks of the Section Officer Level-I and the Law Officer. Service experience of 10 years was the eligibility criteria for the Law Officers (as ALO and LO taken together) and the Section Officer Level-I (as Section Officer Level-II and Level-I taken together) for consideration of promotion to the rank of Under Secretary.
>
> ii. provisions of the OSS Rules, 1980 was amended *vide* Home Department Notification No. 22056—OSS/I-12/2000-OSS dated 12.04.2001 [*vide* Odisha Gazette, Extraordinary No.623, dated 18.04.2001], wherein the promotion of Law Officers was modified with a provision that no Assistant Law Officer or Law Officer in any Department of Government recruited from the Common Cadre except in case of the Law Department shall be considered for inclusion in the list of officers for consideration for promotion to the post of Under Secretary in the service unless his counterpart in the Common Cadre having held the post of Junior Assistant/Senior Assistant, Section Officer, Level-II/Section Officer, Level-I is eligible for such consideration.
>
> iii. the amendments carried in the provisions of Rule 5 and Rule 7 by virtue of the OSS (Amendment) Rules, 2001, being held to be discriminatory without providing quota for promotion to the rank of Under Secretary from the stream of the Assistant Law Officer/Law Officer by the Odisha Administrative Tribunal in O.A. No.1235 (C) of 2001 *vide* Order dated 12.05.2001, was confirmed by this Court in W.P.(C) No.9546 of 2012 *vide* 2018 (II) ILR-CUT 416 and affirmed by the Hon'ble Supreme Court vide Order dated 01.10.2020 in S.L.P.(C) No. 6168-6173 of 2019 with certain clarifications and directions.

3.1. The opposite party No.1 with the aforesaid background of the OSS (Amendment) Rules, 2001 sought to submit that the Order dated 01.10.2020 of the Hon'ble Supreme Court of India referred to above relates to the persons who were already working as Law Officers at that relevant point of time and the term "eligible officers" used in the said order is limited to the Law Officer and not applicable to the existing ALOs like the petitioner, as there was no recruitment rule for the post of ALOs working in different Departments other than Law Department.

4. Adding to the above, the opposite party No.1 has placed subsequent developments being carried out with regard to avenues for the Assistant Law Officers.

4.1. The Odisha State Legal Service (Method of Recruitment and Conditions of Service) Rules, 2016 ("OSLS Rules", for brevity) has been promulgated in exercise of

powers conferred under proviso to Article 309 of the Constitution of India by Home Department Notification No. 743-HOME-OSS-RULES-0001/2014/HD, dtd. 07.01.2017 [published in Odisha Gazette, Extraordinary No.72, dated 11.01.2017].

4.2. Rule 5 of the OSLS Rules has been amended by virtue of the Odisha State Legal Service (Method of Recruitment and Conditions of Service) Amendment Rules, 2021 *vide* Home Department Notification No.21609—HOME-OSS-RULE-0001/2017/ HOME, dated 22.06.2021 [published in Odisha Gazette, Extraordinary No.921, dated 23.06.2021] to create promotional prospects of the ALOs up to the rank of Director (Law). As per Rule 5(a-2) of the OSLS Rules, 2016, existing ALOs working in different Departments under the Government, those who have rendered at least 10 years of continuous service are to be absorbed as Assistant Director (Law).

4.3. Due to shortage of service experience— as 10 years was the prevailing norm prior to coming into force the Odisha State Legal Service (Method of Recruitment and Conditions of Service) Amendment Rules, 2021— in the rank of Assistant Law Officer for absorption in the Legal Service Cadre, the petitioner had to wait till completion of 10 years along with others and the petitioner had completed 10 years of service as ALO on 03.06.2020. On the other hand, all the Offices of Government had been requested *vide* Home Department Letter No. 13846, dated 31.03.2021 to absorb the existing ALOs and Law Officers as Assistant Director (Law) against the posts created.

4.4. The Odisha State Legal Service (Amendment) Rules, 2021, came into force with effect from 23.06.2021 whereby and whereunder it is provided that all the ALOs who have rendered seven years of continuous service as such and all Law Officers working in different Departments of Government or Heads of the Departments shall be absorbed in the post of Assistant Director (Law).

4.5. In order to avoid absorption under the Legal Service Cadre, the petitioner and three other ALOs filed writ petition, being W.P.(C) No. 12807 of 2021, with a prayer to consider their cases for promotion to the rank of Under Secretary in view of Order dated 01.10.2020 of the Hon'ble Supreme Court in S.L.P.(C) No.6168-6173 of 2019 [*State of Odisha Vrs. Sarada Kanta Tripathy*]. This Court while disposing the said writ petition on 09.04.2021 as modified on 28.07.2021 directed the authority to consider the representation of the petitioner and take a decision.

4.6. Despite the OSS Rules, 1980 providing that Section Officer (Level-I) and Law Officers are eligible for promotion to the rank of Under Secretary, since the petitioner was continuing as ALO and not Law Officer and had no eligibility for promotion to the post of Under Secretary, taking into account the entire service period rendered by him, he was accorded deemed promotion to the rank of "Law Officer" and then promoted to the rank of "Under Secretary" on the same day as "special case" on the ground of "hardship faced by him" *vide* Notification No.40459 — PT1-HOME-OSS-CASE1-0018-2021/OSS, dated 17.11.2021 (Annexure-5).

4.7. It is asserted that no ALO junior to the petitioner (unreserved category) has been granted promotion to the post of Under Secretary till date.

REJOINDER OF THE PETITIONER:

5. There are provisions for promotion of ALOs to LOs after completion of 7 years *vide* Notification dated 30.10.2001 of Home Department. There was no further promotion of Law Officers to the next higher post in said notification. Home Department has been dealing with the promotion of ALOs to LOs and for consequential promotions under the OSS Rules up to the rank of Additional Secretary along with Officers in OSS cadre. The petitioner claims his eligibility for promotion to the post of LO with effect from 04.06.2017. The Home Department made provisions under Rules 5 and 7 of the OSS Rules for promotion of Legal Assistant including Junior Law Officers (now, ALOs/Law Officers) to the post of Under Secretary. Further, in the Odisha Secretariat Service (Amendment) Rules, 1987, the length of service period of ALOs/LOs have been incorporated in second proviso to Rule 7 for considering the residency period of ALOs/LOs to the post of Under Secretary, i.e., 10 years as ALOs/ LOs. Hence, in the said Rules, it is mentioned at Rule 5(2) that in case of LOs, means it includes ALO/LO both taken together, since there was no Cadre Rules for ALOs/LOs and regular promotion of ALOs were not accorded by the Home Department.

HEARING:

6. Pleadings, being completed, on the consent of counsel for both the sides, heard Sri Bhabani Sankar Tripathy, learned counsel appearing for the petitioner and Sri Jyoti Prakash Patnaik, learned Government Advocate for the opposite parties on 02.07.2024 finally.

RIVAL CONTENTIONS AND SUBMISSIONS:

7. Sri Bhabani Sankar Tripathy, learned counsel for the petitioner has submitted that after the judgment of this Court rendered in the case of *Sarada Kanta Tripathy vide 2018 (II) ILR-CUT-416* got affirmed by the Hon'ble Supreme Court *vide* Order dated 01.10.2020 in S.L.P.(C) No. 6168-6173 of 2019 with certain clarifications and directions, the petitioner, ALO, approached this Court in W.P.(C) No.12807 of 2021 seeking promotion to the rank of Under Secretary based on order of the Hon'ble Supreme Court and said matter was disposed of on 09.04.2021 as modified by Orders dated 28.07.2021 and 03.11.2021 with the direction to consider the representation of the petitioner and take a lawful decision in the matter taking into consideration the grounds stated in the writ petition and the documents furnished in support thereof along with the ultimate decision of the Hon'ble Supreme Court.

7.1. As a consequence thereto, the case of present petitioner has been considered as special case for the purpose of according promotion to the rank of Under Secretary. The case of the petitioner to the rank of Law Officer has been considered as deemed promotion and then he was granted promotion to the rank of Under Secretary *vide* Notification dated 17.11.2021.

7.2. It is submitted by learned counsel for the petitioner that the promotion so accorded to the petitioner was delayed (as his case could have been considered along with other Law Officers), and that the promotion to the rank of Under Secretary would have been granted effective from 2016 by virtue of Review DPC held on 27.11.2020.

8. *Per contra*, Sri Jyoti Prakash Patnaik, learned Government Advocate would submit that at the time of consideration of promotion to the post of Under Secretary pursuant to Order dated 01.10.2020 passed by the Supreme Court, the eligible officers for promotions to the cadre of Under Secretary essentially meant eligible Law Officers. At the relevant point of time the petitioner was serving as ALO, but not LO. It is manifest from Notification dated 17.11.2021 (Annexure-5) that the petitioner was first "deemed to be promoted to the rank of Law Officer and then promoted to the rank of Under Secretary on *ad hoc* basis for a period of one year or till regular promotion is made". In the said notification it has been clarified that on such promotion his *inter se* seniority in the rank of Under Secretary is fixed below all the existing Under Secretaries promoted earlier. In such view of the matter, the claim of the petitioner for antedating the promotion has justifiably been rejected by the Additional Chief Secretary to the Government of Odisha in Home Department by Order dated 02.02.2023.

RELEVANT STATUTORY PROVISIONS AND NOTIFICATIONS AT A GLANCE:

9. The Odisha Secretariat Service Rules, 1980:

"3. Constitution of cadre.—

The cadre of the service shall consist of the following categories of posts in the departments of Government, namely:

(i) Under Secretary to Government;
(ii) Deputy Secretary to Government;
(iii) Joint Secretary to Government;
(iv) Additional Secretary to Government;
And
(v) Such other post or posts as Government may, from time to time by a Resolution direct.

4. Cadre strength.—

The cadre strength of the service shall consist of such number of permanent and temporary posts of the categories as specified in Rule 3, as the Government may from time to time, by Resolution, direct.

5. Method of recruitment.—

(1) ***All the first appointment to the service shall be made in the rank of Under Secretaries to Government.***

[1]*[(2)* ***The following categories of Officers shall be eligible for consideration for first appointment to the Service namely:***

(a) Section Officers, Level-I appointment under the Odisha Secretariat Service Class-II (Group-II) Rules, 1986; and

(b) Assistant Law Officers appointed from the common cadre or Law Officers in different of Departments of Government other than the Law Department as and when their counterpartsin the common cadre on being promoted to the rank of Section Officer, Level-I become eligible for such consideration.]

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[1]. Substituted by Rule 3 of the Odisha Secretariat Service (Amendment) Rules, 2001, published in Odisha Gazette Extraordinary No.623, dated 18.04.2001. Prior to substitution, sub-rule (2) of Rule 5 of the OSS Rules, 1980 stood thus:

[(2) The following categories of Officers shall be eligible for consideration for first appointment to the Service namely:

(a) Section Officers, Level-I appointment under the Orissa Secretariat Service Class-II Rules, 1986;

(b) Law Officers of Departments of Government except in the Law Department.]

(3) Appointment to the rank of Deputy Secretaries, Joint Secretaries and Additional Secretaries shall be made by promotion from the ranks of Under Secretaries, Deputy Secretaries and Joint Secretaries, respectively.

6. Furnishing particulars for consideration of first appointment.—

(1) The Departments of Government shall furnish to Home Department not later than 31st January of each calendar year the particulars of each officer eligible for consideration for first appointment to the service in the pro forma prescribed in Appendix-l and a list of all Officers eligible for consideration for such appointment arranged in order of their seniority separately in respect of each category as specified in sub-rule (2) of Rule 5, in the pro forma prescribed in Appendix-II.

NOTES:

The Departments of Government shall furnish information in the pro forma prescribed in Appendix-I in quadruplicate and the information prescribed in Appendix-II in duplicate.

(2) On receipt of requisition from the Home Department, the General Administration Department shall furnish to the Home Department the up-to-date Confidential Character Roils in original of each Officer eligible to be considered for first appointment to the Service together with three attested copies of the same

7. Preparation of consolidated list.—

The Home Department on receipt of information, lists and documents specified in Rule 6 shall prepare a consolidated list of officers eligible for consideration for promotion to the rank of Under Secretaries and the names of such Officers shall be arranged on the basis of the total length of their continuous valid officiation in the eligible grades.

[2][Provided that no Section Officer, Level-I shall be considered for promotion to the post of Under Secretary in the Service unless on the date the Selection Board meets he/she has rendered 7 (seven) years of continuous service in the rank of Section Officer, Level-II and Section Officer, Level-I taken together:

Provided further that no Assistant Law Officer or Law Officer in any Department of Government recruited from the Common Cadre except in case of the Law Department shall be considered for inclusion in the list of Officers for consideration for promotion to the post of Under Secretary in the service unless his counterpart in the Common Cadre having held the post Junior Assistant/Senior Assistant/Section Officer, Level-II/Section Officer, Level-I is eligible for such consideration.]

8. Constitution of Selection Board.—

(1) There shall be constituted separate Selection Boards for selection of Officers for promotion to the different categories of posts in the services.

(2) (a) For selection of Officers for promotion to the rank of Under Secretaries The Selection Board shall consist of the following members, namely:

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[2]. Substituted by Rule 4 of the Odisha Secretariat Service (Amendment) Rules, 2001, published in Odisha Gazette Extraordinary No.623, dated 18.04.2001. Prior to substitution, proviso to Rule 7 of the OSS Rules, 1980 stood thus:
[Provided that the total length of continuous valid officiation in the eligible grade of Section Officer Level-I appointed under the Odisha Secretariat Service Class-II Rules, 1986 for the purpose of this rule, shall be taken into consideration from the date of completion of ten years of service in the post of Section Officer Level-II appointed under the Odisha Secretariat Service (Junior) Rules, 1981 and the total length of continuous valid officiation as Section Officer Level-I, both taken together.

In the case of Law Officers except in the Law Department the total length of continuous valid officiation for the purpose of this rule, shall be taken into consideration from the date of completion of ten years of service in the post of Legal Assistant/Junior Law Officer and the total length of continuous valid officiation as Law Officer, both taken together.]

(i) Secretary Home Department
(ii) Special Secretary, General Administration Department
(iii) Secretary, Finance Department.

(b) The senior-most Secretary among the members shall preside over the meetings.

(c) For selection of Officers for promotion to the rank of Deputy Secretary and Joint Secretary, the Selection Board shall consist of:

(i) Chief Secretary or in his absence the Additional Chief Secretary to Government	*Chairman*
(ii) Secretary to Government, Home Department	*Member*
(iii) A Secretary to the Government nominated by the Chairman	*Member*

(d) For selection of Joint Secretaries for promotion to the rank of Additional Secretaries the Selection Board shall consist of:

(i) Chief Secretary to Government.	*Chairman*
(ii) Additional Chief Secretary to Government	*Member*
(iii) Development Commissioner and Secretary to Government Planning and Co-ordination Department	*Member*
(iv) Secretary to Govemment, Home Department	*Member*

(3) The Chairman shall preside over the meeting of the Selection Board. The Deputy Secretary or the Joint Secretary of Home Department, as the case may be, dealing with the subject shall act as the Secretary of the Board without participating in the Selection and decision.

9. Meeting of the Selection Board.—

The Selection Board constituted under Rule 8 shall ordinarily meet once in a calendar year and at intervals ordinarily not exceeding fifteen months.

Provided that the Board may meet more than once in a calendar year if the select list relating to any grade has been exhausted or for any other good and sufficient reason to be recorded in writing.

10. Preparation by the Selection Board of lists suitable officers for promotion to the service.—

(1) Every Selection Boart constituted under rule shall prepare a list of Officers found suitable for promotion to the next higher rank for the selection for which such Board has been constituted.

(2) For preparation of the list of officers fit for promotion to the rank of Under Secretaries list prepared under Rule 7 shall be placed before the Board and for preparation of lists of officers fit for promotion to other ranks in the service the gradation list of the eligible grade shall be placed before the Board.

(3)(a) Zone of consideration for promotion to different posts shall be determined in accordance with the provisions as contained in the Odisha Civil Services (Zone of Consideration for Promotion) Rules, 1988.

Provided that no officer shall be considered for inclusion in the list of Officers it for promotion to the higher posts in the service unless he has worked, including the period of ad hoc officiation, if any, under sub-rule (2) of Rule 14 in the respective eligible grade for a period of one year.

(b) For preparation of the list of officers fit for promotion to the different categories of posts specified under Rule 3, the Selection Board shall consider the cases of eligible officers coming within the zone of consideration as provided in clause (a) above.

(4) The Selection Board shall not ordinarily recommend less than double the expected number of vacancies in each grade.

Provided that the Board may recommend less than double the number of expected vacancies, if adequate number of officers suitable for promotion to any of categories of posts in the service are not available or for reasons to be recorded in writing, the Board consider it in expedient to recommend double the number of expected vacancies as aforesaid.

(5) ***Selection of officers for inclusion in the lists specified in sub-rule (1) shall be based on merit and suitability with due regard to seniority and experience.***

(6) Names of officers considered fit for promotion to any grade in the service shall ordinarily be arranged in the order of their respective position in the list prepared under Rule 7 or in the gradation list of eligible grade, as the case may be.

Provided that any officer, who is of exceptional merit may be assigned a place higher than that of officers senior to him in the list prepared under Rule 7 or in the gradation list of the eligible grade, as the case may be.

14. Appointment to service.—

(1) ***Appointment to different ranks in the service shall be made in the order in which the names appear in the continuing select list as well as Select Lists for the time being in force.***

(2) When a select list is not in force or has been exhausted and it is necessary to make temporary appointments urgently, appointments may be made different grade of the service on ad hoc basic for a period not exceeding one year on the basis of the lists prepared by the selection Board under Rule 10.

Provided that ad hoc appointments made under this sub-rule may be extended beyond the aforesaid period with the prior concurrence of the Commission.

(3) Officers appointed to any grade of the service for the first time on the basic of select lists prepared under these rules shall be on probation for a period of one year.

Provided that the period of ad hoc appointment made under sub-rule (2) shall not count towards the period of probation.

(4) Government may for good and sufficient reason extend the period of probation of any officer.

19. Reservation of vacancies of Scheduled Castes and Scheduled Tribes.—

Vacancies shall be reserved for appointment and ***promotion in favour of candidates*** *belonging to Scheduled Castes and Scheduled Tribes and shall be filled up as prescribed in the Odisha Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 and rules made thereunder.*

[3][21. Relaxation.—

Where the State Government are of the opinion that it is necessary or expedient to do so, they may, by order and for reasons to be recorded in writing, relax any of the provisions of the rules in respect of any Class of category of employees in the interest of the public service in consultation with the OPSC."

10. The Odisha State Legal Service (Method of Recruitment and Conditions of Service) Rules, 2016:

[2. Definitions.—

(c) DEPARTMENT means a Department of Govrnment as specified in the First Schedule of the Odisha Government Rules of Business made under clauus (3) of Article 166 of the Constitution of India and shall not include the Law Department;

(e) GOVERNMENT means the Government of Odisha;

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[3]. Added by Rule 5 of the Odisha Secretariat Service (Amendment) Rules, 2001, published in Odisha Gazette Extraordinary No.623, dated 18.04.2001.

[4][(f) OFFICE means Departments of Government and Heads of Department;]

(g) HEADS OF DEPARTMENT means the Heads of Department as mentioned in Appendix-3 of the Odisha Service Code and shall no include the Heads of Department under the Law Department;

*[5][(h) ***]*

(l) SERVICE means the Odisha State Legal Service;

(2) All other words and expressions used in these rules but not specifically defined shall have the same meaning as respectively assigned to them in the Odisha Service Code.

3. Constitution of Service.—

(1) The Service shall consist of the persons recruited to the Service in accordance with the provisions of these rules.

(2) The Service shall consist of the following posts in the [6] [Departments of Government and Heads of Department] namely:

(i) Assistant Director (Law) in Group 'B':
(ii) Deputy Director (Law) in Group 'A' (Junior);
(iii) Joint Director (Law) in Group 'A' (Senior);
(iv) Additional Director (Law);
(v) Director (Law), and
(vi) Such other post as Government may, from time to time, by notification, decide.

(3) The Cadre shall consist of such number of permanent and temporary posts of each category as specified under sub-rule (2), as the Government may, from time to time, by notification, determine and includes the posts which are to be reserved for deputation to quasi-judicial Bodies as the State Government may decide from time to lime

4. Cadre Controlling Authority.—

The recruitment and appointment to the Service shall be under the administrative control of the Home Department.

5. Method of recruitment to the Service.—

Subject to the other provisions made in these rules, the recruitment to the posts in the service shall be made by the following methods, namely:

(a) recruitment to the posts of Assistant Director (Law) shall be made by the Commission by way of direct recruitment through competitive examination:

[7][(a-1) All Assistant Law Officers who have rendered seven years of continuous service as such and all Law Officers working in different Departments of Government or Heads of Departments shall be absorbed in the post of Assistant Director (Law):

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[4] Substituted for "*(f) Office means different offices of the Government, Heads of Department and includes Departments of Government;"* by Rule 2(1) of the Odisha State Legal Service (Method of Recruitment and Conditions of Service) Amendment Rules, 2021, published in Odisha Gazette Extraordinary No.921, dated 23.06.2021.

[5] Omitted for "*District Office means the Office of the Collector and District Magistrate of a Revenue District as well as district level offices of other Departments of Government;"* by Rule 2(2) of the Odisha State Legal Service (Method of Recruitment and Conditions of Service) Amendment Rules, 2021, published in Odisha Gazette Extraordinary No.921, dated 23.06.2021.

[6] Substituted for "*Departments of Government, Heads of Department and District Offices*" by Rule 3 of the Odisha State Legal Service (Method of Recruitment and Conditions of Service) Amendment Rules, 2021, published in Odisha Gazette Extraordinary No.921, dated 23.06.2021.

[7] Substituted for the first and second proviso to clause (a) of Rule 5 by Rule 4 of the Odisha State Legal Service (Method of Recruitment and Conditions of Service) Amendment Rules, 2021, published in Odisha Gazette Extraordinary No.921, dated 23.06.2021. Prior to substitution, said provisos stood thus:

[*Provided that after commencement of these rules, twenty-five percentum of the posts of Assistant Director (Law) shall be filled up by way of absorption—*

(i) from among the existing Law Officers working in different offices under the Government in the scale of pay of Rs.9300-34,800/- with Grade Pay of Rs.4600/- and

(ii) from among the existing Assistant Law Officers working in different offices under the Government, those who have rendered at least 10 (ten) years of continuous service as such.

(iii)those who do not meet the standards should not be promoted and they may be reverted back to their parent cadre.

Provided further that twenty-five percentum of the posts meant for absorption shall cease to operate on completion of such absorption of all the existing Law Officers and Assistant Law Officers and accordingly all the vacant posts of Assistant Director (Law) arising thereafter shall be filled up by way of direct recruitment, by the Commission;] [7]

Provided that the Assistant Law Officers who have not rendered seven years of continuous service as such shall be absorbed in the post of Assistant Director (Law) on completion of seven years of continuous service.

(a-2) The process of absorption shall cease to operate after all the existing Assistant Law Officers and Law Officers are finally absorbed in the post of Assistant Director (Law).]

(b) recruitment to the posts of Deputy Director (Law) shall be made by way of promotion from the eligible Assistant Directors (Law), who have put in not less than seven years of continuous service as such;

[8]*[Provided that the officers so absorbed in the post of Assistant Director (Law) having completed seven years of continuous service from the date of availing Pay Level-10 of pay matrix under the Odisha Revised Scale of Pay Rules, 2017 shall be eligible for promotion to the post of Deputy Director (Law) after completion of one year of continuous service in the post of Assistant Director (Law).]*

(c) recruitment to the posts of Joint Director (Law) shall be made by way of promotion from the eligible Deputy Directors (Law) who have put in not less than five years of continuous service as such;

(d) recruitment to the post of Additional Director (Law) shall be made by way of promotion from the eligible Joint Directors (Law) who have put in not less than three years of continuous service as such;

(e) recruitment to the post of Director (Law) shall be made by way of promotion from the eligible Additional Directors Law) who have put in at least one year of continuous service as such:

Provided that in case of non-availability of suitable persons for promotion to the post of Additional Director (Law) and the post of Director (Law), it shall be filled up by way of deputation for such periods as the post of Director (Law) and the post of Director (Law), it shall be filled up by way of deputation for such periods as the Government may deem fit by suitable officers from the Odisha Superior Judicial Service Cadre and from any other service, if the Government so decide.

6. Reservation.—

Notwithstanding anything contained in these rules reservation of vacancies or posts, as they may be, for;

(a) Scheduled Castes and Scheduled Tribes shall be made in accordance with the provisions of the Odisha Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 and the rules made thereunder; and

(b) SEBC, Women, Sportsmen, Ex-servicemen and Persons with Disabilities shall be made in accordance with the provisions made under such Act, Rules, Orders or Instructions issued in this behalf by the Government, from time to time.

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[8] Inserted proviso by Rule 5 of the Odisha State Legal Service (Method of Recruitment and Conditions of Service) Amendment Rules, 2021, published in Odisha Gazette Extraordinary No.921, dated 23.06.2021.

8. Inter se Seniority.—

(1) The inter se seniority in the rank of Law Officers as well as Assistant Law Officers working in different offices under the Government shall be fixed on the basis of the date of joining in respective posts.

(2) The officer appointed by way of absorption in a year to the post of Asst. Director (Law) shall be enblock senior to the officer appointed through direct recruitment under Rule 7.

10. Constitution of Selection Committee.—

(1) There shall be separate Selection Committees for selection of Officers for promotion to different categories of posts specified in sub-rule (2) of Rule 3.

(2) For the purpose of promotion to the rank of Assistant Director (Law), Deputy Director (Law), Joint Director (Law) and Additional Director (Law), the Committee shall consist of the following members, namely:

(i) Secretary to Government, Home Department	*Chairman*
(ii) Secretary to Government Law Department	*Member*
(iii) Special Secretary to Government, GA Department	*Member*
(iv) Additional Secretary Joint Secretary, Home Department	*Member-Convenor*

(3) For the purpose of promotion to the rank of Director (Law), the Committee shall consist of the following members, namely:

(i) Chief Secretary	*Chairman*
(ii) Secretary to Government, Home Department	*Member*
(iii) Secretary to Government, Law Department	*Member*
(iv) Special Secretary to Government, GA Department	*Member*
(v) Addl. Secretary Joint Secretary,Home Department	*Member-Convenor*

(4) The Committee shall meet at least once in a year preferably in the month of January to prepare a list of officers suitable for promotion to the next higher grade.

(5) ***The Committee while considering the promotion cases of suitable officers and preparation of the list shall follow the provisions of—***

(a) the Odisha Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 and the rules made thereunder wherever necessary;

(b) the Odisha Civil Services (Zone of Consideration for Promotion) Rules, 1988;

(c) the Odisha Civil Services (Criteria for Promotion) Rules, 1992 and

(d) the Odisha Civil Servicse (Criteria for Selection for Appointment including Promotion) Rules, 2003.

(6) The recommendation of the Committee shall be valid and can be acted upon notwithstanding the absence of any one of its members other than the Chairman:

Provided that the member so absenting was duly invited to attend the meeting of the Committee and the majority of members of the Committee attended the meeting.

11. Consultation with the Commission.—

(1) The recommendation of the Committee under sub-rule (6) of Rule 10 shall be referred to the Commission along with following documents, namely:

(a) Gradation list with service particulars of the officers coming under zone of consideration:

(b) The Confidential Character Rolls of all officers considered by the Committee:

(c) Up-to-date position of disciplinary/Criminal Proceedings and vigilance enquines pending against officers under consideration.

(2) The Commission shall consider the list along with the Service particulars received under sub-rule (1) and shall furnish its recommendations to the Government.

12. Select List.—

(1) The recommendations of the Commission in respect of reference made to it under sub-rule (1) of Rule 11 shall be considered by the Government and the list approved by Government with changes, if any, shall form the Select List.

(2) The Select List shall ordinarily remain in force for a period of one year with effect from the date of its approval by the Government or until another Select List is prepared, whichever is earlier.

13. Appointment to the Service.—

Appointment to different posts in the service shall be made in the order in which the names of officers appear in the select list.

14. Inter se Seniority.—

Save as provided in sub-rule(2) of rule 8, the inter-se seniority of the officers appointed to any post in the service shall be in the order in which their names appear in the select list under sub-rule (7) of Rule 7 and of sub-rule (1) of Rule 12.

16. Other Conditions of Services.—

The conditions of services of the members of the Service in regard to matters not covered by these rules shall be the same as may, from time to time, be prescribed by the Government.

17. Relaxation.—

Where the Government are of the opinion that it is necessary or expedient so to do, 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 employees in the interest of the Public Service in consultation with the Commission.

18. Interpretation.—

If any question arises relating to the interpretation of these rules, it shall be referred to Government whose decision thereon shall be final."

BACKGROUND AND STATUS OF AMENDMENT TO RULES 5 AND 7 OF THE OSS RULES, 1980 BY VIRTUE OF THE OSS (AMENDMENT) RULES, 2001:

11. This Court, while dealing with vires of amendment to Rules 5 and 7 of the OSS Rules, 1980 by virtue of the OSS (Amendment) Rules, 2001 in the case of *State of Odisha Vrs. Sarada Kanta Tripathy, 2018 (II) ILR-CUT 416* in a challenge against the Order dated 12.05.2011 of the Odisha Administrative Tribunal, Cuttack Bench, Cuttack in Original Application being O.A. Nos.1235(C) of 2001, 3462(C) of 2001 and 1113(C) of 2001, held as follows:

*"5.*** Thus, it is clear from the above provisions of Rule 7 of Rules, 1980 that Section Officer Level-I shall be considered for promotion to the cadre of Under Secretary on completion of 10 years of service in the cadre of Section Officer Level-I and Section Officer Level-II taken together. Likewise, Law Officers except in the Law Department can be considered for promotion to the cadre of Under Secretary on completion of 10 years service in the cadre of Legal Assistant/Junior Law Officer (Assistant Law Officer) and Law Officer taken together.*

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12. ***Admittedly, the promotional post of Under Secretary in the Odisha Secretariat has two feeder cadres, namely, Ministerial Cadre and Cadre of Law Officers.*** *As discussed earlier, the Section Officer Level-I and Law Officers of the Departments of Government (except Law Department) are the feeder cadre posts to be promoted to the cadre of Under Secretary. Their scale of pay is same. In Rules, 1980, both feeder cadres were given equal weightage, but by virtue of the Amendment Rules, 2001, the experience of 10 years for the Ministerial Cadre has been reduced to 7 years and the employees belonging to the cadre of Law Officer were made to wait till his counterpart in the common cadre of ministerial officers become*

eligible for such consideration. Learned Government Advocate, in order to substantiate its averments in the counter affidavit, produced the memorandum dated 06.01.2001 of the Home Department in course of hearing, which deals with the object behind amendment of Rules 5(2) and 7 of Rules, 1980. It is stated, inter alia that, after introduction of common cadre in the level of Junior Assistant to the level of Section Officer in the Secretariat and due to imposition of ban on creation of new posts, the promotional avenue available to the Secretariat employees have been narrowed, as a result of which, Senior Assistant of different Departments of the Secretariat are promoted to the post of Section Officer Level-II after rendering more than 20 years of service in the rank of Senior Assistant. As a result, experienced officers in the OSS Cadre could not be considered for promotion to the rank of Under Secretary as they could not acquire the requisite experience of 10 years of service in the rank of Section Officer Level-II and Section Officer Level-I taken together. Whereas the Law Officers having 10 years of service experience in the rank of Assistant Law Officer and Law Officer got a march over the ministerial cadre. Further, it is the memorandum which contained that the Law Officers cannot lay any legitimate claim for accelerated promotion solely on the basis of their additional qualification of Law. It further appears from the memorandum that the object behind the amendment of Rules, 1980 was that no regular or uniform procedure was followed by different Department in selecting Legal Assistant (presently Assistant Law Officer or Law Officer). Thus, the amendment of Rules 5(2) and Rule 7 of Rules, 1980 was expedient.

13. From a close scrutiny of the memorandum dated 6th January, 2001, it appears that the amendment of Rules, 1980 became expedient as the ministerial cadre could not get equal opportunity for promotion to the post of Under Secretary. The situation of ban imposed by the State Government to creation of new posts was temporary and cannot be a ground for amendment of the Rules. Further, other two grounds stated in the memorandum are also equally untenable for the reason it does not meet the scrutiny of reasonableness. ***Both the Ministerial Cadre and the cadre of Law Officer have their distinct entity. The Senior Assistant having a degree in Law and 5 years of service experience has to appear in a selection test for appointment as Assistant Law Officer and on being appointed as such, he ceases to be a member in the Ministerial Cadre. They have their own hierarchy of promotion. Further, the terms 'common cadre' and 'counterpart' etc. becomes misnomer and misleading after a Senior Assistant leaves the Ministerial Cadre by joining the cadre of Law Officer. Thus, keeping the cadre of Law Officer waiting till an employee in the Ministerial Cadre becomes eligible, is by itself an attempt to make the unequals equal which is forbidden under law and does not stand to the scrutiny of classification making the differentia, as held in Ajay Hasia, AIR 1981 SC 487 = (1981) 2 SCR 79.*** *Further, it is sheer arbitrary and unreasonable legislative action of the State by curtailing promotional avenue of the Law Officers even if they are otherwise eligible for the same. The Amendment Rules, 2001 is otherwise ambiguous and does not stand to the scrutiny of Article 16 of the Constitution as it does not make any provision for promotion of direct recruits into the cadre of Law Officers.*

14. In that view of the matter, while upholding the impugned order passed by learned Tribunal, we declare the Amendment Rules, 2001 to be ultra vires of Articles 14 and 16 of the Constitution of India and strike down the same.

The State-Respondents are directed to convene review DPC for the Applicants and other eligible officers for promotion to the cadre of Under Secretary as per the provisions of Rules, 1980 in respect of the vacancies of the year 2001 and also for subsequent years and grant all consequential benefits within a period of three months hence."

11.1. Said matter was further carried to the Hon'ble Supreme Court by the State of Odisha in S.L.P.(C) Nos.6168-6173 of 2019, which came to be dismissed on 01.10.2020 with the following direction:

"The conclusions drawn by the High Court, while holding the concerned Rules to be ultra vires, in our considered view, are absolutely right. We, therefore, affirm the view insofar as the issue of vires is concerned.

As regards, the directions granting consequential benefits, it is clarified:

a) In terms of directions issued in the latter part of para 14, review DPC for the applicants and other eligible officers for promotion to the cadre of Under Secretary as per provisions of Rules, 1980, in respect of the vacancies of the year 2001 and for subsequent years shall be held within two months from the date of this Order.

b) In terms of such review DPC, the orders granting benefit of fixation of pay and consequential benefits on that account shall be finalized within a month thereafter.

c) The applicants and other eligible officers shall be entitled to benefits in terms of such fixation as under:

(i) If the concerned applicants and other eligible officers had attained the age of superannuation on or before 01.08.2018, that is the day the decision of the High Court was rendered, their last drawn pay shall be refixed in terms of such fixation and the concerned applicants and other eligible officers shall be entitled to consequential benefits in terms of upward revision of their retiral dues on and with effect from 01.08.2018.

(ii) In case of the applicants and other eligible officers had not attained the age of superannuation on or before 01.08.2018, all the monetary benefits on account of such fixation shall be granted to them on and with effect from 01.08.2018.

(iii) It is made clear that for the period prior to 01.08.2018 the applicants and other eligible officers will be entitled to only notional benefits and not monetary benefits.

d) As a result of such review DPC, no person shall be reverted and all administrative instructions issued and steps undertaken by the Department shall hold good and any monetary benefits availed by such person shall stand protected and secured. However, the seniority of such person in the cadre of Under Secretary shall be refixed in keeping with the decision of the High Court.

With aforestated directions, the Special Leave Petitions are dismissed."

THE IMPUGNED ORDER DATED 02.02.2023 DENYING CLAIM OF THE PETITIONER:

12. Following Order has been passed on 02.02.2023 by the Additional Chief Secretary to the Government of Odisha in Home Department:

"Government of Odisha
Home Department
ORDER

Bhubaneswar *Dated the 02/02/2023*
No. HOME-OSS-CASE1-0003-2023—4159/OSS

Whereas Sri Chira Kumar Mohapatra, an Officer in the rank/Cadre of Under Secretary and posted at present at Forest & Environment Department, Government of Odisha, has filed WP(C) No 36580/2022 in the Hon'ble High Court of Orissa with a prayer to quash the Annexure-14 and to antedate his promotion to the post of Under Secretary with effect from 29.02.2020 as per decision of the Hon'ble Apex Court dated 01.10.2020 in SLP(C) No 6168-6173/2019 and to allow him the consequential promotion to the post of Under Secretary with effect from 29.02.2020 with consequential fixation of inter-se seniority in the cadre of Under Secretary.

And whereas the Hon'ble High Court has disposed of the Writ Petition vide their Order dated 04.01.2023 with a direction to consider the representation dated 01.08.2022 filed by the

petitioner under Annexure-13 of the Writ Petition in accordance with law within a period of eight weeks from the date of production of certified copy the order.

And whereas in obedience to the direction of the Hon'ble High Court dated 04.01.2023 in WP(C) No. 36580/2022, the petitioner submitted a certified copy of the order alongwith representation and requested for consideration of his representation.

And whereas the petitioner while working as Assistant Law Officer along with 03 others had filed WP(C) No. 12807/2021 for considering their cases for promotion to the rank of Under Secretary with consequential benefits in accordance with the OSS Rules, 1980, which was disposed of by the Hon'ble Court on Dt.09.04.2021 with a direction to the O.P. to take lawful decision on the prayer of the petitioners.

And whereas after careful examination of the provisions contained in Rule 5 of OSS Rules, 1980, it is found that only the Law Officers and Section Officers, Level-I (Re-designated as Desk Officer) in the feeder grade are eligible for promotion to the rank of Under Secretary. ***The petitioner being an Assistant Law Officer was not eligible for promotion. However considering the period of service rendered by the petitioner as Assistant Law Officer, it was decided to consider the cases of the petitioner alongwith Sri Prafulla Kumar Mohanty for promotion to the rank of Under Secretary as a special case due to the hardships faced by them.*** *Accordingly, the above Assistant Law Officers were given deemed promotion to the rank of Law Officer and then promoted to the rank of Under Secretary vide Home Department Notification No. 40459/OSS dated 17.11.2021 with prospective seniority. Such promotion has been challenged before the Hon'ble High Court of Orissa in WP(C) No. 38855/2021 and WP(C) No 38857/2021.*

And whereas the Hon'ble Apex Court vide order dated 01.10.2020 in SLP(C) No. 6168-6173/2019 has struck down the provision of counterpart concept of OSS (Amendment) Rules, 2001. Hence, granting seniority to the petitioner on the basis of initial counterpart of OSS Cadre is illegal and void in the eye of the Law.

And the Government after careful consideration of the representation of the petitioner Sri Chira Kumar Mohapatra, the OSS Rules, 1980 and order of Hon'ble Apex Court in SLP(C) No.6168-6173/2019, is of view that the claim of the petitioner for antedation of his promotion in the post of Under Secretary with effect from 29 02.2020 with all consequential benefits sans any merit and reject the same.

Sd/-
Additional Chief Secretary
to Government"

ANALYSIS AND DISCUSSIONS:

13. Being sponsored by the Home Department vide Letter No.42113/CC/PSC, dated 27.07.1992, the petitioner was appointed as Junior Assistant in General Administration Department by Letter No.OE/1-23/92—32405/Gen., dated 22.08.1992 and claims to have joined on 24.08.1992 and got promoted to the post of Senior Assistant (now, Assistant Section Officer) on 11.11.1997.

13.1. He was appointed as Assistant Law Officer by an Office Order, which is reproduced hereunder:

"Government of Odisha
Fisheries and ARD Department
OFFICE ORDER

6055-I Estt.104/2009/FARD, Bhubaneswar,
dated the 01.06.2010

Sri Chira Kumar Mohapatra, Assistant Section Officer of Law Department is appointed as Assistant Law Officer in Fisheries & ARD Department in the Scale of Pay Rs.9300-34800/- +

Grade Pay Rs.4200/- in the Pay Band-2 with usual D.A. and other allowances as admissible to State Government employees from time to time with effect from the date he actually joins in the post.

This appointment is provisional and subject to clearance of GA (Vig) Department.

By order of Principal Secretary
K.N. Jena
Joint Secretary to Govamment"

13.2. After Rules 5 and 7 of the OSS Rules, 1980, as amended by virtue of the OSS (Amendment) Rules, 2001, being declared *ultra vires* in *State of Odisha Vrs. Sarada Kanta Tripathy, 2018 (II) ILR-CUT 416* and set at rest by dismissal of S.L.P.(C) Nos.6168-6173 of 2019 filed at the behest of State of Odisha, the Government has undertaken the process as directed in the Order dated 01.10.2020 by the Hon'ble Supreme Court. Said case was relating to promotional prospects of the Law Officers, but not the Assistant Law Officers.

13.3. It has been affirmed that since there was no cadre rules in vogue, with effect from 11.01.2017 the Odisha State Legal Services Rules, 2016 came into force with promotional prospects up to the rank of Director (Law). As per Rule 5(a)(ii) of the OSLS Rules, twenty-five percent of Assistant Directors (Law) is to be filled up by way of absorption from among the existing Law Officers working in the Scale of Pay of Rs.9300-34800/- with Grade Pay of Rs.4600/- and from among the existing Assistant Law Officers working in different offices under the Government, those who have rendered at least 10 years of continuous service as such.

13.4. The petitioner completed 10 years as the Assistant Law Officer on 03.06.2020. Needless to observe that the subsequent amendment, *viz*., the Odisha State Legal Service (Method of Recruitment and Conditions of Service) Amendment Rules, 2021, by virtue of which in terms of clause (a-1) of Rule 5 of the OSLS Rules, 2016 "All Assistant Law Officers who have rendered seven years of continuous service as such and all Law Officers working in different Departments of Government or Heads of Departments shall be absorbed in the post of Assistant Director (Law) and it is also provided that the Assistant Law Officers who have not rendered seven years of continuous service as such shall be absorbed in the post of Assistant Director (Law) on completion of seven years of continuous service" has no application to the present case inasmuch as the said Amendment Rules has come into force with effect from 23.06.2021. Before the said Amendment Rules, 2021 came to be effective, the petitioner completed 10 years continuous service as Assistant Law Officer.

13.5. On 31.03.2021, the Home Department created the posts of Assistant Director (Law) under the OSLS Cadre. Relevant portion of the communication of the Home Department runs as follows:

"Government of Odisha
Home Department
No. HOME-OSS-CRTN1-0001-2017—13846/OSS
dated 31.03.2021

From

R.L. Singh, OAS (SB)
Deputy Secretary to Government

To

The Principal Accountant General (A&E)
Odisha, Bhubaneswar

Sub.: Creation of posts of Assistant Director (Law) under Odisha State Legal Service Cadre.

Sir,

In supersession of this Department Notification No.4374 dt. 29.01.2020, Government, after careful consideration, have been pleased for creation of total 90 (Ninety) posts of Assistant Director (Law) in Level-10 Pay Matrix under ORSP Rules, 2017 under Odisha State Legal Service Cadre in the Departments of Government.

Each such Administrative Department shall create the required number of posts of Assistant Director (Law) assigned against them as specified in the list at Annexure-A.

They shall be entitled for usual D.A and other allowances as applicable to State Government employees.

Keeping in view the integration of HoDs with Administrative Departments, the Administrative Departments shall distribute the posts to their HoDs as per their requirement while retaining for their own.

With the creation of posts of Assistant Director (Law) by the Administrative Departments; the Assistant Law Officers completing the prescribed residency period of service under Odisha State Legal Service Rules, 2016 in their Departments/HoD as well as the Law Officers of Departments/HoD as per the said Rule shall be deemed to be absorbed in the post of Assistant Director (Law) with prospective effect and the corresponding post(s) of Law Officer and Assistant Law officer shall stand abolished and they shall be re-designated as Assistant Director (Law) counting their previous service period.

Concurrence of Finance Department has been obtained in OSWAS file No.HOME-OSS-PMTN-0015-2019 and No. HOME-OSS-CRTN1-0001-2017.

Yours faithfully,
Sd/-
Deputy Secretary to Government"

13.6. In the counter affidavit it has been clarified by the opposite parties that, under the Odisha Secretariat (Junior Branch) Rules, 1980 the promotional post of Under Secretary in the Odisha Secretariat has two feeder grades, namely Section Officer, Level-I and Law Officer of the Department of Government (except Law Department). This Court on analysis of relevant rules observed in *State of Odisha Vrs. Sarada Kanta Tripathy, 2018 (II) ILR-CUT-416* that the promotional post of Under Secretary in the Odisha Secretariat has two feeder cadres, namely, Ministerial Cadre and Cadre of Law Officers and in OSS Rules, 1980, both the feeder cadres were given equal weightage.

13.7. The factual matrix of this case borne on record depict that the petitioner was appointed as Junior Assistant on 24.08.1992 and was promoted to the post of Senior Assistant as per the Odisha Ministerial Service (Method of Recruitment and Conditions of Service of Junior Assistants in the Offices of Departments of Secretariat) Rules, 1951 and, subsequently got promoted to the post of Assistant Law Officer in terms of the OSS Rules, 1980 on 04.06.2010. Therefore, the Junior Assistant who gets promoted to the post of Senior Assistant and thereafter Section Officer (Level-II and Level-I) cannot be treated to be equal to the Junior Assistant who got promoted to the post of ALO.

13.8. In such view of the matter, this Court finds force in the submission of learned Government Advocate that the grievance of the petitioner was considered treating to fall under "special case". At this juncture the Home Department Notification dated 17.11.2021 is reproduced hereunder for ready reference:

"Government of Odisha
Home Department
NOTIFICATION

Bhubaneswar, *Dated the 17-11-2021*
No. PT1-HOME-OSS-CASE1-0018-2021—40459/OSS,

In obedience to the Order dated 09.04.2021 and 28.07.2021 of the Hon'ble High Court, Orissa in WP(C) No. 12807/2021, ***the cases of the following 02 ALOs are considered for promotion as a special case due to hardship faced by them. They are deemed to be promoted to the rank of Law Officer and then promoted to the rank of Under Secretary on an ad hoc basis*** *for a period of one year or till regular promotion is made in consultation with the Odisha Public Service Commission or till the date of their retirement whichever is earlier.*

On promotion to the rank of Under Secretary, they are posted as follows:

Sl. No	*Name of the Officer*	*Present place of Posting*	*Place of posting on promotion*
1	*Sri Prafulla Kumar Mohanty*	*Finance Department*	*Finance Department (Against the post transferred vide this Department Notification No.40443, dated 17.11.2021*
2	*Sri Chira Kumar Mohapatra*	*Forest and Environment Department*	*Forest & Environment Department (Against the post transferred vide this Department Notification No.40444, dated 17.11.2021*

On such promotion, their inter-se-seniority in the rank of Under Secretary is fixed below all the existing Under Secretaries promoted earlier.

By Order of the Governor
Sd/- 17.11.2021
Joint Secretary to Govemment"

13.9. As relied on by Sri Bhabani Sankar Tripathy, learned Advocate for the petitioner on the Home Department Memorandum dated 08.11.2021 regarding "Meeting of the Selection Board for selection of Assistant Law Officers for promotion to the rank of Law Officer/Under Secretary in Odisha Secretariat Service Cadre", in the review DPC it has been observed that pursuant to direction of this Court in Order dated 09.04.2021 passed in W.P.(C) No. 12807 of 2021, the promotion of the petitioner to the post of Under Secretary was considered as "special case" and on "hardship ground".

13.10. It has been stipulated under Rule 10 of the OSS Rules, 1980 with regard to preparation of selection list of suitable officers for promotion to different posts is required to be determined in accordance with the provisions as contained in the Odisha Civil Services (Zone of Consideration for Promotion) Rules, 1988. Nonetheless, as consideration of the petitioner to the rank of Under Secretary was a "special case", the requirement of consideration of "zone of consideration" did get dispensed with and in the review DPC, in view of Rule 3 of the Odisha Civil Services (Criteria for Promotion) Rules,1992 the Performance Appraisal Report/Confidential Character Rolls for the years

2015-16 to 2019-20 as per General Administration & Public Grievance (SE) Department Clarification No.1103/SE, dated 19.05.2020 read with Clarification No.5906/Gen., dated 24.02.2005 was taken into consideration. While doing so, it was suggested by the Additional Secretary to Government as follows:

> *"Accordingly, they may be deemed to be promoted to the rank of Law Officer on completion of seven years. On such promotion, they are eligible for promotion to the rank of Under Secretary on completion of ten years as ALO/LO taken together.* ***As such they are eligible for promotion to the post of Under Secretary with effect from 01.01.2021 as a special case on the condition that they cannot claim any seniority from retrospective effect.*** *Accordingly, Under Secretary DPC dated 19.01.2021 may be reviewed and* ***their seniority may be fixed below the existing Under Secretaries on the date of their promotion****.*
>
> ***
>
> *The Selection Committee may peruse the PARs/CCRs along with other service records of the candidates and recommended the suitable ALOs for their promotion to the post of Law Officer (notionally) on completion of 7 years and subsequently to the post of Under Secretary on completion of 10 years from the date of their joining as ALO."*

13.11. The Selection Board in its Meeting held on 09.11.2021 considered the promotion of the petitioner, ALO, to the rank of Law Officer (deemed promotion) and then Under Secretary, ignoring the provisions of the Odisha Civil Services (Zone of Consideration for Promotion) Rules, 1988.

14. Such being the consideration of the case of the petitioner for promotion to the rank of Under Secretary after treating deemed promotion to the post of LO from ALO, nothing is pointed out regarding statutory or binding rule which mandates or lays down a time limit for filling up of the existing vacancies in the post of Under Secretary.

14.1. The right of an employee to be considered for promotion accrues only on the date of consideration of eligible candidates by the Department and not before or if the Rules provide for a particular time-frame in which the selection process is to be concluded. No right accrues to the candidates upon occurrence of vacancies.

14.2. In *State of Bihar Vrs. Akhouri Sachindra Nath, (1991) 2 SCR 410*, it was held that no person can be promoted with retrospective effect from a date when he was not borne in the cadre so as to adversely affect others.

14.3. It is pertinent to have regard to *Director, Lift Irrigation Corporation Ltd. Vrs. Pravat Kiran Mohanty, (1991) 1 SCR 341*, wherein it has been stated thus:

> *"The contention of the appellants is that the respondent has no right to be kept in a particular wing. The Corporation, with a view to create two categories, namely, Mechanical and Electrical sought to amalgamate the third Composite Mechanical/Electrical Wing and sought for options from the persons holding the composite posts. This was taken due to administrative exigency. The Corporation has power to carve out by amalgamating three sections, into two divisions and to prepare the seniority lists from the respective date of their initial appointment, etc. The High Court, therefore, was unjustified to quash the Gradation Lists. It was contended for the respondent by Sri Misra, his learned counsel, that the persons from the three wings are only deputationists holding lien on Government posts. The Corporation did not frame any scheme of its own to appoint its own employees, nor given options to all the deputationists for confirmation as its employees. So long as the employees are continuing on deputation, they are entitled to have seniority in the respective wings. The*

writ petitioner admittedly has been working on the Electrical Wing and was No.2 in the order of seniority as Sub-Assistant Engineer (Electrical). His right to seniority, cannot be disturbed by taking Mechanical Supervisor into the Electrical Wing, offending his right to promotion enshrined under Articles 14 and 16 of the Constitution. The writ petitioner holds only Diploma in Electrical Engineering. S/Shri Bidura Charan Mohapatra and Parijat Ray hold double diploma of Mechanical and Electrical Engineering. It is settled law that the Government or the Corporation, due to administrative exigencies, is entitled to and has power to reorganise the existing cadres of amalgamate some or carve out separate cadres. The pre-existing three separate cadres, namely, Electrical, Mechanical and the composite cadre, namely, Electrical-Mechanical were sought to be amalgamated into two cadres by absorbing the personnel working in the composite cadre, namely, Electrical-Mechanical in either Electrical cadre or Mechanical cadre. Options have been called for in that regard from all the persons working in the Electrical-Mechanical cadre, and the appellants exercised their options for absorption in Electrical cadre. The employees working in the Electrical and Mechanical cadres were also aware of the same. It was, therefore, open to the respondent, to raise any objection to the policy at that stage. But he failed to so. The decision to amalgamate the existing cadres by reorganising into two cadres was a policy decision taken on administrative exigencies. The policy decision is not open to judicial review unless it is mala fide, arbitrary or bereft of any discernible principle. On account of the amalgamation and adjusting the composite Electrical-Mechanical cadre in either of the Electrical or Mechanical cadre as per the options given, the order of seniority of the employees working in Electrical or Mechanical cadres is likely to be reviewed. When the persons in the composite Electrical-Mechanical cadre opted to the Electrical cadre, they are entitled to be considered for their fitment to the cadre as per the seniority from the date of their initial appointment vis-a-vis their scale of pay. This was the procedure adopted by the Corporation in fixing the inter se seniority. The procedure adopted is just, fair and reasonable and beneficial to all the employees without affecting their scales of pay or loosing the seniority from the date of initial appointment. ***Undoubtedly, in this process the respondent/writ petitioner lost some place in seniority which is consequential to amalgamation. He has not been deprived of his right to be considered for promotion, only his chances of promotion have been receded. It was not the case of the respondent that the action was actuated by mala fide or colourable exercise of power. There is no fundamental right to promotion, but an employee has only right to be considered for promotion, when it arises, in accordance with the relevant rules.*** *From this perspective in our view the conclusion of the High Court that the Gradation List prepared by the Corporation is in violation of the right of the respondent/writ petitioner to equality enshrined under Article 14 read with Article 16 of the Constitution, and the respondent/writ petitioner was unjustly denied of the same is obviously unjustified."*

14.4. In Dinesh Kumar Sharma, (2004) 10 SCC 734, the following is the observation:

"Another issue that deserves consideration is whether the year in which the vacancy accrues can have any relevance for the purpose of determining the seniority irrespective of the fact when the persons are recruited. Here the respondent's contention is that since the vacancy arose in 1995-1996, he should be given promotion and seniority from that year and not from 1999, when his actual appointment letter was issued by the appellant. ***This cannot be allowed as no retrospective effect can be given to the order of appointment order under the Rules nor is such contention reasonable to normal parlance.*** *This was the view taken by this Court in Jagdish Ch. Patnaik Vrs. State of Orissa, (1998) 4 SCC 456."*

14.5. In Uttaranchal Forest Rangers' Assn. (Direct Recruit) Vrs. State of U.P., (2006) 10 SCC 346, the following is the observation of the Hon'ble Supreme Court of India:

"37. We are also of the view that no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre so as to adversely affect

the direct recruits appointed validly in the meantime, as decided by this Court in Keshav Chandra Joshi Vrs. Union of India, 1992 Supp (1) SCC 272 held that when promotion is outside the quota, seniority would be reckoned from the date of the vacancy within the quota rendering the previous service fortuitous. The previous promotion would be regular only from the date of the vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent confirmation. In order to do justice to the promotees, it would not be proper to do injustice to the direct recruits. The rule of quota being a statutory one, it must be strictly implemented and it is impermissible for the authorities concerned to deviate from the rule due to administrative exigencies or expediency. The result of pushing down the promotees appointed in excess of the quota may work out hardship, but it is unavoidable and any construction otherwise would be illegal, nullifying the force of the statutory rules and would offend Articles 14 and 16(1) of the Constitution.

38. This Court has consistently held that no retrospective promotion can be granted nor any seniority can be given on retrospective basis from a date when an employee has not even borne in the cadre particularly when this would adversely affect the direct recruits who have been appointed validly in the meantime. In State of Bihar Vrs. Akhouri Sachindra Nath, 1991 Supp (1) SCC 334 this Court observed that: (SCC pp. 342-43, para 12)

'12. In the instant case, the promotee Respondents 6 to 23 were not borne in the cadre of Assistant Engineer in the Bihar Engineering Service, Class II at the time when Respondents 1 to 5 were directly recruited to the post of Assistant Engineer and as such they cannot be given seniority in the service of Assistant Engineers over Respondents 1 to 5. ***It is well settled that no person can be promoted with retrospective effect from a date when he was not borne in the cadre so as to adversely affect others. It is well settled by several decisions of this Court that amongst members of the same grade seniority is reckoned from the date of their initial entry into the service.*** *In other words, seniority inter se amongst the Assistant Engineers in Bihar Engineering Service, Class II will be considered from the date of the length of service rendered as Assistant Engineers. This being the position in law Respondents 6 to 23 cannot be made senior to Respondents 1 to 5 by the impugned Government orders as they entered into the said service by promotion after Respondents 1 to 5 were directly recruited in the quota of direct recruits. The judgment of the High Court quashing the impugned government orders made in Annexures 8, 9 and 10 is unexceptionable.' ***"*

14.6. Nani Sha Vrs. State of Arunachal Pradesh, (2007) 15 SCC 406, proceeded to observe that mere existence of a vacancy is not sufficient for an employee to claim seniority and the date of actual appointment has to be in accordance with the prescribed procedure.

14.7. In *Sunaina Sharma Vrs. State of Jammu and Kashmir, (2017) 10 SCR 261*, following observations of the Hon'ble Supreme Court are worthy of keeping note of:

*"8. At this stage, it would be pertinent to mention that it is a settled principle of law that normally no person can be promoted with retrospective effect from a date when he was not borne in the cadre. Seniority has to be reckoned only from the date the person entered into that service. ****

Thereafter, in Kaushal Kishore Singh Vrs. Dy. Director of Education, (2002) 9 SCC 634 this Court held as follows:

*'5. The claim of seniority of the employee is always determined in any particular grade or cadre and it is not the law that seniority in one grade or cadre would be dependent on the seniority in another grade or cadre. ***'*

***

15. It is well settled that retrospective promotion to a particular group can violate Article 14 and 16 of the Constitution of India. Even if the Rules enable the State to make retrospective promotion, such promotion cannot be granted at the cost of some other group. ***Therefore, the only reasonable interpretation can be that the promotees can get promotion from an anterior date only if they have worked against the said post even if it be on temporary or officiating, or ad-hoc basis etc."***

14.8. Against claim for retrospective promotion and promotional benefit, the Hon'ble Supreme Court of India in *Union of India Vrs. Manpreet Singh Poonam, (2022) 2 SCR 764* held as follows:

"14. The High Court also fell in error in taking note of the delay in considering the case of the respondents to the promotional post of JAG-I. ***No officer has a vested right to a promotional post, which is restricted to that of consideration according to law.*** *The law on this aspect is settled by this Court in the case of Ajay Kumar Shukla Vrs. Arvind Rai, 2021 SCC OnLine SC 1195 = (2022) 12 SCC 579:*

'37. This Court, time and again, has laid emphasis on right to be considered for promotion to be a fundamental right, as was held by K. Ramaswamy, J., in the case of Director, Lift Irrigation Corporation Ltd. Vrs. Pravat Kiran Mohanty, (1991) 2 SCC 295 in paragraph 4 of the report which is reproduced below:

*'4. *** There is no fundamental right to promotion, but an employee has only right to be considered for promotion, when it arises, in accordance with relevant rules. From this perspective in our view the conclusion of the High Court that the gradation list prepared by the Corporation is in violation of the right of respondent/writ petitioner to equality enshrined under Article 14 read with Article 16 of the Constitution, and the respondent/writ petitioner was unjustly denied of the same is obviously unjustified."*

38. A Constitution Bench in case of Ajit Singh Vrs. State of Punjab, (1999) 7 SCC 209, laying emphasis on Article 14 and Article 16(1) of the Constitution of India held that if a person who satisfies the eligibility and the criteria for promotion but still is not considered for promotion, then there will be clear violation of his/her's fundamental right. Jagannadha Rao, J. speaking for himself and Anand, CJI., Venkataswami, Pattanaik, Kurdukar, JJ., observed the same as follows in paragraphs 21 and 22 and 27:

'21. Articles 14 and 16(1): is right to be considered for promotion a fundamental right

22. Article 14 and Article 16(1) are closely connected. They deal with individual rights of the person. Article 14 demands that the 'State shall not deny to any person equality before the law or the equal protection of the laws'. Article 16(1) issues a positive command that "there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State'.

It has been held repeatedly by this Court that clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said clause particularises the generality in Article 14 and identifies, in a constitutional sense 'equality of opportunity in matters of employment and appointment to any office under the State'. The word 'employment' being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. ***Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be 'considered' for promotion.*** *Equal opportunity here means the right to be 'considered' for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be 'considered' for promotion, which is his personal right. 'Promotion based on equal opportunity and seniority attached to such promotion are facets of fundamental right under Article 16(1)*

***

27. In our opinion, the above view expressed in Ashok Kumar Gupta [(1997) 5 SCC 201] and followed in Jagdish Lal [(1997) 6 SCC 538] and other cases, if it is intended to lay down that the right guarantee to employees for being 'considered' for promotion according to relevant rules of recruitment by promotion (i.e. whether on the basis of seniority or merit) is only a statutory right and not a fundamental right, we cannot accept the proposition. We have already stated earlier that the right to equal opportunity in the matter of promotion in the sense of a right to be 'considered' for promotion is indeed a fundamental right guaranteed under Article 16(1) and this has never been doubted in any other case before Ashok Kumar Gupta right from 1950.'

15. On facts, we find that promotions could be given for the reason that the migration of the then incumbent in the post of JAG-I, despite being in the select list to the cadre of IAS, did not take place and thus, they were working in the said post till the date of notification paving way. The aforesaid factual position not disputed, the rigour of Rule 4 would certainly come into play. ***We do not find the proviso to Rule 4 helping the case of the respondents. The post of JAG-I is certainly a promotional post from the feeder cadre of the JAG-II.***

16. It is trite law that once an officer retires voluntarily, there is cessation of jural relationship resorting to a "golden handshake" between the employer and employee. Such a former employee cannot seek to agitate his past, as well as future rights, if any, sans the prescription of rules. This would include the enhanced pay scale. The Respondent in Civil Appeal No.517 of 2017 was rightly not considered in the DPC in 2012 since he was no longer in service at the relevant point of time. The High Court has committed an error in relying upon a circular, which has got no application at all, particularly in the light of our finding that we are dealing with a case of promotion simpliciter as against up-gradation of any nature.

17. On facts, there is no dispute that Respondent in Civil Appeal No.518 of 2017 was given promotion after the successful consideration by the DPC. On such clearance the appellant has rightly fixed the promotion with the year of actual vacancy, as per rules. Thus, the Respondent neither on facts nor on law can claim retrospective promotion, and that too from the year 2009 being the year in which he was placed in the select list against a notional vacancy, especially when the then existing vacancy accrued only in the year 2011, when the JAG-I officers were actually inducted into IAS, against which he was promoted. ***As such, the promotion cannot be granted retrospectively and extended to give benefit and seniority from the date of notional vacancy, causing violence to Rule 4 and 7 of the 2003 Rules.***

18. ***A mere existence of vacancy per se will not create a right in favour of an employee for retrospective promotion when the vacancies in the promotional post is specifically prescribed under the rules, which also mandate the clearance through a selection process. It is also to be borne in mind that when we deal with a case of promotion, there can never be a parity between two separate sets of rules.*** *In other words, a right to promotion and subsequent benefits and seniority would arise only with respect to the rules governing the said promotion, and not a different set of rules which might apply to a promoted post facilitating further promotion which is governed by a different set of rules. In the present case, the authority acting within the rules has rightly granted promotion after clearance of DPC on 17.04.2012 with effect from 01.07.2011, when the actual vacancies arose, which in any case is a benefit granted to the Respondent in Civil Appeal No.518 of 2017. In our view, this exercise of power by the authority of granting retrospective promotion with effect from the date on which actual vacancies arose is based on objective considerations and a valid classification.*

19. This Court in the case of Union of India Vrs. K.K. Vadhera, 1989 Supp (2) SCC 625 has clearly laid down that the promotion to a post should only be granted from the date of promotion and not from the date on which vacancy has arisen, and has observed that:

*'5. *** We do not know of any law or any rule under which a promotion is to be effective from the date of creation of the promotional post. After a post falls vacant for any reason whatsoever, a promotion to that post should be from the date the promotion is granted and not from the date on which such post falls vacant. In the same way when additional posts are created, promotions to those posts can be granted only after the Assessment Board has met and made its recommendations for promotions being granted. If on the contrary, promotions are directed to become effective from the date of the creation of additional posts, then it would have the effect of giving promotions even before the Assessment Board has met and assessed the suitability of the candidates for promotion. In the circumstances, it is difficult to sustain the judgment of the Tribunal.'*

20. Similarly, this Court in the case of Ganga Vishan Gujarati Vrs. State of Rajasthan, (2019) 16 SCC 28 has held that:

'45. A consistent line of precedent of this Court follows the principle that retrospective seniority cannot be granted to an employee from a date when the employee was not borne on a cadre. Seniority amongst members of the same grade has to be counted from the date of initial entry into the grade. This principle emerges from the decision of the Constitution Bench of this Court in Direct Recruit Class II Engg. Officers' Assn. Vrs. State of Maharashtra, (1990) 2 SCC 715. The principle was reiterated by this Court in State of Bihar Vrs. Akhouri Sachindra Nath, 1991 Supp (1) SCC 334 and State of Uttaranchal Vrs. Dinesh Kumar Sharma, (2007) 1 SCC 683. In Pawan Pratap Singh Vrs. Reevan Singh, (2011) 3 SCC 267 = (2011) 2 SCR 831, this Court revisited the precedents on the subject and observed: (SCC pp. 281-82, para 45)

*'45. ****

(i) The effective date of selection has to be understood in the context of the Service Rules under which the appointment is made. It may mean the date on which the process of selection starts with the issuance of advertisement or the factum of preparation of the select list, as the case may be.

(ii) Inter se seniority in a particular service has to be determined as per the Service Rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.

(iii) Ordinarily, notional seniority may not be granted from the backdate and if it is done, it must be based on objective considerations and on a valid classification and must be traceable to the statutory rules.

(iv) ***The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant Service Rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime.'***

This view has been re-affirmed by a Bench of three Judges of this Court in P. Sudhakar Rao Vrs. U.Govinda Rao, (2013) 8 SCC 693."

21. For the aforesaid reasoning, we are unable to give our imprimatur to the reasoning of the High Court."

14.9. With the aforesaid view of the Hon'ble Supreme Court of India, it may be worthwhile to take cognizance of the fact that the promotion of the petitioner from ALO (as there was no cadre rules at the relevant point of time) to LO was granted as "deemed promotion" and on the very same date of such promotion *vide* Notification No.17.11.2021 (Annexure-5), he was promoted to the rank of Under Secretary on *ad hoc*

basis for a period of one year "as a special case due to hardship faced" by him. Furthermore, by way of a petition, being I.A. No.4507 of 2024, enclosing therewith a Notification dated 05.01.2024, it has been brought to the notice of this Court that promotion to the rank of Deputy Secretary has been accorded to the petitioner, the content of such notification is reproduced hereunder:

"Government of Odisha
Home Department
Notification
Bhubaneswar, dated the 5th January, 2024

No. HOME-OSS-PMTN-0009-2023—609/OSS

Sri Chira Kumar Mohapatra, Under Secretary to Government, Forest, Environment and Climate Change Department is hereby promoted to the rank of Deputy Secretary in OSS Cadre in the Level-13 of Pay Matrix of Odisha Revised Scale of Pay Rules, 2017 against the post kept vacant in pursuance of the Order dated 11.07.2023 of the Hon'ble High Court in W.P.(C) No.14238 of 2023 on ad hoc basis for a period of one year or till regular promotion on the concurrence of the OPSC or till the date of his retirement whichever is earlier subject to the final outcome of O.A. No.1017/2010, O.A. No.102/2011, O.A. No.150/2011, O.A. No.152/2011, O.A. No.153/2011, O.A. No.154/2011, O.A. No.155/2011, O.A. No.156/2011, W.P.(C) No.6837/2022, W.P.(C) No.6841/2022, W.P.(C) No.4216 of 2023, W.P.(C) No.14328 of 2023 and other related cases, if any.

On promotion, he is posted as Deputy Secretary in Forest, Environment and Climate Change Department.

By Order of the Governor
Sd/- 05.01.2024
Joint Secretary to Government."

Conclusion and decision:

15. There seems no arbitrariness in action of the Additional Chief Secretary to the Government of Odisha in Home Department while deciding the matter of antedating promotion in the post of Under Secretary in the impugned Order dated 02.02.2023 passed in pursuance of the direction of this Court *vide* Order dated 04.01.2023 in W.P.(C) No.36580 of 2022.

15.1. The petitioner being promoted in the rank of Under Secretary on *ad hoc* basis by virtue of Notification dated 17.11.2021 in consideration of "hardship faced" by him treating his promotion to the post of Law Officer on the said date as "deemed promotion", in view of *Sunaina Sharma Vrs. State of Jammu and Kashmir, (2017) 10 SCR 261* the petitioner-promotee cannot get promotion from an anterior date.

15.2. In furtherance to what has been observed above, it is requirement of Rule 3 of the OSS Rules, 1980 that for granting promotion to the rank of Under Secretary zone of consideration was to be ascertained in consonance with the provisions of the Odisha Civil Services (Zone of Consideration for Promotion) Rules, 1988. It is also not emanating from record whether in terms of Rule 19 of the OSS Rules, the provisions of the Odisha Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 and rules made thereunder have been adhered to. As the petitioner was granted promotion to the rank of Under Secretary as special case, the DPC ignored said provisions of statute. Record reveals that he was granted deemed promotion to the post of Law Officer and on the same date he was promoted to the rank of Under Secretary.

15.3. It is also noticed that preparation of list of officers found suitable for promotion by the Selection Board as per clause (5) of Rule 10 of the OSS Rules would be based on merit and suitability with due regard to seniority and experience. In this context it may be apposite to refer to Rule 3(b) of the Odisha Civil Services (Criteria for Promotion) Rules, 1992, whereby and whereunder selection for such promotion was to be made on the basis of merit and suitability in all respect with due regard to seniority and the names of persons included in the Select List shall be arranged in order of seniority in the feeder service or grade. Nothing is put forth in this regard on record.

15.4. However, there is an indication in the "Minutes of the Review Selection Board Meeting held on 09.11.2021" for consideration of promotion of the petitioner in the rank of Under Secretary from Assistant Law Officer, the Committee comprising of the Additional Chief Secretary to Government, Home Department; Additional Secretary to Government, Finance Department; and Additional Secretary to Government, General Administration & Public Grievance Department considered PARs/CCRs of preceding 3 years and 2 years back periods, as the PARs/CCRs of preceding 5 years were not available.

15.5. As is required under Rule 3 of the Odisha Civil Services (Criteria for Promotion) Rules, 1992, the available Confidential Character Rolls/Performance Appraisal Reports are to be taken into consideration for promotion which shall include C.C.Rs./P.A.Rs. covering at least a period of three years in preceding five years. It has been clarified in said rules that, the expression 'preceding five years' means the five years preceding the year which the officer's performance is, in accordance with the relevant Recruitment Rules, first evaluated.

15.6. On analysis of available material, the Review Selection Board assessed the performance of the petitioner as 'fit' for promotion to the rank of Under Secretary in OSS Cadre and his seniority has been fixed below the existing Under Secretaries on the date of his promotion.

15.7. Though fundamental right is attracted for consideration for promotion subject to eligibility so far as the right to equal opportunity is concerned as envisaged under Articles 14 and 16 of the Constitution of India, such a right cannot be construed to enure vested right for being necessarily promoted to the promotional post, as mere existence of a vacancy is not sufficient for an employee to claim seniority and the date of actual appointment has to be in accordance with the prescribed procedure. It may also be observed that there happens to be some time lag between the year when the vacancy accrues and the year when the final appointment in the promotional post is made for complying with the procedure prescribed, but that would not give a handle to the Court to include something which is not there in the rules.

15.8. Under the aforesaid premise, the prayer of the petitioner to "quash the impugned Order dated 02.02.2023 in Annexure-9" does not warrant indulgence, as the said order is rational and has been made within the parameters of legal perspective delineated by the Hon'ble Supreme Court of India as discussed supra.

16. So far as next prayer of the petitioner is concerned, i.e., to antedate the promotion of the petitioner to the post of Under Secretary with effect from 25.02.2021 in

terms of the decision of the Hon'ble Supreme Court under Annexure-3 series and to allow him consequential promotion to the post of Deputy Secretary with effect from 31.01.2023, i.e., the date of promotion of his juniors in service *vide* Annexure-11 with consequential restoration of his *inter se* seniority in the cadre of Under Secretary by modifying Notification dated 17.11.2021 as well as Gradation List published on 05.01.2022 is concerned, this Court is not persuaded to grant relief to the petitioner.

16.1. In the first place, this Court in the instant case vide Order dated 11.07.2023 has issued notice to the opposite parties and directed that,

> *"As an interim measure, it is directed that one post of Deputy Secretary shall not be filled up till the next date."*

16.2. In pursuance thereof, the petitioner, who was due to get retired on attaining the age of superannuation on 30.06.2024, got promoted to the rank of Deputy Secretary in OSS Cadre in the Level-13 vide Home Department Notification dated 05.01.2024.

16.3. As the petitioner has been granted the relief sought for in the second prayer made in the writ petition, this Court does not feel it expedient to modify the Notification dated 17.11.2021 and Gradation List published on 05.01.2022.

16.4. Another reason for non-interference is that intermeddling with the Gradation List at this distance of time would disturb the seniority of other employees whose names have already been shown above the petitioner.

16.5. The position of seniority has been succinctly propounded as follows in the case of *R. Prabha Devi Vrs. Governmen of India, (1988) 3 SCR 147*:

> *"The prescribing of an eligibility condition for entitlement for consideration for promotion is within the competence of the rule-making authority. This eligibility condition has to be fulfilled by the Section Officers including senior direct recruits in order to be eligible for being considered for promotion. When qualifications for appointment to a post in a particular cadre are prescribed, the same have to be satisfied before a person can be considered for appointment.* ***Seniority in a particular cadre does not entitle a public servant for promotion to a higher post unless he fulfils the eligibility condition prescribed by the relevant rules. A person must be eligible for promotion having regard to the qualifications prescribed for the post before he can be considered for promotion.*** *Seniority will be relevant only amongst persons eligible. Seniority cannot be substituted for eligibility nor it can over-ride it in the matter of promotion to the next higher post."*

16.6. The petitioner was not in the cadre of Law Officer while other eligible Law Officers were being considered for promotion to the rank of Under Secretary. At this juncture, reference to Rule 11 of the Odisha Service Code may not be inept to be referred to in order to ascertain the true purport of the term "cadre". The term is defined as "the strength of a service or part of service sanctioned as a separate unit". Normally, an ex-cadre post means a post outside the cadre posts comprised in a service and all posts in the service whether permanent or temporary are generally regarded as cadre posts. (See, *O.P. Singla Vrs. Union of India, (1985) 1 SCR 351*).

16.7. In *Jaskaran Singh Brar Vrs. State of Punjab, 2004 SCC OnLine P&H 1029 = ILR (2005) 1 P&H 143 = (2005) 1 SLR 792*, it has been noticed by the Punjab and Haryana High Court as follows:

"This takes us to question No. 4, namely, what is an ex-cadre post and where does it stand vis-à-vis a cadre post. "Cadre" is a well-defined connotation in the service jurisprudence. Invariably, a service and/or posts created in relation to the affairs of the Union and/or States, are governed by either the legislative enactments or the Rules framed by the subordinate legislation in exercise of its powers under proviso to Article 309 of the Constitution of India. In the Acts/Rules, as the case may be, the "service" and the "posts" which are governed by such Acts/Rules are defined. Since the posts are created for running an efficient administration, namely, in public interest, the total strength of such posts is also invariably reflected in the Acts/Rules governing such posts. The strength of "service" or the posts, namely, a part of "service", along with their identified nomenclature as well as the mode of their recruitment and/or eligibility conditions required to be possessed to man the same, are normally known as the "cadre posts". However, in the administrative exigencies and to meet urgent requirements and/or to deal with a situation having arisen due to unforeseen circumstances, sometimes posts are created which appear to be similar to some existing cadre posts either due to their deceptive nomenclature or in the nature of the duties attached to such posts, which are known as the "ex-cadre posts". Since these posts do not form a part of the total strength of posts governed under the Act/Rules, as the case may be, obviously these posts are not treated as cadre posts and are thus strictly not governed by the Act/Rules meant for the cadre posts. Normally, an "ex-cadre post" is a diminishing cadre and once the incumbent goes, the post also stands abolished. It is for this precise reason that the incumbent of an "ex-cadre post" is always an outsider to the "cadre" and does not have any right either for fixation of inter se seniority in the cadre nor can claim pay scale, promotions and other incidental perks admissible to the incumbents of the cadre posts for the obvious reason that both are not governed by the same set of Act/Rules."

16.8. The decision in *Dr. Chakradhar Paswan Vrs. State of Bihar, (1988) 2 SCC 214*, clarifies the position that it is open for the Government to constitute two distinct cadres in any particular service as it may choose according to administrative convenience and expediency. It is also well-established principle *vide State of Maharashtra Vrs. Purushottam, (1996) 8 SCC 266* that services rendered by an employee in one cadre cannot be taken into account for determining the seniority in another cadre unless by any rules of seniority this privilege is conferred.

16.9. Taking cue from the above discussions with respect to understanding of "cadre", "service" and "post", when the petitioner was not borne on the cadre till he was considered for promotion to the post of Law Officer from Assistant Law Officer, which was done simultaneously while granting him promotion to the rank of Under Secretary as special case on account of hardship faced, the claim of the petitioner to modify the Gradation List is unreasonable. Hence the prayer of the petitioner is liable to be rejected and, hereby rejected.

17. In the result, the writ petition fails and, accordingly, the same is dismissed with no order as to costs.

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2024 (II) ILR-CUT-1322

MURAHARI SRI RAMAN, J.

CRP NO.10 OF 2022

ANIL KUMAR DALAL .....Petitioner

-V-

STATE OF ODISHA .....Opp.Party

CODE OF CIVIL PROCEDURE, 1908 – Order VII, Rule 11(d) – Whether a plaint can be rejected on the ground of limitation? – Held, Yes – From the statement in the plaint, if it appears that the suit is barred by any law, which includes the law of limitation, in clause (d) of Rule 11 which empowers the Court to reject the plaint.

Case Laws Relied on and Referred to :-

1. 2007 (II) OLR (SC) 613 = (2007) 6 SCR 608 = (2007) 5 SCC 614 : Hardesh Ores Pvt. Ltd. Vrs. Hede & Company.
2. 1996 (II) OLR 402 = AIR 1997 Ori 67 = 82 (1996) CLT 653 : Satyananda Sahoo Vrs. Ratikanta Panda.
3. W.P.(C) No.4602 of 2016 : Batakrushna Sahoo Vrs. Commissioner, Consolidation, Odisha, Bhubaneswar & Ors.
4. (2019) 4 SCR 1069 : Raghwendra Sharan Singh -V- Ram Prasanna Singh (Dead) by LRs.
5. (2007) 7 SCC 510 : Popat and Kotecha Property -V- State Bank of India Staff Association.
6. (2009) 3 SCR 238 = (2009) 12 SCC 175 : J. Kumaradasan Nair Vrs. Iric Sohan.
7. (2015) 7 SCR 291 = 2015 INSC 346 : M.P. Steel Corporation Vrs. CCE.
8. (2004) 12 SCC 278 : N. Mani Vrs. Sangeetha Theatre.
9. (2011) 2 SCC 654 : Kedar Shashikant Deshpande Vrs. Bhor Municipal Council.
10. (1978) 1 SCR 742 : T. Arivandandam Vrs. T.V. Satyapal.
11. (2020) 5 SCR 694 : Dahiben Vrs. Arvindbhai Kalyanji Bhanusali.
12. 1986 Supp. SCC 315 : Azhar Hussain Vrs. Rajiv Gandhi.
13. (2004) 9 SCC 512 : Liverpool & London S.P. & I Assn. Ltd. -V- M.V. Sea Success I & Anr.
14. (1999) 3 SCC 267 : D. Ramachandran Vrs. R.V. Janakiraman.
15. AIR 1962 SC 941 : Vijay Pratap Singh Vrs. Dukh Haran Nath Singh.
16. (2003) 1 SCC 557 : Saleem Bhai Vrs. State of Maharashtra.
17. (1998) 7 SCC 184 : Raptakos Brett & Co. Ltd. Vrs. Ganesh Property.
18. (2006) 3 SCC 100 : Mayar (H.K.) Ltd. Vrs. Vessel M.V. Fortune Express.
19. (2017) 13 SCC 174 : Madanuri Sri Rama Chandra Murthy Vrs. Syed Jalal.
20. (2018) 13 SCR 1242 : Urvashiben Vrs. Krishnakant Manuprasad Trivedi.
21. (2019) 15 SCR 795 : Nusli Neville Wadia Vrs. Ivory Properties.
22. AIR 1964 SC 497 : Major S.S. Khanna Vrs. Brig. F.J. Dhillon.
23. (2005) 6 SCC 614 : Narne Rama Murthy Vrs. Ravula Somasundaram & Ors.
24. (2015) 5 SCC 674 : Satti Paradesi Samadhi & Pillayar Temple Vrs. M. Sankuntala (Dead) through LRs & Ors.
25. 1979 M.P.L.J. 736 : Ramdayal Umraomal Vrs. Pannalal Jagannathji.
26. AIR 2015 SC 3357 : Vaish Aggarwal Panchayat Vrs. Inder Kumar & Ors.
27. (2018) 14 SCC 187 : Hareendran and others Vrs. Sukumaran & Ors.
28. (2006) 5 SCC 638 : Ramesh B. Desai Vrs. Bipin Vadilal Mehta.
29. AIR 2019 SC 1430 : Raghwendra Sharan Singh Vrs. Ram Prasanna Singh (Dead) by Lrs.
30. (2005) 5 SCC 548 : N.V. Srinivasa Murthy Vrs. Mariyamma (Dead) by proposed LRs.
31. (2018) 9 SCC 808 : Suman Devi Vrs. Manisha Devi & Ors.
32. (2006) 5 SCC 658 : Balasaria Construction (P) Ltd. Vrs. Hanuman Seva Trust.
33. (2018) 6 SCC 422 : Chhotanben Vrs. Kiritbhai Jalkrushnabhai Thakkar.
34. (2022) 3 SCR 302 : Biswanath Banik Vrs. Sulanga Bose.
35. (2007) 10 SCC 59 = (2007) 10 SCR 520 : Ram Prakash Gupta Vrs. Rajiv Kumar Gupta.
36. (1998) 2 SCC 70 : ITC Ltd. Vrs. Debts Recovery Appellate Tribunal.
37. (2023) 14 SCR 153 = 2023 INSC 964 : Kum Geetha Vrs. Nanjundaswamy.
38. (2023) 16 SCR 872 = 2023 INSC 1043 : Eldeco Housing & Industries Ltd. Vrs. Ashok Vidyarthi.
39. (2008) 12 SCC 661 : Kamala Vrs. K.T. Eshwara Sa & Ors.
40. (2020)17 SCC 260 = 2020:INSC:413 : Shakti Bhog Food Industries Ltd. -v- Central Bank of India & Anr.

41. (2021)9 SCC 99 = 2011:INSC:387 : Srihari Hanumandas Totala -v- Hemant Vithal Kamat & Ors.
42. (2009) 4 SCR 1223 : Krishna Kumar Sharma Vrs. Rajesh Kumar Sharma.
43. (1976) 4 SCC 634 : The Kerala State Electricity Board, Trivandrum -V- T.P Kunhaliumma.
44. (1989) 4 SCC 582 : S.S. Rathore Vrs. State of M.P.
45. (2011) 9 SCC 126 : Khatri Hotels Private Limited Vrs. Union of India.
46. (2005) Supp.2 SCR 1030 : Popat & Katecha Property -v- State Bank of India Staff Association.
46. (1996) 7 SCC 626 : V. Subba Rao Vrs. Secretary to Govt. PR & RD, Govt. of A.P.
47. (1982) 3 SCC 487 : Roop Lal Sathi Vrs. Nachhattar Singh Gill.
48. (1936) 1 KB 697 : Scott, L.J. in Bruce Vrs. Odhams Press Ltd.
49. (2020) 5 SCR 694 : Dahiben Vrs. Arvindbhai Kalyanji Bhanusali.
50. (2005) 10 SCC 51 : Swamy Atmanand Vrs. Sri Ramakrishna Tapovanam.
51. FA No. 254 of 2020 : Bhadreshkumar Bipinchandra Sheth Vrs. Rajnikant Manubhai Patel.
52. (2006) 6 SCC 207 : Om Prakash Srivastava Vrs. Union of India.
53. (2001) 2 SCC 294 : Rajasthan High Court Advocates' Association Vrs. Union of India.
54. (1977) 1 SCC 791 : Gurdit Singh Vrs. Munsha Singh.
55. (2000) 7 SCC 640 : Navinchandra N. Majithia Vrs. State of Maharashtra.
56. AIR 2002 SC 126 : Union of India Vrs. Adani Exports Ltd.
57. (2008) 6 SCR 653 : Kamlesh Babu Vrs. Lajpat Rai Sharma.

For Petitioner : Ms. Amit Prasad Bose, D.J. Sahoo & A. Pattnaik.
For Opp.Party : Mr. Sailaza Nandan Das, ASC.

JUDGMENT Date of Hearing : 22.07.2024 : Date of Judgment : 02.08.2024

MURAHARI SRI RAMAN, J.

THE CHALLENGE:

Questioning the propriety of Order dated 30.03.2022 passed by the Additional Senior Civil Judge, Balangir in suit being C.S. No.173 of 2011, rejecting the petition under Order VII, Rule 11 of the Code of Civil Procedure, 1908 ("CPC", for short) filed by the Petitioner-Defendant before the learned Trial Court, this Civil Revision Petition has been filed under Section 115 with the following prayer(s):

> *"The Petitioner, therefore, prays that Your Lordship's may graciously be pleased to admit the writ and call for the records from the opposite parties and after hearing the parties set aside the order dated 30.03.2022 and thus allow the petition under Annexure-4.*
>
> *And for this act of kindness the petitioner shall, as in duty bound ever pray."*

THE FACTS:

2. The facts as adumbrated by the petitioner-defendant in the revision petition reveal that the suit, being C.S. No.173 of 2011, was filed for recovery of cost of repair undertaken by the Government and penalty imposed on left out balance work in terms of clause 2(b) of amendment to F-2 Agreement for non-performance of the contract to the tune of Rs.10,30,110/- with pendente lite and future interest.

2.1. The plaint discloses cause of action arose on 09.03.2006, i.e., the date on which F-2 Agreement was executed and on 22.12.2006, when the petitioner-defendant was called upon to deposit an amount of Rs.10,30,110/-. Objecting to maintainability of suit, the petitioner-defendant filed a petition under clause (a) and clause (b) of Rule 11 of Order VII on the ground that as the suit has been filed in the year 2011 disclosing cause of action to have arisen in the year 2006, the suit is barred by limitation, in view of Part-

II-SUITS RELATING TO CONTRACTS, First Division—Suits of the Schedule appended to the Limitation Act, 1963.

2.2. The petitioner contended that the suit for recovery of money should have been filed within three years from 22.12.2006, which is apparently shown in the plaint to be the last date of cause of action that arose.

2.3. The Additional Senior Civil Judge, Balangir, relying on the decisions in the case of *Hardesh Ores Pvt. Ltd. Vrs. Hede and Company, 2007 (II) OLR (SC) 613 = (2007) 6 SCR 608 = (2007) 5 SCC 614 and Satyananda Sahoo Vrs. Ratikanta Panda, 1996 (II) OLR 402 = AIR 1997 Ori 67 = 82 (1996) CLT 653* held that plaint can be decided on the ground of limitation in the course of trial of the suit as the question of limitation is mixed question of law and fact. Such question does require analysis on the basis on the evidence of the parties and observed that,

> *"It is the duty of the plaintiff to bring facts to record to prove that the suit is filed within limitation. The Court to give opportunity to the plaintiff to explain the same. The defendant has no role at all. So, from the discussion mentioned above, it is empathetically stated that the contention of the defendant, so far rejection of the plaint are not coming under the provision of the Order 7, Rule 11 of the CPC, thus the petition is liable to be rejected."*

2.4. The petitioner-defendant being aggrieved has preferred this revision petition.

HEARING OF THE CIVIL REVISION:

3. Since *vide* Order dated 10.11.2022, this Court has granted stay of further proceeding in the suit i.e., C.S. No.173 of 2011 pending in the Court of Additional Senior Civil Judge, Balangir, on consent the matter has been taken up for final hearing.

3.1. Heard Sri Amit Prasad Bose, learned Counsel for the petitioner-defendant and Sri Sailaza Nandan Das, learned Additional Standing Counsel for the opposite party-plaintiff.

3.2. Hearing being concluded on 22.07.2024, the matter is kept reserved for preparation of Judgment and delivery thereof.

ARGUMENTS OF COUNSEL FOR THE RESPECTIVE PARTIES:

4. Sri Amit Prasad Bose, learned counsel for the petitioner in the course of hearing submitted and reiterated in the written note of submission that in view of *Satyananda Sahoo Vrs. Ratikanta Panda, 1996 (II) OLR 402 = AIR 1997 Ori 67 = 82 (1996) CLT 653*, as referred to in the impugned order and relied on by the learned trial Court, this Court is vested with jurisdiction to examine "carefully the contents and averments in the plaint in order to find out if the same is barred by limitation". Hence, he submitted that on plain reading of the plaint it transpires that the last date on which cause of action arose is found mentioned in the plaint as 22.12.2006, i.e., when the defendant was called upon to deposit the said amount". As is apparent from the year of filing of the suit, which bears C.S. No.173 of 2011, is indicative of the fact that the same was filed in 2011 before the Court of Civil Judge (Senior Division), Balangir. Thus, the Additional Senior Civil Judge, Balangir committed manifest error in transgressing his jurisdiction and seeking to proceed with the suit. Having not applied judicious mind while considering

the petition under clauses (a) and (d) of Order VII, Rule 11 of the Code of Civil Procedure, 1908, said Court fell in grave error of law.

4.1. To buttress his argument that in absence of any specific provision contained in the Limitation Act, Article 137 thereof would come into play in order to ascertain whether the suit is hit by law of limitation, Sri Amit Prasad Bose, learned counsel for the petitioner placed reliance on the judgment dated 25.07.2022 rendered by this Court in *Batakrushna Sahoo Vrs. Commissioner, Consolidation, Odisha, Bhubaneswar and others, W.P.(C) No.4602 of 2016* and the judgment dated 13.03.2019 of the Hon'ble Supreme Court of India in *Raghwendra Sharan Singh Vrs. Ram Prasanna Singh (Dead) by LRs, Civil Appeal No.2960 (arising out of SLP(C) No.20068 of 2013), reported at (2019) 4 SCR 1069.*

4.2. Taking aid of requirement of disclosure of particulars as envisaged in clause (e) of Rule 1 of Order VII that "the plaint shall contain" *inter alia* "the facts constituting the cause of action and when it arose", Sri Amit Prasad Bose, learned Advocate has made strenuous attempt to impress upon this Court that clever drafting of the plaintiff would not protect the opposite party to agitate the cause of action in the suit. He, therefore, would submit that the expression "subsequent dates" as mentioned in paragraph 7 of the plaint would not enlarge the scope of the trial Court to proceed to examine the fact so as to support the plaintiff to demonstrate that the suit was filed within three years from 22.12.2006 cited to be the last date when the petitioner-defendant was called upon to make payment.

4.3. Sri Amit Prasad Bose, learned Advocate with his erudition drew attention of this Court to Rule 14 of Order VII to contend that the learned Additional Senior Civil Judge failed to appreciate that the plaint is silent about the disclosure of material particulars. He argued that the plaint, though mentions about "subsequent dates", no date is specifically mentioned in none of the contents of the plaint with respect to repairs and penalty being imposed and communicated to the petitioner. Such clever drafting would not shelter the suit to proceed.

5. *Per contra*, Sri Sailaza Nandan Das, learned Additional Standing Counsel for the State-opposite party refuting the contentions of learned counsel for the petitioner, vehemently argued that paragraph 7 of the plaint is very clear that the last date of cause of action is not 22.12.2006, but it is the date when the opposite party was called upon by the petitioner-plaintiff to make payment of the cost repairs incurred by the Government on account of abandonment of work by the petitioner.

5.1. He would submit that the cause of action as spelt out in paragraph 7 of the suit clarifies the position that the date 22.12.2006 is the date when the petitioner was called upon to make good the expenditure incurred towards repairs undertaken due to non-execution of the work as per agreement. This apart, other recital(s) of the plaint is also to be looked into while ascertaining the limitation aspect. Contents of the plaint would depict that the petitioner is required to make payment not only towards expenditure incurred towards repairs, but also is liable for deposit of penalty in terms of F-2 Agreement, which fact can be determined by the Court on the basis of evidence produced. In the trial only it can be ascertain whether the suit is barred by limitation as the stage of

penalty arose after accomplishment of execution of balance work that is left out by the defendant in defiance of covenant of contract. Therefore, it cannot be construed from the recitals of the plaint that the last date of cause of action is 22.12.2006 and the petition under Order VII, Rule 11 is premature.

5.2. To countenance his submission, Sri Sailaza Nandan Das, learned Additional Standing Counsel has taken this Court to the following paragraphs of the plaint:

> "***
>
> *2. That the defendant was awarded a contract for "Periodical repair from 227/10 to 239/0 and from 245/0 to 249/0 N.H. No.224" at an estimated cost of Rs.96,51,671/- (Rupees Ninety Six Lakhs Fifty One Thousand Six Hundred and Seventy One). An agreement for the purpose was entered into between the parties in Agreement No.108 F-2 of 2005-06 on 09.03.2006, the agreement inter-alia, stipulates that the date of commencement of the work should be 09.03.2006 and the date of completion should be 08.02.2007. It was further stipulated that the Contractor shall compensate the Government for any delay or failure in completion of the work. The amended clauses 2(b) of the contract agreement specially lays down that '20% of the left over work shall be realized from the Contractor as penalty' if the defendant fails to complete the contract. Accordingly, the defendant was issued with the work order.*
>
> *3. That, the defendant Contractor could not complete the awarded work in the stipulated time and left the work incomplete by this time he had completed work of total value of Rs.15,09,224/- leaving a balance work value of Rs.81,42,337/-. Due to such non-execution of the work the said agreement was rescinded under clause 2(b) of the F-2 agreement by Letter No.WR-III-P/R-T/14/05-14100 dt.6.12.2006 of the Chief Engineer, N.Hs. Odisha, Bhubaneswar with stipulation of recovery of the agreed penalty of the rate of 20% of the left over work value, that is Rs.10,30,110/-. The fact of rescission of contract was intimated to the defendant by the plaintiff in its letter No.4310 dated 18.12.2006. He was also asked to deposit the said amount with the plaintiff, as per statement of accounts given below:*

1.	*Agreement value of the work vide Agrt No.108 F-2 of 2005-06*	*Rs. 96,51,671.00*
2.	*Gross value of work done as per Final Measurement vide M.B. No.2992, P-28*	*Rs. 15,09,224.00*
3.	*Value of balance left over work*	*Rs. 81,42,447.00*
4.	*Penalty under amendment clause 2(b) of F-2 Agreement i.e. @20% of the left out balance of work*	*Rs. 16,28,489.00*
5.	*Cost of repair under taken by Department*	*Rs. 38,468.00*
6.	*Total dues recoverable from the Agency*	*Rs. 16,66,957.00*
7.	*The following dues of the Agency is with the Department which can be adjusted against claim vide item-6 above.*	
(i)	*Security deposit of 1st Running Accounts bill paid*	*Rs. 53,252.00*
(ii)	*Security deposit out of 2nd R.A. Bill*	*Rs. 22,209.00*
(iii)	***Net amount of Final Bill payable to Contractor (Not yet paid)***	*Rs. 3,68,186.00*
(iv)	*E.M.D. and I.S.D. available against the Agreement*	*Rs. 1,93,200.00*
		Rs. 6,36,847.00

8. Net amount to be recovered by Money suit (Rs.16,66,957.00 – Rs.6,36,847.00) Rs. 10,30,110.00

4. That, however, the defendant has failed to deposit the said balance amount of Rs.10,30,110.00 which he owes to the plaintiff as per the agreement entered in to between the plaintiff and the defendant.

5. That, since the defendant abandoned the work and the work of repairing the N.H. is of emergent nature for smooth plying of traffic. The plaintiff had to affect repairs costing Rs.38,468/-. The defendant is also bound and liable to pay this amount to the plaintiff.

6. That, thus defendant is liable and bound to pay the sum of Rs.10,30,110/- as stated above in para-3.

7. That, the cause of action for this suit arose on 9.3.2006 when the F-2 agreement was executed on 9.3.2006 and 18.12.2006 vide letter No.4310 and 22.12.2006 when the defendant was called upon to deposit the said amount and ***on subsequent dates.****"*

5.3. Sri Sailaza Nandan Das, learned Additional Standing Counsel urged that the aforesaid contents of the plaint clearly manifest that the execution of work was required to be accomplished by 08.02.2007 as per Agreement No.108— F-2 of 2005-06 executed on 09.03.2006 between the parties. It is apparent from the pleading that since the defendant abandoned the work further repairing work was undertaken in order to make the National Highway ready for smooth plying of vehicles and make it free for flow of traffic for which the Government in State of Odisha incurred certain expenditure which the petitioner-defendant was liable to pay. Therefore, *prima facie*, the cause of action did not end within three years from 22.12.2006, in view of Part-II of Schedule appended to the Limitation Act, 1963.

5.4. It is, thus, submitted that from the statement of accounts as set forth in paragraph 3 of the plaint, it is abundantly unambiguous that "final bill" has not yet been settled with the defendant-contractor till the date of filing of the suit. On the facts, it is contended that the right to recover by way of suit did survive.

5.5. Furthermore, learned Additional Standing Counsel forcefully contended that apart from expenditure stated to have been incurred, the suit was filed for recovery of the amount of penalty imposed in terms of Clause 2(b) of F-2 Agreement, i.e., @ 20% of the left over (balance) work. Therefore, he would wish to contend that the facts narrated in the plaint specify that the suit has been filed within the period of limitation as contemplated in Part-II of the Schedule appended to the Limitation Act, 1963.

5.6. Thus, the learned Additional Standing Counsel opposing the invocation of power under Section 115, CPC, submitted that in view of legal position as set forth in *Popat and Kotecha Property Vrs. State Bank of India Staff Association, (2007) 7 SCC 510*, which supports the stand of the opposite party-plaintiff, the order dated 30.03.2022 passed by the learned Additional Senior Civil Judge, Balangir in Civil Suit No.173 of 2011 does not warrant intervention at this stage.

ANALYSIS AND DISCUSSION:

6. Before the learned Additional Senior Civil Judge, Balangir the consideration was a petition under Order VII, Rule 11 (a) and (b) of the CPC with a prayer to reject the plaint in Civil Suit No. 173 of 2011. The first objection raised by the learned Additional

Standing Counsel that though the learned counsel for the petitioner attacked the Order of the learned trial Court on the ground of limitation in terms of Order VII, Rule 11(d), the petition reveals the same inasmuch as the petitioner has been filed under Order VII, Rule 11(b).

6.1. For ready reference the petition under Order VII, Rule 11 as filed by the petitioner and enclosed to this revision petition as Annexure-4 is reproduced herein below:

> *"In the matter of a petition under Order VII, Rule 11(a) and (b) CPC to reject the plaint.*
>
> *The above named defendant begs to submit as follows:*
>
> *1.That the defendant has filed his written statement in the suit and specifically pleaded that the suit is not maintainable and the plaint is also liable to be rejected.*
>
> *2.That in plain paragraph No.7 the plaintiff has specifically pleaded the cause of action to be on 09.03.2006, 18.12.2006 and 22.12.2006 and on 'subsequent dates'. But no subsequent dates are given or pleaded in the plaint.*
>
> *3.That the present suit is filed on 2011 after four years.*
>
> ***4.That the limitation period is three years to file the suit as per Part-II of Schedule of the Limitation Act, 1963 in a suit relating to contract. The present suit is filed after one year of the prescribed limitation and hence is liable to be dismissed. Further no explanation for such delay is also given in the plaint.***
>
> ***5.That only an illusory cause of action is given in the plaint. Specific cause of actions against the defendant are not pleaded in the plaint enabling the defendant to explain the situation/allegation or take a proper stand of defense. Without proper and specific cause of action in the plaint it is liable to be rejected.***
>
> *6.That the defendant will be prejudiced if the plaint is not rejected at this stage of the suit as he is to fight the litigation for no good/legal grounds.*
>
> *In view of the above it is therefore submitted that the Hon'ble Court may be pleased to reject the plaint at this stage of the suit for the ends of justice,*
>
> *And for this act of kindness the defendant shall ever pray."*

6.2. It is emanated from the plaint that though the petitioner-defendant has mentioned the petition was filed mentioning clauses (a) and (b) of Order VII, Rule 11, this Court is required to take into consideration the substance of it. Quoting wrong provision would not take away the right to agitate the true perspective of the claim of the petitioner.

6.3. Mentioning of a wrong provision or non-mentioning of any provision of law would, by itself, be not sufficient to take away the jurisdiction of a Court, if it is otherwise vested it in law. While exercising its power, the Court will merely consider whether it has the source to exercise such power or not. Refer, *J. Kumaradasan Nair Vrs. Iric Sohan, (2009) 3 SCR 238 = (2009) 12 SCC 175; M.P. Steel Corporation Vrs. CCE, (2015) 7 SCR 291 = 2015 INSC 346.*

6.4. If an authority has a power under law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exit and can be traced to a source available in law. Quoting wrong provisions would not invalidate the order passed by the authority, if it is shown that such

order could be passed under the provisions of the statute. Reference may be had to N. Mani Vrs. Sangeetha Theatre, *(2004) 12 SCC 278; Kedar Shashikant Deshpande Vrs. Bhor Municipal Council, (2011) 2 SCC 654.*

6.5. In contrast to what is objected to by the learned Additional Standing Counsel, the impugned Order dated 30.03.2022 reflects that the learned Additional Senior Civil Judge proceeded to decide the issue raised by the petitioner-defendant on the basis of clause (a) and clause (d) of Rule 11 of Order VII.

6.6. In the light of ratio of above judgments, the argument advanced by the learned Additional Standing Counsel that the petitioner is not entitled to agitate its plea stemming on clause (d) read with clause (a) of Rule 11 of Order VII is repelled.

7. It is the submission of the learned counsel for the petitioner that the plaint does not disclose the material particulars or material fact to show that the cause of action to sue continued beyond 22.12.2006 so that the suit could be maintainable under clause (d) of Rule 11 of Order VII. Per contra, the learned Additional Standing Counsel contended that the plaint is clear to the effect that the amount of penalty and expenditure incurred by the Government, which events were subsequent to abandonment of work, are sought to be recovered from the petitioner-contractor in terms of amended Clause 2(b) of F-2 Agreement.

7.1. This Court has, therefore, taken excursion of the plaint. The dates on which cause of action arose have been enumerated in paragraph 7 of the plaint; nowhere is there any indication of any subsequent date. Though the plaintiff has stated to have initiated actions against the petitioner-defendant subsequent to 22.12.2006, this Court does not find any date beyond 22.12.2006. Analysing the plaint it is found that the opposite party-plaintiff has mentioned about non-finalisation of bill and maintenance of measurement book. Further, the plaint is silent about the period during which the repair to the National Highway was undertaken. Rather in the plaint it has been clearly mentioned that, "The fact of rescission-of contract was intimated to the defendant by the plaintiff in its Letter No.4310, dated 18.12.2006, He was also asked to deposit the said amount with the plaintiff, as per statement of accounts given below." There is no indication of specific dates with regard to subsequent action which unequivocally clarifies the position that the specific amount which was to be recovered from the defendant was within the knowledge of the Government on 18.12.2006, when demand to pay the sum of penalty and expenditure towards repairs was made. Only date, i.e., 22.12.2006 has been clearly mentioned to indicate the cause of action for filing the suit by specifically making assertion that on this date the defendant was called upon to deposit the amount. As has been contended by Sri Amit Prasad Bose, such clever drafting in order to stretch the period of limitation so as to bring the filing of suit for recovery of money within period stipulated under the Limitation Act, 1963 is impermissible.

7.2. In *T. Arivandandam Vrs. T.V. Satyapal, (1978) 1 SCR 742*, it has been made clear that,

> "*** if on a meaningful— not formal— reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power

under Order VII, Rule 11, CPC taking care to see that the ground mentioned therein is fulfilled. And, if clever, drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X, CPC. An activist Judge is the answer to irresponsible law suits. The trial court should insist imperatively on examining the party at the first bearing so that bogus litigation can be shot down at the earliest stage. The Penal Code (Ch. XI) is also resourceful enough to meet such men, and must be triggered against them. In this case, the learned Judge to his cost realised what George Bernard Shaw remarked on the assassination of Mahatma Gandhi 'It is dangerous to be too good'."

7.3. In *Hardesh Ores Pvt. Ltd. Vrs. Hede and Company, 2007 (II) OLR (SC) 613 = (2007) 6 SCR 608 = (2007) 5 SCC 614* it has been observed thus:

> *"21. The language of Order VII, Rule 11, CPC is quite clear and unambiguous. The plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law. Mr. Nariman did not dispute that 'law' within the meaning of clause (d) of Order VII, Rule 11 must include the law of limitation as well.* ***It is well settled that whether a plaint discloses a cause of action is essentially a question of fact, but whether it does or does not must be found out from reading the plaint itself.*** *For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is whether the averments made in the plaint if taken to be correct in their entirety a decree would be passed. The averments made in the plaint as a whole have to be seen to find out whether clause (d) of Rule 11 of Order VII is applicable. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. As observed earlier, the language of clause (d) is quite clear but if any authority is required, one may usefully refer to the judgments of this court in Liverpool and London S.P. & I Association Ltd. Vrs. M.V. Sea Success I and Anr., (2004) 9 SCC 512 = (2003) Supp. (5) SCR 851 = 2003 INSC 659 and Popat and Kotecha Property Vrs. State Bank of India Staff Association, (2005) 7 SCC 510."*

7.4. Thus is the remarks made in *Satyananda Sahoo Vrs. Ratikanta Panda, 1996 (II) OLR 402 = AIR 1997 Ori 67 = 82 (1996) CLT 653*:

> *"20. It is worth-mentioning here that the plaintiff must have a cause of action to sue and the same must have arisen within the prescribed period of limitation. Both the concepts are in a way inseparable.* ***If the cause of action on a meaningful reading of the entire plaint does not disclose a clear right to sue and creates an illusion of cause of action, it should be nipped in the bud.*** *Similarly, if a cause of action giving rise to a grievance is no more remediable because of prescript of the law of limitation, the plaintiff cannot approach a court of law.*
>
> *21. The effect of Mr. Panda is that a clear right to sue or the cause of action has to be found out on a meaningful reading of the plaint and while doing so it is also obligatory on the part of the court to find out if the case can be adjudication or the same has become no more adjudicate being barred by limitation. Emphasis has been laid by Mr. Panda that a plaintiff cannot create a mirage and clothe his lis in such a manner to persuade a court to entertain a vexatious litigation and the court has to exercise its jurisdiction to scrutinise the plaint in its entirety, whether the suit has been filed within the period of limitation or not; and whether the cause of action is revealed on a meaningful manifestation of the plaint or not.* ***If, after uncurtaining and undraping the plaint and scanning the averments in their conceptual eventuality it is found that a clear cause of action not only exists but survives to be adjudicated in a court of law without being hit by the prescription of limitation, the court should admit the suit, otherwise law has to take its own course. ***"***

7.5. In *Dahiben Vrs. Arvindbhai Kalyanji Bhanusali, (2020) 5 SCR 694* the object behind Order VII, Rule 11 has been discussed as follows:

> *"12. We have heard the learned Counsel for the parties, perused the plaint and documents filed therewith, as also the written submissions filed on behalf of the parties.*
>
> *12.1 We will first briefly touch upon the law applicable for deciding an application under Order VII Rule 11 CPC, which reads as under:*
>
> *'11. Rejection of plaint.–*
>
> *The plaint shall be rejected in the following cases:*
>
> *(a)where it does not disclose a cause of action;*
>
> *(b) where the relief claimed in undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;*
>
> *(c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;*
>
> *(d) where the suit appears from the statement in the plaint to be barred by any law;*
>
> *(e) where it is not filed in duplicate;*
>
> *(f) where the plaintiff fails to comply with the provisions of Rule 9:*
>
> *Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevent by any cause of exceptional nature for correction the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."*
>
> *The remedy under Order VII Rule 11 is an independent and special remedy, wherein the Court is empowered to summarily dismiss a suit at the threshold, without proceeding to record evidence, and conducting a trial, on the basis of the evidence adduced, if it is satisfied that the action should be terminated on any of the grounds contained in this provision.*
>
> *The underlying object of Order VII Rule 11(a) is that if in a suit, no cause of action is disclosed, or the suit is barred by limitation under Rule 11(d), the Court would not permit the plaintiff to unnecessarily protract the proceedings in the suit. In such a case, it would be necessary to put an end to the sham litigation, so that further judicial time is not wasted.*
>
> *In Azhar Hussain Vrs. Rajiv Gandhi, 1986 Supp. SCC 315 this Court held that the whole purpose of conferment of powers under this provision is to ensure that a litigation which is meaningless, and bound to prove abortive, should not be permitted to waste judicial time of the Court, in the following words:*
>
> *'12.*** The whole purpose of conferment of such power is to ensure that a litigation which is meaningless, and bound to prove abortive should not be permitted to occupy the time of the Court, and exercise the mind of the respondent. The sword of Damocles need not be kept hanging over his head unnecessarily without point or purpose. Even if an ordinary civil litigation, the Court readily exercises the power to reject a plaint, if it does not disclose any cause of action.'*
>
> *12.2 The power conferred on the court to terminate a civil action is, however, a drastic one, and the conditions enumerated in Order VII Rule 11 are required to be strictly adhered to.*
>
> *12.3 Under Order VII Rule 11, a duty is cast on the Court to determine whether the plaint discloses a cause of action by scrutinizing the averments in the plaint, read in conjunction with the documents relied upon, or whether the suit is barred by any law.*
>
> ***

12.7 The test for exercising the power under Order VII Rule 11 is that if the averments made in the plaint are taken in entirety, in conjunction with the documents relied upon, would the same result in a decree being passed. This test was laid down in Liverpool & London S.P. & I Assn. Ltd. Vrs. M.V. Sea Success I & Anr., (2004) 9 SCC 512 which reads as:

'139.Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the said purpose, the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed.'

In Hardesh Ores (P.) Ltd. Vrs. Hede & Co., (2007) 5 SCC 614 the Court further held that it is not permissible to cull out a sentence or a passage, and to read it in isolation. It is the substance, and not merely the form, which has to be looked into. The plaint has to be construed as it stands, without addition or subtraction of words. If the allegations in the plaint prima facie show a cause of action, the court cannot embark upon an enquiry whether the allegations are true in fact. [D. Ramachandran Vrs. R.V. Janakiraman, (1999) 3 SCC 267; See also Vijay Pratap Singh Vrs. Dukh Haran Nath Singh, AIR 1962 SC 941].

12.8 If on a meaningful reading of the plaint, it is found that the suit is manifestly vexatious and without any merit, and does not disclose a right to sue, the court would be justified in exercising the power under Order VII Rule 11 CPC.

12.9 The power under Order VII Rule 11 CPC may be exercised by the Court at any stage of the suit, either before registering the plaint, or after issuing summons to the defendant, or before conclusion of the trial, as held by this Court in the judgment of Saleem Bhai Vrs. State of Maharashtra. (2003) 1 SCC 557.

The plea that once issues are framed, the matter must necessarily go to trial was repelled by this Court in Azhar Hussain (supra).

12.10 The provision of Order VII Rule 11 is mandatory in nature. It states that the plaint "shall" be rejected if any of the grounds specified in clause (a) to (e) are made out. If the Court finds that the plaint does not disclose a cause of action, or that the suit is barred by any law, the Court has no option, but to reject the plaint."

7.6. It is clear that in order to consider Order VII, Rule 11, the Court has to look into the averments in the plaint and the same can be exercised by the trial court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the Court to scrutinise the averments/pleas in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the version of the plaintiff as contained in the plaint. Regard may be had to *Raptakos Brett & Co. Ltd. Vrs. Ganesh Property, (1998) 7 SCC 184 and Mayar (H.K.) Ltd. Vrs. Vessel M.V. Fortune Express, (2006) 3 SCC 100.*

7.7. In the case of *Madanuri Sri Rama Chandra Murthy Vrs. Syed Jalal, (2017) 13 SCC 174* the question fell for consideration was whether the suit is barred by any law, would always depend upon the facts and circumstances of each case. The averments in the written statement as well as the contentions of the defendant are wholly immaterial while considering the prayer of the defendant for rejection of the plaint. Even when the allegations made in the plaint are taken to be correct as a whole on their face value, if they show that the suit is barred by any law, or do not disclose cause of action, the application for rejection of plaint can be entertained and the power under Order VII, Rule 11 CPC can be exercised.

7.8. In *Urvashiben Vrs. Krishnakant Manuprasad Trivedi, (2018) 13 SCR 1242* it has been observed that the merits and demerits of the matter cannot be gone into while deciding an application filed under Order VII, Rule 11, CPC and held that:

> *"11. It is fairly well settled that, so far as the issue of limitation is concerned, it is a mixed question of fact and law. It is true that limitation can be the ground for rejection of plaint in exercise of powers under O.VII, R.11(d) of the CPC. Equally, it is well settled that for the purpose of deciding application filed under O.VII, R.11 only averments stated in the plaint alone can be looked into, merits and demerits of the matter and the allegations by the parties cannot be gone into. Article 54 of the Limitation Act, 1963 prescribes the limitation of three years, for suits for specific performance. ****
>
> *12. From a reading of the aforesaid Article, it is clear that when the date is fixed for performance, limitation is three years from such date. If no such date is fixed, the period of three years is to be computed from the date when the plaintiff, has notice of refusal. When rejection of plaint is sought in an application filed under O.VII R.11, same is to be considered from the facts of each case, looking at the averments made in the plaint, for the purpose of adjudicating such application. As averred in the plaint, it is the case of the plaintiff that even after payment of the entire consideration amount registration of the document was not made and prolonged on some grounds and ultimately when he had visited the site on 25.05.2017 he had come to know that the same land was sold to third parties and appellants have refused performance of contract. In such event, it is a matter for trial to record correctness or otherwise of such allegation made in the plaint. In the suits for specific performance falling in the second limb of the Article, period of three years is to be counted from the date when it had come to the notice of the plaintiff that performance is refused by the defendants. For the purpose of cause of action and limitation when it is pleaded that when he had visited the site on 25.05.2017 he had come to know that the sale was made in favour of third parties and the appellants have refused to execute the Sale Deed in which event same is a case for adjudication after trial but not a case for rejection of plaint under O.VII, R.11(d) of CPC."*

7.9. The Hon'ble Supreme Court of India in the case of Nusli Neville Wadia Vrs. Ivory Properties, (2019) 15 SCR 795, it has been discussed as:

> *"In Re: Mixed question of law and fact and Order VII, Rule 11 CPC.—*
>
> *57. A Three-Judge Bench of this Court in Major S.S. Khanna Vrs. Brig. F.J. Dhillon, AIR 1964 SC 497, has held that jurisdiction to try issues of law apart from the issues of fact may be exercised by the Court if the whole suit may be disposed on the issue of law alone, but the Code confers no jurisdiction upon the Court to try a suit on the mixed issue of law and facts as preliminary issues.*
>
> *58. In Narne Rama Murthy Vrs. Ravula Somasundaram & Ors. (2005) 6 SCC 614, this Court has held that* ***even if it is apparent from the plaint averment only, that suit is barred by limitation, it can be tried as a preliminary issue even in the absence of plea of limitation raised by the defendants. However, in cases where the question of limitation is a mixed question of fact and law and suit does not appear to be barred by limitation on the face of it, then the facts necessary to prove limitation, which have been pleaded have to be proved, on issues raised and decided on evidence. However, in our considered opinion question of limitation, in no case, can be said to be a question of jurisdiction of the Court in the context it has been used in Section 9A CPC.***
>
> *59. In Satti Paradesi Samadhi and Pillayar Temple Vrs. M. Sankuntala (Dead) through Legal Representatives and others, (2015) 5 SCC 674, it has been observed that issue of limitation requiring an inquiry into the facts, cannot be tried as a preliminary issue. The mixed questions of law and facts cannot be decided as a preliminary issue.*

*60. In Ramdayal Umraomal Vrs. Pannalal Jagannathji, 1979 M.P.L.J. 736, a Full Bench of Madhya Pradesh High Court has observed that under Order XIV Rule 2, mixed questions of law and fact requiring recording of evidence cannot be tried as a preliminary issue. The issue of jurisdiction can be tried as a preliminary issue when it is an issue of law requiring no evidence to be adduced. ****

61. In Vaish Aggarwal Panchayat Vrs. Inder Kumar and others, AIR 2015 SC 3357, the question came up for consideration of rejection of the plaint under Order VII, Rule 11 on the ground that same being barred by limitation. Mere ex facie reading of the plaint, it could not be held that the suit was barred by time. The question of limitation becomes a mixed question of facts and law and cannot be decided as a preliminary issue as the framing of issues and taking evidence was necessary.

62. ***In our opinion, it cannot be laid down as proposition of law under Order VII Rule 11(d) that plaint cannot be rejected as barred by limitation. It can be said that it is permissible to do so mainly in a case where the plaint averment itself indicate the cause of action to be barred by limitation and no further evidence is required to adjudicate the issue.***

63. In Hareendran and others Vrs. Sukumaran and others, (2018) 14 SCC 187, this Court has laid down that question of limitation in the case being mixed question of law and facts, could not have been decided as preliminary issue. The provision under which a plaint can be rejected is provided in Order VII, Rule 11(d). The language used in Order VII Rule 11 is where averments made in plaint does not disclose a cause of action; relief claimed is undervalued, and the plaint is not corrected in spite of the direction of the Court; plaint is insufficiently stamped, and in spite of Court's order the plaintiff has failed to supply the requisite stamp duty; where the suit appears from the statement in the plaint to be barred by any law; where it is not filed in duplicate; and where plaintiff fails to comply with the provisions of Rule 9. ***What is of significance under Order VII Rule 11 is that from the averments of plaint itself the suit is barred by any law and it would include limitation also including bar created by any other law for the time being in force. For the rejection of plaint, averments made by the defendant in the written statement or otherwise cannot be seen, only the averments of the plaint are material and can be taken into consideration and no other evidence.***

64. The question concerning Order VII, Rule 11 came up for consideration in Ramesh B. Desai Vrs. Bipin Vadilal Mehta, (2006) 5 SCC 638, as to the determination of the question of limitation as a preliminary issue. The Court observed that the starting point of limitation has to be ascertained on facts in every case. A plea of limitation cannot be decided as an abstract principle of law divorced from the facts for rejection of the plaint under Order VII Rule 11(d). In the case of a disputed question of fact, the question of limitation cannot be decided as a preliminary issue without a decision on facts based on the evidence that has to be adduced by the parties. The Court has no jurisdiction under Order XIV Rule 2 to decide a mixed question of law and facts as a preliminary issue. Following observations have been made:

'13.Sub-rule (2) of Order 14 Rule 2 CPC lays down that where issues both of law and fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to:

(a) the jurisdiction of the court, or

(b) a bar to the suit created by any law for the time being in force.

The provisions of this Rule came up for consideration before this Court in Major S.S. Khanna Vrs. Brig. F.J. Dillon, AIR 1964 SC 497 and it was held as under:

'Under Order 14 Rule 2, Code of Civil Procedure where issues both of law and fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be

disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the court; not to do so, especially when the decision on issues even of law depend upon the decision of issues of fact, would result in a lopsided trial of the suit.'

Though there has been a slight amendment in the language of Order 14 Rule 2 CPC by the amending Act, 1976 but the principle enunciated in the above-quoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue."

65.(a)Reliance has been placed on various decisions, under Order VII Rule 11(d) in which expression has been used that plaint has to be rejected if any law bars it as per the averments made in the plaint. In Raghwendra Sharan Singh Vrs. Ram Prasanna Singh (Dead) by Lrs., AIR 2019 SC 1430, it was held as under:

'7. Applying the law laid down by this Court in the aforesaid decisions on exercise of powers under Order 7 Rule 11 of the CPC to the facts of the case in hand and the averments in the plaint, we are of the opinion that both the Courts below have materially erred in not rejecting the plaint in exercise of powers under Order 7 Rule 11 of the CPC. It is required to be noted that it is not in dispute that the original Plaintiff himself executed the gift deed along with his brother. The deed of gift was a registered gift deed. The execution of the gift deed is not disputed by the Plaintiff. It is the case of the Plaintiff that the gift deed was a showy deed of gift, and therefore the same is not binding on him. However, it is required to be noted that for approximately 22 years, neither the Plaintiff nor his brother (who died on 15.12.2002) claimed at any point of time that the gift deed was showy deed of gift. One of the executants of the gift deed— brother of the Plaintiff during his lifetime never claimed that the gift deed was a showy deed of gift. It was the Appellant herein-original Defendant who filed the suit in the year 2001 for partition, and the said suit was filed against his brothers to which the Plaintiff was joined as Defendant No.10. It appears that the summon of the suit filed by the Defendant being T.S. (Partition) Suit No. 203 of 2001 was served upon the Defendant No. 10—Plaintiff herein in the year 2001 itself. Despite the same, he instituted the present suit in the year 2003. Even from the averments in the plaint, it appears that during these 22 years i.e., the period from 1981 till 2001/2003, the suit property was mortgaged by the Appellant herein-original Defendant and the mortgage deed was executed by the Defendant. Therefore, considering the averments in the plaint and the bundle of facts stated in the plaint, we are of the opinion that by clever drafting the Plaintiff has tried to bring the suit within the period of limitation which, otherwise, is barred by law of limitation. Therefore, considering the decisions of this Court in the case of T. Arivandandam (AIR 1977 SC 2421) (supra) and others, as stated above, and as the suit is clearly barred by law of limitation, the plaint is required to be rejected in exercise of powers under Order 7 Rule 11 of the CPC.'

65. (b)In N.V. Srinivasa Murthy Vrs. Mariyamma (Dead) by proposed LRs., (2005) 5 SCC 548, this Court observed as under:

'16. The High Court does not seem to be right in rejecting the plaint on the ground that it does not disclose any "cause of action." In our view, the trial court was right in coming to the conclusion that accepting all averments in the plaint, the suit seems to be barred by limitation. On critical examination of the plaint as discussed by us above, the suit seems to be clearly barred on the facts stated in the plaint itself. The suit as framed is prima facie barred

by the law of limitation, provisions of the Specific Relief Act as also under Order 2 Rule 2 of the Code of Civil Procedure.'

65.(c)This Court in Suman Devi Vrs. Manisha Devi & others, (2018) 9 SCC 808, observed as under:

'10. The Haryana Panchayati Raj Act, 1994 is a complete code for the presentation of election petitions. The statute has mandated that an election petition must be filed within a period of 30 days of the date of the declaration of results. This period cannot be extended. The provision of Section 14 of the Limitation Act, 1963 would clearly stand excluded. The legislature having made a specific provision, any election petition which fails to comply with the statute is liable to be dismissed. The High Court has failed to notice both the binding judgments of this Court and its own precedents on the subject, to which we have referred. The first respondent filed an election petition in the first instance to which there was an objection to maintainability under Order 7 Rule 11 CPC. Confronted with the objection under Order 7 Rule 11, the first respondent obviated a decision thereon by withdrawing the election petition. The grant of liberty to file a fresh election petition cannot obviate the bar of limitation. The fresh election petition filed by the first respondent was beyond the statutory period of 30 days and was hence liable to be rejected.'

The decisions described above under Order VII Rule 11, CPC do not advance the submissions raised on behalf of respondents. In case averments in the plaint indicate that suit is barred, it is liable to be rejected before the stage of Section 9A of CPC comes. Thus, the stage at which Order VII Rule 11(d) has to be applied, is at the threshold and the scope of Section 9A is somewhat limited and different. ***Though the scope of rejection of plaint under Order VII Rule 11(d) is broad enough which includes rejection of the plaint in case any law bars it, however, only the averments in the plaint have to be seen, nevertheless Section 9A is limited in its operation as to the jurisdiction of the Court to entertain a suit."***

7.10. In *Balasaria Construction (P) Ltd. Vrs. Hanuman Seva Trust, (2006) 5 SCC 658* and *Chhotanben Vrs. Kiritbhai Jalkrushnabhai Thakkar, (2018) 6 SCC 422* it has been held that issue of limitation, being a mixed question of fact and law, is to be decided only after evidence is adduced. However, in the case of Biswanath Banik Vrs. Sulanga Bose, (2022) 3 SCR 302 it is held,

"Now, so far as the issue whether the suit can be said to be barred by limitation or not, at this stage, what is required to be considered is the averments in the plaint ***Only in a case where on the face of it, it is seen that the suit is barred by limitation, then and then only a plaint can be rejected under Order VII Rule 11(d) CPC on the ground of limitation. At this stage what is required to be considered is the averments in the plaint.*** *For the aforesaid purpose, the Court has to consider and read the averments in the plaint as a whole. As observed and held by this Court in the case of Ram Prakash Gupta Vrs. Rajiv Kumar Gupta, (2007) 10 SCC 59 = (2007) 10 SCR 520, rejection of a plaint under Order VII, Rule 11(d), CPC by reading only few lines and passages and ignoring the other relevant parts of the plaint is impermissible. In the said decision, in paragraph 21, it is observed and held as under:*

'21. As observed earlier, before passing an order in an application filed for rejection of the plaint under Order 7, Rule 11(d), it is but proper to verify the entire plaint averments. The abovementioned materials clearly show that the decree passed in Suit No. 183 of 1974 came to the knowledge of the plaintiff in the year 1986, when Suit No. 424 of 1989 titled Assema Architect Vrs. Ram Prakash was filed in which a copy of the earlier decree was placed on record and thereafter he took steps at the earliest and filed the suit for declaration and in the alternative for possession. It is not in dispute that as per Article 59 of the Limitation Act, 1963, a suit ought to have been filed within a period of three years from the date of the knowledge. The knowledge mentioned in the plaint cannot be termed as inadequate and

*incomplete as observed by the High Court. While deciding the application under Order 7, Rule 11, few lines or passage should not be read in isolation and the pleadings have to be read as a whole to ascertain its true import. We are of the view that both the trial court as well as the High Court failed to advert to the relevant averments as stated in the plaint.' ***"*

7.11. In *ITC Ltd. Vrs. Debts Recovery Appellate Tribunal, (1998) 2 SCC 70*, it is observed as under:

"16. ***The question is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order VII Rule 11 CPC. Clever drafting creating illusions of cause of action are not permitted in law and clear right to sue should be shown in the plaint."***

7.12. Pertinent may be to refer to *Kum Geetha Vrs. Nanjundaswamy, (2023) 14 SCR 153 = 2023 INSC 964*, wherein it has been succinctly said that,

"7. In simple terms, the true test is first to read the plaint meaningfully and as a whole, taking it to be true. Upon such reading, if the plaint discloses a cause of action, then the application under Order VII Rule 11 of the CPC must fail. To put it negatively, where it does not disclose a cause of action, the plaint shall be rejected."

7.13. In *Eldeco Housing and Industries Limited Vrs. Ashok Vidyarthi, (2023) 16 SCR 872 = 2023 INSC 1043*, it has been laid down as follows:

"17. In Kamala Vrs. K.T. Eshwara Sa and others, (2008) 12 SCC 661 this Court opined that for invoking clause (d) of Order VII, Rule 11, C.P.C., only the averments in the plaint would be relevant. For this purpose, there cannot be any addition or subtraction. No amount of evidence can be looked into. The issue on merits of the matter would not be within the realm of the Court at that stage. The Court at that stage would not consider any evidence or enter a disputed question of fact of law. Relevant paragraphs thereof are extracted below:

'21. Order 7 Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a Court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.

22. For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject matter of an order under the said provision.

23. The principles of res judicata, when attracted, would bar another suit in view of Section 12 of the Code. The question involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit may be taken up either as a preliminary issue or at the final hearing, but, the said question cannot be determined at that stage.

24. It is one thing to say that the averments made in the plaint on their face discloses no cause of action, but it is another thing to say that although the same discloses a cause of action, the same is barred by a law.

25. The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact or law. In the event, the jurisdiction of the court is found to be barred by any law, meaning thereby, the subject-matter thereof, the application for rejection of plaint should be entertained."

18. Similar was the view expressed in Shakti Bhog Food Industries Ltd. Vrs. Central Bank of India and another, (2020) 17 SCC 260 = 2020: INSC:413 and Srihari Hanumandas Totala Vrs. Hemant Vithal Kamat and others, (2021) 9 SCC 99 = 2011: INSC:387."

7.14. In *Srihari Hanumandas Totala Vrs. Hemant Vithal Kamat, (2021) 8 SCR 387* the guiding principles have been propounded as follows:

"20. On a perusal of the above authorities, the guiding principles for deciding an application under Order 7 Rule 11(d) can be summarized as follows:

(i) To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to;
(ii) The defense made by the defendant in the suit must not be considered while deciding the merits of the application;
(iii) To determine whether a suit is barred by res judicata, it is necessary that:

(i) the 'previous suit' is decided,
(ii) the issues in the subsequent suit were directly and substantially in issue in the former suit;
(iii) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and
(iv) that these issues were adjudicated and finally decided by a court competent to try the subsequent suit; and
(v) Since an adjudication of the plea of res judicata requires consideration of the pleadings, issues and decision in the 'previous suit', such a plea will be beyond the scope of Order 7 Rule 11(d), where only the statements in the plaint will have to be perused."

7.15. The petitioner in the petition under Order VII, Rule 11 has specified that the suit is barred by limitation as per Part-II of Schedule appended to the Limitation.

7.16. In *Krishna Kumar Sharma Vrs. Rajesh Kumar Sharma, (2009) 4 SCR 1223*, the scope of Article 137 of the Limitation Act has been laid down as follows:

"5. In The Kerala State Electricity Board, Trivandrum Vrs. T.P. Kunhaliumma, (1976) 4 SCC 634 it was inter alia observed as follows:

'18.The alteration of the division as well as the change in the collocation of words in Article 137 of the Limitation Act, 1963 compared with Article 181 of the 1908 Limitation Act shows that applications contemplated under Article 137 are not applications confined to the Code of Civil Procedure. In the 1908 Limitation Act there was no division between applications in specified cases and other applications as in the 1963 Limitation Act. The words "any other application" under Article 137 cannot be said on the principle of ejusdem generis to be applications under the Civil Procedure Code other than those mentioned in Part I of the third division. Any other application under Article 137 would be petition or any application under any Act. But it has to be an application to a Court for the reason that Sections 4 and 5 of the 1963 Limitation Act speak of expiry of prescribed period when court is closed and extension of prescribed period if applicant or the appellant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application during such period.

22. The conclusion we reach is that Article 137 of the 1963 Limitation Act will apply to any petition or application filed under any Act to a Civil Court. With respect we differ from the

view taken by the two-judge bench of this Court in Athani Municipal Council case and hold that Article 137 of the 1963 Limitation Act is not confined to applications contemplated by or under the Code of Civil Procedure. The petition in the present case was to the District Judge as a court. The petition was one contemplated by the Telegraph Act for judicial decision. The petition is an application falling within the scope of Article 137 of the 1963 Limitation Act.'

In terms of the aforesaid judgment any application to Civil Court under the Act is covered by Article 137. The application is made in terms of Section 264 of the Act to the District Judge. Section 2(bb) of the Act defines the District Judge to be Judge of Principal Civil Court.

6. Further in S.S. Rathore Vrs. State of M.P., (1989) 4 SCC 582 it was inter alia stated as follows:

*'5. Appellant's counsel placed before us the residuary Article 113 and had referred to a few decisions of some High Courts where in a situation as here reliance was placed on that article. It is unnecessary to refer to those decisions as on the authority of the judgment of this Court in the case of Pierce Leslie & Co. Ltd. Vrs. Violet Ouchterlony Wapshare it must be held that Article 113 of the Act of 1963, corresponding to Article 120 of the old Act, is a general one and would apply to suits to which no other article in the schedule applies.' ***"*

7.17. While interpreting Articles 58 and 59 respectively of the Limitation Act, 1963, the Supreme Court relied on *Khatri Hotels Private Limited Vrs. Union of India, (2011) 9 SCC 126* to reiterate that the period of limitation would begin to run from the date when the first right to sue accrues. Accordingly, it is observed that since the Suit was filed much after the expiry of three years when the first right to sue occurred, it found the Suit to be barred by limitation.

7.18. Having diligently considered the impugned Order, it is perceived that the learned Additional Senior Civil Judge, Balangir has dealt with the question whether on the ground of limitation the plaint could be rejected. From a bare reading of the contents of the plaint as a whole it is apparent that the plaintiff has raised demand by Letter dated 18.12.2006 *vide* paragraph 3 of the plaint. Material fact is lacking in the pleading as to when further action against the defendant was taken and nothing is placed on record to suggest that the defendant had refuted such demand within three years prior to filing of the suit in the year 2011.

7.19. Another significant aspect which requires to be considered is that the plaintiff admitted in the plaint *vide* paragraph 2 that, "the agreement *inter alia* stipulates that the date of commencement of the work, should be 09.03.2006 and the date of completion should be 08.02.2007." When this fact is read juxtaposed with the averment at paragraph 3 of the plaint that the contract with the defendant was rescinded and demand for making good the expenditure towards repairs and payment of penalty was made *vide* Letter dated 18.12.2006, there is no doubt in mind that the cause of action for filing suit arose within three years from this date. Since the suit has been filed in the year 2011, in view of legal position as discussed above would suggest that when the suit is clearly barred by law, this Court is, therefore, inclined to interfere with the impugned Order passed by the Additional Senior Civil Judge, Balangir inasmuch as mere use of expression "subsequent dates" without specifying dates when cause of action subsisted within three years prior to filing of suit would not come to the aid of the plaintiff.

7.20. The language of Order VII, Rule 11, CPC is quite clear and unambiguous which suggests that the plaint can be rejected on the ground of limitation. Clause (d) thereof

empowers the Court to reject the plaint if the suit appears from the statement in the plaint to be barred by any "law", which includes the law of limitation. In *Popat and Katecha Property Vrs. State Bank of India Staff Association, (2005) Supp.2 SCR 1030,* it has been analysed as follows:

> *"The period of limitation is founded on public policy, its aim being to secure the quiet of the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. The statute i.e. Limitation Act is founded on the most salutary principle of general and public policy and incorporates a principle of great benefit to the community. It has, with great propriety, been termed a statute of repose, peace and justice. The statute discourages litigation by burying in one common receptacle all the accumulations of past times which are unexplained and have not from lapse of time become inexplicable. It has been said by John Voet, with singular felicity, that controversies are limited to a fixed period of time, lest they should be immortal while men are mortal. (Also See France B. Martins Vrs. Mafalda Maria, (1996) 6 SCC 627).*
>
> *Bar of limitation does not obstruct the execution. It bars the remedy. (See V. Subba Rao Vrs. Secretary to Govt. Panchayat Raj and Rural Development, Govt. of A.P., (1996) 7 SCC 626).*
>
> *Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a life span for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So, a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae ut sit finis litium (it is for the general welfare that a period be put to litigation). The idea is that every legal remedy must be kept alive for legislatively fixed period of time. (See N. Balakrishanan Vrs. M Krishna Murthy, (1998) 7 SCC 123).*
>
> *Clause (d) of Order VII, Rule 7 speaks of suit, as appears from the statement in the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order VII, Rule 11, CPC. Clause (d) of Rule 11 of Order VII applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force.*
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> ***
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> *It is trite law that not any particular plea has to be considered, and the whole plaint has to be read. As was observed by this Court in Roop Lal Sathi Vrs. Nachhattar Singh Gill, (1982) 3 SCC 487, only a part of the plaint cannot be rejected and if no cause of action is disclosed, the plaint as a whole must be rejected.*
>
> *There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities.*
>
> ***

Order VI, Rule 2(1) of the Code states the basic, and cardinal rule of pleadings and declares that the pleading has to state material facts and not the evidence. It mandates that every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved. There is distinction between 'material facts' and 'particulars'. ***The words 'material facts' show that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement or plaint becomes bad.*** *The distinction which has been made between 'material facts' and 'particulars' was brought by Scott, L.J. in Bruce Vrs. Odhams Press Ltd., (1936) 1 KB 697.*

Rule 11 of Order VII lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word 'shall' is used clearly implying thereby that it casts a duty on the Court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant. In any event, rejection of the plaint under Rule 11 does not preclude the plaintiffs from presenting a fresh plaint in terms of Rule 13."

7.21. In *Dahiben Vrs. Arvindbhai Kalyanji Bhanusali, (2020) 5 SCR 694*, it has been explained that,

"13. Cause of action' means every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment. It consists of a bundle of material facts, which are necessary for the plaintiff to prove in order to entitle him to the reliefs claimed in the suit.

In Swamy Atmanand Vrs. Sri Ramakrishna Tapovanam, (2005) 10 SCC 51 this Court held :

*'24.A cause of action, thus, means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts, which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act, no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded.' ***"*

7.22. The Gujarat High Court *vide* Judgment dated 20.07.2021 in the case of *Bhadresh kumar Bipinchandra Sheth Vrs. Rajnikant Manubhai Patel, R/First Appeal No. 254 of 2020, [Neutral Citation: 2021:GUJHC:26938-DB]* has clarified the position with respect to "law" *vis-à-vis* "cause of action" and observed as follows:

"21.While determining, as to what would constitute cause of action, the Supreme Court in the case of Om Prakash Srivastava Vrs. Union of India, reported in (2006) 6 SCC 207, observed as below:

'12.The expression 'cause of action' has acquired a judicially settled meaning. In the restricted sense 'cause of action' means the circumstances forming the infraction of the right or the immediate occasion for the reaction. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but also the infraction coupled with the right itself. Compendiously, as noted above, the expression means every fact, which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is necessary to prove each fact, comprises in 'cause of action'. (See Rajasthan High Court Advocates' Association Vrs. Union of India, (2001) 2 SCC 294).

13.The expression 'cause of action' has sometimes been employed to convey the restricted idea of facts or circumstances which constitute either the infringement or the basis of a right and no more.

In a wider and more comprehensive sense, it has been used to denote the whole bundle of material facts, which a plaintiff must prove in order to succeed. These are all those essential facts without the proof of which the plaintiff must fail in his suit.' (See Gurdit Singh Vrs. Munsha Singh, (1977) 1 SCC 791).

14. The expression 'cause of action' is generally understood to mean a situation or state of facts that entitles a party to maintain an action in a court or a tribunal; a group of operative facts giving rise to one or more bases of suing; a factual situation that entitles one person to obtain a remedy in court from another person (see Black's Law Dictionary). In Stroud's Judicial Dictionary a 'cause of action' is stated to be the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact, which if traversed, the plaintiff must prove in order to obtain judgment. In Words and Phrases (4th Edn.) the meaning attributed to the phrase 'cause of action' in common legal parlance is existence of those facts, which give a party a right to judicial interference on his behalf.' (See Navinchandra N. Majithia Vrs. State of Maharashtra, (2000) 7 SCC 640).

22. In the case of Union of India Vrs. Adani Exports Ltd. reported in AIR 2002 SC 126, the Supreme Court observed as under:

*'10. *** Cause of action as understood in civil proceedings means every fact which, if traversed, would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. It is the bundle of facts which taken with the law applicable to them, gives the plaintiff a right to relief against the defendant. Each and every fact pleaded in the writ petition does not ipso facto lead to the conclusion that those facts give rise to a cause of action within the court's territorial jurisdiction unless those facts pleaded are such which have a nexus or relevance with the lis that is involved in the case. Facts which have no bearing with the lis or dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the court concerned.'*

23.Thus, it is apparent from the aforesaid judicial pronouncements that while examining the expressing cause of action, the court ought to look at the factual situation that gives rise to an enforceable claim. For the said purpose, the material facts are required to be stated. As observed by the Supreme Court in the case of Liverpool & London S.P.&I Association Ltd., (supra) whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not, must be found out from reading the plaint itself. For the said purpose, the averments made in the plaint in their entirety must be held to be correct. Although the Order 7 Rule 11(a) of the CPC authorizes the court to reject a plaint on failure on part of the plaintiff to disclose a cause of action but the same would not mean that the averments made therein or document upon which reliance has been placed although discloses a cause of action, the plaint would be rejected on the ground that such averments which are not sufficient to prove the facts stated therein for the purpose of obtaining the reliefs claimed in the suit. The court must assume that the submissions in the plaint are true and has to find out if they disclose a cause of action or a triable issue. For the said purpose, the defence taken by the defendant in its written statement cannot be probed. Nor can the court dissect the pleading into several parts and consider whether each of them disclose a cause of action (Refer: D. Ramachandran Vrs. R.V. Janakiraman, (1999) 3 SCC 267).

24. It is true that the rejection of the plaint under Order VII, Rule 11 of the CPC is a drastic power conferred in the court to terminate a civil action at the threshold. The conditions precedent for the exercise of powers under Order VII Rule 11, therefore, are stringent and have been consistently held to be so by the Supreme Court. It is the averments in the plaint that have to be read as a whole to find out, whether it discloses a cause of action or whether

the suit is barred under any law. At the stage of exercise of powers under Order VII Rule 11, the stand of the defendants in the written-statement or in the plaint for rejection of the plaint is wholly immaterial. It is only if the averments in the plaint ex-facie do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law that the plaint can be rejected. In all situations, the claims will have to be adjudicated in the course of trial. ***When we say 'averments in the plaint', it would embrace the documentary evidence also relied upon by the plaintiffs.*** *It is a settled position of law that for the purpose of considering an application seeking rejection of plaint, the court can look into the accompanying documents relied upon by the plaintiffs. It is equally well-settled that a frivolous civil action should be terminated at the threshold. The civil court should not be permitted to adjudicate upon a frivolous suit instituted with clever drafting of the plaint.* ***If clever drafting has created an illusion of the cause of action, then it is the duty of the court to nip it in the bud at the first hearing.*** ****"*

7.23. In the plaint of the present case, there is no mention of the cause of action by pleading material fact as to when the demand was raised and the same was last refused to be complied with by the defendant. Furthermore, as has already been noticed as per F-2 Agreement the work was required to be completed by 08.02.2007 and there is no pleading as to novation of contract by extending the terms of agreement. Rather it is the case of the plaintiff that the defendant has abandoned the work, meaning thereby that prior to said date the defendant had stopped work and the contract with the defendant came to an end. Thus, lacking material fact to indicate that the suit was filed within three years from the demand for recovery of penalty and expenditure being made, the suit, therefore, falls foul of clause (d) of Rule 11 of Order VII, CPC.

8. It is next contended by Sri Amit Prasad Bose, learned Advocate for the petitioner-defendant that at paragraph 10 of the plaint the opposite party-plaintiff has relied on following documents:

"10. The plaintiff, relies on the following documents;
i) Notification
ii) Rescission proposal of S.E. vide Letter No.7504 dt.01.12.206.
iii) Rescission proposal of C.E. N.Hs. (0), BBSR vide Letter No. 14100, dt.06.12.2006.
iv) Copy of F-2 Agreement.
v) Copy of Measurement Book.
vi) Copy of 1st Running & 2nd Running Bill.
vi) Rescission proposal of E.E.N.H. Division, Sambalpur vide Letter No.4130, dt. 29.11.2006
vii)Copy of Letter No.4310, dt. 18.12.2006."

8.1. It is submitted that except these letter which without any ambiguity reflects that there is no iota of evidence produced by the plaintiff, though it is the custodian of record so far as recovery of demand from the defendant is concerned, that the demand has been made and refused by the petitioner-defendant at any point of time within three years prior to the date of filing of suit.

8.2. In *Dahiben Vrs. Arvindbhai Kalyanji Bhanusali, (2020) 5 SCR 694* it has been observed as follows:

"12.4 Order VII Rule 14(1) provides for production of documents, on which the plaintiff places reliance in his suit, which reads as under:

'Order VII Rule 14:

Production of document on which plaintiff sues or relies.—

(1) Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

(2) Where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to document produced for the cross examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory.

Having regard to Order VII Rule 14 CPC, the documents filed alongwith the plaint, are required to be taken into consideration for deciding the application under Order VII, Rule 11(a). When a document referred to in the plaint, forms the basis of the plaint, it should be treated as a part of the plaint.

12.5.In exercise of power under this provision, the Court would determine if the assertions made in the plaint are contrary to statutory law, or judicial dicta, for deciding whether a case for rejecting the plaint at the threshold is made out."

8.3. In the case of *Kamlesh Babu Vrs. Lajpat Rai Sharma, (2008) 6 SCR 653*, it has been held as under:

"21.It is no doubt true, as was pointed out by this Court in the case of Balasaria Construction {P) Ltd. Vrs. Hanuman Seva Trust and Ors. (2006) 5 SCC 658 and also in Narne Rama Murthy Vrs. Ravula Somasundram and Ors. (2005) 6 SCC 614, that if the plea of limitation is a mixed question of law and fact, the same cannot be raised at the appellate stage. We have no problem with the said proposition of law. ***What we are concerned with is whether the said proposition is applicable to the facts of this case.*** *In this case the plea of limitation had been raised in the written statement and though no specific issue was framed in respect thereof, a decision was given thereupon by the learned Trial Court.* ***Apart from Section 3(1) of the Limitation Act, even Order 7 Rule 11(d) of the Code of Civil Procedure casts a mandate upon the court to reject a plaint where the suit appears from the statement in the plaint to be barred by any law, in this case by the law of limitation.*** *Further, as far back as in 1943, the Privy Council in the case of Lachhmi Sewak Sahu Vrs. Ram Rup Sahu & Ors., AIR 1944 Privy Council 24 held that* ***a point of limitation is prima facie admissible even in the court of last resort, although it had not been taken in the lower courts.***

22. ***The reasoning behind the said proposition is that certain questions relating to the jurisdiction of a Court, including limitation, goes to the very root of the Court's jurisdiction to entertain and decide a matter, as otherwise, the decision rendered without jurisdiction will be a nullity.*** *... Needless to say, if the suit is found to be so barred, the appeal is to be dismissed. If the suit is not found to be time-barred, the decision of the First Appellate Court on the other issues shall not be disturbed."*

8.4. The documents relied on by the opposite party-plaintiff does not depict the last date of cause of action in order to ascertain from the pleading that before lapse of period of three years from the date of demand for payment, the suit was filed.

CONCLUSION:

9. Though the plea of limitation is always mixed question of law and facts, in the instance case, the entire perusal of the averments of plaint clearly depicts that the suit

itself is barred by limitation. This Court is of the view that it is a fit case which falls within the ambit of Order VII, Rule 11(d) of the CPC for rejection of plaint. The law as delineated makes it crystal clear that where on the face of the plaint, a suit appears to be barred by any law, the Court shall dismiss the suit. But where it does not so appear, but requires further consideration or, in other words, if there be any doubt or if the Court is not sure and certain that the suit is barred by some law, the Court cannot reject the plaint under clause (d) of Order VII, Rule 11 of C.P.C.

9.1. Suffice it to observe in the present context that 'having no cause of action' is entirely different from 'disclosing no cause of action'. While the former entails a detailed enquiry on merits, the latter only involves a plain reading of the plaint, upon taking the averments in the plaint to be sacrosanct. In this perspective, examining the plaint reveals that though the plaintiff has disclosed cause of action and disclosed "22.12.2006" as the last date, the suit being filed in the year 2011, there is no option but to hold that the same is hit by law of limitation, inasmuch as no "subsequent date" is found mentioned so as to ascertain whether there was any demand for payment made by the opposite party-plaintiff at any point of time after 08.02.2007, i.e., the date by which the work entrusted by the plaintiff in terms of F-2 Agreement was required to be completed. If the manner of approach as required to be adopted under Order VII, Rule 11 of the CPC, it is seen that the plaintiff has not sufficiently disclosed the cause of action vis-à-vis period within which the suit was to be filed from the date of cause of action. As has been held by the Hon'ble Supreme Court of India that by clever drafting the plaintiff cannot try to bring the suit within the period of limitation which, otherwise, is barred by law of limitation.

9.2. Therefore, this Court is of the view that there is no legal and valid cause of action in favour of the opposite party-plaintiff and against the petitioner-defendant. The plaintiff has abused the process of law by filing the frivolous suit. This Court, therefore, invokes the power under Order VII Rule 11 of the Code of Civil Procedure to reject the plaint by setting aside the Order dated 30.03.2022 passed in Civil Suit No.173 of 2011 by the Additional Senior Civil Judge, Balangir.

10. In fine, this Court finds merit in the revision petition and, accordingly, the civil revision petition is allowed, but in the circumstances, there shall be no order as to costs.

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2024 (II) ILR-CUT-1346

SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 2154 OF 2024

GANESWAR SAHOO ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

ODISHA PUBLIC DISTRIBUTION SYSTEM (CONTROL) ORDER, 2016 – Clause 17 – The authority without any reason and without following the procedure did not allow the petitioner to supply PDS commodities to

the beneficiaries/consumers – Effect of – Held, the action of authority is contrary to the provisions of the Control Order, 2016.

For Petitioner : Mr. S. Mishra
For Opp.Parties : Mr. P.K. Rout , AGA

JUDGMENT Date of Hearing & Judgment : 16.07.2024

S.K. MISHRA, J.

1. The Petitioner, who has been appointed as the P.D.S. retailer to distribute the P.D.S. commodities in Bandalo Gram Panchayat, has preferred the Writ Petition seeking a direction from the Court to the Sub-Collector, Jajpur (Opposite Party No.2) to allow him to supply P.D.S. commodities to the beneficiaries/consumers of Bandalo Gram Panchayat with a further prayer to direct the authority concerned to dispose of his representation, as at Annexure-6, as expeditiously as possible, which is pending before the Opposite Party No.2.

2. The factual matrix of the case, as pleaded in the Writ Petition, is that the Petitioner along with others were selected as P.D.S. retailers. Vide general notice dated 07.06.2022, objections were invited from general public to be submitted between 08.06.2022 to 18.06.2022. Since no complaint was received pursuant to the said notice dated 07.06.2022, the Sub-Collector, Jajpur, vide order dated 16.11.2023, communicated to the Petitioner that he has been provisionally selected for appointment as P.D.S. retailer in Bandalo Retail Centre under Bandalo Gram Panchayat of Korei Block, pursuant to notice dated 16.12.2021 and 07.06.2022 and the decision of the three members committee meeting held on 14.11.2023. Pursuant to the said communication, the Sub-Collector & Licensing Authority, Jajpur (Opposite Party No.2) directed the Petitioner to deposit the required amount towards license fee, security and undertaking vide Office Order dated 18.11.2023 and the Petitioner was allowed to carry out the P.D.S. business in Korei Block area, in the scheduled place. Thereafter, the Petitioner deposited the required fees in shape of bankers cheque dated 20.11.2023 and the authority concerned was pleased to issue FPS code in favour of the Petitioner vide Code No.1308P161 which was duly approved by the Food Supply & Consumer Welfare Department (Opposite Party No.1). Thereafter, the authority concerned gave a list of 544 ration card holders to the Petitioner to supply P.D.S. commodities to the said beneficiaries. However, no further action was taken pursuant to issuing the list of beneficiaries in favour of the Petitioner. Being remediless, the Petitioner gave a representation to the Sub-Collector, Jajpur (Opposite Party No.2) ventilating his grievance and ultimately preferred the present Writ Petition for inaction of the authority concerned to act on the said representation.

3. The State has filed Counter Affidavit opposing to the allegation made in the Writ Petition. Paragraphs No.5 to 8 of the said Counter, being relevant, are extracted below:

"5. That, in reply to the averments made in Para-1 of the writ petition; it is humbly submitted that, ***after receipt of the representation of 132 nos consumers of Bandalo G.P., the Sub-Collector, jajpur as the Licensing Authority has withdrawan the consumers list from the petitioner though BDO, Korei and again tagged the said list with an old retailer Nathuram Das of Bandalo G.P. for smooth distribution of PDS commodities.*** *Hence, the allegation made by the petitioner that the Sub-Collector, OP No.2 has illegally and arbitrarily withdrawn the consumers list from the petitioner is not true. Copy of the representation dated 10.12.2023 is annexed herewith as AnnexureA/4.*

6. That, in reply to the averments made in Paras-3 to 7 of the writ petition, it is humbly submitted that, the Annexures-1 to 4 series filed by the petitioner in this writ petition are matter of documents and records. ***The same has been issued only as per provision under order 17(4) of O.P.D.S. (Control) 2016 which states that the Licensing Authority has power to suspend the license of a dealer without giving any prior notice to him, if the Authority is satisfied that it is not in the interest of the smooth operation of the P.D.S. system to allow the dealer to handle the P.D.S. stock.*** *So these paras have no meaning to challenge the action of the licensing Authority and is liable to be dismissed being devoid of merit.*

7. That, in reply to the averments made in Paras-8 to 10 of the writ petition, it is humbly submitted that, ***after receipt of representation with consumer number from 132 beneficiaries of Bandalo G.P. and giving importance to the opinion of PDS beneficiaries, the list of consumers has been withdrawn from the petitioner for smooth distribution of P.D.S. commodities in Bandalo G.P.*** *Hence these para deserves no merit for consideration and are liable to be dismissed being devoid of merit.*

8. ***That, basing upon the grievance of the P.D.S. beneficiaries dated 10.12.2023 the Licensing Authority has exercised his power under Order-7(4) of OPDS (Control) 2016*** *and considering for smooth operation of PDS commodities has been pleased to allow one Nathuram Das to distribute the PDS commodities in place of the petitioner."*

(Emphasis supplied)

4. In response to the Counter filed by the State, the Petitioner has filed Rejoinder Affidavit reiterating therein that the Licensing Authority (Opposite Party No.2) neither suspended nor cancelled the P.D.S. license of the Petitioner. Though there is an averment in the Counter Affidavit as to acting in terms of Clause 17(4) of the Odisha Public Distribution System (Control) Order, 2016, shortly, 'Control Order, 2016', there was no intimation regarding suspension of his license nor any proceeding was initiated against him in terms of sub-clause (1) of Clause 17 of the Control Order, 2016. Since no suspension or any cancellation order has been issued in favour of the Petitioner, he is unable to prefer any Appeal in terms of provision prescribed under clause-9 of the Control Order, 2016. The Authority concerned is intentionally harassing the Petitioner without any cogent reason and without following due procedure to justify such action. So far as the allegations made by some of the P.D.S. beneficiaries, in order to annul the said complaint to be false and baseless, copy of the minutes of meeting dated 14.11.2023 has been annexed to the Rejoinder as Annexure-7. Relevant paragraphs of the said Minutes, being relevant for adjudication of the present lis, are extracted below.

> *"MINUTES OF THE MEETING OF THREE MEMBERS COMMITTEE HELD ON 14.11.2023 AT 4.00 P.M. IN THE OFFICE CHAMBER OF THE SUB-COLLECTOR, JAJPUR FOR APPOINTMENT OF PDS RETAILER IN KOREI BLOCK*
>
> *xxxx xxxx xxxx*
>
> *Earlier meeting was held on 16.09.2022 for selection of retailer in the place of Bandalo under Bandalo G.P. In the said meeting it was decided that the final decision will be taken after receipt of the Inquiry report from the BDO, Korei for the purpose. Accordingly the BDO, Korei intimated in this office vide letter No.674 dt.11.07.2022. Basing on the inquiry report of BDO, Korei in his letters vide No.1552 dt. 19.04.2023 & 2194 dt. 25.05.2023 and placed before the committee for finalization of retailership of Bandalo.* ***On examination of reports of concerned BDO, it was came to notice that the allegation made against Sri Ganeswar Sahu who applied for retailership in Bandalo retail centre was false & fabricated****. Then the BDO, Korei had been asked to submit the joint field verification report of Bandalo retail centre vide L.No.778 dt. 30.06.2023.* ***The BDO, Korei has submitted the joint field verification report vide L.No.5763 dt. 03.08.2023 with their recommendation to appoint Sri Ganeswar Sahoo as a PDS retailer in Bandalo under Bandalo G.P. as he has adequate godown for storage of PDS commodities. He is financial sound and good in nature. The Behaviour towards public is very satisfactory.***
>
> *In view of the above the committee unanimously accepted the proposal of BDO, Korei to appoint Sri Ganeswar Sahoo as a retailer in the Bandalo retail centre of Bandalo G.P."*
>
> ***(Emphasis supplied)***

5. As is revealed from the joint representation, which is appended to the Counter Affidavit as Annexure-A/4, some of the beneficiaries gave representation to the B.D.O., Korei opposing to the appointment of the Petitioner as the new retailer on the ground that since long they are lifting the P.D.S. commodities from the previous retailer namely, Nathuram Das and the present Petitioner is in the habit of misbehaving with public and is a drug addicted person.

6. A stand being taken in the Counter regarding acting in terms of Clause 17(4) of the Control Order, 2016 so also allegation of the Petitioner in the Rejoinder as to not following due procedure prescribed under Clause 17(4) of Control Order, 2016, this Court, vide order dated 06.05.2024, permitted the State to file Additional Affidavit. Paragraphs-3 & 4 of the said order dated 06.05.2024 are extracted below for ready reference.

> *"3. Para-6 of the Counter Affidavit filed by the State, being relevant, is extracted below, for ready reference:-*
>
> *"6. That, in reply to the averments made in Paras-3 to 7 of the writ petition, it is humbly submitted that, the Annexures-1 to 4 series filed by the petitioner in this writ petition are matter of documents and records.* ***The same has been issued only as per provision under order 17(4) of O.P.D.S. (Control) 2016 which states that the Licensing Authority has power to suspend the license of a dealer without giving any prior notice to him, if the Authority is satisfied that it is not in the interest of the smooth operation of the P.D.S. system to allow the dealer to handle the P.D.S. stock****. So these paras have no meaning to challenge the action of the licensing Authority and is liable to be dismissed being devoid of merit."*

4. In view of the such stand taken in the Counter Affidavit, a query being made as to whether the PDS License of the Petitioner has been suspended or any proceeding under sub-clause(1) of clause-17 has been initiated against the Petitioner, since the said issue has not been specifically dealt in the Counter, learned State counsel prays for a short adjournment to take instruction and file additional affidavit, if so required. Prayer for adjournment is allowed."

7. On being so permitted, an Additional Affidavit has been filed on 17.05.2024 reiterating the facts detailed in the Counter. Apart from that, the report of the Inspector of Supplies, Korei, has been annexed to the Additional Affidavit as Annexure-B/4 series along with the hand written joint representation of some of the beneficiaries, which is different from the joint representation, appended to the Counter as Annexure-A/4. The contents of the report submitted by the Inspector of Supplies, Korei, addressed to the Block Development Officer, Korei is extracted below:

"To

The Block Development Officer, Korei

Sub : Submission of inquiry report on the representation of Sri Ramesh Chandra Senapati and others of Bandalo G.P.

Sir,

As per your kind direction, I proceeded to the Bandalo village under Bandalo G.P. to substantiate the fact of allegation petition filed by Sri Ramesh Chandra Senapati & others of Bandalo G.P. on dtd. 31.01.2024. After reaching at the spot first I contacted some of the petitioner. During my inquiry it was ascertained that most of the PDS beneficiaries of that area are willing to take their PDS commodities from Sri Nathram Das instead of the new retailer namely Sri Ganeswar Sahoo as the tagged retailer Sri Nathuram Das has distributed the PDS commodities regularly to them. They also stated that the retailer Sri Das is very sincere and there is no any disturbance at the time of distribution of PDS commodities. The statement of public is enclosed herewith for your kind information and necessary action.

Yours faithfully,

Encl: As above *Inspector of Supplies, Korei"*

8. As it seems from the Report submitted by the Inspector of Supplies, Korei, the authority concerned has acted based on the joint representation of some of the beneficiaries out of 544 beneficiaries. Neither in the statement of public attached to the said Report nor in the said report, as extracted above, it has been indicated that the Petitioner is having bad conduct and is a drug addicted person. The only reason assigned in the said report submitted by the Inspector of Supplies, Korei, is that some of the beneficiaries are willing to take P.D.S. commodities from the previous retailer namely, Sri Nathuram Das on the ground that Nathuram Das has distributed the P.D.S. commodities regularly to them and he is very sincere and there is no disturbance at the time of distribution of P.D.S. commodities.

9. Admittedly, pursuant to the selection of the Petitioner as P.D.S. retailer of Bandalo Gram Panchayat and supplying him the list of 544 beneficiaries, no reason has been communicated to him thereafter till date not to act further pursuant to the

said selection and his appointment as retailer. Rather, after filing of the Writ Petition, such a stand has been taken in the Counter so also in the Additional Affidavit to justify the action of the authority concerned not to act further for release of P.D.S. commodities for its smooth distribution in favour of the beneficiaries. In view of the stand taken in the Counter so also Additional Affidavit filed by the State-Opposite Party, it would be apt to extract below Clause-17 of the Control Order, 2016 for ready reference:

> *"**17. Contravention of Conditions of License or Control Orders.-** (1) **No holder of a license issued under this Order**, or his agent or servant or any other person acting on his behalf or placed by him in physical charge of stock **shall contravene any of the terms or conditions of the license or of any control Order issued under the Act**.*
>
> *(2) **If any such person contravenes any of the said terms or conditions**, without prejudice to any other action that may be taken against him, **the license shall be cancelled and security deposit shall be forfeited in full or in part**:*
>
> *Provided that **no such order shall be made under this clause unless the licensee has been given a reasonable opportunity of stating his case and if he desires of personal hearing against the proposed cancellation and forfeiture**.*
>
> *(3) Upon compliance with all obligations under the license by the licensee, the amount of security deposit or such part thereof, which is not forfeited as aforesaid, shall be refunded to the licensee after termination of the license by the Licensing Authority.*
>
> *(4) **The Licensing Authority may, by order, without giving prior notice to the Dealer, suspend the license of a Dealer, if a proceeding under sub-clause (1) has been initiated against the dealer**, and the said Licensing Authority is satisfied that it is not in the interest of the smooth operation of the Public Distribution System to allow the Dealer to handle the PDS stocks.*
>
> *Explanation.- For the purpose of this sub-clause, the proceedings under sub clause (1) shall be deemed to have been initiated on the date of issue of the show-cause notice by the Licensing Authority.*
>
> *(5) No prior show cause notice would be required for withholding the allocation of quota to any licensee for a period not exceeding sixty days pending enquiry or investigation against the licensee, if the Licensing Authority has reasons to believe that the licensee has not maintained proper and correct accounts in respect of the quota allocated to him earlier or has diverted the Public Distribution System stocks or committed any other irregularities."*

10. From the provisions enshrined under Clause-17 of the Control Order, 2016, it is amply clear that no holder of a license issued under the said Order, 2016 or his agent or servant or any other person acting on his behalf or placed by him in physical charge of stock shall contravene any of the terms or conditions of the license or of any control Order issued under the Act. If any such person contravenes any of the said terms or conditions, without prejudice to any other action that may be taken against him, the license shall be cancelled and security deposit shall be forfeited in full or in part. Proviso to sub-clause (2) of Clause 17 of the Control Order, 2016 prescribes that no such order shall be made under the said clause unless the licensee has been given a reasonable opportunity of stating his case and personal hearing, if he so desires, against the proposed cancellation and forfeiture. Similarly,

sub-clause (4) under clause 17 of the Control Order, 2016 mandates that the Licensing Authority may, by order, without giving prior notice to the Dealer, suspend the license of a Dealer, if a proceeding under sub-clause (1) has been initiated against the Dealer, and the said Licensing Authority is satisfied that it is not in the interest of the smooth operation of the Public Distribution System (PDS) to allow the Dealer to handle the PDS stock. However, sub-clause (5) under Control Order, 2016 prescribes that no prior show cause notice would be required for withholding the allocation of quota to any licensee for a period not exceeding sixty days pending enquiry or investigation against the licensee, if the Licensing Authority has reasons to believe that the licensee has not maintained proper and correct accounts in respect of the quota allocated to him earlier or has diverted the PDS stocks or committed any other irregularities.

11. Clause-18 of the Control Order, 2016 prescribes as to cancellation of license in case of contravention of the provisions enshrined under clause 17 of the Control Order, 2016. Similarly, Clause-19 of the Control Order, 2016 prescribes as to preferring an Appeal against the action taken in terms of Clause-18 of the Control Order, 2016. Admittedly, in the Counter so also Additional Affidavit, filed by the State in terms of order dated 06.05.2024, none of the grounds, as prescribed under Clause-17 of the Control Order, 2016, has been agitated to justify such stand excepting sub-clause (4) of Clause-17 of the Control Order, 2016, which prescribes as to suspension of license of a Dealer, if a proceeding under sub-clause (1) has been initiated against the Dealer and the licensing Authority is satisfied that it is not in the interest of the smooth operation of the public distribution to allow the Dealer to handle the P.D.S. stock. Admittedly, no proceeding has been initiated against the Petitioner, as provided under sub-clause (1) and his license was never suspended. Hence, this Court is of the view that the State Authority has failed to substantiate its action to withdraw the list of consumers allotted in favour of the Petitioner and allow Nathuram Das, the previous retailer to distribute the PDS commodities in place of the Petitioner, that to based on the suggestion of some of the beneficiaries.

12. This Court is of further view that representation of some of the beneficiaries to the authority concerned to continue with the old retailer namely, Nathuram Das of Bandalo Gram Panchayt cannot be a ground to withheld the supply of P.D.S. commodities to the Petitioner, who was duly selected in accordance with the provisions prescribed under the Control Order, 2016 without any allegation against him and after inviting objections from general public.

Admittedly, no action has been taken against the Petitioner in terms of any of the sub-clauses of Clause-17 of the Control Order, 2016. The stand taken in the Counter so also in the Additional Affidavit to annul the selection and appointment of the Petitioner, who has been appointed as PDS retailer, being contrary to the provisions of the Control Order, 2016 is not acceptable. Accordingly, the Sub-Collector, Jajpur (Opposite Party No.2), who is the Licensing Authority, is directed

to act pursuant to the order dated 18.11.2023 issued by him, followed by the list of beneficiaries supplied to the Petitioner vide FPS Code number and name "1308P161-Ganeswar Sahoo" as at Annexure-5 at the earliest, preferably with a period of four weeks hence and ensure release of PDS quota in favour of the Petitioner enabling him to distribute the same in favour of the beneficiaries as per the list provided to him.

13. With the aforesaid observation and direction, the Writ Petition stands disposed of. No order as to cost.

14. Urgent certified copy of this order be granted on proper application.

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2024 (II) ILR-CUT-1353

SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 5103 OF 2024

SULOCHANA PRADHAN ……Petitioner

-V-

THE D.M, NEW INDIA ASSURANCE CO. LTD. & ANR. ……Opp.Parties

INCOME TAX ACT, 1961 – Sections 145A(b), 56(2)(vii), 194A(3)(ix) – The Income Tax Department deducted an amount of ₹57,672/- from the interest accrued on the compensation amount awarded by the Motor Accident Claim Tribunal – Whether such deduction admissible? – Held, No, as the interest calculated on the compensation amount is for the entire period, i.e. from 2002 till the date of actual realization in the year 2022/2023 and if the interest awarded and calculated after bifurcation, did not exceed ₹ 50,000/- during any of the financial year in between 2002 & 2022, so the deduction is not tenable. (Para 10)

Case Laws Relied on and Referred to :-

1. W.P(C) No. 8462/2020 (Dt.30.01.2023) : Smt. Kuni Sahoo & Ors. Vs. Union of India & Ors.
2. W.P(C) No.16241/2019 (Dt. 18.12.2023) : Sanghamitra Sahoo & Ors. Vs. Divisional Manager, National Insurance Co. Ltd. & Anr.

For Petitioner : Mr. P.K. Mishra
For Opp.Parties : Mr. G.P. Dutta, Mr. S.C. Mohanty, Sr. Standing Counsel

JUDGMENT Date of Hearing & Judgment : 16.07.2024

S.K. MISHRA, J.

1. The Petitioner, who was the claimant before the Claims Tribunal in M.A.C. No.157 of 2002, has preferred the present Writ Petition with the following prayer:

PRAYER

"Under the circumstance, the Petitioner most humbly prays that this Hon'ble Court be graciously pleased to issue Rule Nisi calling upon the Opposite Party to show- cause as to why the provisions contained the provisions of the Income Tax Act shall not be

enforced, declaring the amount deducted towards TDS from the compensation amount to be illegal further direction shall not be issued to the Opposite Party no.1 to pay the amount deducted towards TDS from the compensation amount amounting to Rs. 57,672/- to be paid to the Petitioner within a stipulated period with accrued interest thereon;

And be pleased to pass any other order/orders as deemed fit and proper in the circumstances of the case;"

2. The brief background facts, which led to filing of the present Writ Petition, are that the Petitioner, who is the legal heir of late Tuku Pradhan, preferred MAC Case No.157 of 2002 before the Court of 2nd MACT Northern Division, Sambalpur claiming compensation on account of the accidental death of the deceased Tuku Pradhan, impleading the owner of the offending Autorickshaw as Opposite Party No.1 and the present Opposite Party No.1-Insurance Company as Opposite Party No.2. The Tribunal, on contest, allowed the said claim application directing the Insurance Company to pay compensation of Rs.2,45,000/- with interest @ 6% per annum from the date of application till the date of actual realization. Being aggrieved by the said judgment, the Insurance Company preferred MACA No.779 of 2015 before this Court. However, on contest, the said Appeal was disposed of by order dated 05.01.2022 and the award was confirmed. Pursuant to such order passed by the this Court, the Opposite Party No.1-Insurance Company, vide letter dated 12.04.2022, though deposited the cheque drawn in the name of the claimant, the present Petitioner, but an amount of Rs.57,672/- was deducted from the interest accrued on the compensation amount and deposited with the Income Tax Department towards Tax Deducted at Source (TDS).

It is the case of the Petitioner that the said deduction is not permissible in view of the provisions enshrined under Sections 145A(b), 56(2)(viii), 194-A(3)(ix) of the Income Tax Act, 1961, shortly, the Act, 1961. The said deduction is permissible only if the interest payable on any awarded amount exceeds Rs.50,000/-. It is further case of the Petitioner that as the interest accrued on the compensation amount awarded in favour of the claimant during any of the financial year did not exceed Rs.50,000/-, TDS is not at all permissible and such act of Opposite Party No.1 is illegal. Since the Insurance Company did not pay any heed to the request of the Petitioner, so also the Court below did not act on the application filed by the present Petitioner, being remediless, she has approached this Court invoking the extra-ordinary writ jurisdiction under Articles 226 and 227 of the Constitution of India.

3. On being noticed, though the Opposite Party No.1-Insurance Company has appeared, but no Counter Affidavit has been filed. Similarly, the Department has also not filed any Counter Affidavit opposing to the prayer made in the Writ Petition.

4. Heard Mr. Mishra, learned Counsel for the Petitioner, Mr. Dutta, learned Counsel for the Insurance Company and Mr. Mohanty, learned Senior Standing Counsel for the Income Tax Department (O.P. No.2).

5. To substantiate the prayer made in the Writ Petition, Mr Mishra, learned Counsel for the Petitioner, relying on the judgment dated 30.01.2023 in W.P.(C) No.8462 of 2020 (***Smt. Kuni Sahoo and others vs. Union of India and others***) passed by the 1st Division Bench of this Court and judgment of this Court dated 18.12.2023 in W.P.(C) No.16241 of 2019 (***Sanghamitra Sahoo & ors. Vs. Divisional Manager, National Insurance Co. Ltd. & another***) submitted that the case of the present Petitioner is squarely covered by the said judgments. Accordingly, Mr. Mishra prays for a direction to the Opposite Party No.1- Insurance Company to refund the said amount to the Petitioner, which has been illegally deducted and deposited by it with the Department (Opposite Party No.2).

6. Mr. Mishra learned Counsel for the Petitioner submitted that the Writ Petition can be disposed of in terms of the aforesaid judgments directing the Opposite Party No.1-Insurance Company to refund the said deducted amount.

7. Mr. Dutta, learned Counsel for the Opposite Party-Insurance Company submitted that his client was justified to deduct TDS and deposit the same with the Department, as the Petitioner has received more than Rs.50,000/- (Rupees fifty thousand only) towards interest in the financial year 2022-23.

8. At this juncture, it would apt to reproduce below the relevant provisions under the Act, 1961.

> "2**. Definitions**.—
>
> (**28A**) 'interest' means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized;
>
> **56. Income from other sources**.—
>
> (1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head 'Income from other sources', if it is not chargeable to income tax under any of the heads specified in Section 14, items A to E.
>
> (2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head 'Income from other sources', namely:
>
> ***
>
> (viii) income by way of interest received on compensation or on enhanced compensation referred to in sub-section (1) of Section 145B;"
>
> **145B. Taxability of certain income**.—
>
> (1) Notwithstanding anything to the contrary contained in Section 145, the interest received by an assessee on any compensation or on enhanced compensation, as the case may be, shall be deemed to be the income of the previous year in which it is received.
>
> (2) Any claim for escalation of price in a contract or export incentives shall be deemed to be the income of the previous year in which reasonable certainty of its realization is achieved.
>
> (3) ***

194A. Interest other than 'interest on securities'.—

(1)Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any income by way of interest other than income by way of interest on securities, shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rates in force:

***

(3) The provisions of sub-section (1) shall not apply—

(ix) to such income credited by way of interest on the compensation amount awarded by the Motor Accidents Claims Tribunal;

(ixa) **to such income credited by way of interest on the compensation amount awarded by the Motor Accidents Claims Tribunal where the amount of such income or, as the case may be, the aggregate of the amounts of such income paid during the financial year does not exceed fifty thousand rupees**;

(**Emphasis supplied**)

9. In an identical issue, the Division Bench of this Court in ***Kuni Sahoo*** (supra) came to the following conclusion and gave direction, as extracted below:

"**Conclusion and directions**:

12. When this Court is faced with the above proposition of law laid down in various Judgments of different Courts, it is not considered proper to accept the contention of the opposite parties, nonetheless, it is reasonable to follow the view expressed in favour of the claimants who are sufferers on account of loss of family member in vehicular accident.

13. **This Court is, thus, inclined to hold that the tax is payable on the interest on the amount of compensation under the MV Act with a rider that the interest should not be more than Rs. 50,000/- per clamant per financial year**. In the present case, after the award being finalised, the opposite party No.4-National insurance Co. Ltd. has calculated the interest payable on the entire amount of compensation. **Had the interest in question been computed by spreading over for six years commencing from 2013-14 till the deposit is made, the interest would be less than Rs.50,000/-, in such eventuality view of Section 194A(3)(ix) [pre amendment]/ Section 194A(3) (ixa) [post amendment], TDS was not required to be deducted by the opposite party No.4.**

14. In the result, the writ petition is allowed and the TDS amount wrongly deducted will be refunded to the petitioners by the Income-tax Department not later than eight weeks from today, failing which simple interest at the rate of 6% per annum on the said sum will be paid to the petitioners for the period of delay.

In the aforesaid circumstances, there is no order as to costs." (**Emphasis supplied**)

10. In view of the pleadings made in the Writ Petition so also submissions made by the learned Counsel for the Parties and the relevant provisions under the Act, 1961, as extracted above, as the interest calculated on the compensation amount is for the entire period i.e. from 2002 till the date of actual realization in the year 2022/2023 and the interest awarded and calculated, after bifurcation, did not exceed Rs.50,000/- during any of the financial year in between 2002 and 2022, in view of the judgments of this Court, as detailed above, the Opposite Party No.1 is directed to

refund the amount of Rs.57,672/- (Rupees Fifty seven thousand six hundred seventy two only) to the Petitioner within four weeks from the date of production of the certified copy of this order, failing which the Opposite Party No.1 shall pay 6% interest per annum on the said sum to the Petitioner for the period of delay.

11. Mr. Dutta learned Counsel for the Insurance Company submitted that as there is a delay, his client be given liberty to file revised return with an application to condone the delay and direction be given to the Department to condone the delay and process such revised return and refund the money deposited within a stipulated period.

12. In view of such submission of Mr. Dutta, learned Counsel for the Insurance Company, this Court grants liberty to the Opposite Party No.1- Insurance Company to file revised return before the Jurisdictional Principal Commissioner of Income Tax with application for condonation of delay. On filing of such revised return so also application for condonation of delay, the said Authority of the Department shall do well to condone the delay and process the revised return for refund of the money wrongly deposited with the Department towards TDS and refund Rs.57,672/- (Rupees Fifty seven thousand six hundred seventy two only) to the Opposite Party No.1-Insurance Company within a period of six weeks from the date of filing the revised return following due procedure, as prescribed under the Income Tax Act, 1961.

13. With the above observation and direction, the Writ Petition stands disposed of. No order as to cost.

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2024 (II) ILR-CUT-1357

G. SATAPATHY, J.

SAO. NO. 3 OF 2023

JAYANTI BARIK & ORS. ……Appellants

-V-

RAMAKANTA BARIK & ORS. ……Respondents

CODE OF CIVIL PROCEDURE, 1908 – Order XLI, Rule 26 – The learned Trial Court has not recorded a proper finding on the issue of right, title and interest of the plaintiffs over the suit land by duly analyzing the pleadings and evidence on record – The 1st Appellate Court remanded the matter to adjudicate the issue but the judgment and decree of the learned Trial Court has not been set aside rather the same has been stayed – Whether the order of 1st Appellate Court sustainable under law? – Held, No – Reason indicated. (Paras 11-12)

Case Laws Relied on and Referred to :-

1. AIR 2005 of Karnatak of 419 : Putlabai -Vs- Vaijnath & Ors.

For Appellants : Mr. A.Mohanta.
For Respondents : Mr. S.K.Mohanty on behalf of Mr. D.K.Pattanayak.

JUDGMENT Date of Judgment : 06.08.2024

G. SATAPATHY, J.

1. This is an appeal from order under Section 104 read with Order-XLIII Rule-1(u) of the Code of Civil Procedure, 1908 (in short "the CPC") questioning the legality of the judgment dated 30.07.2022 passed by the learned Additional District Judge, Champua in RFA No.13 of 2017.

2. By the aforesaid order, the learned ADJ, Champua has remitted the matter back to the learned trial Court for framing of additional issue and to decide the same with regard to right, title and interest over the suit property. Further, while passing such order, the learned ADJ, Champua has also stayed the operation of judgment and decree passed by the learned trial Court in CS No.28 of 2015 till disposal of the additional issue.

3. The facts in precise is that the present appellants being the plaintiffs had instituted the suit in CS No.28 of 2015 against the present Respondents as Defendants in the Court of learned Civil Judge (Sr. Divn.), Champua by praying therein to evict the Defendant Nos.1 to 3 (D1 to 3) along with realization of arrear rents amounting to Rs. 27,000/- from D1 and D2 jointly and Rs.27,000/- from D3 individually. According to the plaintiffs, the suit schedule land under Plot No.402/1487 of Khata No.328 measuring an area to the extent of Ac.0.390 decimals of Mouza-Barbil with Kissam-Gharabari was originally recorded in the name of Raja Ghana and Srimati Ghana and a pucca house was constructed thereon, but plaintiff No.1 (P1) was the widow of Khetra Ghana, whereas plaintiff Nos.2 to 5 (P2 to 5) with D4 and D5 are the daughters of late Raja Ghana, who died in the year 2011 leaving behind the plaintiffs and D4 and D5 as the successors-in-interest. Due to family dissension and dispute, D4 and D5 were not cooperating with the plaintiffs and thereby, they were impleaded in the suit as Proforma Defendants. After death of Srimati Ghana, Raja Ghana became the absolute owner and in possession of the suit schedule land and during his lifetime, he constructed a pucca residential house on a portion of the suit schedule land standing over an area Ac.0.100 decimals and he gave the residential house on rent to Dhania Barik and Banshi Barik, but after death of Dhania Barik and Banshi Barik, their sons D1 to 3 continued to reside in the same house by paying monthly rent regularly to Raja Ghana. After the death of Raja Ghana on 27.05.2011, D1 and 2 jointly paid Rs.1,000/- and D3 separately paid Rs.1,000/- as monthly rent to the P1 for above two years. It is alleged by the plaintiffs that since D1 & 3 had defaulted in paying the rent from January, 2013 and the plaintiffs wanted to modify the suit house for commercial purpose, on 13.03.2014 P1 sent a pleader notice to D1 to 3 to vacate the house standing on the suit land by clearing the arrear rents. Since D1 to 3 did not pay the arrear rents, the plaintiffs instituted the suit against the defendants for eviction and realization of arrear rents.

In response to the summons of the suit, D1 to 3 filed their joint written statement denying all the allegations made therein and *inter-alia* pleading that the suit is not maintainable and plaintiffs have no cause of action to file the suit. Further, D1 to 3 had resisted the claim of the plaintiffs by stating that the suit is barred by law of limitation and hit by provision of estoppels, res-judicata, waiver and acquiescence, but they admitted the fact that the suit schedule land stands recorded in the name of Raja Ghana and Srimati Ghana, however, resisted the claim of the plaintiffs to be the absolute owner in possession of the properties as the successor of Raja Ghana and Srimati Ghana, but it was also denied by the contesting defendants that after the death of Srimati Ghana, Raja Ghana became the absolute owner of the properties or Raja Ghana constructed the pucca house on suit plot or they were paying rents for the suit house. According to defendants, Raja Ghana was the son of Khetra Ghana who was the husband of Srimati Ghana and after the death of Khetra Ghana, his widow Srimati Ghana got married to Baju Barik and through him, Srimati Ghana was blessed with two sons namely, Ramachandra @ Dhania and Ghasia. Further, it was also claimed in WS that D1 & 2 are the legal heirs of Ramachandra @Dhania, whereas D3 is the son of Ghasia. It was claimed by contesting defendants that Srimati Ghana was the owner of 50% of the suit schedule land under Khata No. 328 and after her death, the suit property devolved upon them (contesting defendants) as her successors and, therefore, the claim of the plaintiffs was resisted in the above manner. In the above backdrop, the suit was prayed to be dismissed by the contesting defendants.

4. On the basis of the rival pleadings, the learned trial Court framed as many as 9 issues and proceeded with the trial of this case. After appreciating the evidence upon hearing the parties, the learned Civil Judge (Sr. Divn.), Champua decreed the suit in favour of the plaintiffs and directed D1 to 3 to vacate the suit premises within three months from the date of passing of the decree with liberty to the plaintiffs to take possession of the house in due process of law.

5. Feeling aggrieved with the judgment and decree, the D1 to 3 filed the appeal in RFA No.13 of 2017 which was disposed of by the learned ADJ, Champua by the impugned judgment remitting the matter back to the learned Civil Judge (Sr. Divn.), Champua to frame an additional issue and decide the same with regard to right, title and interest of the parties.

6. In assailing the impugned judgment, Mr. Ashutosh Mohanta, learned counsel for the appellant submits that the learned 1st Appellate Court has erred in remitting the matter back to decide the right, title and interest of the parties by framing an additional issue thereon, since the issue No.8 in the suit pertains to the question of declaration of right, title and possession of the plaintiffs over the suit property, but notwithstanding to such facts, the learned 1st Appellate Court has passed a direction to frame an additional issue and decide the in accordance with law. Further, he by taking this Court through the decision on issue No.8 submits that it has already been rightly answered by the Civil Judge (Sr. Divn.), Champua.

Accordingly, Mr. Mohanta has prayed to allow this appeal and set aside the impugned judgment and decree by directing the 1st Appellate Court to decide the appeal on merit.

7. On the other hand, Mr. S.K. Mohanty, learned counsel appearing on behalf of Mr. D.K. Pattanayak, learned counsel for the Respondent Nos.1 to 3 submits that the learned 1st Appellate Court has rightly decided the appeal by remitting the matter, since the right, title and interest of the plaintiffs has not been properly adjudicated upon by the learned trial Court. Accordingly, Mr. Mohanty has prayed to dismiss the present appeal.

8. After having considered the rival submissions upon perusal of record, since the dispute pertains to the 1st Appellate Court judgment with regard to framing of issue on right, title and interest, this Court straight away proceed to re-examine and relook the impugned judgment passed by the learned Civil Judge (Sr. Divn.), Champua in the suit, wherein the learned trial Court has formulated the following question under issue No.8:-

(i) Whether the plaintiffs are entitled to right, title and possession over the suit property?

Although, there is an issue on right, title and possession of the plaintiffs over the suit property, but the learned 1st Appellate Court in remitting the matter back to the learned Civil Judge (Sr. Divn.), Champua has asked for framing the same issue.

9. A perusal of the finding of the learned trial Court on issue No.8, it appears that the learned trial Court has recorded the following findings under issue No.8:-

> *"As far as this issue is concerned, it reveals from the pleadings of the plaintiffs that they have not made any prayer for declaration of right, title, interest. The contesting defendants while arguing in this case submitted that without seeking the relief of declaration of right, title and interest, the plaintiffs cannot pray for the other prayers, to support this, he relied on the decision of [**AIR 2005 of Karnatak of 419**] in the case of **Putlabai Vrs. VAijnath and others** have held that "Specific Relief Act (47 of 1963), S.38-Injunction-Suit for bare injunction without seeking relief of declaration of title-Is maintainable- Particularly, when title of plaintiff is unassailable".*
>
> *This court is of considered view that the present facts and circumstances of this case is something different from the present case. In this case, as discussed above, it is already found that the plaintiffs have a valid title in respect of the suit land. This is a suit for eviction along with the prayer of recovery of the rent as discussed above, the plaintiffs along with defendants no.4 and 5 are found to be rightful owner in respect of suit schedule land. Being the absolute owner, the plaintiffs have a very right to file the suit for eviction if any other persons having no title resided, possessed or occupied his or her right. Accordingly, this issue is answered in favour of the plaintiffs."*

10. A careful analysis of the above finding on issue No.8, it appears that the learned trial Court has not answered the issue properly by discussing the evidence and pleadings of the parties available on record by simply holding that the suit is for eviction along with prayer for recovery of the rent and the plaintiffs and D4 & D5 are found to be rightful owner in respect of the schedule land. It, however, appears

to the Court that such finding of the learned trial Court is not in accordance with law and weight of evidence, rather the same appears to be on mere assumption. Learned counsel for the appellants has also taken this Court to the finding of the learned trial Court on issue Nos.5 and 7, which are questions relating to the ownership and possession of the plaintiffs over the suit land in question, but this Court on careful perusal of the findings of the learned Civil Judge (Sr. Divn.), Champua on these two issues, is of the opinion that there is absolutely no discussion about right, title and interest of the plaintiffs over the suit land, no matter the learned trial Court has recorded some finding on these issues, however, it has not decided the core issue of right, title and interest of the parties over the suit land.

11. It, however, appears to the Court that although the 1st Appellate Court has directed for framing of additional issues on right, title and interest, which appears to be erroneous, since there is already an issue on the plaintiffs' right, title and possession over the suit property under issue No.8. However, the findings recorded by the learned trial Court on such issue appears to be inconsistent and, thereby, the remand order as passed by the learned 1st Appellate Court is otherwise correct on the ground that the learned trial Court has not recorded a proper finding on the said issue of right title interest of the plaintiffs over the suit land by duly analyzing the pleadings and evidence on record. In such view of the matter, the impugned judgment of the 1st Appellate Court cannot be questioned for fresh adjudication on issue No.8, but the learned 1st Appellate Court appears to be confused while passing the impugned judgment by staying operation of the judgment and decree of the trial Court and directing disposal of the suit within three months. For clarity, the exact verbatim of the operative part of the impugned judgment of learned ADJ, Champua is extracted below:-

> *"The RFA No. 13 of 2017 is disposed off with following observation.* ***The operation of the judgment and decree of the trial Court passed in CS 28 of 2015 is hereby stayed till disposal of additional issue.*** *The case record be remanded back to trial Court for framing of additional issue and to decide the issue regarding the right, title and interest over the suit property. The parties are at liberty to adduce additional and further evidence subject to cross-examination by opposite party. The parties are directed to present their case before the trial Court within fifteen days.* ***The trial Court is directed to dispose off the suit within three months".***

In addition, the aforesaid contradictory direction as found in the operative part of the impugned judgment gains momentum, when it is further found from the judgment of the learned 1st Appellate Court that the judgment and decree of the learned trial Court has not been set aside, rather the same has been stayed. Further, if the learned 1st Appellate Court is not satisfied with the findings of the learned trial Court for want of necessary issue, it is left with two options; firstly, if there is sufficient evidence on record to enable it to pronounce judgment, it may resettle issue and finally determine the suit and secondly, if according to it, the trial Court has omitted to frame or try any issue; or to determine any question of fact, which is essential to the right decision of the suit upon merits, it may frame issue and refer

them for trial to the trial Court and shall direct the trial Court to take the additional evidence required. In this case, it appears to this Court that the learned 1st Appellate Court is of the considered opinion that the core issue of right, title and interest of the plaintiffs over the suit property has neither been framed nor has it been decided which is of course erroneous and contrary to the fact since such issue is already there under issue No.8 which has not been properly adjudicated upon. Whatever may be the situation, in either case, the impugned judgment of the learned 1st Appellate Court demonstrates a case of close remand under Order XLI, Rule-25 of the CPC, since the issue on right, title and interest of the plaintiffs has not been properly adjudicated.

12. In the aforesaid situation and discussions made hereinabove, the inevitable consequence is that the learned trial Court is required to decide issue No.8 afresh by taking evidence from both the sides and returned the same together with the evidence to the learned 1st Appellate Court for deciding the appeal in RFA No. 13 of 2017 on merit. Hence, the learned Civil Judge (Sr. Divn.), Champua is, accordingly, requested to proceed to try issue No.8 and decide the same by affording opportunity to the parties to lead fresh evidence and returned its findings on issue No.8 together with evidence within a period of three months to the 1st Appellate Court, who thereupon proceed to decide the Appeal in RFA No. 13 of 2017 afresh by following procedure of Order XLI, Rule-26 of the CPC.

13. In the result, the present appeal is accordingly disposed of with partial modification on contest and the impugned judgment of learned 1st Appellate Court is hereby set aside and modified to the extent indicated above. There is no order as to costs.

14. A copy of this order be immediately communicated to the learned trial Court and 1st Appellate Court, Champua for compliance. Parties are directed to co-operate with both the Courts by appearing therein. If one or more of the contesting party(ies) do/does not appear, notice be issued in accordance with law for his/their appearance. Needless to say, the interim order passed to stay the further proceeding of CS No. 28 of 2015 stands vacated and merged with this final order.

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2024 (II) ILR-CUT-1362

G. SATAPATHY, J.

CRLMP. NO. 731 OF 2024

SWAGAT KUMAR SAHU ……Petitioner

-V-

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

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 156(3), 197 r/w offences under the Prevention of Corruption Act, 1988 – The petitioner made a complaint against the accused persons who are the Headmaster

and Teachers of a Government School and prayed for investigation against them in corruption charges – Whether the Magistrate can order investigation against a public servant U/s. 156(3) of Cr.P.C. without previous sanction? – Held, No – Reason indicated with reference to case laws.

Case Laws Relied on and Referred to :-

1. (2013) 10 SCC 705 : Anil Kumar & Others -Vs- M.K.Aiyappa & Another.
2. (2009) 6 SCC 372 : State of Uttar Pradesh -Vs- Paras Nath Singh.
3. (2012) 3 SCC 64 : Subramanian Swamy -Vs- Manmohan Singh & Another.
4. (2016) 9 SCC 598 : L.Narayana Swamy -Vs- State of Karnatak & Others.
5. (2018) 5 SCC 557 : Manju Surana vrs. Sunil Arora and others.

For Petitioner : Mr. S.P.Das.
For Opp.Parties : Mr. N.Moharana, ASC (Vigilance)

JUDGMENT Date of Judgment : 30.07.2024

G. SATAPATHY, J.

1. Heard Mr. Sidharth Prasad Das, learned counsel for the petitioner and Mr.Niranjan Moharana, learned ASC for Vigilance Department and perused the record.

2. The sole grievance of the petitioner is for a direction to the State-Respondents to complete the investigation in a time bound manner taking stringent action against the culprits with needful protection to the petitioner.

3. In the course of hearing, Mr.Das by bringing to the notice of this Court the order passed by this Court on 16.10.2023 in CRLMP No. 1647 of 2023 submits that the result of the enquiry conducted by the opposite party-Vigilance Department has not been communicated to the petitioner and since the opposite party are not taking proper steps in registering a case against the accused persons, necessary direction may kindly be issued to register a case against the accused persons and proceed against them.

4. Mr.Moharana, however, by producing the written instruction received from Inspector of Police, Vigilance Berhampur Division submits that on the allegation of the petitioner, an enquiry was conducted, but no material was found to proceed against the accused Headmaster and other Teachers of City High School, Berhampur. Mr. Moharana further submits that since the prayer of the petitioner is not cognizable by this Court, the present CRLMP may kindly be dismissed. The written instruction be kept on record.

5. After having considered the rival submissions upon perusal of record, there appears no dispute that the present petitioner is a private person who has made a complaint against the accused persons who are the Headmaster and Teachers serving in City High School, Berhampur, but law is very clear that before proceeding with the investigation in the case against the proposed accused persons, sanction/approval is required as contemplated in Prevention of Corruption (Amendment) Act, 2018.

Further, to entertain a complaint of a private complainant against the public servant for charges of corruption, sanction is required in terms of Prevention of Corruption Act, 1988 as held by Apex Court in ***Anil Kumar and others Vrs. M.K.Aiyappa and another; (2013) 10 SCC 705*** wherein in a similar matter where the private complainant has made an application before the concerned Court to refer the complaint against the public servant U/S. 156(3) of CrPC, it was held by the Apex Court that once it is noticed that there was no previous sanction, the Magistrate cannot order investigation against a public servant while invoking powers U/S. 156(3) of CrPC. In laying down the above legal principle, the Apex Court has reiterated what has been spelt out in ***State of Uttar Pradesh vrs. Paras Nath Singh; (2009) 6 SCC 372*** and ***Subramanian Swamy vrs. Manmohan Singh and another; (2012) 3 SCC 64.***

6. Further, in ***Anil Kumar (supra)***, the Apex Court in Paragraph-11 has also observed as under:-

> *"where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 of CrPC, the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter U/S. 156(3) of the CrPC against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such as reflected in the order, will not be sufficient".*

7. Further, the precedent of ***Anil Kumar (supra)*** has been subsequently followed in the decision in ***L.Narayana Swamy vrs. State of Karnataka and others; (2016) 9 SCC 598***, wherein the Apex Court has held that an order directing further investigation U/S. 156(3) of CrPC cannot be passed in absence of a valid sanction. The same legal position still holds the field, of course, in another matter the issue has been referred to a larger Bench in ***Manju Surana vrs. Sunil Arora and others; (2018) 5 SCC 557*** which is yet to be answered and, therefore, the law laid down in ***Anil Kumar(supra)*** still holds the field. In this case admittedly, no sanction has been obtained to proceed against any of the accused persons, so also no FIR has yet been registered against them. Besides, the written instruction as supplied by learned ASC, Vigilance discloses that on the grievance of the petitioner, an enquiry was conducted by the Vigilance Department, but the allegations leveled by the petitioner was found to be untrue, even the petitioner could not throw any light regarding the misappropriation of cheque amount of Rs.10,00,000/- by anybody. Further, it is also stated in the instruction that before the aforesaid enquiry by the Vigilance, the DEO, Ganjam also got the matter enquired by a team constituting two Headmistress of other schools namely, Dr.Pravati Kumar Mohapatra and Smt. Chandini Panda, who submitted a joint enquiry report to DEO, Ganjam by concluding that they did not find any evidence any financial irregularities by the HM & staff of the school in question. It is further stated that in the enquiry by the Vigilance, the present petitioner stated that he has no knowledge about the cheque of Rs.10,00,000/-, but after hearing information from one Simanchal Tripathy, the Classical Teacher of

City High School, he has filed the petition, however, the petitioner could not produce any document to substantiate the allegation of corruption against the HM & staff of City High School. It, thus, appears to the Court that the petitioner is set up by another person to bring this allegation against the Govt. officials of the school. In the aforesaid situation, the allegations leveled by the petitioner seem to be his personal vendetta and appears to be motivated, but such arm-twisting method appears to be adopted by the petitioner is not appreciable and strongly deprecated.

8. In view of the above facts and discussion made hereinabove and taking into account the law laid down by Apex Court in ***Anil Kumar (Supra)*** and regard being had to the written instruction as produced by Mr.Moharana, this Court does not find any merit in the CRLMP.

9. Accordingly, the CRLMP stands dismissed on contest, but no order as to costs.

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2024 (II) ILR-CUT-1365

SIBO SANKAR MISHRA, J.

CRLMC NO. 2634 OF 2023

M/s.ORISSA HOMES PVT. LTD. & ANR. .....Petitioners

-V-

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 r/w Section 13 of the OPID Act – The petitioner has challenged the order of charge passed by learned Presiding Officer, Designated Court under the OPID Act in appeal, which is pending before the Appellate Court – Whether the inherent jurisdiction U/s. 482 Cr.P.C. can be invoked at this stage? – Held, No, liberty is granted to the petitioners to argue all the issues before the Appellate Court.

Case Laws Relied on and Referred to :-

1. CRLMC No. 1296 of 2021 (24.09.2021) : Rashmita Patra vs. State of Odisha & Ors.
2. Spl.Leave to Appeal (Crl.) No(s). 2107 of 2022 : The State of Odisha & Ors. Vs. Rashmita Patra.
3. CRLMC No. 3386 of 2022 (26.06.2023) : Dusmanta Kumar Muduli vs. State of Odisha.
4. 2023 SCC OnLine SC 1399 : Bhisham Lal Verma vs. State of Uttar Pradesh & Anr.

For Petitioners : Mr. Jaganath Patnaik, Sr. Adv. along with Ms. S.Patnaik.
For Opp.Parties : Mr. P.K.Maharaj, ASC.
Mr. Bibekananda Bhuyan & Mr. Anil Kumar Nayak.

JUDGMENT Date of Hearing : 12.04.2024 : Date of Judgment : 30.04.2024

S.S. MISHRA, J.

1. In the present petition under Section 482 Cr. P.C, the petitioner explore for the following reliefs:

i) admit the Application, call for records and quush the entire criminal proceeding in CT. Case No. 03 of 2018 arising out of E.O.W. Bhubaneswar P.S. Case No.02 of 2018, Dated 30.01.2018 for commission of alleged offences under Sections 406/420/467/ 468/471/120-B IPC read with Section 6 of Odisha Protection of Interests of Depositors (in Financial Establishments) Act, 2011 which is now pending before the Court of the Learned Presiding Officer, Designated under the OPID Act, Cuttack.

ii) And set aside the cognizance order dated 09.07.2018 in C.T. Case No 03. 2018 by the learned Presiding Officer, Designated Court under The OPID Act, Cuttack."

2. The petitioners are accused in C.T. Case No.3 of 2018 arising out of E.O.W. Bhubaneswar P.S. Case No.02 of 2018 for the offences under Sections 406/420/ 467/468/471/120-B IPC read with Section 6 of Odisha Protection of Interests of Depositors (in Financial Establishments) Act, 2011 (hereinafter referred to as the "OPID Act").

3. The informant in the present case has alleged that the petitioners and the other Directors have entered into a criminal conspiracy and committed the offence as stated above. Complainant alleged that huge amount had been taken from him with a promise to deliver the property/flat in a stipulated time frame. However, even the construction of the flat has not been taken up by the accused company. It is alleged that the agreement and the other documents given by the petitioners were all forged and fabricated documents. The petitioners have cheated many home buyers in the similar fashion. On the basis of the aforementioned allegation, case was registered, the investigation was carried out by the E.O.W. Cell, Bhubaneswar and the charge sheet was filed against the petitioners and other accused persons for commission of alleged offences as mentioned above.

4. On 09.07.2018, the Designated Court, OPID Act had taken cognizance of the offences. Subsequently thereafter, the petitioners moved an application for discharging them before the learned trial Court, which was turned down on 08.08.2019. Thereafter the charges for the alleged offences under Sections 406/ 420/467/468/471/120-B IPC read with Section 6 of the OPID Act, 2011 were framed against the petitioners.

5. The petitioners appear to have challenged the order of charge by filing appeal under Section 13 of the OPID Act being Criminal Appeal No.711 of 2019 which is pending before this Court.

6. Apart from the aforementioned Criminal Appeal No.711 of 2019 pending before this Court, the petitioners had also filed CRLMC No.1126 of 2018 and CRLMC No. 2497 of 2019 ventilating same grievances on the same/similar grounds. Both these CRLMCs were withdrawn by the petitioners.

7. The precise ground of challenge of the petitioners in all the aforementioned proceedings as well as in the present proceeding is that the petitioners company being engaged in the business of development and sell of the property is not a financial establishment as defined in the OPID Act. Therefore, the offence under the OPID Act fastens upon petitioners is not sustainable under law.

8. To buttress their argument, the petitioners have relied upon the judgment of this Court passed on 24.09.2021 in the case of ***Rashmita Patra vs. State of Odisha & Others*** in CRLMC No.1296 of 2021 wherein this Court has held as under:

> *"17. The case at hand, it is evident that the alleged "deposit" was made as a part of the consideration for purchase of an immovable property. Subsequently, the plot was registered in the informant's name but it came to light that there was alleged misrepresentation pertaining to whether or not the petitioner and co-accused had the absolute rights over the nearby plots which were essential for constructing a connecting road. These are the issues which is the subject matter of other legislations and not of OPID Act.*
>
> *21. Without going into the question of legislative competence, it has to be borne in mind that the source of power for every legislation is derived from one of the three lists present in the Seventh Schedule of the Constitution of India. That being the case, it is pertinent to note that in the case of* ***New Horizon Sugar Mills Limited*** *(supra). the Hon'ble Supreme Court has, in terms, observed that the the power to enact the pari materia legislations of Tamil Nadu, Pondicherry and Maharashta Act, is derived by the State from Entries 1, 30 and 32 of the State List, which involves the business of unincorporated trading and money-lending. In my view, the objective of the State legislature by enacting the OFID Act was aimed at protecting the interest of gullible depositors who were fraudulently conned into participating in a scheme or arrangement with unscrupulous financial establishments involved in the business or receiving such deposits. By no stretch of imagination could the provision of the OPID Act be contemplated to mean that the intendment of the State legislature was to bring simple transactions pertaining to sale/ transfer of immovable property within the purview of the Act."*

9. Eventually, this Court in the aforementioned judgment has held that the Real Estate Developer Companies are not the financial establishments as defined under the OPID Act. Therefore, no offence under the OPID Act could be alleged against the Real Estate Developer for having failed to deliver the property/flat.

10. This matter was taken up by the State to the Hon'ble Supreme Court by filing Petition(s) bearing ***Special Leave to Appeal (Crl.) No(s).2107 of 2022 (The State of Odisha & others vs. Rashmita Patra)***. The said SLP and many other connected matters raising the similar issue are pending determination by the Hon'ble Apex Court.

11. When the matter stood thus, the coordinate Bench of our own High Court, while dealing with the same issue in the similar matter in ***Dusmanta Kumar Muduli vs. State of Odisha*** in ***CRLMC No.3386 of 2022*** vide its judgment dated 26.06.2023 opined that the judgment of this Court passed in ***Rashmita Patra*** (supra) is *per incuriam*. The relevant part of the judgment reads as under :

> *"8. Referring to the Apex Court decision in* ***Ripa Sharma*** *(supra) and other decisions cited herein above laying down the principles of binding precedence and that if a conflicting view is taken by a Co-ordinate Bench of the same Court in ignorance of earlier decisions, it shall have no binding effect and said to be a judgment per incuriam, Mr. Bhuyan, learned counsel for the OPID State submits that the earlier view of the Benches of equal strength was to be followed by the subsequent Bench of co-equal*

strength while dealing with similar matter. It is claimed that since the Co-ordinate Benches of this Court confirmed the orders of charge and initiation of criminal proceeding, the subsequent judgment in CRLMC No. 1296 of 2021, without taking note of said decisions has lost its binding effect. However, it is argued by Mr. Das, learned Senior Advocate that the judgment in CRLMC No. 2781 of 2019 is a non-speaking one which simply followed the judgment in CRLA No. 32 of 2020 which was related to an order under Section 239 Cr.P.C. seeking discharge. It is contended by Mr. Das that RERA governs the field which is a complete Code in itself and therefore, the doctrine of occupied field squarely applies. On a reading of the judgment in CRLA No. 32 of 2020, it is made to understand that the charge under Section 6 of the OPID Act was under challenge therein and the same did not find favour with this Court which was also followed in CRLMC No. 2781 of 2019 and therefore, the only option which is now left open to conclude that the prosecution against the petitioner for the said offence shall have to continue, however, its fate being dependent on the final decision of the Apex Court in SLP (Crl.) No. 2107 of 2022 and SLA (Crl.No. 4910 of 2022 and as a necessary corollary, the decision in CRLMC No. 1296 of 2021 has to be held as a judgment ***per incuriam****. Whether for other IPC offences, a prima facie case is made out against the petitioner or otherwise, in the considered view of the Court, it should be left for the decision of the learned court below during enquiry."*

12. Therefore, the moot question that arises for consideration before this Court is whether a real estate business could be dragged into the proceedings under Section 6 of the OPID Act, 2011, by classifying a person paying in advance and booking a flat/property to be "depositor", and necessarily entail the consequences under the OPID Act.

13. Heard Mr. Jaganath Patnaik, learned Senior Counsel appearing for the petitioners and Mr. Bibekananda Bhuyan & Mr. Anil Kumar Nayak, learned counsels appearing for the opposite parties.

14. At the outset, when the matter was taken up for hearing. Mr. Patnaik, learned Senior Counsel appearing for the petitioners has drawn the attention of this court to the affidavit filed by the petitioners on 16.02.2024 and explained the reason for which his clients have approached this Court for the same relief time and again and withdrawn the cases.

15. Mr. Patnaik, learned Senior Counsel, by relying upon the judgment of this Court in ***Rashmita*** (supra) submits that the larger issue regarding the offence under the OPID Act being registered against his client is maintainable or not is pending determination before the Hon'ble Supreme Court. Therefore, till the case is finally decided, he seeks interim stay of the proceeding pending against the petitioners before the Designated Court.

16. Mr. Bhuyan and Mr. Nayak, learned counsels appearing for the opposite party no.2 submits as follows:

*"*The petitioner has taken sole ground that Section 6 of OPID Act is not applicable, relying upon the decision rendered in CRLMC No. 1296 of 2021 dated 24.09.2021 (Rashmita Patra vs. State of Orissa). It is pertinent to mention here that this Hon'ble Court in Judgment dated 26.06.2023 passed in CRLMC No. 3386/2022 (copy enclosed)

> hold that the decision rendered in Rashmita Patra case is *per incuriam.* Since the decision rendered in Rashmita Patra case has been declared as *per incuriam* by this Hon'ble Court, the said decision has lost its binding force. Hence, the contention made by the petitioners has got no merit and this petition is liable to be dismissed."

17. Learned counsel for the opposite no.2 has also contended that on 28.09.2021, the petitioners have withdrawn CRLMC No.1126 of 2018 without seeking liberty from the Court to file a fresh petition. CRLMC No.2497 of 2019 filed by the petitioner No.2 was also dismissed on 02.03.2021.

18. In view of the aforementioned orders of this Court dated 28.09.2021 and 02.03.2021 passed in CRLMC No.1126 of 2018 and CRLMC No.2497 of 2019 respectively, the present petition is not maintainable. Moreover, the Designated Court, OPID Act vide its order dated 08.08.2019 has already framed the charges against the accused persons under Sections 406/420/467/468/471/120-1B IPC read with Section 6 of the OPID Act, 2011.

19. The petitioners have already preferred Criminal Appeal No.711 of 2019, which is pending before this Court. In all the aforementioned three matters, the petitioners have precisely argued the same point. Therefore, no indulgence should be granted to the petitioners in the present proceeding being a repetitive petition for the same grievance.

20. I am persuaded by the argument advanced by learned counsel for the opposite party no.2. Therefore, instead of delving upon the merits of the present case and acceding to the prayer made by Mr. Patnaik, learned Senior Counsel for the petitioners, I prefer the petitioners to raise all their contentions in the pending appeal.

21. In so far as the interim prayer is concerned, it is also opened for the petitioners to make such prayer before the appellate Court.

22. I have formed the opinion by relying upon the judgment of the Hon'ble Supreme Court in the case of ***Bhisham Lal Verma vs. State of Uttar Pradesh and another***, reported in ***2023 SCC Online SC 1399***. Apt is to reproduce the following paragraphs

> ***"9.*** *Mr. S.Nagamuthu, learned amicus curiae, would however point out that entertainment of the second petition in Mohan Singh (supra) was held permissible as the circumstances obtaining at the time of the subsequent petition were clearly different from what they were at the time of the earlier one and that was the distinguishing factor which saved the second petition. He would further point out that, in Simrikhia v. Dolley Mukherjee and Chhabi Mukherjee, this Court cautioned that the inherent jurisdiction under Section 482 Cr. P.C. cannot be invoked to override the bar of review under Section 362 Cr. P.C. Reference was made to Sooraj Devi v. Pyare Lal which held that the inherent power of the Court could not be exercised for doing that which is specifically prohibited by the Criminal Procedure Code, 1973. He also drew our attention to R. Annapurna v. Ramadugu Anantha Krishna Sastry, wherein a quash petition under Section 482 Cr.P.C. was dismissed on 28.01.1995 and without mentioning*

the same, another petition was filed under Section 482 Cr. P.C. with a similar prayer. Noting that the second petition was not made on the strength of anything which had developed after 28.01.1995 but only on the facts which subsisted prior to that date, this Court held that the second petition was not maintainable, as the High Court did not have the power to upset the order dated 28.01.1995 which had attained finality.

10. *In S. Madan Kumar v. K. Arjunan, the Madras High Court observed that a person who invokes Section 482 Cr. P.C. should honestly come before the Court raising all the pleas available to him at that point of time and he is not supposed to approach the Court with installment pleas. It was further observed that there may be a change of circumstances during the course of criminal proceedings which would give scope for the person aggrieved to invoke the inherent jurisdiction of the Court, but when he is posted with all the facts and circumstances of a case, he cannot withhold part of it for the purpose of filing yet another petition seeking the same relief.*

11. *We are in complete agreement with these observations of the Madras High Court. Though it is clear that there can be no blanket rule that a second petition under Section 482 Cr. P.C. would not lie in any situation and it would depend upon the facts and circumstances of the individual case, it is not open to a person aggrieved to raise one plea after the other, by invoking the jurisdiction of the High Court under Section 482 Cr.P.C, though all such pleas were very much available even at the first instance. Permitting the filing of successive petitions under Section 482 Cr. P.C. ignoring this principle would enable an ingenious accused to effectively stall the proceedings against him to suit his own interest and convenience, by filing one petition after another under Section 482 Cr. P.C., irrespective of when the cause therefore arose. Such abuse of process cannot be permitted."*

23. In view of the aforementioned decision of the Hon'ble Supreme Court in ***Bhisham Lal Verma*** (supra), I am not inclined to entertain this petition. However, liberty is granted to the petitioners to argue all the issues before the appellate Court, when Criminal Appeal No.711 of 2019 is heard.

24. With the aforementioned liberty, the CRLMC is disposed of.

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2024 (II) ILR-CUT-1370

SIBO SANKAR MISHRA, J.

CRLMC NO.3566 OF 2016

(WITH CRLMC NOS. 3114 & 3157 OF 2018)

Md. SERAJ YUSHA .....Petitioner

-V-

STATE OF ORISSA (VIGILANCE) & ORS. .....Opp.Parties

PRINCIPLES OF VICARIOUS LIABILITY – Discussed with reference to case laws.

Case Laws Relied on and Referred to :-

1. (2015) 4 SCC 609 : Sunil Bharti Mittal vs. CBI.
2. (1989) 4 SCC 630 : Sham Sundar Vs. State of Haryana.
3. (2008) 5 SCC 668 : Muksud Sayed vs. State of Gujrat.

4. (2017) 67 OCR (SC) 796 : State of Karnataka vs. J. Jayalalitha.
5. AIR 1998 (SC) 1128 : UP Polution Control Board vs. Modi Industries & Ors.
6. 2012 (10) SCC 303 : Gian Singh vs. State of Punjab & Anr.

For Petitioners : Mr. Ashok Mohanty, Sr. Adv. & Mr. S. P.Sarangi,
Mr. B.S.Tripathy 1
Mr. Pitambar Acharya, Sr. Adv. & Mr. P.K. Das.

For Opp.Parties : Mr. Sanjay Das, SC(Vig.), Mr. Niranjan Maharana, ASC (Vig.)

JUDGEMENT Date of Hearing : 15.05.2024 : Date of Judgement : 20.06.2024

S.S. MISHRA, J.

1. The present proceedings have been drawn invoking inherent jurisdiction of this Court under Section 482 of Code of Criminal Procedure, 1974 (Cr.P.C) with prayers to quash the charge sheet No.42 dated 29.09.2014 filed by the respondents under Sections 13(2) r/w Section 13(1) (c) (d) of the Prevention of Corruption Act, 1988 (hereinafter referred as "the P.C. Act") r/w Sections 379/ 467/ 468/ 471/409/411/120 B of the Indian Penal Code (IPC) in T.R No. 53 of 2015 pending before the Court of learned Special Judge, Vigilance, Cuttack, which is emanating from Vigilance Case No.25 dated 13.04.2010 under Section 13(2) read with Section 13(1) (d) of the P.C. Act.

2. The petitioners have further challenged the validity of the order of taking cognizance of offences from the aforesaid charge-sheet dated 06.11.2015, passed by the learned Special Judge, Vigilance, Cuttack in pending T.R. Case No. 53 of 2015.

3. All the three petitions are being decided by way of this common judgment/order as all of them arise out of a common proceeding i.e. T.R.Case No. 53 of 2015 pending before the Court of learned Special Judge, Vigilance, Cuttack.

4. The relevant admitted facts sans unnecessary details for the purpose of deciding the present petitions are discussed herein below:

The Respondent lodged the F.I.R. No.25 of 2010 P.S. Vigilance, Cuttack alleging that one Smt. Shantilata Behera, had purchased one 10 wheeler truck under Hypothecation/Lease Agreement with Shriram Transport Finance Co. Ltd., which was registered with the Registering Authority (M.V.) Cuttack with Registration No. OR-05-AA-1869 (hereinafter referred as "Offending Vehicle"). Since, Smt. Shantilata Behera could not pay the monthly installments of repayment of the vehicle loan; Shriram Transport Finance Co. Ltd. took possession of the offending vehicle and put it on auction to recover the loan amount. One Susanta Kumar Bal purchased the offending vehicle in the auction and thereafter sold the offending vehicle to One Surendra Jain of Kolkata (W.B.).

Shri Surendra Jain brought the offending vehicle to Cuttack for the purpose of repair and regularization of the papers of the vehicle at RTA, Cuttack. Shri Surendra Jain stayed at Jasmine Hotel at Cuttack which was owned by Shri Prasant Kumar Patra (Accused No.1). It is stated in the F.I.R. that the Accused No.1 in connivance with Sri Dhaneswar Nayak (Accused No.2), who was posted as Traffic

Inspector, Office of RTO, Cuttack enticed Shri Surendra Jain to get the repair work of the offending vehicle done at one Chagala Garage at Sikharpur, Cuttack. When the offending vehicle was taken to the said garage, Accused No.2 suddenly arrived and seized the offending vehicle under the charges of non-payment of statutory charges/ taxes and on the charge of driving the vehicle without requisite documents and permits. Exploiting this situation, Accused No. 1, Mr. Patra struck a deal with Surendra Jain to purchase the offending vehicle for a consideration of Rs. 10,00,000/- for which cheques were issued by Accused no. 1 to Surendra Jain. The said cheques were dishonored on presentation. When Surendra Jain confronted with the Accused No.1 about dishonoring of the cheques, Accused no. 1 asked him to come to Cuttack to take cash in lieu of the cheques. Once, Surendra Jain came to Cuttack, he got to know that Accused No.1 was plying the offending vehicle and when Surendra Jain failed to receive any satisfactory response from Accused No.2 about plying of the offending vehicle, he reported the same to the Vigilance Department leading to lodging of the F.I.R. by the respondent Vigilance Department naming Accused No.1 and Accused No.2 only in the F.I.R.

During the course of investigation, it came to the light that the offending vehicle which the Accused No.1 was plying in connivance with the Accused No.2 was used for transporting of Iron Ore Fines from various places to Paradeep Port for export. The investigation further revealed that the Transit Passes which were used for the purpose of transporting the Iron Ore Fines were forged and the said Transit Passes were never issued by the Mining Department.

The petitioners herein are Directors/Partners of Exporter Company/ firms of Iron Ore Fines and they allegedly purchased/procured Iron Ore Fines from Intermediaries' Companies/firms and received the Iron Ore Fines at Paradeep Port. The said Intermediaries firms have used the offending vehicle and forged transit passes to transport the Iron Ore fines to Paradeep Port. The relevant details of alleged instances of transportation of the Iron Ore Fines to the petitioner's company/firms are extracted in tabulated form herein below:-

Transit Pass No.	T.P. Book No.	Name of Consigner	Name of Consignee	Name of Career owner
A025109 (Forged transit Pass)	25157	M/s. Jay Iron & Steel Ltd.	M/s. GNG Exports	Bajarangbali Roadways, Rourkela
A025139 (Forged transit Pass)	25158	-do-	-do-	-do-
A024918 (Forged transit Pass)		T.R Chemical Ltd.	Bagadiya Brothers (P) Ltd.	
A024910 (Forged transit Pass)	30624	Scan Steel Ltd.	F. Serjuddin Exports Pvt. Ltd.	Om Transport
A474001 (Forged transit Pass)	2590	-do-	-do-	P Patra

After completion of investigation, the charge-sheet was laid down by the investigating authorities under Section 13(2) r/w Section 13(1) (c) (d) of the P.C.

Act, r/w Sections379/467/468/471/409/411/120-B of IPC, against 11 persons including the present petitioners as accused. The specific roles attributed to the petitioners herein are discussed as under:-

CRLMC No. 3114 of 2018

5. The Petitioners in CRLMC No. 3114 of 2018 namely Shri Vineet Agarwal and Shri Prakash Agarwal have been arrayed as Accused No. 8 and Accused No.9 respectively in the aforesaid charge-sheet. The role attributed to the aforesaid accused persons in the charge-sheet is that M/s. G.N.G. Export–202 Lords 7/1, Lord Sinha Road, Kolkata-700071 a partnership firm dealing with export of Iron Ore fines. The partners of he said firm are Shri Praveen Agarwal, aged about 38 years, S/o. Late Gajanan Agarwal, Shri Veenet Agarwal, aged about 33 years, S/o. Late Gajanan Agarwal and Smt. Geeta Agarwal, W/o. Late Gajanan Agarwal of 2/1 ANB Bardwan Road, Kolkota. Shri Prakash Agarwal, DOB-04.05.1981, S/o. Sri Rambhagat Agarwal of 5/7/Bara Shrutala Road, Kolkota 38 is the Manager of GNG Exports. The investigation revealed that GNG Exports has received a quantity of 45.480 M.T. of Iron Ore fines from one M/s. Jay Iron and Steel Ltd. vide Transit Permit bearing Transit Pass No.A-025109 Book No.25157 dtd. 4.2.2010 showing transportation of the said quantity of Iron Ores fines through Truck No.0R-05AA 1869. Similarly, the said firm had received a quantity of 42.820 M.T. of Iron ore fines from the consigners M/s. Jay Iron and steel Company Ltd. vide Transit Permit bearing No. A-025139, Book No. 25158 dtd. 9.2.2010 through the same truck. But the investigation revealed that both the Transit Passes were forged transit pass as informed by the Dy. Director, Mines, Rourkela that no Transit Pass Book bearing Transit Pass No. A025109 and A- 025139 issued to M/s. Jay Iron & Steel Ltd. The handwriting expert also opined that the said two Transit Passes are forged. But from the daily unloading report maintained by their Stevedores M/s. J.N. Buxi it was found that on 07.02.2010 they have received a quantity of 45.480 M.T. of Iron Ore fines through Transit Pass No. 025109 and Truck No.0R-05 AA-1869.

CRLMC No. 3157 of 2018

6. The Petitioners in CRLMC No.3157 of 2018 namely Omi Bagadiya has been arrayed as Accused No.10 in the aforesaid charge-sheet. The role attributed to the aforesaid accused person in the charge-sheet is that M/s. Bagadiya Brothers is a Private Ltd. Company having its Registration No.U5110107 2002 PTC 022248 and its Head Office at Bagadiya Mansion, Ground Floor, Jawahar Nagar, Raipur, Chhatisgarh. The Directors of the Company are Shri Omi Bagadiya, aged about 50 years, S/o. Late Kishore Lal Bagadiya, 2) Om Prakash Agarwal, 3) Shri Prakash Raheja, 4) Shri Ananda Agarwal and 5) Mr. Anurag Agarwal. The Area Manager of M/s. Bagadiya Brothers is Shri Sanjay Bansal, DOB 1.7.1974, S/o. Late Jayaprakash Bansal of KK-42 Civil Township, Rourkela, Tel. No.9937046047, who is actually looking after the export of Iron ore fines. The investigation revealed that the said company has received a quantity of 38.360 M.T. of Iron Ore Fines vide Transit Pass

Book No. as A-024918 and the said quantity of Iron Ore was transported from T.R. Chemicals Ltd., Barpali to the said company at Paradip Port. Shri Sanjay Bansal failed to produce any invoice showing purchase of such quantity from T.R. Chemicals. But the record of their Stevedores clearly shows that a quantity of 38.360 M.T. of fines was unloaded by them at Paradip Port which was subsequently exported. The Dy. Director, Mines, Rourkela during investigation clearly stated that no such Transit Pass Book bearing Transit Pass No. A024918 has been issued to T.R. Chemicals. Further, the handwriting expert's opinion revealed that the said transit pass is a forged one.

CRLMC No. 3566 of 2018

7. The Petitioner in CRLMC No. 3566 of 2018 namely Md. Seraj Yusha has been arrayed as Accused No. 4 in the aforesaid charge-sheet. The role attributed to aforesaid accused person in the charge-sheet is that M/s. F. Serajuddin Exports Private Ltd. is a registered company dealing with Export of Iron Ore from Paradeep Port incorporated under the Companies Act, 1956 having its Corporate Identity No.U131000R2007 PTC 009611 2007-2008 and its address is Plot No.N-2/158, IRC Village, Nayapalli, Bhubaneswar. The Directors of the said company are (1) Sheraj Yusha, S/o M. Yusha of N/4/135 IRC Village, Nayapalli, Bhubaneswar and the others. The investigation revealed that during the month of March 2010 i.e. the company had received Iron Ore Fines of 39.220 M.T. from M/s. Scan Steel Ltd. Vide Transit Pass No.2590/25/2010 and Pass No.A-4740001 which were issued on 8.3.2010 and also received 40.220 M.T. of Iron Ore Fines from M/s. Scan Steel Ltd. vide Transit Pass No.2590/25.2.2010 and Pass No.A-024910 which was received by the said company on 15.03.2010. During the investigation, both the Transit Passes found to be forged as ascertained from the Deputy Director Mines Office, Rourkela that such books bearing the aforementioned two Transit Pass Nos. were never used to M/s. Scan Steel Ltd. Further the handwriting opinion has also been received that both the Transit Passes are forged. Further during examination, Shri N. Seraj, Managing Director of F. Serajuddin Exports (P) Ltd. could not able to produce any invoice of M/s. Scan Steel Ltd. showing sale of such quantity to them. The Iron Ore Fines received through such forged Transit Passes has been exported by the said company and thereby earned pecuniary gain.

The much could be said regarding the casual manner in which the investigation has been carried out although the petitioner namely Md. Seraj Yusha is implicated in the present case as Directors of the Company but he has been shown to be a public servant.

8. Perusal of the charge-sheet further indicates certain other facts contained in the charge-sheet which are necessary to be discussed for holistic approach to decide the issue in *lis*. The opposite parties have relied upon the documents as well as the statements of the witnesses to indicate that M/s. Scan Steel Ltd. has sold the Iron Ore Fines to M/s. JBS Energy, Paradeep on account of M/s. F. Serajuddin Exports

Pvt. Ltd. using the offending vehicle for the purpose of transportation of the Iron Ore and the payment has also been made by the M/s. JBS Energy to M/s. Scan Steel Ltd. M/s. F. Serajuddin Exports Pvt. Ltd. has also made the agreement with M/s. JBS Energy for supply of Iron Ore Fines. Similarly, M/s. Jay Iron & Steel Ltd. sold and transported Iron Ore Fines to M/s. GNG Exports; M/s. T. R. Chemical sold and transported Iron Ore Fines to M/s. Bagadiya Brothers Pvt. Ltd.

9. It is very much clear from the above narrated facts that the accused/petitioners are Directors/Partners/Managers of the export companies/firms, which have purchased Iron Ore Fines from other traders, who have transported the Iron Ore Fines and delivered the same using the offending vehicle to Paradeep Port.

10. At this juncture, it is important to consider Rule 10 of the Orissa Minerals (Prevention of Theft, Smuggling and Illegal Mining and Regulation of Possession, Storage, Trading and Transportation) Rules 2007 which provides that any person who is transporting the minerals need to apply and obtaining transit permits from the Competent Authority after complying with the requisite conditions. Admittedly, the petitioners are not the transporters or sellers of the Iron Ore. They are consignee of the Iron Ore, who took the delivery at Paradeep Port from the seller/transporters. As per the prosecution's own story the Officials of the respective transporter have admitted that they have transported Iron Ore. It is important to take note of the fact that despite long drawn investigation the respondents have not been able to collect the material to implicate the sellers/transporters and therefore, none of the transporters have been arrayed as accused in the charge-sheet.

11. Interestingly, the investigation remained inconclusive about who has transported the Iron Ore Fines by using the offending vehicle under he forged Transport Permits, although the name of the drivers who have transported the Iron Ore have been mentioned by the respondent in their charge-sheet. Apart from that, another crucial factor to be considered is that the prosecution has arrayed officials of M/s. Jay Iron & Steel Ltd., M/s. T.R. Chemical Ltd. and M/s Scan Steel Ltd. as witnesses, who have admitted in their statements that their Companies have transported the Iron Ore Fines to Paradeep Port at storage yards of respective Companies of the petitioners. Moreover, the charge-sheet also does not disclose any material to connect the petitioners with Accused No.1 or 2, who are alleged to have the possession of the offending vehicle during the relevant period. The prosecution only relies on the fact that the export Companies/Firms received the Iron Ore Fines at Paradeep Port being transported by the offending vehicle, which in considered opinion of this Court is not enough to prosecute the accused petitioners.

12. The other very important aspect of the case is that all the exports have been done by companies or firms who have been managed by various other individuals in their respective capacity as Directors/ Partners/Managers. The opposite parties have implicated only the petitioners as accused. The opposite parties have neither implicated the company nor other individuals although in the charge-sheet itself, the

names of other Directors/Partners are found mentioned. The charge-sheet is further silent about the overt acts of omission or commission attributable to the petitioners.

13. Therefore, it is to be tested as to whether in the facts of the present case the petitioners could be prosecuted under the principles of vicarious liability.

14. It has been strenuously argued by the learned counsel for the opposite parties that whether the petitioners used forged Transit Passes for the purpose of transportation of the Iron Ore is a matter of trial. However, in the considered opinion of this Court issue of petitioners using forged Transit Permits would arise only, if it is prima facie proved by the opposite parties that the petitioners were required to procure the Transit Permits in the first place and that the petitioners themselves have transported the Iron Ore by using forged documents. The Investigating Agency has completely failed to bring any material in that regard.

15. The charge-sheet fails to whisper about any overt act of the petitioners in transportation of the Iron Ore Fines other than stating that they received the Iron Ore Fines at Paradeep Port. The charge-sheet does not bring out iota of evidence to establish any kind of nexus of the petitioners or for that matter the Companies/ Firms in which the petitioners are Directors/Partner/Manager either with the drivers of the truck or with the transport Companies, neither the charge-sheet attempts to show any relationship between the petitioners and the Accused No.1 or Accused No.2.

16. On the canvas of aforementioned fact scenario illuminating on the record the parties are heard on the issue regarding criminal liabilities of the petitioners.

17. Learned Senior Counsels appearing for the petitioners by relying upon various provisions of MMDR Act and Companies Act have contended that from the allegation made by the prosecution and the material available on record even if taken on its face value no *mens rea* could be attributable to the petitioners being the Directors/ Partner/ Manager of the Companies/Firms to which the Iron Ore was transported. The petitioners have strongly relied upon the judgment of the co-ordinate Bench of this Court passed in Crl. M.P. No.1238 of 2018 titled as "Smt. Geeta Devi Agarwal and others Vs. State of Orissa" to substantiate the aforementioned point. To buttress their argument regarding the criminal liability of the Director in the case of similar nature they have also reliedupon the judgment in the case of ***Sunil Bharti Mittal vs. CBI*** reported in ***(2015) 4 SCC 609***. Learned Senior Counsels have emphasized on the paragraphs-42 and 43 of the said judgment which reads as under:

> ***iii) Circumstances when Director/person in charge of the affairs of the company can also be prosecuted, when the company is an accused person***
>
> ***42.*** *No doubt, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that*

> *of conspiracy. However, at the same time, it is the cardinal principle of criminal* jurisprudence that there is no vicarious liability unless the statute specifically provides so.
>
> ***This extract is taken from Sunil Bharti Mittal v. CBI,: (2015) 2 SCC (Cri) 687 : 2015 SCC OnLine SC 18 at page 638***
>
> ***43.*** *Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.*

Learned counsel for the petitioners have also relied upon para 9 of the judgment of Hon'ble Suprme Court in ***"Sham Sundar Vs. State of Haryana*** reported in ***(1989) 4 SCC 630"*** which reads as under:

> **"9.** But we are concerned with a criminal liability under penal provision and not a civil liability. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for such liability. It does not make all the partners liable for the offence whether they do business or not."

While relying upon ***Muksud Sayed vs. State of Gujrat*** reported in ***(2008) 5 SCC 668,*** the learned counsel emphasized on para 13 :

> **"13.** Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability."

18. On the strength of the ratio of aforementioned judgment, learned Senior Counsels have contended that the petitioners cannot be made vicariously liable even if the Company is involved in the alleged crime. However, in the instant case, even if the prosecution story is taken as it is Directors of the Companies cannot be made as an accused.

19. Learned counsel for the State vehemently opposed the prayer made by the petitioners and has contended that in view of the complicated facts involved in the case, it is inevitable to subject the petitioners to trial so as to separate grain from the chaff. Therefore, the learned counsels submit at this stage, while exercising the plenary jurisdiction, this Court should not scuttle the trial. To buttress their arguments, learned Counsels relied upon the judgment of the Hon'ble Supreme

Court in the case of ***State of Karnataka vs. J. Jayalalitha*** reported in ***(2017) 67 OCR (SC) 796*.** The Hon'ble Supreme Court has held that :

> *"the concept of corporate entity was evolved to encourage and promote trade and commerce and not to commit crime or defraud people and thus when the corporate character is employed for the purpose of committing illegality of defrauding others, the court ought to ignore the corporate character and scan the reality behind the corporate veil so as to enable it to pass appropriateorders to do justice between the parties."*

By relying upon the Judgment of the Hon'ble Supreme Court reported in ***AIR 1998 (SC) 1128, UP Polution Control Board vs. Modi Industries and others.,*** the counsel for the opposite parties contends that the petitioners are trying to hide behind corporate veil. The Hon'ble Apex Court in the said judgment has held that:

> *"it would be travesty if a big business house of M/s Modi Industries ltd. is allowed to defeat the prosecution launched and avoid the trial on technical flaws which is curable for their alleged deliberate and willful breach of provisions contained in Section 25(1) and 26 made punishable under section 44 read with 47 of the Act."*

20. The sum and substance of the contention of the learned Counsels for the opposite parties is that, if a crime is committed by any Partner or Member or Director of a Firm/Company, they should not be allowed to hide behind corporate veil rather which is oppose to public policy, therefore, corporate veil in such case is liable to be pierced.

21. In principle the contentions raised by both the parties are correct, however, in the instant case that is not the test. The petitioners have invoked the inherent jurisdiction of this Court, inter alia stating that no case is made out against the petitioners even if the evidence collected and relied upon by the investigating agency are taken on its face value to be true. On the basis of the said test, I have gone through the charge sheet and the evidence relied upon by the prosecution against the petitioners. The evidences so collected are disjuncting the petitioners' role in the commission of the crime. The investigation is completely jumbled up and not an iota of evidence is brought on record to rope the petitioners in the present case. Therefore, in my considered opinion, the case of the petitioners is squarely covered by the principle laid down by the Hon'ble Supreme Court in the case of ***Gian Singh vs. State of Punjab and another*** reported in ***2012 (10) SCC 303,*** wherein it is held that if the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case. Therefore, in the aforementioned circumstances subjecting the petitioners to trial in the present case would be a futile excise in the absence of any material available on record against them.

22. In that view of the matter, subjecting the petitioners to trial on the strength of the available material would be a futile exercise on the part of prosecution. Therefore, while exercising the jurisdiction of this Court under Section 482 Cr.P.C., I am inclined to quash the criminal proceedings initiated by the prosecution.

However, quashing of the criminal prosecution against the petitioners on the available material as of today shall not preclude the learned Trial Court to invoke section 319 Cr.P.C in the event materials comes on record against the petitioners during the course of trial.

23. Accordingly, all the three petitions are allowed and the charge sheet No.42 dated 29.09.2014 filed by the opposite parties under Section 13(2) r/w Section 13(1) (c) (d) of the P.C. Act, r/w Sections 379/ 467/ 468/ 471/ 409/411/120-B of IPC in T.R. No.53 of 2015 pending before the Court of learned Special Judge, Vigilance, Cuttack, which is emanating from Vigilance Case No.25 dated 13.04.2010, under Section 13(2) read with Section 13(1) (d) of the P.C. Act and the consequential proceedings arising therefrom qua the petitioners in all the three cases are quashed.

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2024 (II) ILR-CUT-1379

SIBO SANKAR MISHRA, J.

CRLMC NO.1677 OF 2024

RPFAS TECHNOLOGIES PVT. LTD. .....Petitioner

-V-

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

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 102, 482 – The authority in compliance with the provision of section 102 of Cr.P.C. has intimated to the Judicial Magistrate regarding freezing of the account of the petitioner – During the investigation of the case, 66 complaints have been received regarding fraudulent transaction of ₹ 43 crores – Whether the prayer for de-freezing the account of petitioner with a plea of violation of fundamental right is acceptable? – Held, No.

Case Laws Relied on and Referred to :-

1. 2018 SCC OnLine Ker 22772: Mohammad Enamul Haque Vs. C.B.I
2. Crl. R.C. No.857 of 2022 (Telangana High Court) : Fone Paisa Payment Solutions Pvt. Ltd. v. State of Telangana.
3. 2024 SCC OnLine SC 895: Shento Varghese v. Julfikar Husen & Ors.

For Petitioner : Mr. Janakalyan Das, Sr. Adv.
For Opp.Parties : Mr. P.K. Maharaj, ASC.

JUDGMENT Date of Hearing : 13.05.2024 : Date of Judgment : 20.06.2024

S.S. MISHRA, J.

1. The petitioner invokes the inherent jurisdiction of this Court under Section 482 of the Criminal Procedure Code inter alia exploring the following prayer:

> "In the circumstances stated above, it is humbly prayed that this Hon'ble Court may be graciously pleased to admit the case, call for the records of the FIR/Complaint on the basis of which the Petitioner's account with Respondent No.4 has been frozen, issue

notice to the Opp. Parties, and after hearing the parties and upon perusal of records, quash the Impugned Notice dated 18 March 2024 issued by the Respondent No.3 and direct de-freezing of the Petitioner's bank account with Respondent No.4.

2. The petitioner submitted that all of a sudden on 24.03.2024 it came to know that the Opposite Party No.4-Bank has debit frozen their current Account No. 232000000027. At the time of freezing of the account, the account was holding an amount of Rs. 9,87,48,844/-. The debit-freezing of their bank account is an outcome of an arbitrary and colourable exercise of power by Opposite Party Nos.2 and 3. It was contended by the learned senior counsel for the petitioner that the Opposite Party No.3 issued a notice dated 18.03.2024 through email to the Opposite Party No.4 asking the said Opposite Party to freeze the account of the petitioner. The petitioner was not put to notice regarding such freezing of the account and the petitioner had no clue till the account was frozen. After the copy of email was made available to the petitioner by the Opposite Party No.4, the banker of the petitioner, it came to know that on the pretext of some preliminary enquiry being initiated by the Opposite Party No.3, the Opposite Party No.4 was directed to debit freeze the account till the enquiry is over. The mail addressed to the banker of the petitioner did not even disclose the particulars of any case registered against the petitioner or for that matter against any other accused persons. Therefore, the petitioner challenges the arbitrary action of the Opposite Parties primarily on the following grounds:

(1) The letter address by Opposite Party No.3 to Opposite Party No.4 debit-freezing the petitioner's account is without any basis;

(2) The Opposite Party No.3 has debit-freezed the account of the petitioner for unlimited period as it has directed the Opposite Party No.4 to freeze the account till the enquiry is over;

(3) The mandatory provisions under Section 102 of Cr.P.C. have not been complied with by Opposite Party No.3 while freezing the account of the petitioner;

(4) Petitioner's fundamental right to know regarding the reasons of freezing of his account is violated;

(5) The Opposite Party No.3 under the guise of preliminary enquiry cannot freeze an account of a Company validly functioning by complying statutory provisions; and

(6) The Police does not have the power to freeze an account at the enquiry stage, that could only be done at the investigation stage, i.e., after registration of the F.I.R.

3. Heard Mr. Janakalyan Das, learned Senior Counsel appearing for the petitioner and Mr. P.K. Maharaj, learned Additional Standing Counsel appearing for the State-Opposite Parties.

4. Mr. Das, learned Senior Counsel submitted that the petitioner is running genuine business engaged in trading and investment of Virtual Digital Assets (VDA) and is one of the leading VDA exchanges in the country. It operates under the brand name of 'MUDREX' and has been carrying on the business since 2018. The petitioner's Company is a registered entity with the Financial Intelligence Unit, Ministry of Finance, Government of India and is also a Reporting Entity as per the

Prevention of Money Laundering Act, 2002. The petitioner introduced its first VDA in the year 2020. Therefore, the petitioner's Company has been following and complying all the statutory requirements. The Purported Victim purchased VDAs worth Rs.90,000/- and placed a transfer request from the digital wallet of the petitioner to another external digital wallet. The Purported Victim thereafter wrote to the petitioner for reversal of the said transaction. The petitioner informed that the transfer was an external transaction. Therefore, reversal was not possible as it would be beyond the control of the petitioner. The Purported Victim appears to have filed a complaint with Opposite Party Nos.2 and 3. The details of the complaint have not been made available to the petitioner as yet. In the context of the enquiry to the complaint made by the Purported Victim, Opposite Party No.3 has issued the impugned notice to the Bank for debit-freezing. Therefore, learned counsel for the petitioner submitted that the dispute is pertaining to a transaction of Rs.90,000/- and the account carries more than Rs.9 crores. In that view of the matter, debit-freezing the entire account in the guise of an enquiry pertaining to a dispute of Rs.90,000/- is absolutely arbitrary. As such, the account needs to be de-frozen.

5. Learned Senior Counsel has relied upon the judgment of Kerala High Court in ***Mohammad Enamul Haque v. Central Bureau of Investigation***, reported in ***2018 SCC OnLine Ker 22772*** and emphasized on paragraph-8 which reads as under:

> "8. Now, the question is whether the bank accounts of the petitioner will have any nexus, or whether the investigating agency can have any reason to believe or suspect that his bank accounts will have any nexus with the commission of crime alleged against the 1st accused. As already stated, it cannot be the concern of the CBI now, whether the accused has committed any economic offence. If the CBI has reason to believe or suspect that the petitioner has committed any such offence, it will have to be reported to the concerned authority, and the concerned authority will have to step in for necessary action under the existing laws. Every investigating agency is governed by the laws of the land, including the Code of Criminal Procedure. No agency can arbitrarily freeze bank accounts under Section 102 Cr.P.C., or keep the accounts frozen indefinitely, because it will have the ultimate effect of denying the Constitutional or legal rights of the account holder. Such a step can be resorted to by the investigating agencies only if it is found absolutely necessary……"

6. Learned Senior Counsel for the petitioner further relied upon the judgment of Telangana High Court in ***Fone Paisa Payment Solutions Pvt. Ltd. v. State of Telangana,*** *Crl. R.C. No.857 of 2022* which held as under:

> "19. It is pertinent to note that the trial Court has no authorization on record to prove that the bank accounts of the petitioner has no nexus with the commission of alleged offences. Even as per the propositions laid down by the Apex Court and other courts, there is no notice issued to the petitioner before freezing the bank accounts and no specific time limit was also fixed. The record also reveals that the son of the complainant has already received amount from the petitioner company. Thus, this Court is of the opinion that it is a fit case to interfere with orders of the trial Court and defreeze the bank accounts of the petitioner."

7. While relying upon the judgment of the Hon'ble Supreme Court in ***Shento Varghese v. Julfikar Husen & Others***, reported in ***2024 SCC OnLine SC 895***, the learned Senior Counsel submitted that the Opposite Party No.3 was statutorily bound to inform the seizure forthwith to the Jurisdictional Magistrate. He relied upon paragraphs-22 to 24 of the said judgment which read as under:

> "**22.** From the discussion made above, it would emerge that the expression '*forthwith'* means *'as soon as may be'*, *'with reasonable speed and expedition'*, '*with a sense of urgency'*, and *'without any unnecessary delay'*. In other words, it would mean as soon as possible, judged in the context of the object sought to be achieved or accomplished.
>
> **23.** We are of the considered view that the said expression must receive a reasonable construction and in giving such construction, regard must be had to the nature of the act or thing to be performed and the prevailing circumstances of the case. When it is not the mandate of the law that the act should be done within a fixed time, it would mean that the act must be done within a reasonable time. It all depends upon the circumstances that may unfold in a given case and there cannot be a straight-jacket formula prescribed in this regard. In that sense, the interpretation of the word '*forthwith'* would depend upon the terrain in which it travels and would take its colour depending upon the prevailing circumstances which can be variable.
>
> **24.** Therefore, in deciding whether the police officer has properly discharged his obligation under Section 102(3) Cr.P.C., the Magistrate would have to, firstly, examine whether the seizure was reported forthwith. In doing so, it ought to have regard to the interpretation of the expression, '*forthwith'* as discussed above. If it finds that the report was not sent forthwith, then it must examine whether there is any explanation offered in support of the delay. If the Magistrate finds that the delay has been properly explained, it would leave the matter at that. However, if it finds that there is no reasonable explanation for the delay or that the official has acted with deliberate disregard/wanton negligence, then it may direct for appropriate departmental action to be initiated against such erring official. We once again reiterate that the act of seizure would not get vitiated by virtue of such delay, as discussed in detail herein above."

8. The main crux of the argument of the ld. Senior Counsel for the petitioner is that the Opposite Party No.3 has not complied with the mandate of Section 102 of Cr.P.C. Therefore, the seizure in the form of freezing of the account at the stage of preliminary enquiry is bad in law. The petitioner has also relied upon many judgments to urge before this Court that non-supply of the particulars of the case in which the enquiry is going on and on the strength of which the account has been frozen, is also violative of his fundamental rights.

9. *Per contra*, Mr. Maharaj, learned counsel for the State-Opposite Parties has submitted that the petition is not maintainable as it does not disclose any cause of action. Mr. Maharaj filed a detailed written note of submission, paragraphs-3 to 7 of which are relevant to be reproduced hereunder:

> "3. That the true fact of the case is that on the basis of complaint made by one Manash Ranjan Mohapatra on 19.05.2024 at about 01.00 P.M. to the effect that the complainant was searching for marriage proposal on jeevanshati.com where the complainant came across on girl namely Neha Bharadwaj. This girl insisted the complainant to trade in website having URLhttps://www.famuget.com Total amount of Rs.90,000/- was paid by

the complainant from his A/c No.12261050045376 IFSHDFC0001226 to his mudrex wallet through his google pay account, then he transferred the account from mudrex to famuget.com through wallet address TGN1Be7fbDhUwiSKY9fTzQQhAJ. While he trying to withdraw the amount from famuget, he is unable to withdraw the amount. So, he reported at PS for legal action, on his report IIC entrusted the enquiry to SI Jyoti Ranjan Parida of CC & EO PS, UPD Bhubaneswar.

4. That SI Jyoti Ranjan Parida of CC & EO PS, enquiring office has submitted the report that the alleged account i.e.232000000027 of Suryodaya Small Finance bank which is the first beneficiary account in which the fraud amount of the victim Manash Ranjan Mohapatra was credited. During enquiry, it is ascertained that there are more than 66 (sixty six) complainant has been made by different Law Enforcement Agency of India regarding fraudulent transactions of more than Rs.43,00,00,000/- (Forty Three Crores Rupees) only and more than Ten numbers of FIR has been registered against the said account.

5. That, basing on the enquiry report, called the complainant and obtained a fresh report and, FIR has been registered PS Case No.113 dated 19.05.2024 Under Section 419/420/467 IPC read with Section 66(C)/66(D) IT act investigation started. FIR copy is attached herewith along with some acknowledgment receipts as

Annexure-1 Series.

6. That, after registration of the case intimated the same to the Hon'ble Court of SDJM, BBSR regarding the freezing of the said alleged account.

7. That, hence it is submitted before this Hon'ble Court that, if debit freeze of the account No. 232000000027 will be removed then the hard-earned money of more than Rs.43,00,00,000/- (Forty Three Crores Rupees) Only of civilian will be misappropriated and they may not get justice."

10. The contention raised by the petitioner in the present petition has been well answered by Mr. P.K. Maharaj in his written note of submission. It emerges from the contentions raised by both the parties that there is an F.I.R. already registered in pursuance of which the seizure has been made. In compliance with the provisions of Section 102 of Cr.P.C., freezing of the account of the petitioner has already been intimated to the Jurisdictional Magistrate. The investigation of the case is still on. It appears, there are 66 complaints received by the Investigating Agency and investigation is still on. So far, fraudulent transaction of Rs.43 crores has come to light. Therefore, I am not inclined to accept the argument of the learned Senior Counsel appearing for the petitioner at this stage and accordingly I am not inclined to entertain this petition. However, suffice it to say that since the petition has been filed at the very threshold when there was no information available to the petitioner except the impugned email addressed by Opposite Party No.3 to Opposite Party No.4, the petitioner is granted liberty to move fresh application before the appropriate court in accordance with law. If such application is moved, the same shall be considered on its own merit as expeditiously as possible, because the entire business of the petitioner has been seriously affected due to freezing of the Account.

11. With the above observation, the CRLMC is disposed of.

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2024 (II) ILR-CUT-1384

A.C BEHERA, J.

SA. NO. 311 OF 1994

SAKILA MAJHI ….Appellant

-V-

SHYAM MAJHI (DEAD) & ORS. ….Respondents

(A) HINDU SUCCESSION ACT, 1956 – Section 2(2) – The parties in the suit are 'Santhal' by caste & they are practicing Hinduism by following the Hindu tradition – Whether sub-Section(2) of Section 2 of 1956 Act exclude them from application of the Act in the matter of succession and inheritance? – Held, No – Though parties have become sufficiently Hinduised, they are governed by the Hindu Law in the matter of succession and inheritance and not by Santhal Tribal Law. (Paras 17-18)

(B) TRANSFER OF PROPERTY ACT, 1882 – Section 54 – Alienation of co-sharer out of joint property – Effect of – Explained. (Paras 19-20)

Case Laws Relied on and Referred to :-

1. (2003) 96 CLT-151: Kunjabihari Pradhan -Vs- Jayanti Pradhan.
2. AIR 1971(Patna)-185: Langa Manjhi & Ors. -Vs- Jaba Majhian & Ors.
3. (2000) 8 SCC 857: Lobiswar Manjhi -Vs- Pran Manjhi.
4. 1974(I) C.W.R.222: Gananath Sahu & Anr.-Vs- Smt. Bulli Sahu & Ors.
5. AIR 1973(SC)-2451: Gorakh Nath Dube -Vs- Hari Narin Singh & Ors.
6. 2009(I) CLR 560: Harekrushana Mahakuda -Vs-Radhanath Mahakuda & Ors.
7. 116 (2013) CLT 209: Monaj Kumar Nayak & Anr.-Vs- Guna Mohanty & Ors.
8. 2024(2)CCC(ORISSA)172 : Tankadhara Pradhan & Ors. v. Bimala Naik@Dei(Dead) & Ors.
9. 2010(IV) Civ. C.C 05(Punjab & Haryana):Balwinder Singh -Vs- Gurucharan Singh.
10. JBR Vol-XVII (1982) Part-II : Sudam Das -Vs- Krushna Mahakur.
11. 2019 (Suppl.) Civil Court Cases-586 (Madras): S. Selvarajan (died) & Ors. -Vs- R.Saraswathi (died) & Ors.

For Appellant : Mr. S.K. Pattanaik, on behalf of Mr. P.K. Patnaik
For Respondents : Ms. J. Sahoo, on behalf of Mr. M. Mishra, Sr Adv.

JUDGMENT Date of Hearing : 27.06.2024 : Date of Judgment : 12.07.2024

A.C. BEHERA, J.

1. The 2nd appeal has been preferred against the confirming judgment.

2. The appellant of this 2nd appeal was the sole plaintiff before the trial court in the suit vide T.S. No.25 of 1989 and he was the appellant before the 1st appellate court in the 1st appeal vide T.A. No.08 of 1990.

3. The respondents of this 2nd appeal were the defendants before the trial court in the suit vide T.S. No.25 of 1989 and they were the respondents before the 1st appellate court in the 1st appeal vide T.A. No.08 of 1990.

4. The suit of the plaintiff vide T.S. No.25 of 1989 against the defendants was a suit for declaration of title and recovery of possession through mandatory injunction.

5. The case of the plaintiff (appellant in this 2nd appeal) against the defendants (respondents in this 2nd appeal) as per his pleadings in the suit vide T.S. No.25 of 1989 was that, the parties to the suit belong to SANTAL by caste and they are governed by Mitakshara School of Hindu Law. The suit properties were originally belonged to Dharmal Majhi. That Dharmal Majhi died before Sabik Settlement of the year 1927 leaving behind his only son Bhika Majhi. After the death of Dharmal Majhi, the suit properties left by him devolved upon his son Bhika Majhi. So, in the Sabik Settlement of the year 1927, the suit properties were recorded in the name of Bhika Majhi under Sabik Khata No.24. The said Bhika Majhi had no issue of his own, for which, he (Bhika Majhi) adopted his cousin's son, i.e., Parau Majhi. Bhika Majhi died leaving behind his adopted son Parau Majhi as his only successor. Therefore, the suit properties left by Bhika Majhi devolved upon his son Parau Majhi. Parau Majhi filed a suit vide T.S. No.07 of 1987 in the court of Sub-judge, Mayurbhanj, Baripada praying for declaring him as the adopted son of Bhika Majhi. That suit vide T.S. No.07 of 1987 filed by Parau Majhi was decreed in his favour and he (Parau Majhi) was declared as the adopted son of Bhika Majhi.

Parau Majhi had also no natural born child of his own, for which, he(Parau Majhi) adopted plaintiff Sakila Majhi as his son. That Parau Majhi died leaving behind the plaintiff as his only son and successor. For which, after the death of Parau Majhi, the suit properties left by Parau Majhi devolved upon the plaintiff. As such, he(plaintiff) is the exclusive owner over the entire suit properties. But, during the Hal Settlement Operation, the settlement authorities on being influenced by the defendants, erroneously recorded the suit properties in the name of the defendant nos.3, 4, 5, 6, 8 and 9, husband of the defendant no.7 and the plaintiff jointly indicating the name of the plaintiff as the son of his natural father Kandra Majhi.

6. On the basis of the said wrong entry of the names of the defendants in the Hal RoR, they (defendants) tried to occupy the suit properties forcibly and in the year 1989, they (defendants) forcibly cut and removed the paddy crops from the same raised by the plaintiff. So, without getting any way, the plaintiff approached the civil court by filing the suit vide T.S. No.25 of 1989 against the defendants praying for a declaration that, he (plaintiff) is the lawful owner over the suit properties and to direct the defendants to deliver the possession of the suit properties to him (plaintiff) along with other reliefs, to which, he (plaintiff) is entitled for.

7. Having been noticed from the trial court in the suit vide T.S. No.25 of 1989, the defendant nos.1, 2, 3, 4, 5, 7 to 9 contested the suit of the plaintiff by filing their written statements jointly and separately taking their stands identically denying the allegations alleged by the plaintiff in his plaint against them stating that, Parau Majhi had never adopted plaintiff as his son at any point of time. The plaintiff is all along living in his natural father's house. For which, the plaintiff is not the successor of Parau Majhi and he (plaintiff) has not inherited the properties left by Parau Majhi. As such, the plaintiff has no interest in the suit properties. According to them (defendants), the suit properties have been jointly recorded in the names of the

defendant nos.3 to 6 and 8 and 9 along with husband of defendant no.7 and the plaintiff in the Hal Settlement.

It was the specific stands of the defendants that, Bhika Majhi died leaving behind one son and one daughter, i.e., Parau Majhi and Malho Majhi (defendant no.9) as his successors. After the death of Bhika Majhi, the suit properties left by him (Bhika Majhi) devolved upon Parau Majhi and Malho Majhi (defendant no.9) simultaneously. As Parau Majhi died issueless leaving behind his sister Malho (defendant no.9) as his only successor, then Malho Majhi(defendant No.9) became the owner of the entire suit properties. Accordingly, the defendant no.9 being the exclusive owner over the entire suit properties, she (defendant no.9) sold some portions thereof to defendant nos.1 to 8 by executing and registering different sale deeds and delivering possession thereof. Therefore, the defendants are the owners and they are in possession over the suit properties. For which, the plaintiff has no interest in the suit properties.

The further case of the defendants was that, the judgment and decree passed in T.S. No.07 of 1987 declaring the plaintiff as the adopted son of Parau Majhi is not binding upon them (defendants). So, on the basis of that judgment and decree passed in T.S. No.07 of 1987, he (plaintiff) cannot be the lawful successor of Parau Majhi. Therefore, the plaintiff has no right, title, interest and possession over the suit properties. For which, the suit of the plaintiff is liable to be dismissed against them (defendants).

8. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether eleven numbers of issues were framed by the trial court in the suit vide T.S. No.25 of 1989 and the said issues are:-

I S S U E S

1. Is the suit maintainable?
2. Has the plaintiff any cause of action for the suit?
3. Is the suit barred by limitation?
4. Is the suit barred by waiver and acquisence?
5. Has the court any pecuniary jurisdiction to try the suit?
6. Whether the defendant nos.1 and 2 have purchased the suit land orally by delivery of possession from Parau Majhi on 16.01.1959?
7. Whether the defendants have perfected their title over the suit land by adverse possession?
8. Whether the plaintiff is the adopted son of Late Parau Majhi?
9. Whether the plaintiff has inherited the suit land and other lands of Late Parau Majhi?
10. Whether the defendant no.9 has inherited the property of Late Parau Majhi as his sister and whether she had sold some of the lands to the different persons?
11. Whether T.S. No.7/87 is binding on the defendants, who were not parties and proforma defendants?

9. In order to substantiate the aforesaid reliefs sought for by the plaintiff in the suit vide T.S. No.25 of 1989 against the defendants, he (plaintiff) examined two witnesses from his side including him as P.W.1 and relied upon the documents vide Exts.1 to 5.

On the contrary, in order to nullify/defeat the suit of the plaintiff, the defendants examined four witnesses from their side including the defendant nos.1, 8 and 9 as D.Ws.1, 2 and 3 respectively and relied upon the documents vide Exts.A to D on their behalf.

10. After conclusion of hearing and on perusal of the materials, documents and evidence available in the record, the trial court answered all the issues against the plaintiff and in favour of the defendants and basing upon the findings and observations made by the trial court in all the issues against the plaintiff and in favour of the defendants, the trial court dismissed the suit of the plaintiff vide T.S. No.25 of 1989 on contest against the defendants with cost, as per its judgment and decree dated 28.04.1990 and 10.05.1990 respectively assigning the reasons that, the plaintiff is not the adopted son of Late Parau Majhi and the judgment and decree passed in T.S. No.07 of 1987 declaring the plaintiff as the adopted son of Parau Majhi is not binding upon the defendants and the defendant No.9 being the daughter of Bhika Majhi and sister of Parau Majhi, she (defendant no.9) had become the owner over the entire suit properties after the death of Parau Majhi, because, the suit properties left by Bhika Majhi devolved upon Parau Majhi and his sister(defendant no.9) simultaneously and when Parau Majhi died issueless, then, his share in the suit properties devolved upon his sister, i.e., defendant no.9 and she (defendant no.9) being the owner of the entire suit properties sold some portions thereof to the defendant nos.1 to 8. For which, the plaintiff is not entitled for the decree of declaration of his title over the suit properties and he(plaintiff) is also not entitled for the decree of recovery of possession of the suit properties against the defendants.

11. On being dissatisfied with the aforesaid judgment and decree of the dismissal of the suit of the plaintiff vide T.S. No.25 of 1989 passed by the trial court, he(plaintiff) challenged the same preferring the 1st appeal vide T.A. No.08 of 1990 being the appellant against the defendants arraying them (defendants) as respondents.

12. After hearing from both the sides, the 1st appellate court dismissed that 1st appeal vide T.A. No.08 of 1990 of the plaintiff on contest against the defendants as per its judgment and decree dated 20.08.1994 and 03.09.1994 respectively accepting the findings and observations made by the trial court against the plaintiff.

13. On being aggrieved with the aforesaid judgment and decree of the dismissal of the 1st appeal vide T.A. No.08 of 1990 of the plaintiff passed by the 1st appellate court, he (plaintiff) challenged the same by preferring this 2nd appeal being the appellant against the defendants arraying them (defendants) as respondents.

14. This 2nd appeal was admitted on formulation of the following substantial questions of law, i.e., :-

> "(i) Whether the courts below are justified in holding that, the judgment and decree passed in T.S. No.07 of 1987 could not bind defendant-respondent nos.1 and 2, when the said decision declaring the status of plaintiff/appellant as an adopted son of Parau Majhi

is a judgment in rem and binding against all, even if, defendant/respondent nos.1 and 2 are not party to that proceeding?

(ii) When the defendant nos.1 and 2 alleges to have purchased the suit land from defendant/respondent no.9(Malho), who was the party and defendant in the said suit, then whether the courts below correct in holding that, the said judgment is a judgment-in-personam and hence, the same is not binding against the defendant nos.1 and 2?

(iii) Whether the courts below are justified in holding that, the defendants have acquired title over the suit land by way of adverse possession in absence of any proof regarding animus to possess the said land adversely and in the absence of any specific time as to when they started possessing the said land adversely?

(iv) Whether the courts below are justified in holding that 'Malho' (defendant no.9), who is the sister of Parau has inherited the properties under the peculiar facts and circumstances of the case as per Hindu Succession Act, 1956, when the parties belong to Schedule Tribe Community?"

15. As, the above four formulated substantial questions of law are inter-linked having ample nexus with each other according to the findings and observations made by the trial court and 1st appellate court in their respective judgment and decree, then, in order to have the just decision of this 2nd appeal, the above four formulated substantial questions of law are taken up together analogously for their discussions hereunder:-

It is the undisputed case of the parties that, Bhika Majhi was the owner of the suit properties. Both the parties, i.e., plaintiff and defendants are claiming their title and possession over the suit properties through Bhika Majhi.

When the plaintiff has claimed the suit properties as the grand-son of Bhika Majhi stating him as the son of Parau Majhi, at the same time, the defendant no.9 has claimed the suit properties as the daughter of Bhika Majhi.

The plaintiff has relied upon the judgment and decree passed in T.S. No.07 of 1987(Ext.4) in order to establish him as the adopted son of Parau Majhi, to which, the defendants are disputing on the plea that, the said judgment and decree passed in T.S. No.07 of 1987(Ext.4) is not binding upon them.

It appears from the Ext.4 that, the defendants nos.3, 4, 5, 6, 7, 8 and 9 in the present vide T.S. No.25 of 1987 were the defendants(parties) in that suit vide T.S. No.07 of 1987 filed by the plaintiff and that suit vide T.S. No.07 of 1987 has been decreed ex parte against all the defendants including defendant nos.3, 4, 5, 6, 7, 8 and 9, wherein the plaintiff Sakila Majhi has been declared as the adopted son of Parau Majhi as per its ex parte judgment and decree dated 31.03.1988 and 15.04.1988 respectively. Accordingly, the said judgment and decree passed in T.S. No.07 of 1987 vide Ext.4 declaring the plaintiff as the adopted son of Parau Majhi has been passed in presence of the defendant nos.3, 4, 5, 6, 7, 8 and 9. That judgment and decree passed in T.S. No.07 of 1987 vide Ext.4 in favour of the plaintiff has not been varied/altered or set aside till yet by any competent court of law.

16. The law regarding the enforceability and binding effect of an ex parte judgment and decree like the decree passed in T.S. No.07 of 1987 vide Ext.4 has already been clarified by the Hon'ble Courts and Apex Court in the ratio of the following decisions:-

> ***(i) 96(2003) CLT-151 : Kunjabihari Pradhan vrs. Jayanti Pradhan—Judgment—Binding effect of—A judgment delivered by a Court between the parties on relevant issue is binding on the parties, so long as that judgment and decree holds the field. In that context, it is immaterial, whether that judgment was passed on contest or ex parte. (Para-12)***

So, in view of the principles of law enunciated in the ratio of the aforesaid decision of the Hon'ble Courts, the judgment and decree passed in T.S. No.07 of 1987 vide Ext.4 declaring the plaintiff as the adopted son of Parau Majhi is binding upon the defendant nos.3, 4, 5, 6, 7, 8 and 9 as per Section 35 of the Specific of Relief Act, 1963, which is also ultimately binding upon the defendant nos.1 and 2, even though they were not the parties to that suit. Because, they (defendant nos.1 and 2) have stepped their shoes into the suit through defendant no.9 being the vendees of the suit properties from defendant no.9. The defendant nos.3 to 8 are also the vendees of the suit properties from the defendant no.9

Therefore, the findings and observations made by the trial court in issue no.11 that, it is not established by the plaintiff that, he is the adopted son of Parau Majhi is held to be unsustainable under law. For which, in other words, it is held that, the plaintiff has lawfully established as per its unchallenged judgment and decree passed in T.S. No.07 of 1987 vide Ext.4 that, he is the adopted son of Parau Majhi.

17. When, there is no dispute that, the defendant no.9 (Malho Majhi) is not the daughter of Bika Majhi, then automatically, it is established that, the father of the plaintiff, i.e., Parau Majkjhi and defendant no.9 (Malho Majhi) are the son and daughter of Bhika Majhi. For which, as per law, after the death of Bhika Majhi, the suit properties left by him devolved upon father of the plaintiff, i.e., Parau Majhi and defendant no.9-Malho Majhi simultaneously, even though, they belong to Scheduled Tribe Community.

Because, it is the own case of the appellant (plaintiff) as per Para no.1 of his plaint that, "they (parties) belong to Santal by caste and are Hindus and they are governed by Mitakshara School of Hindu Law," to which, the defendants have not denied.

> It has been observed by our parent High Court, that is Patna High Court in ***Langa Manjhi and others vrs. Jaba Majhian and others*** reported in ***AIR 1971 (Patna)-185 (at Para Nos.10 to 18)***, taking the Section 2(2) of the Hindu Succession Act, 1956 into consideration as per the available materials in the record of that case that,
>
> "Scheduled Tribe SANTALS have become sufficiently Hinduised, for which, they are governed by the Hindu Law in the matter of succession and inheritance and not by Santhal Tribal Law."

In ***Lobishwar Manjhi vrs. Pran Manjhi*** reported in ***(2000) 8 SCC 857(at Para no.6)***, the Apex Court after interpreting the Section 2(2) of the Hindu Succession Act, 1956 has held that,

"though the parties belong to SANTAL TRIBE, but, they are Hinduised following the Hindu Traditions, for which, Sub-section (2) of Section 2 of the Hindu Succession Act, 1956 will not apply to exclude them (parties) from application of the Hindu Succession Act, 1956 in the matter of their succession and inheritance."

18. Here, in this suit/appeal at hand, when, the parties have admitted in their respective pleadings that, though they belong to SANTAL by caste, they are Hindus and they are guided by Mitakshara School of Hindu Law, then in view of the principles of law enunciated in the ratio of the above decisions of Hon'ble courts and Apex Court, Section 2(2) of the Hindu Succession Act, 1956 shall not apply to exclude them(parties) from application of Hindu Succession Act, 1956 in the matter of succession and inheritance.

Therefore, it is held that, though, they (parties) to the suit belong to Scheduled Tribe Community, having their Sub-caste SANTAL, but, Hindu Succession Act, 1956 is fully applicable to them in the matter of their succession and inheritance.

So, the properties left by Bhika Majhi devolved upon his son and daughter, i.e., Parau Majhi (father of the plaintiff) and Malho Majhi (defendant no.9) simultaneously. For which, Parau Majhi and Malho Majhi entitled for half share each in the suit properties after the death of Bhika Majhi. When Parau Majhi died leaving behind the plaintiff (Sakila Majhi) as his son and successor, then his half share in the suit properties devolved upon the plaintiff(Sakila Majhi)

Accordingly, after the death of Bhika Majhi, Parau Majhi and defendant no.9 were the joint owners of the suit properties and after the death of Parau Majhi, his adopted son, i.e., plaintiff and defendant no.9 had become joint owners of the suit properties.

Section 44 of the T.P. Act, 1882 authorizes a co-owner to alienate his/her share in the joint and undivided properties.

When, the defendant no.9 has alienated some parts of the suit properties to the defendant nos.1 to 8 and when the defendant no.9 had her half share in the suit properties, then the said alienations of the suit properties made by the defendant no.9 in favour of other defendants cannot be held as illegal and void.

19. On this aspect, the propositions of law has already been clarified by the Hon'ble Courts and the Apex Court in the ratio of the following decisions:-

(i) 1974(I) C.W.R. 222: Gananath Sahu & Another Vs. Smt. Bulli Sahu & Others (Para No.10), AIR, 1973(SC) 2451: Gorakh Nath Dube Vs. Hari Narin Singh & Others, 2009(I) CLR 560: Harekrushna Mahakud Vs. Radhanath Mahakud & Others—T.P. Act, 1882, Section 54—Transfer of property more than the transferor's 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.

(ii) 116(2013) CLT 209: Manoj Kumar Nayak & Another vrs. Guna Mohanty & Others (Para No.11.

2009(I) CLR-560: Harekrushna Mahakud vrs. Radhanath Mahakud and others—T.P. Act, 1882, Section 54—Sale of joint property by one co-owner—Validity thereof—It is well settled that, transfer by one of the co-owners remains valid to the extent of the share of the transferor.

(iii) 2024(2) CCC(Orissa) 172—Tankadhar Pradhan and others vrs. Bimala Naik @ Dei (dead) and others—T.P. Act, 1882 Section 54—Alienation by a co-owner (Co-sharer) shall be valid to the extent of his/her share.

(iv) 2010 (IV) Civ. C.C. 05 (Punjab & Haryana) : Balwinder Singh vrs. Gurcharan Singh—T.P. Act, 1882, Section 54—Alienation out of the joint property by a co-sharer would amount to alienation of the property out of the share. Even, the alienation of any specific Khasra number or specific portion, the same amounts to alienation of the share, which is subject to adjustment at the time of partition.

(v) JBR Vol-XVII (1982) Part-II Page-43 : Sudam Das vrs. Krushna Mahakur.

"When one of the co-sharers sells his share, the purchaser will become the co-sharer in place of the seller. If he wants to record some particular plot of land in his name, he has to make partition suit to the court or persuade the other co-sharers to distribute the land among themselves.

No particular plot of land can be mutated in his name, unless other co-sharers consent to it or a decree from the civil court is obtained indicating his share."

20. When, the defendant no.9 being the co-sharer of the suit properties with the plaintiff, she (defendant no.9) has alienated some portions of the suit properties to the defendant no.9, then, in view of the propositions of law enunciated in the ratio of the aforesaid decisions, the plaintiff as well as the defendants are the co-sharers (co-owners) of the suit properties as per law.

21. Here, in this appeal at hand, when the plaintiff has prayed for declaration of his right, title and interest over the entire suit properties and also has prayed for mandatory injunction against the defendants in order to direct them (defendants) to deliver the possession of the entire suit properties to him (plaintiff) and when as per the discussions and observations made above, it has been held that, the defendant nos.1 to 9 are the co-sharers (co-owners) of the suit properties with the plaintiff, then at this juncture, the plaintiff is not entitled for the decree for declaration of his title over the entire suit properties.

22. On this aspect, the propositions of law has already been clarified in the ratio of the following decisions:-

(i) ***2019(Suppl.) Civil Court Cases-586 (Madras): S. Selvarajan (died) and others vrs. R. Saraswathi (died) and others—Specific Relief Act, 1963, Section 34—***Suit for declaration—Joint property—Suit for declaration without filing suit for partition, in respect to undivided properties is not maintainable.

23. Likewise, the plaintiff is also not entitled for the decree of recovery of possession of the suit properties against the defendants. Because, as per law, one co-owner is to be treated as having his/her right in every part and parcel of the joint properties.

When as per law, the defendants have their legal right to possess the suit properties and they are in possession over the same being the co-owners with the plaintiff, then at this juncture, the plaintiff is also not entitled to get the decree for recovery of possession of the suit properties from the defendants, as they (defendants) are the co-owners of the suit properties with the plaintiff. For which, the judgment and decree passed by the trial court as well as 1st appellate court in dismissing the suit of the plaintiff cannot be held erroneous, though the part finding of the trial court as well as the 1st appellate court that, the plaintiff is not the adopted son of Parau Majhi has been held as unsustainable under law. Because, it has been held above that, the plaintiff is the adopted son of Parau Majhi, in view of the judgment and decree passed in T.S. No.07 of 1987 (Ext.4), as in that, judgment and decree, it has been declared that, the plaintiff is the adopted son of Parau Majhi, which is fully binding upon the defendants.

24. As per the discussions and observations made above, though the part finding of the trial court and 1st appellate court concerning the finding that, the plaintiff is not the adopted son of Parau Majhi is interferable, but the final result of the trial court and 1st appellate court regarding the dismissal of the suit of the plaintiff is not interferable. So, the appeal of the appellant (plaintiff) shall succeed in part.

25. In result, the 2nd appeal filed by the appellant (plaintiff) is allowed in part.

26. The judgment and decree of the dismissal of the suit vide T.S. No.25 of 1989 passed by the trial court and the confirmation of the same by the 1st appellate court refusing the prayers of the appellant/plaintiff for declaration of his exclusive title over the entire suit properties and recovery of possession of the suit properties against the respondents/defendants are confirmed.

Whereas, the part finding of the trial court and the confirmation of the same by the 1st appellate court in respect of issue no.8 that, the appellant/plaintiff has failed to prove that, he is the adopted son of Late Parau Majhi is set aside and held that, the plaintiff is the adopted son of Parau Majhi.

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2024 (II) ILR-CUT-1392

A.C. BEHERA, J.

S.A. NO.366 OF 1982

ANANTA CHARAN PANI (DEAD) & ORS. ……Appellants

-V-

BHIKARI JENA (DEAD) & ORS. ……Respondents

PROPERTY LAW – Benami transaction – Relevant aspects to be considered while determining a transaction as Benami or not? – Explained. (Paras 17-20)

For Appellants : Mr. S.Mantry.
For Respondents : None

JUDGMENT Date of Hearing : 02.07.2024 : Date of Judgment : 23.07.2024

A.C. BEHERA, J.

This 2nd appeal has been preferred against the reversing judgment.

2. The appellants of this 2nd appeal were the plaintiffs before the Trial Court in the suit vide T.S. No.150 of 1973 and they were the respondents before the First Appellate Court in the First Appeal Court vide T.A. No.27 of 1976.

The respondents of this 2nd appeal were the defendant Nos.1 to 4 before the Trial Court in the suit vide T.S. No.150 of 1973 and they were the appellants before the First Appellate Court in the First Appeal vide T.A. No.27 of 1976**.**

3. The suit of the plaintiffs (appellants in this 2nd appeal) before the Trial Court against the defendants (respondents in this 2nd appeal) vide T.S. No.150 of 1973 was a suit for declaration, confirmation of possession, permanent injunction in alternative recovery of possession.

4. The case of the plaintiffs as per their pleadings in the suit before the Trial Court vide T.S. No.150 of 1973 was that, the suit properties along with other properties were originally belonged to Mandardhar Patra and Chandramani Patra, both are sons of late Dama Patra. Accordingly, C.S. R.o.R. of the suit properties was prepared in the names of Mandardhar Patra and Chandramani Patra.

Chandramani Patra died leaving behind his widow Rajani. After the death of Chandramani Patra his half share in the suit properties devolved upon his widow wife Rajani. As Rajani sold her half share in the suit properties on dated 14.01.1950 to Mandardhar Patra, for which, Mandardhar Patra became the owner of the entire suit properties. After selling her half share to Mandardhar Patra, Rajani went away to her father's house and stayed there.

While Mandardhar Patra was the exclusive owner over the entire suit properties, Rajani created disturbances in his possession, for which, Mandardhar Patra sold the suit properties to the defendant No.5 Maheswar Jena by executing and registering the sale deed on dated 29.07.1955 vide Ext.C. The defendant No.5 Maheswar Jena was the natural born son of defendant No.1 and brother of defendant Nos.2 to 4. When, in the year 1962, the health condition of Mandardhar Patra deteriorated and did not able to look after his own affairs, then he (Mandardhar Patra) adopted defendant No.5 (son of the defendant No.1) on 10.03.1963 i.e. on the day of Dolo Purnima as per Hindu Sastric rites and customs, as his adopted son in order to look after him on being given by his natural parents i.e. defendant No.1 and his wife and since the date of adoption i.e. since 10.03.1963, the defendant No.5 stayed in the house of Mandardhar Patra as his son and looked after all the affairs of Mandardhar Patra and after the death of Mandardhar Patra, he (defendant No.5) inherited/succeeded all the properties left by Mandardhar Patra. Thereafter, the

defendant No.5 sold the suit properties, which was purchased by him from Mandardhar Patra through R.S.D. dated 29.07.1955 vide Ext.C to the plaintiffs by executing and registering the sale deed dated 12.03.1973 vide Ext.1 and delivered the possession thereof and accordingly, the plaintiffs became the owners over the suit properties by purchasing the same from the defendant No.5 on dated 12.03.1973 through sale deed vide Ext.1. But, when the plaintiffs were the owners and in possession over the suit properties, the defendant Nos.1 to 4 being the natural father and natural brothers of their vendor i.e. defendant No.5 tried to grab the suit properties from the plaintiffs and created disturbances in their possession in the suit properties, then without getting any way, the plaintiffs approached the Civil Court by filing the suit vide T.S. No.150 of 1973 against the defendant No.1 to 4 arraying their vendor i.e. defendant No.5 as performa defendant praying for declaration of their title over the suit properties and to confirm their possession on the same and to injunct the defendants permanently by restraining them (defendants) from interfering into his possession over the suit properties with an alternative relief that, if they (plaintiffs) are found dispossessed from the suit properties by the defendant Nos.1 to 4 during the pendency of the suit, to pass a decree for recovery of possession.

5. Having been noticed from the Trial Court in the suit vide T.S. No.150 of 1973 filed by the plaintiffs, the defendant Nos.1 to 3 contested the same by filing their joint written statement denying the allegations alleged against them by the plaintiffs in their plaint taking their stands therein that, the suit properties are within the consolidation area of Salipur P.S. and there is a notification under Section 3(1) of Orissa Act 21 of 1973 for the same, for which, the Civil Court has no jurisdiction to entertain the suit. Their specific case was that, the defendant No.5 has not been adopted by Mandardhar Patra, but he is the son of the defendant No.1 and brother of defendant Nos.2 to 4. The wife of Chandramani Patra i.e. Rajani had validly sold her half share (eight annas interest in the suit properties) to Mandardhar Patra by executing and registering the sale deed dated 14.01.1950 after receiving due consideration amount thereof and accordingly, Mandardhar Patra was the full owner over the suit properties. The defendant No.5 has never possessed and enjoyed the suit properties with Mandardhar Patra. The sale deed dated 29.07.1955 vide Ext.C was executed by Mandardhar Patra in the name of the defendant No.5 (son of the defendant No.1) in respect of the suit properties, while the defendant No.5 was a minor is a valid and real transaction. In fact, the said sell was made by Mandardhar Patra in favour of all the family members of the defendant No.1 and after executing and registering the sale deed dated 29.07.1955 vide Ext.C in the name of the defendant No.5, Mandardhar Patra lost his all interest and possession in the suit properties. On the strength of purchase of the suit properties through the sale deed dated 29.07.1955 vide Ext.C by all the family members of the defendants in the name of defendant No.5, the family members of the defendant No.1 became the owners and in possession over the suit properties and they are continuing their possession on the same by paying rent to the Government. The consideration amount

of the sale deed vide Ext.C was paid by the defendant No.1 out of the joint family funds as karta of such family, though that sale deed vide Ext.C was executed in the name of defendant No.5 as the vendee thereof. Mandardhar Patra had not at all adopted defendant No.5 either on 10.03.1963 or in any other date as stated in the plaint of the plaintiffs and no adoption ceremony was performed on any Dola Purnima day. The defendant No.1 and his wife had never given defendant No.5 in adoption to Mandardhar Patra. On dated 10.03.1963, the age of the defendant No.5 was more than 15 years, for which, he (defendant No.5) was not capable under law to be adopted as the adopted son of Mandardhar Patra. As such, defendant No.5 has never lived with Mandardhar Patra at any point of time in his house. Therefore, the question of inheriting the properties left by Mandardhar Patra by the defendant No.5 does not arise. The defendant No.5 had never any separate residential house and he was not possessing the suit properties separately. The defendant No.5 was all through remaining joint with the defendant Nos.1 to 4. The defendant No.5 had never incurred any loan, for which, there was no necessity for him to sell the suit properties to the plaintiffs for repayment of any loan. The marriage of the defendant No.5 was performed by defendant No.1 out of the joint family funds. The sale deed dated 12.03.1973 vide Ext.1 said to have been executed by defendant No.5 in favour of the plaintiffs is an invalid and inoperative document without consideration and without delivery of possession of the suit properties. The plaintiffs have never possessed the suit properties at any point of time. As such, they (defendants) are possessing the suit properties peacefully since the date of purchase from Mandardhar Patra through R.S.D. dated 29.07.1955 vide Ext.C and accordingly, they (defendants) have already acquired their valid title over the suit properties through their continuous possession to the same for more than 12 years as owners under the aforesaid sale deed dated 29.07.1955 vide Ext.C as well as through adverse possession to the knowledge of all concerned. As, the suit properties were purchased from Mandardhar Patra through R.S.D. dated 29.07.1955 vide Ext.C on behalf of their joint family in the name of the defendant No.5, for which, the R.o.R. of the last settlement in respect of the suit properties was published in the name of the defendant No.5 on behalf of their all family members. He (defendant No.1) being the Karta of the family, he (defendant No.1) is dealing with the suit properties to the knowledge of others including Government. As the plaintiffs have no interest in the suit properties, for which, the suit of the plaintiffs is liable to be dismissed against them (defendant Nos.1 to 4).

6. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether 12 (twelve) numbers of issues were framed by the Trial Court in the suit vide T.S. No.150 of 1973 and the said issues are:-

I S S U E S

(i) Is the suit as laid maintainable?
(ii) Have the plaintiffs any cause of action for this suit?
(iii) Is the suit barred by limitation?

(iv) Has this Court jurisdiction to entertain this suit in view of the operation of the Consolidation Act (Orissa Act 21 of 1973) in the area including the disputed land?
(v) Is defendant No.5 the adopted son of Mandardhar Patra?
(vi) Is defendant No.4 a minor, if so is the suit bad in the absence of proper representation of defendant No.4?
(vii) Is the sale deed dated 12.03.1973 executed by defendant No.5 in favour of the plaintiffs valid. Have the plaintiffs acquired any interest in the disputed property on the strength of such sale deed?
(viii) Is the disputed property the joint family property of defendants? If so could defendant No.5 transfer the same in favour of the plaintiffs?
(ix) Is the sale deed dated 29.07.1955 valid and conveyed good title in favour of defendants' family?
(x) Have the defendants acquired valid title to the disputed property by adverse possession?
(xi) Have the plaintiffs any right, title, interest in or possession over the disputed property?
(xii) To what reliefs, if any, are the plaintiffs entitled?

7. In order to substantiate aforesaid reliefs sought for by the plaintiffs against the defendants before the Trial Court in the suit vide T.S. No.150 of 1973, they (plaintiffs) examined altogether 11 (eleven) numbers of witnesses from their side including plaintiff No.1 as P.W.7 and relied upon the documents vide Exts.1 to 3 on their behalf.

On the contrary, in order to nullify/defeat the suit of the plaintiffs, the contesting defendant Nos.1 to 3 examined 6 (six) witnesses from their side including defendant Nos.1 to 3 as D.Ws.5, 6 & 2 and exhibited series of documents on their behalf vide Exts.A to R.

8. After the conclusion of hearing and on perusal of the materials, documents and evidence available in the Record, the Trial Court answered issue Nos.1, 2, 3, 7, 8, 9, 10 & 11 in favour of the plaintiffs and against the defendants and answered issue No.5 in full and issue No.4 in part against the plaintiffs, as issue No.6 was not pressed and basing upon the findings and observations made by the Trial Court in all the issues, the Trial Court decreed the suit of the plaintiffs in part on contest and against the defendant Nos.1 to 4 without cost and declared that, the plaintiffs have right, title and interest over the lot No.1 suit properties and confirmed their possession on the same and restrained the defendants permanently from interfering into the possession of the plaintiffs over the lot No.1 suit properties of the Schedule giving the observations that, the defendant No.5 is not the adopted son of Mandardhar Patra and the lot No.2 suit properties are excluded from adjudication due to abatement of the suit in respect of the said lot No.2 for the continuance of consolidation operation in respect of the same as per its judgment and decree dated 15.01.1976 and 22.01.1976 respectively.

9. On being dissatisfied with the aforesaid part judgment and decree passed in T.S. No.150 of 1973 on dated 15.01.1976 and 22.01.1976 respectively by the Trial Court in favour of the plaintiffs and against the defendants, the defendant Nos.1 to 4

challenged the same by preferring the First Appeal vide T.A. No.27 of 1976 being the appellants against the plaintiffs arraying them (plaintiffs) as respondents.

10. After hearing from both the sides, the First Appellate Court allowed the First Appeal vide T.A. No.27 of 1976 of the defendant Nos.1 to 4 and set aside to the part judgment and decree passed by the Trial Court in the suit vide T.S. No.150 of 1976 and dismissed the entire suit vide T.S. No.150 of 1976 of the plaintiffs as per its judgment and decree dated 28.08.1982 and 02.09.1982 respectively assigning the reasons that, the plaintiffs have failed to prove that, the defendant No.5 had purchased the suit properties through R.S.D. dated 29.07.1955 vide Ext.C out of his own fund with observations that, whether the defendant No.1 had purchased the suit properties under Ext.C (R.S.D. dated 29.07.1955) out of his own fund or joint family fund is absolutely immaterial for the purpose of the suit, because the said matter is confined between the defendant No.1 and defendant No.5, to which, the plaintiffs are in no way concerned and no valid title has ever been passed to the plaintiffs through the sale deed dated 12.03.1973 vide Ext.1, for which, question of possession of the plaintiffs over the suit properties is immaterial, as the plaintiffs have not based their claim through possession. So, the judgment and decree passed by the Trial Court is not sustainable under law. Therefore, plaintiffs are not entitled for any relief in the suit as prayed for by them.

11. On being aggrieved with the aforesaid judgment and decree dated 28.08.1982 and 02.09.1982 respectively passed by the 1st appellate Court in T.A. No.27 of 1976 in dismissing their suit vide T.S. No.150 of 1973 after setting aside the part judgment and decree passed by the Trial Court in their favour, they (plaintiffs) challenged the same by preferring this 2nd appeal being the appellants against the defendant Nos.1 to 4 arraying them (defendant Nos.1 to 4) as respondents.

12. As, during the pendency of this 2nd appeal, both the appellants as well as respondent Nos.1 & 3 expired, for which, their respective LRs have been substituted in their respective places.

13. This Second Appeal was admitted on formulation of the following substantial questions of law i.e.-

> *(i) Whether the learned lower appellate court has erred in law by holding that the acquisition of property under Ext.C in the name of defendant No.5 is out of his own fund or from the joint family nucleus is absolutely immaterial?*
>
> *(ii) Whether the learned lower appellate court has clearly gone wrong by not appreciating the legal position that defendant No.5 had got exclusive title, as he had acquired the property from his own income and, therefore, having the independent status he was legally entitled to transfer his title and as the plaintiffs have purchased the suit property from him, their title was legal and acceptable in the eye of law?*
>
> *(iii) Whether the learned lower appellate court has erred in law by opining that the acquisition of title under Ext.C for the purpose of conferring the title jointly on all the defendants or exclusively on defendant No.5 is a question to be confined as between defendant No.1 and defendant No.5, in which, the plaintiffs are in no way concerned?*

14. I have already heard from the learned counsel for the appellants (plaintiffs) only, as none appeared from the side of the respondents (defendants) for participating in the hearing of the 2nd appeal.

15. When the above three formulated substantial questions of law are interlinked with the findings and observations made by the Trial Court and the First Appellate Court in their respective judgment and decree basing upon the pleading and evidence of the parties, then all the above three formulated substantial questions of law are taken up together analogously for their discussions hereunder.

16. As per the pleadings of the plaintiffs, they (plaintiffs) have claimed their title and possession over the properties described in lot No.1 of the Schedule basing upon the sale deed dated 12.03.1973 vide Ext.1 executed by the defendant No.5 in their favour stating that, the defendant No.5 had purchased the said properties from Mandardhar Patra through sale deed dated 29.07.1955 vide Ext.C.

The defendant No.5 has not disputed/denied to the execution and registration of the sale deed dated 12.03.1973 vide Ext.1 in respect of the lot No.1 suit properties in favour of the plaintiffs for consideration amount indicated therein as well as giving delivery of the possession of the said sold properties to them (plaintiffs) by him (defendant No.5).

The defendant Nos.1 to 3 have seriously challenged the title and possession of the plaintiffs over the suit properties by taking their stands in their pleadings that, though the sale deed dated 29.07.1955 vide Ext.C was executed in the name of the defendant No.5 by Mandardhar Patra, but the same was purchased Benami out of their joint family income. For which, the defendant No.5 is not the exclusive owner over the suit properties. Therefore, the defendant No.5 had no right to alienate the suit properties through the sale dated 12.03.1973 vide Ext.1 to the plaintiffs. So, the sale deed dated 12.03.1973 vide Ext.1, which was executed by the defendant No.5 in respect of lot No.1 suit properties in favour of the plaintiffs is invalid.

Though, the Trial Court had held that, the defendant No.5 was the exclusive owner over the suit properties by purchasing the same on dated 29.07.1955 through the sale deed vide Ext.C from Mandardhar Patra, but the First Appellate Court set aside the same assigning the reasons that, the question i.e. whether the defendant No.5 had purchased the properties under Ext.C out of his own fund or joint family fund of the defendants is absolutely immaterial for the purpose of the suit, as the said matter is confined between the defendant No.1 and defendant No.5, in which, the plaintiffs are in no way concerned.

The above findings and observations of the First Appellate Court i.e. the plaintiffs are in no way concerned i.e. whether the defendant No.5 had purchased the suit properties of lot No.1 under Ext.C out of his own fund or joint family fund of the defendants is absolutely immaterial for the purpose of the suit cannot be sustainable under law. Because, the plaintiffs have based their title and possession

over the suit properties through the sale deed dated 29.07.1955 vide Ext.C executed by Mandardhar Patra in the name of the defendant No.5.

Therefore, the said findings and observations of the First Appellate Court i.e. the plaintiffs are in no way concerned i.e. whether their vendor (defendant No.5) had purchased the lot No.1 suit properties through sale deed dated 29.07.1955 out of his own fund or joint family fund of the defendants is immaterial, as the said matter is confined between defendant Nos.1 and 5 and the plaintiffs have nothing to say on the same are held as unsustainable under law.

17. When, undisputedly the sale deed dated 29.07.1955 vide Ext.C has been executed by its undisputed owner i.e. Mandardhar Patra in the name of the defendant No.5, then at this juncture, it will be seen from the materials on record that, whether the nature of transaction i.e. the sale deed dated 29.07.1955 vide Ext.C executed by Mandardhar Patra in favour of the defendant No.5 was a Benami or not?

Two kinds of Benami transactions in India are recognized.

First one is, where a person buys properties through his own money, but in the name of another person without any intention to give benefit to such other person (named as vendee), that transaction is called as Benami. In that case, the transferee holds properties for the benefit of person, who has contributed the purchase money and he (the person who made the contribution of the purchase money) is real owner.

The second type of Benami transaction is that, where a person, who is the owner of property, executes conveyance in favour of another without any intention of transferring title of the property there under, in that case, the transferor continues as to be the real owner.

18. There is presumption in law that, person who purchases property is the owner of the same and such presumption can be displaced/rebutted only by pleading and successfully proving that, the person, whose name appears in the document (sale deed) is not a real owner, but only Benami and in that case, heavy burden lies on person, who pleads that, the recorded owner as well as the vendee in the sale deed is a mere named lender.

19. While determining a transaction is Benami or not, the Court has to look into the following aspects:-

(i) The source, from which, the purchase money was given.

(ii) The possession of the property.

(iii) The position of the parties and their relationship

(iv) The circumstances of the parties.

(v) The motive for resorting to the Benami transaction.

(vi) Custody and production of title deeds.

(vii) Previous and subsequent conduct of the parties.

20. It is the settled propositions of law that, burden lies on the person, who alleges the transaction as Benami.

The aspects i.e. the essentials indicated above can be taken as a guide for determination that, whether the nature of transaction was Benami or not?

There is no documentary evidence on behalf of the defendant Nos.1 to 3 to prove about the payment of the consideration money of the sale deed vide Ext.C by the defendants. There is also no pleadings and evidence on behalf of the defendant Nos.1 to 3 about the source, from which, the purchase money was given as well as the causes, reasons, circumstances and the motive for resorting to the alleged Benami transaction for purchasing the suit properties in the name of the defendant No.5 through Ext.C instead of all the defendants.

So, the pleadings and evidence of the defendant Nos.1 to 3 are not fulfilling the aforesaid three essentials to establish the transaction through Ext.C in the name of the defendant No.5 as Benami transaction.

Rather, the undisputed/unchallenged R.o.R. of the lot No.1 suit properties in the name of the defendant No.5 alone on the basis of the sale deed vide Ext.C and thereafter in the name of the plaintiffs through mutation on the basis of the sale deed dated 12.03.1973 vide Ext.1 is ultimately establishing that, on the basis of the sale deed dated 29.07.1955 vide Ext.C, the defendant No.5 had become the exclusive owner over the lot No.1 suit properties.

So, due to the nonfulfillment of the above three essentials for terming the sale deed dated 29.07.1955 vide Ext.C in favour of the defendant No.5 as Benami, it is held that, the presumption provided under law in favour of the plaintiffs regarding their ownership and possession over the suit properties has not been displaced/rebutted properly by the contesting defendants.

Therefore, for non-discharging the above heavy burden, which was lying upon the defendant Nos.1 to 4, the presumption provided under law in favour of the purchasers/plaintiffs has become acceptable under law.

So, on the basis of the above unrebutted presumption, it is held that, the sale deed executed by Mandardhar Patra on dated 29.07.1955 vide Ext.C in favour of the defendant No.5 in respect of lot No.1 suit properties was not a Benami transaction, but that was a sale deed in favour of the defendant No.5 and on the strength of that sale deed vide Ext.C, the defendant No.5 was the exclusive owner and in possession over the said lot No.1 suit properties and while he (defendant No.5) was the exclusive owner and in possession over the lot No.1 suit properties on the basis of the sale deed vide Ext.C and as well as the R.o.R. in his name, he (defendant No.5) had sold the same to the plaintiffs by executing and registering the sale deed dated 12.03.1973 vide Ext.1 and had delivered the possession thereof to the plaintiffs. So, the plaintiffs are the owners of lot No.1 suit properties and they are in possession over the same, in which, the defendants have no interest.

Therefore, the findings and observations made by the First Appellate Court against the plaintiffs for setting aside the judgment and decree of the Trial Court in respect of the lot No.1 properties cannot be sustainable under law. For which, there is justification under law for making interference with the said judgment and decree passed by the First Appellate Court through this 2nd appeal filed by the appellants (plaintiffs).

As such, there is merit in the 2nd appeal of the appellants (plaintiffs). The same must succeed.

21. In result, the 2nd appeal filed by the appellants (plaintiffs) is *allowed* on merit, but without cost.

The judgment and decree dated 28.08.1982 and 02.09.1982 respectively passed by the First Appellate Court in T.A. No.27 of 1976 is set aside.

The judgment and decree dated 15.01.1976 and 22.01.1976 respectively passed by the Trial Court in T.S. No.150 of 1973 is confirmed.

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2024 (II) ILR-CUT-1401

A.C. BEHERA, J.

F.A. NO.167 OF 1997

Mrs. INDIRA PANIGRAHI ……Appellant

-V-

LAND ACQUISITION OFFICER, GANJAM ..…..Respondent

(A) LAND ACQUISITION ACT, 1894 – Compensation – Determination of just & adequate compensation – Explained.

(B) INTERPRETATION OF STATUTES – Reasoning in Rule of Law – Recording of reasons is the principle of natural justice.

Case Laws Relied on and Referred to :-

1. 2010(2) Civil Law Times-204(S.C.) : Assistant Commissioner, Commercial Tax Dept, Works Contract & Leasing, Kota vrs. Shukla & Brothers.
2. (2015) 1 CCC-640(Rajasthan) : Atul Kuchhal vrs. Hem Ram & Anr.
3. 2010(2) Civil Law Times-34(S.C.) : Secretary & Curator, Victoria Memorial Hall vrs. Howrah Ganatantrik Nagrik Samity & others.
4. 2002(2) OLR-228 : L.A.O-cum-Collector, Kalahandi. vrs. Baladev Chandrakar.
5. 2021(1) CLR-1172(S.C.) : Acquainted Realtors LLP etc. etc. vrs. State of Haryana & Ors.
6. 2023(1) CCC (S.C.)-164 : State of Haryana & Anr. vrs. Subhash Chander & Ors.
7. 2023(1) CCC-439 (Bombay) : Chandaba W/o. Gangaram Pauyed & Ors. vrs. State of Maharashtra & Ors.
8. 2022 (2) CCC-225 (S.C.) : Sh. Ram Chander (Dead) Thr Lrs vrs. Union of India.

For Appellant : Mr. G.Mukharji, Sr. Adv. & Ms. K.Banarji.
For Respondent : Mr. S.Patnaik, A.G.A.

JUDGMENT Date of Hearing : 09.07.2024 : Date of Judgment : 26.07.2024

A.C. BEHERA, J.

This 1st appeal has been preferred by the appellant challenging the inadequacy of an award passed on dated 11.04.1997 by the learned Civil Judge, (Sr. Division), Berhampur in M.J.C. No.133 of 1978 in answering the reference under Section 18 of the Land Acquisition Act, 1894 (in short 'L.A. Act, 1894') made by the Land Acquisition Officer, Ganjam, Chhatrapur (respondent in this appeal).

2. The factual backgrounds of this appeal, which prompted the appellant for preferring the same is that, she (appellant) is the owner of the acquired land and its building vide Survey No.337/1A at Bijipur inside Berhampur Town, which was acquired in the year 1976 by the Government of Orissa through notification under Section 4(1) of the Land Acquisition Act, 1894. For acquisition of the said land and building of the appellant, a sum of Rs.8,250/- towards the value of the land at the rate of Rs.75,000/- per acre, a sum of Rs.3,500/- towards the value of the building and a sum of Rs.1,762.50 Paise towards additional compensation in total of Rs.13,512.50 Paise were assessed by the Land Acquisition Officer, Chhatrapur to be paid to the appellant, to which, she(appellant) received with protest and submitted an application on dated 20.01.1977 before the Land Acquisition Officer, Chhatrapur for making a reference to the said acquisition matter under Section 18 of the Land Acquisition Act, 1894 to the Civil Court for payment of higher compensation amount stating that, she(appellant) is entitled to get compensation of Rs.43,120/- towards the value of the land and building, Rs.4,719/- towards Stamp duty of her sale deed for purchasing the acquired land and Rs.500/- towards registration fee and Rs.1,000/- towards the preparation of the plan for the building in total Rs.49,339/-. After receiving that application under Section 18 of the Land Acquisition Act, 1894, the Land Acquisition Officer, Chhatrapur, referred the said matter to the court of the learned Civil Judge (Sr. Division), Berhampur for its answer through proper adjudication.

3. The said reference of the Land Acquisition Officer, Chhatrapur was initiated as M.J.C. No.133 of 1978 before the court of learned Civil Judge (Sr. Division), Berhampur, wherein the applicant/appellant became the claimant/petitioner and Land Acquisition Officer, Ganjam, Chhatrapur became Opposite Party. During hearing of that M.J.C. No.133 of 1978, the petitioner examined two witnesses on her behalf as P.Ws.1 and 2 and relied upon the documents vide Exts.1 to 7 including the sale deed vide Ext.1, through which, she had purchased the acquired land on dated 26.08.1975. Whereas the Opposite Party (Land Acquisition Officer, Chhatrapur) neither examined any witness on his behalf nor proved any documents from his side.

4. After conclusion of hearing and on perusal of the materials, documents and evidence available in the record, the referral court, i.e., learned Civil Judge (Sr. Division), Berhampur allowed the said M.J.C. No.133 of 1978 in part on contest in favour for the petitioner(appellant) on dated 11.04.1997 entitling her (petitioner) to

get compensation of Rs.16,280/- towards the cost of the acquired land and Rs.3,500/- towards the cost of the building along with all other statutory benefits, i.e., solatium and interest on the said amount as per law, assigning the reasons that, previously for the same purpose, the properties involved in the reference was acquired by the Government through notification, but, that notification was quashed by the Hon'ble High Court in O.J.C. No.500 of 1973. Thereafter, the subsequent notification was made under Section 4(1) of the Land Acquisition Act in the year 1976 for acquisition of the self-same properties involved in the reference along with other properties. As the petitioner has purchased the acquired land on dated 26.08.1975 through sale deed vide Ext.1, then, presumption arises that, "*the petitioner has purchased the acquired land after the quashing of the earlier notification of the acquisition of self-same properties only in order to get more compensation in the subsequent acquisition of the same properties indicating inflated amount as consideration in the sale deed dated 26.08.1975 vide Ext.1, for which, the consideration amount indicated in the sale deed dated 26.08.1975 vide Ext.1 cannot be a guiding factor for deciding the land value of the acquired land.*"

5. On being aggrieved with the aforesaid award passed on dated 11.04.1997 in M.J.C. No.133 of 1978 under Section 18 of the Land Acquisition Act, 1894 awarding less amount than her claimed amount, she(petitioner/appellant) challenged the same by preferring this 1st appeal being the appellant against the Opposite Party(Land Acquisition Officer, Ganjam, Chhatrapur) arraying the Land Acquisition Officer, Ganjam, Chhatrapur as a respondent for enhancement of the awarded compensation amount on the ground of inadequacy/improper taking several grounds in her appeal memo.

6. I have already heard from the learned counsel for the appellant and the learned Additional Government Advocate for the Land Acquisition Officer, Ganjam (respondent) and so also have perused the materials, documents and evidence available in the record.

7. Basing upon the application of the appellant/petitioner/claimant dated 20.01.1977 for reference under Section 18 of the Land Acquisition Act, 1894, materials, evidence and documents available in the record, the final order dated 11.04.1997 passed in M.J.C. No.133 of 1978, the grounds taken by the appellant/claimant in her appeal memo and the rival submissions of the learned counsels of both the sides,

> the crux of this appeal is,
>
> Whether the impugned order/award passed in M.J.C. No.133 of 1978 by the learned Civil Judge (Sr. Division), Ganjam on dated 11.04.1997 in M.J.C. No.133 of 1978 less than the claimed amount of the petitioner/appellant is sustainable/acceptable under law?

8 It is the admitted case of the parties that, the land in question was acquired through notification under Section 4(1) of the Land Acquisition Act, 1894 in the

year 1976. The acquired land in question was purchased by the appellant/petitioner on dated 26.08.1975, which is much prior to the acquisition of the land in question. Therefore, learned Civil Judge (Sr. Division), Berhampur has specifically indicated in para no.4 of the impugned order that, admittedly, acquired land in question was purchased by the appellant/petitioner/claimant through Ext.1 (sale deed) prior to its acquisition.

9. The learned Civil Judge (Sr. Division), Berhampur has awarded amount, i.e., Rs.19,780/-(which is less than the claimed amount) in favour of the petitioner/appellant as per the impugned order passed in M.J.C. No.133 of 1978 assigning the specific reasons that, "the petitioner/claimant has purchased the land in question on dated 26.08.1975 through sale deed vide Ext.1 only in order to get more compensation anticipating about the acquisition of the same in future by putting inflated amount in that sale deed as consideration amount, for which, the rate indicated in the sale deed vide Ext.1 cannot be guiding factor for determination of the compensation amount."

10. The aforesaid reasons assigned by the referral court in awarding compensation in favour of the petitioner/appellant less than her claimed amount without taking the consideration amount indicated in her purchase deed vide Ext.1 as the guiding factor for the determination of adequate/proper compensation are baseless.

Because, the reasons assigned above by the referral court in the above final order passed in M.J.C. No.133 of 1978 are on surmises/imaginations without being backed by(supported by) any authentic material, evidence or document, for the reason that, the acquired land in question was purchased by the petitioner/claimant much prior to the acquisition of the same, while there was no proposal of the Government for acquisition of the same in future.

11. Therefore, the aforesaid reasons assigned by the referral court for passing the award on the basis of surmises and conjectures cannot be sustainable under law in view of the propositions of law enunciated in the ratio of the following decisions:-

> *(i)* ***2010(2) Civil Law Times-204(S.C.) : Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota vrs. Shukla and Brothers—Reasoning in Rule of law—Significance—****When the reason for a law once ceases, law itself ceases(Wharton's Law Lexicon).*
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> *(ii)* ***(2015) 1 CCC-640(Rajasthan) : Atul Kuchhal vrs. Hem Ram & another****—An* ***order*** *which does not reveal ground for coming to conclusion, falls in the category of being non-speaking order.(Para-7)*
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> *(iii)* ***2010(2) Civil Law Times-34(S.C.) : Secretary and Curator, Victoria Memorial Hall vrs. Howrah Ganatantrik Nagrik Samity and others—Reasons****—Recording of reasons is principle of natural justice—So, every judicial order must be supported by reasons recorded in writing, which ensures transparency and fairness in decision making.(Paras-31, 32, 33)*

12. Here, in this appeal at hand, when the reasons assigned by the referral court for passing the impugned final order in M.J.C. No.133 of 1978 are on the basis of surmises and conjectures, then at this juncture, the impugned order has come within the category of a non-speaking order in view of the principles of law enunciated in the ratio of the aforesaid decisions of the Hon'ble Courts and Apex Court. For which, the impugned order/award passed in M.J.C. No.133 of 1978 by the referral court cannot be sustainable under law.

13. So far as the determination of the compensation amount as per the provisions of Land Acquisition Act, 1894 is concerned,

On this aspect, the guidelines have already been made in the ratio of the following decisions:-

> *(i)* ***2002(2) OLR-228 : Land Acquisition Officer-cum-Collector, Kalahandi. vrs. Baladev Chandrakar—Land Acquisition Act—Compensation—Determination of just and adequate compensation****—Price prevalent at the time of notification under Section 4(1) of the Land Acquisition Act, 1894 is pertinent.(Paras-2 and 3).*
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> *(ii)* ***2021(1) CLR-1172(S.C.) : Acquainted Realtors LLP etc. etc. vrs. Stateof Haryana and Others—Land Acquisition Act,1894—Sections 4, 6 and 23—Compensation Claim—Assessment of****—In a case where pre-acquisition sale instances are otherwise found to be adequate and appropriate, post-acquisition instances by themselves cannot out way and discard such pre-acquisition sale instances.*
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> *(iii)* ***2023(1) CCC (S.C.)-164 : State of Haryana and Anr. vrs. Subhash Chander & Ors.—Land Acquisition Act, 1894.—Section 18—Acquisition of land.****—Quantum of compensation must be based on current market value of land.*
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> *(iv)* ***2023(1) CCC-439 (Bombay) : Chandaba W/o. Gangaram Pauyed and Ors. vrs. State of Maharashtra and Ors.—Land Acquisition Act, 1894.—Sections 18 and 26****—Reference has to be decided by Civil Court on the basis of material before it on merits.*
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> *(v)* ***2022(2) CCC-225 (S.C.) : Sh. Ram Chander (Dead) Thr Lrs vrs. Union of India—Acquisition of land.****—The claimant shall have to be paid compensation along with all other statutory benefits, which may be available under the Land Acquisition Act, 1894.*

14. Here this case at hand, when in the sale deed dated 26.08.1975 vide Ext.1, the vendor of the appellant/claimant/petitioner has indicated the consideration amount of the acquired land as Rs. 33,000/- as the value of the acquired land and she has received the same from the petitioner/claimant, then as per law, the petitioner/claimant shall be entitled to the said amount, i.e., Rs.33,000/- towards the value of the land Rs.10,000/- towards the value of the building constructed thereon after its purchase Rs. 4,719/- towards Stamp duty, Rs.500/- towards registration fee and Rs.1,000/- towards the expenditures incurred for obtaining plan for construction of the building thereon, i.e., in total Rs.49,219/- from the State for the acquisition of her land and building along with all other statutory benefits, i.e., solatium and interest thereon as provided under Land Acquisition Act, 1894.

15. Here, in this appeal at hand, when the materials available in the record are going to show that, the claimant/appellant is entitled for Rs.49,219/- in total for acquisition of her land and building as per the prevailing current market value at the time of acquisition on the basis of the value indicated in the undisputed sale deed dated 26.08.1975 vide Ext.1 prior to the notification under Section 4(1) of the L.A. Act, 1894 for the acquisition of the land in question and when the petitioner/ appellant has already received Rs.13,512.50 Paise out of Rs. 49,219/-, therefore, the appellant is entitled for the rest amount, i.e., Rs.35,706.50 Paise as enhanced compensation in respect of her acquired land and building along with all other statutory benefits, i.e., solatium and interest on the said amount as per the Land Acquisition Act, 1894.

16. As per the discussions and observations made above, when in the impugned order, passed in M.J.C. No.133 of 1978, the referral court has awarded less amount than the entitled amount of the appellant/claimant, then at this juncture, there is justification under law for making interference with the impugned award passed in M.J.C. No.133 of 1978 by the referral court through this 1st appeal preferred by the appellant/claimant.

For which, there is merit in the appeal of the appellant/claimant. The same must succeed. Hence, the order.

O R D E R

17. The appeal be and the same filed by the appellant/claimant is allowed on contest against the respondent, but without cost.

18. The impugned order/award dated 11.04.1997 passed in M.J.C. No.133 of 1978 by the learned Civil Judge (Sr. Division), Berhampur is set aside. The reference issued by the Land Acquisition Officer, Ganjam, Chhatrapur under Section 18 of the Land Acquisition Act, 1894 is answered entitling the petitioner/appellant to get the rest amount, i.e., Rs.35,706.50 Paise as compensation along with all other statutory benefits, i.e., solatium and interest on the said amount as per the L.A. Act, 1894.

The respondent/Opposite Party is directed to pay the above compensation amount with all the statutory benefits, i.e., solatium and interest on the said amount to the petitioner within a month hence positively, failing which, the petitioner/ appellant can realize the same with prevailing interest on the same from the respondent/Opposite Party as per law.

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